

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION

IN RE:)	
)	
LARRY KENNETH McCRAW,)	Case No. 00-50675C-7W
)	
Debtor.)	
_____)	
)	
EDWIN H. FERGUSON, JR. TRUSTEE)	
IN BANKRUPTCY FOR LARRY)	
KENNETH McCRAW,)	
)	
Plaintiff,)	
)	Adv. Pro. No. 00-6049W
v.)	
)	
TRAVIS J. McCRAW)	
)	
Defendants.)	
_____)	

ORDER

This matter coming on for trial before the undersigned Bankruptcy Judge on July 9, 2001 in Winston-Salem, North Carolina, after due and proper notice, upon the Complaint to Avoid Preferential Transfer filed by Edwin H. Ferguson, Jr., Trustee in Bankruptcy for Larry Kenneth McCraw ("Trustee") against Defendant, Travis J. McCraw. Appearing before the court were Edwin H. Ferguson, Jr., Trustee, and J. Brooks Reitzel, Jr., on behalf of the Defendant.

This court has jurisdiction over the subject matter of this proceeding pursuant to 28 U.S.C. §§ 1334 and 157(a) and the General Order of Reference entered by the United States District Court for the Middle District of North Carolina on August 15, 1984. This is a core proceeding under 28 U.S.C. § 157(b)(2)(F) which this court may hear and determine.

After reviewing the file and considering the arguments of counsel and the testimony of

witnesses at trial, this court makes the following:

FINDINGS OF FACT

1. On or about April 10, 2000, Larry Kenneth McCraw ("Debtor") filed a voluntary petition under Chapter 7 of the United States Bankruptcy Code.

2. Due to illness and other health problems for a period of several years prior to the filing of the voluntary petition, the Debtor did not have sufficient income to pay his usual monthly expenses. The Debtor suffers from a sleep disorder and is on several medications. The lack of sleep and the medications result in impaired memory. As a result, on numerous occasions, the Debtor's son Travis J. McCraw ("Defendant") loaned the Debtor funds to pay these monthly expenses in amounts ranging from \$10.00 to \$100.00. The Defendant usually made these loans in cash to the Debtor. In addition, the Debtor's daughter, Amanda McCraw made a loan to the Debtor in the amount of \$900.00.

3. Prior to filing Bankruptcy, the Debtor's financial records indicate that on or about February 16, 2000, the Debtor borrowed \$7,500.00 from his 401(k). On February 23, 2000 the Debtor deposited \$4,500.00 into his checking account at Lexington State Bank and retained \$3,000.00 in cash. On February 22, 2000, the Debtor paid \$1,979.80 to the IRS and on February 23, 2000 the Debtor paid \$900.00 to Amanda McCraw. Both payments were made by checks from the Lexington State Bank Account.

4. Out of the \$3,000.00 in cash remaining from the 401(k), the Debtor paid \$1,000.00 in attorneys' fees to Mr. Towers. The Debtor cannot account for the remaining \$2,000.00 in cash other than he paid some to the Defendant.

5. The Debtor's Statement of Financial Affairs lists payments in March of 2000 to Amanda McCraw in the amount of \$900.00, the Defendant in the amount of \$2,500.00 and to the

Internal Revenue Service in the amount of \$1,979.80.

6. At the Meeting of Creditors on or about May 26, 2000, the Debtor testified that he used the funds he received from the 401(k) to pay his debts to Amanda McCraw, the IRS and the Defendant.

7. On or about May 30, 2000, the Trustee sent correspondence to Richard S. Towers, ("Mr. Towers") attorney for the Debtor, requesting the addresses for Amanda McCraw and Travis McCraw, and requesting that the Debtor resolve the issue by payment of \$3,400.00.

8. On or about June 8, 2000, Mr. Towers sent correspondence to the Trustee stating that "Mr. McCraw felt he needed to pay his children back as quickly as possible since neither one could afford to pay on his own bills and also their bills."

9. On or about June 12, 2000, the Trustee sent correspondence to the Defendant making demand that he pay \$2,500.00, the total amount of the preference received from the Debtor during the 90 day period prior to the filing of the bankruptcy petition.

10. On or about July 18, 2000, the Defendant sent correspondence to the Trustee stating that he did assist his father when he was ill and unable to work and that some of the money had been repaid, but the Defendant was uncertain of the amount.

11. On or about September 11, 2000, the Trustee filed a Complaint to Avoid Preferential Transfer requesting that the court avoid the transfer to the Defendant and order the Defendant to pay over to the Trustee the sum of \$2,500.00.

12. The Defendant denies receiving payment of any substantial amount of money from the Debtor at any time and contends his father is just confused.

13. Based on the greater weight of the evidence, the court finds that the Debtor paid the \$2,000.00 in cash remaining from the 401(k) funds to the Defendant in March of the year 2000.

DISCUSSION

Pursuant to Section 547 of the Bankruptcy Code a transfer of an interest of the debtor in property is an avoidable preference if:

- (1) The transfer is to or for the benefit of a creditor;
- (2) The transfer is for or on account of an antecedent debt owed by the debtor before the transfer is made;
- (3) The transfer is made while the debtor is insolvent;
- (4) The transfer is made within 90 days before the date of the filing of the petition; and
- (5) The transfer enables the creditor to receive more than such creditor would receive if the case were a Chapter 7 liquidation case and the transfer had not been made.

11 U.S.C. § 547(b). In order for the Trustee to prevail and avoid the transfer, the Trustee has the burden of proving each element of 11 U.S.C. § 547(b) by the preponderance of the evidence.

Matter of Southway Corp., 88 F.3d 311 (5th Cir. 1996).

Based on the facts stated above, the court finds that the Trustee has met the burden on each element and as a matter of law, the transfer of \$2,000.00 by the Debtor to the Defendant is a preferential transfer. First, the facts show that the Defendant made small loans to the Debtor for a period of several years prior to the filing of the petition during the time that the Debtor was ill and unable to work, and that the Debtor repaid this debt in cash out of funds received from his 401(k). Second, the debt was clearly created well before the time that transfer was made. Third, the transfer was made after the Debtor received the check in the amount of \$7,500.00 from his 401(k) on February 16, 2000, and therefore, is well within 90 days of the filing of the petition on April 10, 2000. The debtor is presumed to be insolvent for the 90 days preceding the filing of the petition. 11 U.S.C. § 547(f). Finally, as an unsecured creditor, the Defendant received more than

he would have had he not received the cash payment from the Debtor.

Based on the foregoing, the court concludes that the transfer of \$2,000.00 by the Debtor to the Defendant satisfies all of the elements of an avoidable preference. The Defendant has not raised any of the defenses under 11U.S.C. § 547(c).

Therefore, it is ORDERED, ADJUDGED AND DECREED that the transfer of \$2,000.00 by the Debtor to the Defendant is avoided pursuant to 11 U.S.C. § 547(b) and that the Defendant pay over to the Trustee the sum of \$2,000.00.

This the 16 day of July, 2001.

CATHARINE R. CARRUTHERS

Catharine R. Carruthers
United States Bankruptcy Judge