

United States Bankruptcy Court
Northern District of Illinois
Eastern Division

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Bankruptcy Caption: In re Rudyard P. Stevens

Bankruptcy No. 98 B 15966

Adversary Caption: Rudyard P. Stevens v. Homeside Lending, Inc.

Adversary No. 00 A 01082

Date of Issuance: May 31, 2001

Judge: Judge John H. Squires

Appearance of Counsel:

Attorney for Plaintiff: Mark J. Stauber, Esq., 1N141 County Farm Road, Suite 230,
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**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

IN RE:)	
RUDYARD P. STEVENS,)	Bankruptcy No. 98 B 15966
Debtor.)	Chapter 13
_____)	Judge John H. Squires
)	
RUDYARD P. STEVENS,)	
)	
Plaintiff,)	
)	
v.)	Adversary No. 00 A 01082
)	
HOMESIDE LENDING, INC.,)	
)	
Defendant.)	

MEMORANDUM OPINION

This matter comes before the Court on the complaint of Rudyard P. Stevens (the “Debtor”) against Homeside Lending, Inc. (“Homeside”). The Debtor seeks an accounting and turnover of funds pursuant to 11 U.S.C. § 542. For the reasons set forth below, the Court hereby denies the Debtor’s request for an accounting. The Court orders Homeside to turn over the sum of \$2,547.67 to the Debtor.

I. JURISDICTION AND PROCEDURE

The Court has jurisdiction to entertain this matter pursuant to 28 U.S.C. § 1334 and Internal Operating Procedure 15(a) of the United States District Court for the Northern District of Illinois. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A), (E) and (O).

II. FACTS AND BACKGROUND

The Debtor filed a Chapter 13 petition on May 22, 1998. Homeside is a secured creditor of the Debtor, holding a first mortgage lien on the Debtor's residence. The Debtor's plan, which was filed on July 9, 1998, was confirmed on September 25, 1998. In pertinent part, the confirmed plan provides that Homeside's secured claim for pre-filing mortgage arrearage in the amount of \$17,309.37 shall be paid in full through the plan payments disbursed by the Chapter 13 Trustee. The post-filing mortgage payments shall be paid by the Debtor directly to Homeside.

The genesis of the parties' dispute concerns a related escrow account for accruing homeowner's hazard insurance premiums which the Debtor was to fund. Apparently, Homeside forced-placed insurance on the subject property when the Debtor allegedly did not produce evidence that he had insured the property. The Debtor alleges in the complaint filed on November 24, 2000, that Homeside raised the Debtor's mortgage payment by adding a monthly escrow payment of \$394.60 to the existing monthly principal and interest payment of \$276.10. Initially, Homeside claimed that there was a net escrow shortage of \$4,286.72. See Exhibit 1 to the Complaint. The Debtor contends that a portion of this sum should have been allocated to Homeside's pre-petition principal and interest arrearage claim; that he has continuously maintained insurance on the property since December 1999, and thus should not have the account debited or be liable for any forced-placed insurance paid by Homeside subsequent to that date; and that he has actually paid Homeside funds in excess of the correct amount of the escrow shortage.

On April 20, 2001, the Court entered an order of default against Homeside for failure

to file an answer to the complaint. With leave of the Court, Homeside filed a belated answer to the complaint on May 4, 2001. In its answer, Homeside admits that \$1,260.00 should have been included in its pre-petition arrearage claim and not as a part of its post-petition escrow shortage. Homeside is willing to refund that amount to the Debtor and file a supplemental proof of claim for such amount as a pre-petition disbursement. Homeside further answers that it received a notice of cancellation of insurance on September 13, 1999, thus compelling it to renew forced-placed insurance. Homeside has not filed any further papers nor any affidavit in opposition to the affidavit filed by the Debtor's attorney.

The Court instructed the Debtor to file an affidavit and supporting documentation showing his calculations proving the alleged overpayment. On May 14, 2001, the Debtor's attorney filed an affidavit with an attached payment history which had been furnished to him by Homeside's attorney. After crediting the Debtor with post-petition principal and interest payments of over \$13,000.00, less the accrued post-petition principal and interest monthly installments due, and less the net forced-placed insurance advanced and properly paid by Homeside, the balance as a refund due from Homeside to the Debtor totals \$2,547.67. The Debtor claims the overpayment to Homeside should be returned to him as it was funded out of post-petition payments from his post-petition income. The Chapter 13 Trustee filed his report showing disbursements on Homeside's pre-petition arrearage claim. The report indicates that the claim has not yet been paid in full.

III. DISCUSSION

A. The Debtor's Request for an Accounting

Whether a plaintiff has a right to an accounting depends on applicable state law, which neither party has cited. See Butner v. United States, 440 U.S. 48, 55 (1979) (property interests are created and defined by state law). Typically, as in Illinois, a right to an accounting arises when the defendant possesses money or property which, because of some particular relationship between himself and the plaintiff, he is obligated to surrender. 1A C.J.S. Accounting § 15 at 13 (1985). An accounting is an equitable remedy, and courts have broad discretion to refuse to award such a remedy to a party who has an adequate remedy at law. First Commodity Traders, Inc. v. Heinold Commodities, Inc., 766 F.2d 1007, 1011 (7th Cir. 1985). The Supreme Court in Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962) set forth the standards for allowing an equitable accounting:

The necessary prerequisite to the right to maintain a suit for an equitable accounting, like all other equitable remedies, is, as we pointed out in *Beacon Theaters*, the absence of an adequate remedy at law. Consequently, in order to maintain such a suit on a cause of action cognizable at law, . . . the plaintiff must be able to show that the “accounts between the parties” are of such a “complicated nature” that only a court of equity can satisfactorily unravel them.

Id. at 478 (footnotes omitted).

Pursuant to Illinois law, a court will take jurisdiction of an accounting action in the absence of an adequate remedy at law and if the accounting action is based upon one of the following: (1) a breach of a fiduciary relationship between the parties; (2) a need for discovery; (3) fraud; or (4) the existence of mutual accounts which are of a complex nature. See, e.g., People ex rel. Hartigan v. Candy Club, 149 Ill. App.3d 498, 500-501, 501 N.E.2d 188, 190 (1st Dist. 1986); Metro-Goldwyn-Mayer, Inc. v. Antioch Theatre Co., Inc., 52 Ill.

App.3d 122, 132, 367 N.E.2d 247, 255 (1st Dist. 1977) (complexity of discovery and complicated and numerous accounting problems established equitable need for accounting).

The Court hereby exercises its discretion and declines to grant the Debtor the relief requested. In fact, Homeside has already furnished a partial accounting to the Debtor. See Exhibit A to the Affidavit of the Debtor's Attorney. The Debtor has not alleged nor demonstrated that he lacks an adequate remedy at law. In light of the uncontroverted affidavit and the supporting documents filed on behalf of the Debtor, the Court concludes that the turnover relief sought under § 542 provides an adequate remedy at law.

B. The Debtor's Request for Turnover

The Bankruptcy Code statutory provision for turnover contained in 11 U.S.C. § 542(a) deals with property of the estate to be turned over to the appropriate party, normally the case trustee, with the exceptions provided in § 542(c) and (d) and subject to set-off rights referenced in § 542(b) pursuant to 11 U.S.C. § 553. Turnover is thus not intended as a remedy to determine disputed rights of parties to property, rather it is intended as the remedy to obtain what is acknowledged to be property of the bankruptcy estate. Marlow v. Oakland Gin Co., Inc. (In re Julien Co.), 128 B.R. 987 (Bankr. W.D. Tenn. 1991), aff'd, 44 F.3d 426 (6th Cir. 1995). In this case, the Debtor seeks to obtain the alleged overpayment, which is derived from property of the estate and which includes the Debtor's post-petition earned income. That income constitutes property of the estate under 11 U.S.C. § 1306(a)(2).

Relief under § 542(a) is most frequently afforded to case trustees or debtors against creditors who are in actual or constructive possession of the subject property and who do not voluntarily surrender it. See Pileckas v. Marcucio, 156 B.R. 721 (N.D. N.Y. 1993). Hence,

the burden is usually on the trustee or debtor seeking turnover, Groupe v. Hill (In re Hill), 156 B.R. 998 (Bankr. N.D. Ill. 1993), and the evidence must show that the asset in question is part of the bankruptcy estate. Mather v. Tailored Fabrics, Inc. (In re Himes), 179 B.R. 279 (Bankr. E.D. Okla. 1995). See Orix Credit Alliance, Inc. v. Wojcicki (In re Wojcicki), No. 97 B 24008, Adv. No. 01286, 1997 WL 742513 (Bankr. N.D. Ill. Dec. 1, 1997). Only property in which the debtor has an interest that properly becomes part of the bankruptcy estate can be made the subject of an order for turnover under § 542(a). Cates-Harman v. Stage (In re Stage), 85 B.R. 880 (Bankr. M.D. Fla. 1988). It thus follows that, if the debtor does not have the right to possess or use property at the commencement of a case, a turnover action cannot be a tool to acquire such rights. Creative Data Forms, Inc. v. Pennsylvania Minority Bus. Dev. Auth. (In re Creative Data Forms, Inc.), 41 B.R. 334 (Bankr. E.D. Pa. 1984), aff'd, 72 B.R. 619 (E.D. Pa. 1985), aff'd, 800 F.2d 1132 (3d Cir. 1986). Case law further notes that a debtor's turnover rights under § 542(a) are subject to the adequate protection rights of the secured creditor in the property and that want of adequate protection thereof results in denial of turnover from the secured creditor. See Loof v. Frankford Trust Co. (In re Loof), 41 B.R. 855 (Bankr. E.D. Pa. 1984); In re McNeely, 51 B.R. 816 (Bankr. D. Utah 1985). The adequate protection requirement for turnover in favor of debtors ties in with that same concept under the relief from the automatic stay provisions of 11 U.S.C. § 362(d). See Associates Commercial Corp. v. Attinello (In re Attinello), 38 B.R. 609 (Bankr. E.D. Pa. 1984); Medicar Ambulance Co., Inc. v. Kramer (In re Medicar Ambulance Co., Inc.), 174 B.R. 804 (N.D. Cal. 1994). The United States Supreme Court in United States v. Whiting Pools, Inc., 462 U.S. 198, 203-04 (1983), ruled that 11 U.S.C. § 363(e) is an essential element of a § 542(a) action.

The excess payments received by Homeside were derived from the Debtor's post-petition earned income. That income constitutes property of the estate which should be refunded and turned over to the Debtor. Homeside has adequate protection inasmuch as it continues to hold a perfected secured mortgage lien against the subject property. It is undisputed that the Debtor has paid Homeside over \$13,000.00 in post-petition mortgage payments, plus it has received over \$10,000.00 on its pre-petition arrearage claim from the Chapter 13 Trustee. Moreover, because the property was valued in the Debtor's Schedule A at \$100,000.00, Homeside enjoys the benefit of an equity cushion that increases as the Debtor continues to service the loan and reduce the principal balance owed through each successive monthly payment. Accordingly, in the absence of any contrary evidence from Homeside or any showing that the Debtor's computations of the overpayment are inaccurate, the Court concludes that the Debtor has proven the overpayment by a preponderance of the documentary evidence and should receive turnover of the amount of \$2,547.67.

IV. CONCLUSION

For the foregoing reasons, the Court hereby denies the Debtor's request for an accounting. The Court orders Homeside to turn over to the Debtor the sum of \$2,547.67.

This Opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. A separate order shall be entered pursuant to Federal Rule of Bankruptcy Procedure 9021.

ENTERED:

DATE: _____

John H. Squires
United States Bankruptcy Judge

cc: See attached Service List

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
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v.)	Adversary No. 00 A 01082
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HOMESIDE LENDING, INC.,)	
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Defendant.)	

ORDER

For the reasons set forth in a Memorandum Opinion dated the 31st day of May, 2001, the Court hereby denies the Debtor's request for an accounting. The Court orders Homeside Lending, Inc. to turn over the sum of \$2,547.67 to the Debtor.

ENTERED:

DATE: _____

John H. Squires
United States Bankruptcy Judge

cc: See attached Service List