UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

In re:

DARNELL REGINALD BROOKS, CASE NO.: 12-40654-KKS

CHAPTER: 13

Debtor.

_____/

ORDER GRANTING IN PART AND DENYING IN PART ENVISION CREDIT UNION'S AMENDED MOTION FOR RELIEF FROM THE AUTOMATIC STAY (DOC. 35)

This matter came before the Court for a preliminary hearing on November 20, 2012 and a final evidentiary hearing on December 12, 2012 on Envision Credit Union's Amended Motion for Relief from the Automatic Stay (Doc. 35) and the Debtor's Response (Doc. 43). The issue here is whether Envision Credit Union ("Envision") is entitled to relief from the automatic stay to permit it to setoff the Debtor's indebtedness under a Visa credit card account against funds on deposit in a joint account owned by the Debtor and the Debtor's non-filing spouse.

The Debtor is a member of Envision Credit Union having opened an account in 1999. In 2004, the Debtor updated his account to add his wife, who is not a debtor in the present bankruptcy case. On December 30, 2008, the Debtor applied for and was issued a Visa credit card with Envision; the Debtor's wife has never been obligated on this account. On September 20, 2012, the date the Debtor filed his Chapter 13 petition, the balance due on the Debtor's Visa credit card account, according to Envision's filed Proof of Claim was $2,223.74. On the petition date, Envision placed an administrative freeze on the Debtor's joint account with his wife, with a then balance of $2,402.14, and filed its original stay relief motion on October 18, 2012, seeking relief from the automatic stay to setoff against the account.

It is well settled that a financial institution can use an administrative freeze as a temporary measure in order to protect its setoff rights while it seeks relief from the automatic stay with the goal of having the court determine whether it can keep the funds permanently. *See Citizens Bank of Maryland v. Strumpf*, 516 U.S. 16, 20-21, 116 S.Ct. 286, 133 L.Ed. 2d 258 (1995). A right of setoff that exists prepetition is preserved in bankruptcy pursuant to 11 U.S.C. § 553(a). *See Strumpf*, 516 U.S. at 20. There is no federal right of setoff created under the Bankruptcy Code. Credit unions in Florida have a statutory right of setoff under Section 657.033(4), Florida Statutes, which provides: "The credit union shall have a lien and right of setoff on the shares, deposits, and accumulated dividends or interest in any member's individual, joint, or trust account for any sum due the credit union from that member." If Envision were seeking setoff on account of a non-credit card loan, then this statute would be dispositive and our analysis would be over. When a credit union asserts a right to setoff on account of a credit card debt, however, we must look also to the Consumer Credit Protection Act, 15 U.S.C. § 1666h and the Truth and Lending Regulations as set forth in 12 C.F.R. Part 226 (Regulation Z).

In order for a credit card issuer to offset a cardholder's indebtedness against funds held on deposit with the card issuer, the issuer must have been given a consensual security interest in the funds on deposit. *In re Clark*, 161 B.R. 290, 292 (Bankr. N.D. Fla. 1993). A statutory lien, such as the one created by Section 657.033, Florida Statutes, does not require the consent of the debtor and would not be considered a consensual lien. *Id.*

The loan application for the Visa credit card signed by the Debtor here is sufficient to grant Envision a consensual security interest on the funds held in the joint account. The operative language, just above the Debtor's signature, states:

> I (WE) GRANT THE CREDIT UNION A SECURITY INTEREST IN ALL SHARES, DEPOSITS AND OTHER FUNDS ON DEPOSIT WITH CREDIT UNION .... IN WHICH I (WE) HAVE ANY OWNERSHIP INTEREST NOW

> AND HEREAFTER TO SECURE ALL AMOUNTS OWED TO CREDIT UNION NOW AND HEREAFTER.

Debtor's Exhibit 5.

In spite of this grant of a security interest in joint accounts, the Debtor argues that the joint account in question was owned by him and his wife as tenancy by the entireties and therefore cannot be reached to satisfy the obligation of only the Debtor.

It is undisputed that the signature card for the account in question states that the account is held by the Debtor and his wife as "Joint with Rights of Survivorship." (Docs. 60 & 61). The Debtor did not present any evidence that he and his wife intended the account to be owned as tenancy by the entireties. The Debtor also did not present evidence rebutting the specific intent shown by the signature card, that he and his wife owned the account jointly, with right of survivorship. As Envision has pointed out in its Memorandum, in the seminal case in Florida on joint bank accounts and tenancy by the entireties, the Florida Supreme Court stated:

> [W]e hold that as between the debtor and a third-party creditor (*other than the financial institution into which the deposits have been made*), if the signature card of the account does not expressly disclaim the tenancy by the entireties form of ownership, a presumption arises that a bank account titled in the names of both spouses is held as a tenancy by the entireties as long as the account is established by husband and wife in accordance with the unities of possession, interest, title, and time and with right of survivorship.

Beal Bank, SSB v. Almand & Associates, 780 So.2d 45, at 58 (Fla. 2001) (emphasis added). Here, we are not dealing with Envision as a third party creditor. Rather, Envision is the "financial institution into which the [Debtor's] deposits have been made." Even if the Debtor had presented evidence that he and his wife owned their checking account as tenants by the entireties, that ownership would only have applied as a rebuttable presumption as to a third party creditor or the bankruptcy Trustee, and not to Envision. As between the Debtor and Envision, the terms of the contract (specifically including the Visa credit agreement and account signature card) govern and the claim of entireties ownership to protect the account from Envision must

fail. Even though this was a Visa credit card debt, because the credit card application granted Envision a security interest in any funds of the Debtor on deposit, including in joint accounts, Envision is entitled to setoff the Debtor's indebtedness to it up to the amount due on the Visa account. Envision placed a freeze on all of the funds in the Debtor's joint account, but is not entitled to setoff on funds in excess of the amount due to it from the Debtor. Envision's Motion for Relief from Stay is denied as to the $178.40 that was over and above the amount due to Envision on the Visa account as of the date of the administrative freeze.

The Debtor's other argument was that the funds in the account were not his, but rather that 1) part of the funds were travel expenses given to the Debtor by the State of Florida, which he held in trust; and 2) part of the funds were the wife's exempt wages. The Court finds these arguments non-persuasive. There is no evidence that the travel expense money constituted trust funds. Any exempt status the wife's wages may have had was lost once they were commingled into the joint account with the other funds.

At the time of the administrative freeze, the Debtor was out of town on business and was left with no money for food, lodging or transportation. The Debtor subsisted by eating the complimentary food and beverages at the motel where he was staying and had to rely on friends and family for money with which to get home.

Although the placing of an administrative freeze on an account is an accepted way for a financial institution to protect its right to setoff, an administrative freeze should not be used to protect more than the creditor would be entitled to if no bankruptcy had occurred. A creditor putting an administrative freeze on an account should promptly seek bankruptcy court relief so that its entitlement, or not, to the frozen funds can be determined as quickly as possible. Here, Envision placed an administrative freeze on all of the money in the account, rather than on the amount that it was owed. There is a dearth of case law as to whether, by so doing, Envision may

have intentionally violated the automatic stay as to the excess funds. The Debtor did not raise that as an issue in response to Envision's motion so the issue is not currently before the Court.

It is ORDERED:

1. Envision Credit Union's Amended Motion for Relief from Stay (Doc. 35) is GRANTED. Envision may setoff against $2,223.74 that was in the joint account as of the date of the Debtor's petition.

2. Envision Credit Union's Amended Motion for Relief from Stay (Doc. 35) is DENIED as to the balance of $178.40 that was in the joint account in excess of the amount due to Envision, and shall turn that sum over to the Debtor.

DONE and ORDERED in Tallahassee, Florida this 30 day of January, 2013.

KAREN K. SPECIE
United States Bankruptcy Judge

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