

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION**

IN RE:

ANTHONY T. BERGALOWSKI,

Debtor.

CASE NO. G12-20687-REB

ANTHONY T. BERGALOWSKI,

Plaintiff,

v.

MILITARY STAR,

Defendant.

ADVERSARY PROCEEDING
NO. 12-2056

CHAPTER 7

JUDGE BRIZENDINE

ORDER OF DISMISSAL

Before the Court is the motion of the United States of America on behalf of Defendant Military Star named above, filed on July 16, 2012, to dismiss the complaint of Plaintiff-Debtor herein for failure to state a claim upon which relief can be granted.¹ Debtor has not responded to the motion. Debtor alleges in the complaint that Defendant caused an involuntary preferential transfer of funds from Debtor in the sum of \$4,080.00 via a garnishment in violation of 11 U.S.C. § 547 that should be avoided, and said funds recovered from Defendant through 11 U.S.C. § 550.

In the motion, Defendant contends that with respect to the transfer at issue, AAFES properly exercised its valid right of setoff of Debtor's pre-petition 2011 federal tax refund, through

¹ As represented in the motion, Military Star serves as an in-house credit plan operated through the Army and Air Force Exchange Services ("AAFES"), which is a joint military command of the United States Army and United States Air Force and a non-appropriated fund instrumentality within the United States Department of Defense.

the Treasury Offset Program and consistent with 11 U.S.C. § 553, against a pre-petition debt Debtor owed to AAFES through its Military Star in-house credit plan. The record reflects that this Chapter 7 case was commenced on February 23, 2012. According to a sworn declaration attached to the motion, Defendant posted Debtor's tax refund to his delinquent AAFES account several days later on March 1, 2012.

Defendant argues that under Section 553, AAFES and the Internal Revenue Service are considered a single entity for purposes of exercising a right to set off. *See In re Shortt*, 277 B.R. 683, 692 (Bankr. N.D. Tex. 2002). Further, it maintains that Debtor's claim of an exemption in the refund did not give him any rights thereto because of Defendant's right of setoff. In fact, it asserts, the refund never even became property of this Chapter 7 bankruptcy estate. In addition, Defendant contends its actions did not violate the automatic stay under Section 362(b)(26).

Based upon a review of the record, the Court concludes that Defendant's motion should be granted as Debtor has failed to state a claim upon which the Court can grant relief in accordance with Federal Rule of Civil Procedure 12(b), applicable herein through Federal Rule of Bankruptcy Procedure 7012(b). It appears that Defendant had a valid right of setoff with respect to the tax refund that it exercised post-petition and not within ninety days of the commencement of this case as required under Section 547. The Court further observes that Section 553(a), which preserves existing setoff rights, states that other provisions of title 11, such as Section 547, do not apply to setoffs. Also, a right of setoff is considered a secured claim under Section 506 and the holder of such claim, by exercising its right to setoff, is in effect taking its collateral and is not thereby receiving more than it would otherwise be entitled. For these reasons, the Court concludes that Debtor has not alleged sufficient facts to support a plausible claim that the transfer at issue

constitutes a voidable preference as defined under Section 547 of the Bankruptcy Code.

The Court further notes that by virtue of its valid setoff right, once the bankruptcy petition was filed Defendant was still entitled to exercise same as such action is excepted from the automatic stay as provided in Section 362(b)(26). Ordinarily, creditors should come to this Court to obtain a ruling regarding the effect of the stay on such rights before exercising same. The reason is that one of the primary purposes of the automatic stay is to prevent a piecemeal dismantling of the bankruptcy estate. While this Court typically makes the decision regarding the operation and scope of the stay and determines what property does or does not become property of the estate with regard to same, the law as amended appears to allow a governmental unit holding a setoff right to exercise same against a pre-petition federal income tax refund on a unilateral basis. *See Ewing v. United States (In re Ewing)*, 400 B.R. 913 (Bankr. N.D.Ga. 2008).

Accordingly, based on the above discussion, it is

ORDERED that the motion of the United States of America on behalf of Defendant Military Star as named above to dismiss the complaint of Plaintiff-Debtor herein for failure to state a claim upon which relief can be granted be, and the same hereby is, **granted**; and, it is

FURTHER ORDERED that the complaint of Plaintiff-Debtor named above be, and the same hereby is, **dismissed**.

The Clerk is directed to close this adversary proceeding as soon as administratively appropriate.

The Clerk is further directed to serve a copy of this Order upon counsel for Plaintiff-Debtor, counsel for Defendant Military Star through the office of the United States Attorney, the Chapter

7 Trustee, and the United States Trustee.

IT IS SO ORDERED.

At Atlanta, Georgia this 31st day of August, 2012.



ROBERT E. BRIZENDINE
UNITED STATES BANKRUPTCY JUDGE