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WRITTEN DECISION – NOT FOR PUBLICATION

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CLERK, U.S. BANKRUPTCY COURT SOUTHERN DISTRICT OF CALIFORNIA BY _____ DEPUTY

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA

In re:) Bankruptcy Case No. 12-11693-CL13
)
) Chapter 13
)
)
SAMUEL S. SOLORZANO, JR.,) MEMORANDUM DECISION AND
) ORDER DENYING EX PARTE MOTION
) FOR TURNOVER
)
)
Debtor,) Judge: Christopher B. Latham
)
)
_____)

1 Debtor did not serve his motion on the EWO creditor. But even if he had, § 522(f) does not aid
2 him. Section 522(f) allows a debtor to avoid a lien on property that impairs an exemption to which the
3 debtor is entitled. Assuming *arguendo* the funds are estate property – and therefore subject to a
4 bankruptcy exemption – in this case there exists no lien to avoid. California Code of Civil Procedure
5 § 706.029 expressly provides that a lien created by a wage garnishment order expires when the
6 withholdings amount is paid. Cal. Civ. Proc. Code § 706.029. Section 522(f) therefore does not entitle
7 Debtor to the funds.

8 III

9 Moreover, the funds are not estate property. A bankruptcy court has authority to enter a
10 § 105(a) order requiring surrender of exempt property. *Hernandez*, 483 B.R. at 726. But before
11 Debtor may claim property as exempt, it must first come into the estate. *Id.* at 725; *In re Varney*, 449
12 B.R. 411, 417 (Bankr. D. Idaho 2011). Whether a prepetition levy or garnishment of funds transfers
13 ownership must be determined on a case-by-case basis. *Hernandez*, 483 B.R. at 723. Debtor may only
14 recover and exempt the funds if he could have challenged the garnishment in the state court,
15 prepetition.

16 Here, Debtor has not claimed the funds as exempt. Depending on the nature of the funds and
17 the manner of their garnishment, Debtor *might* be entitled to an automatic exemption allowing him a
18 prepetition challenge to the levy.¹ But, at present, he has not asserted such exemption. Thus, it does
19 not appear the funds are estate property warranting a § 105(a) surrender order.

20 IV

21 The court recognizes that Debtor may simply be seeking to preserve an exemption. Similarly,
22 in *Hernandez*,

23 The ultimate relief that debtor sought was to preserve his exemption in the levied funds
24 by invoking § 522(g) and/or by exercising the trustee's avoiding powers under § 522(h).
25 . . . [And] [a]s an enforcement mechanism, a debtor is afforded a private right of action
26 to seek redress [for violations of the automatic stay] under § 362(k)(1). "Section 522's
right to claim exemptions in property of the estate bestows standing on debtors for
purposes of § 362(k)(1)."

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28 ¹ For example, in *Hernandez*, the creditor levied upon the debtor's social security benefits. And "[u]nder California law, government benefits such as social security are intended exclusively for the benefit and support of qualified recipients. These funds are exempt and cannot be subject to collection. [citation omitted]." *Hernandez*, 483 B.R. at 724.

1 *Hernandez*, 483 B.R. at 725-26 (quoting *Mwangi v. Wells Fargo Bank, N.A. (In re Mwangi)*, 432 B.R.
2 812, 822 (B.A.P. 9th Cir. 2010)).

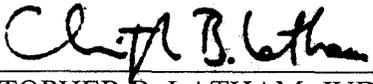
3 But Debtor has not invoked §§ 522(g) or (h), or 362(k)(1). And it is unclear whether any of
4 these sections avail him. Section 522(g) allows Debtor to claim an exemption in property a trustee
5 recovers under certain Chapter 5 actions, and with certain conditions. In Debtor's case, however, the
6 trustee has not moved to recover the funds. Section 522(h) allows a debtor to stand in a trustee's shoes
7 to pursue certain Chapter 5 actions if the trustee does not bring the action himself. But again, the court
8 is unaware of the circumstances surrounding the funds' garnishment, or whether Debtor has any
9 meritorious action. Nor is it clear whether the trustee's non-opposition works to waive the action.
10 And even if Debtor brings the action, he will have to do so by adversary proceeding – a potentially
11 costly proposition given the amount in question. *See* Fed. R. Bankr. P. 7001(1) and (2). Finally,
12 § 362(k)(1) allows a debtor to recover damages for a willful violation of the automatic stay. There is
13 no stay violation, however, unless the funds were estate property. And, as concluded above, they
14 are not.

15 V

16 Debtor's motion is legally, factually and procedurally insufficient for the court to grant his
17 requested relief. The court therefore **denies** Debtor's *ex parte* motion for turnover without prejudice.

18 IT IS SO ORDERED.

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20 Dated: April 12, 2013

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23 CHRISTOPHER B. LATHAM, JUDGE
24 United States Bankruptcy Court
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