

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

WRITTEN DECISION – NOT FOR PUBLICATION

| |
|---|
| ENTERED MAR 26 2013 |
| FILED |
| MAR 26 2013 |
| CLERK, U.S. BANKRUPTCY COURT SOUTHERN DISTRICT OF CALIFORNIA |
| BY _____ DEPUTY |

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA

In re:) Bankruptcy Case No. 13-02216-CL7
)
) Chapter 7
)
)
MELINDA KAY MASSEY,) MEMORANDUM DECISION AND
) ORDER DENYING EX PARTE MOTION
) FOR TURNOVER
)
)
Debtor,) Judge: Christopher B. Latham
)
)
_____)

1 debtor is entitled. Assuming *arguendo* the funds are estate property – and therefore subject to Debtor’s
2 claimed exemption – there exists no lien to avoid. Under California Code of Civil Procedure
3 § 700.140(e), a levy on funds in a deposit account subject to an execution lien terminates that lien. As
4 such, § 522(f) does not entitle Debtor to the funds. *Hernandez*, 483 B.R. at 721.

5 III

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

12 Here, Debtor scheduled the funds as exempt under California’s wildcard exemption, California
13 Code of Civil Procedure § 703.140(b)(5). But this exemption is only available to debtors in
14 bankruptcy; it does not arise automatically. *See* Cal. Civ. P. Code § 703.140(a). Depending on the
15 nature of the funds and the manner of their garnishment, Debtor *might* be entitled to an automatic
16 exemption allowing her a prepetition challenge to the levy.¹ But, at present, she has not claimed such
17 exemption. Thus, it does not appear the funds are estate property warranting a § 105(a) surrender
18 order.

19 IV

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

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

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)).

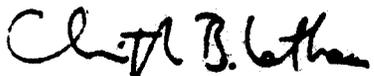
3 But Debtor has not invoked § 522(g) or (h), or § 362(k)(1). And it is unclear whether any of
4 these sections avail her. Section 522(g) allows Debtor to claim an exemption in property the trustee
5 recovers under certain Chapter 5 actions, and with certain conditions. In Debtor's case, however, the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

14 V

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

17 IT IS SO ORDERED.

18
19 Dated: March 26, 2013

20 
CHRISTOPHER B. LATHAM, JUDGE
United States Bankruptcy Court