



**IT IS ORDERED as set forth below:**

**Date: February 10, 2014**

*Mary Grace Diehl*

**Mary Grace Diehl  
U.S. Bankruptcy Court Judge**

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

In re:	)	Case No. 13-43242-MGD
	)	
HOWELL JAMES COCHRAN, II,	)	Chapter 7
	)	
Debtor.	)	Judge Diehl
	)	
HOWELL JAMES COCHRAN, II,	)	
	)	
Movant,	)	
	)	
v.	)	CONTESTED MATTER
	)	
DOUGLASVILLE WINAIR COMPANY,	)	
	)	
Respondent.	)	

**ORDER**

This case raises the issue of whether funds that have been paid into court pursuant to a Summons of Garnishment remain property of the estate, subject to exemption by a Chapter 7 debtor. The facts of the case present this issue in two different scenarios: (1) funds which have been paid into court pursuant to a summons of garnishment and paid out to the creditor prior to

the filing of the bankruptcy; and (2) funds which have been paid into court pursuant to a summons of garnishment and as to which an Order of Disbursement has been entered, but the funds have not been paid out to the creditor/garnishor as of the filing of the bankruptcy petition.

The matter is before the Court on Debtor, Howell James Cochran, II's ("Debtor") Motion to Avoid Lien pursuant to 11 U.S.C. § 522(f) and Bankruptcy Rule 4003(d) (Docket No. 13) and Creditor, Douglasville Winair Company's ("Creditor") Objection to Exemption (Docket No. 23). A hearing on the motions was originally scheduled for January 29, 2014 and, because of the closing of the court for inclement weather on that date, was actually held on February 5, 2014. Tracie Wynn represented the Debtor. Lisa H. Baggett appeared on behalf of the Creditor. Certain documents were admitted into evidence based upon the stipulation of the parties. (Docket No. 39).

The facts giving rise to the current dispute are as follows: Creditor obtained a judgment against Debtor in September of 2010 in the amount of \$18,388.03 plus post-judgment interest. A continuing garnishment summons was filed in the Superior Court of Bartow County on August 28, 2013. Debtor filed a Chapter 7 case on November 9, 2013. Prior to the filing of the case, the Clerk of the Bartow County Court had disbursed \$1341.54 of garnished funds to the creditor. As of November 9, 2013, the Bartow County Clerk was holding \$894.36. Of that sum, \$447.18 had been paid into court with an Answer filed on October 17, 2013. A Disbursement Order directing the Clerk to disburse these monies was entered on October 24, 2013. An additional \$447.18 was paid into court with an Answer filed on October 31, 2013. A disbursement Order as to those funds was signed and entered on November 8, 2013, the day before the filing of Debtor's Chapter 7 case. However, neither of these deposits had been disbursed by the Clerk at the time of the bankruptcy filing. The disbursement of the total amount (\$894.36) was by check dated

November 13, 2013. Those funds are being held by Creditor's counsel. None of these facts are disputed.

Debtor seeks to exempt the entire \$2,235.90 which was the subject of Creditor's garnishment. The Court will address the pre- and post-petition disbursements separately.

#### **A. Pre-Petition Disbursement**

Section 541 of the Bankruptcy Code provides that included in property of the estate are all "legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541. At the time the bankruptcy was filed, \$1341.54 had been disbursed by the Clerk of Court to Creditor. Those funds became property of Creditor and, under Georgia law, Debtor had no interest in those funds. While a defendant in a garnishment proceeding retains a right to file a traverse of the garnishment "before a judgment is entered on the garnishee's answer or before money . . . subject to garnishment is distributed" under O.C.G.A. § 18-4-93, once the distribution has occurred, the defendant has no remaining interest in the funds. The funds distributed to Creditor pre-petition, therefore, are not property of the estate, even under the broad reach of Section 541.

Debtor argues that the estate, or the debtor<sup>1</sup>, may recover these funds pursuant to Section 547 of the Bankruptcy Code as a preference, and therefore, the funds may be exempted. This analysis is not faulty but it presupposes the avoidance of the transfer, which has not yet taken place. Indeed, Debtor has not filed an avoidance action against Creditor, and the Court cannot pre-determine the outcome of any such adversary proceeding. If Debtor successfully brings these funds into the bankruptcy estate and the funds become subject to the claim of exemption, the

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<sup>1</sup>Section 522(h) allows the debtor to bring an avoidance action to assert an exemption where the trustee has not attempted to do so. Here, the trustee has filed a no asset report and did not seek any recovery from Creditor.

Court can address any objections raised at that time.

Section 522(b)(1) allows a debtor to claim exemptions “from property of the estate . . . .” It follows that a debtor cannot claim an exemption in property that is not property of the estate. 11 U.S.C. § 522(b)(1); *see also In re Williams*, 460 B.R. 915, 917 (Bankr. N.D.Ga. Sept. 22, 2011)(Stating that to determine whether the debtor could exempt funds, “[t]he Court must first determine whether the Debtor had any interest in the garnished wages at the time the petition was filed.”). Accordingly, Debtor’s Motion to Avoid Lien as to these funds will be denied and Creditor’s Objection to Exemption as to these funds will be granted.

#### **B. Post-Petition Disbursement**

At the time the bankruptcy petition was filed, \$894.36 was in the registry of the Superior Court of Bartow County. Half of those funds had been paid into court on October 17, 2013 and the other half on October 31, 2013. Both sums were the subject of Orders of Disbursement, the former on October 24, 2013 and the latter on November 8, 2013. Both Orders were entered pre-petition. Creditor argues that those orders served to divest Debtor of any interest in the funds.

O.C.G.A. § 18-4-93 governs claims to garnished funds. It provides:

A garnishment proceeding is an action between the plaintiff and the garnishee; but, at any time before judgment is entered on the garnishee's answer or before the money or other property subject to garnishment is distributed, the defendant may become a party to the garnishment for the purposes set out in Code Section 18-4-65 by filing a traverse to the plaintiff's affidavit . . . .

Other claimants to the funds such as other judgment creditors with prior liens may file their claims "at any time before judgment is entered on the garnishee's answer or other money or other

property subject to garnishment is distributed.” O.C.G.A. § 18-4-95.

Georgia Code directs the Clerk to pay the funds to the garnishee (or its attorney) if no traverse or claim has been filed within fifteen days of the filing of the garnishee's answer, upon application by the plaintiff. O.C.G.A. § 18-4-89. Here, the Orders of Disbursement submitted by Creditor are those applications. With respect to the October 17, 2013 funds, the minimum fifteen days had run with no traverse or adverse claim being made. The Clerk could have disbursed those funds in accordance with the statute but had not done so. As a result, a traverse could still have been filed by Defendant/Debtor as of the date of the bankruptcy filing. As to the October 31, 2013 deposit, the disbursement by the Clerk on November 8, 2013 was premature under the statute since the 15 days had not yet expired. In both cases, however, Debtor retained an interest in the funds which are subject to exemption and the avoidance of Creditor's lien is possible under 11 U.S.C § 522 (f). *In re Williams*, 460 B.R. 915 (Determining that the debtor retained an interest in garnished funds held in the court registry because she retained the right to file a traverse.).

Accordingly, it is hereby

**ORDERED** that the Motion to Avoid Lien is **DENIED** without prejudice as to the \$1341.54 disbursed pre-petition and the Objection to Exemptions is **GRANTED** as to the \$1341.54 disbursed pre-petition. It is further **ORDERED** that the Motion to Avoid Lien is **GRANTED** as to the \$894.36 disbursed post-petition and the Objection to Exemptions is **DENIED** as to the \$894.36 disbursed post-petition.

The clerk is directed to serve a copy of this Order on Movant, counsel for Movant, Respondent, counsel for Respondent, and the Chapter 7 Trustee.

**END OF DOCUMENT**