

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION (DETROIT)

In re:

Case No. 16-44233

Nichelle Marie Parham,

Chapter 7

Debtor.

Hon. Mark A. Randon

**OPINION AND ORDER GRANTING CREDITOR'S
MOTION FOR RECONSIDERATION**

I. INTRODUCTION

Five days before Debtor filed Chapter 7 bankruptcy, Credit Acceptance Corporation, through its attorney Jason Michael Katz, P.C. (Collectively, "CAC"), lawfully garnished and received \$777.60 from Debtor's bank account. Post-petition, CAC promptly authorized a garnishment release. But it took three written requests from Debtor's counsel—and almost a year—for CAC to return the garnished funds. In the meantime, Debtor received her discharge and the case was closed.

Debtor moved to reopen her bankruptcy case to recover the garnished funds (that CAC had already returned) as a preferential transfer and obtain damages, including attorney fees, for violation of the automatic stay. The Court granted Debtor's motion; CAC's motion for reconsideration is pending.

Upon reconsideration, the Court finds there is no cause to reopen the case because: (1) the garnished funds were not property of the bankruptcy estate; (2) CAC did not,

therefore, violate the automatic stay; and (3) CAC returned the garnished funds to Debtor before an adversary proceeding was filed or a judicial determination was made that CAC's receipt of the garnished funds was a preference. CAC's motion for reconsideration is **GRANTED**; the Court's order reopening the case is **VACATED**.

II. BACKGROUND

CAC obtained a \$7,218.16 state-court judgment against Debtor. The state court issued a writ of garnishment, which was served on Debtor's bank. The bank released \$777.60 to CAC on March 17, 2016. Debtor filed bankruptcy on March 22, 2016. Two days later, CAC authorized a garnishment release; no funds were received post-petition.

On June 1, 2016, Debtor's counsel sent CAC a written demand for "all funds received from garnishment 90 days prior to filing of the petition and any funds received after the filing date."¹ CAC did not respond. After Debtor received a discharge and her case was closed, she retained new counsel to recover the garnished funds. On April 24, 2017, counsel sent CAC a letter requesting proof that the garnished funds had been returned to Debtor. Again, CAC did not respond. A third letter was sent to CAC on May 8, 2017, demanding that CAC pay \$3,402.60 "in order to avoid the filing of an adversary proceeding in which [Debtor] shall seek actual damages, including costs and attorney fees, sanctions, punitive damages, and/or treble damages[.]" The next day, CAC returned only the garnished funds.

¹The Chapter 7 Trustee declined to file an adversary proceeding to avoid the potential preference.

III. STANDARD OF REVIEW

Local Bankruptcy Rule 9024-1(a)(3) requires a party bringing a motion for reconsideration to demonstrate “a palpable defect by which the court and the parties have been misled” and “show that a different disposition of the case must result from a correction thereof.” “Generally, . . . a motion for reconsideration that merely presents the same issues ruled upon by the court, either expressly or by reasonable implication, will not be granted.” *Id.*

IV. ANALYSIS

11 U.S.C. § 541(a)(1) provides that a bankruptcy estate includes “all legal or equitable interests of the debtor in property as of the commencement of the case.” Debtor argues that she had an interest in the garnished funds—and they were part of the bankruptcy estate—because the transfer of funds occurred within 90 days of her bankruptcy filing and were subject to avoidance as a preference. 11 U.S.C. § 547(b); *see also* 11 U.S.C. § 522(h). Debtor, therefore, urges the Court to find that CAC was automatically required to turnover the funds, and its failure to do so violated the automatic stay. *See* 11 U.S.C. §§542(a) and 362(a); *see also e.g., United States v. Whiting Pools, Inc.*, 462 U.S. 198, 205-06 (1983) (“Given the broad scope of the reorganization estate, property of the debtor repossessed by a secured creditor . . . may be drawn into the estate”); *TranSouth Fin. Corp. v. Sharon (In re Sharon)*, 234 B.R. 676, 681 (B.A.P. 6th Cir. 1999) (“*Whiting Pools* requires that the right to possess the Debtor’s car became property of this Debtor’s Chapter 13 estate”); *Roche v. Pep Boys, Inc. (In re Roche)*, 361

B.R. 615, 621 (Bankr. N.D. Ga. 2005) (“the continuation of the garnishment is a violation of the automatic stay”); *In re Trujillo*, 485 B.R. 238 (D. Col. 2012) (debtors’ wages that the creditor received post-petition pursuant to a pre-petition writ were property of the bankruptcy estate).

Debtor’s cases are inapplicable for two reasons. First, debtors, whose vehicles or other tangible personal property are repossessed before filing bankruptcy, still have an interest in the property until it is sold. However, the Court finds Debtor’s interest in the garnished funds was terminated with finality upon CAC’s *pre-petition* receipt. The garnished funds were not property of the estate. Second, CAC satisfied its obligation to promptly release the garnishment upon notice of the bankruptcy, and thus, no funds were received *post-petition*. Had CAC received post-petition funds, they would have constituted property of the estate and been subject to immediate turnover or a possible stay violation. *See In re Manuel*, No. 14-53487, 2014 WL 7405471 (Bankr. E.D. Mich. Dec. 24, 2014) (the automatic stay is violated when the creditor fails to release its pre-petition garnishment and refuses to return funds received post-petition).

The Court’s finding that the garnished funds are not property of the estate under section 541(a)(1) does not end its inquiry. Section 541(a) further provides that the bankruptcy estate includes “[a]ny interest in property that the trustee *recovers* under section . . . 550 . . . of this title.” 11 U.S.C. § 541(a)(3) (emphasis added).

11 U.S.C. § 550(a) allows the trustee/debtor to bring into the bankruptcy estate involuntary transfers of property *that were avoided pursuant to section 547*. However,

avoidance actions require an adversary proceeding. Fed. R. Bank. P. 7001(1); *see also In re Montellano*, No. 2:15-bk-11049-RK, 2015 WL 3878412, at *1 (Bankr. C.D. Cal. June 19, 2015):

[D]ebtor . . . seeks to avoid and recover a prepetition involuntary transfer of her wages garnished prepetition through the bankruptcy trustee’s avoidance powers under 11 U.S.C. § 547(b), granted to the debtor pursuant to 11 U.S.C. § 522(h). Under Federal Rule of Bankruptcy Procedure 7001(1), this would be “a proceeding to recover money or property” which is required to be brought in an adversary proceeding. *See* 10 Resnick and Sommer, *Collier on Bankruptcy*, ¶ 7001.02 at 7001-4-7001-8 (16th ed. 2015) (“Proceedings within Rule 7001(1) include actions by trustees or debtors . . . to recover property that was the subject of avoided preferences under section 547 [of the Bankruptcy Code, 11 U.S.C.] . . .”).

No adversary proceeding was filed in Debtor’s bankruptcy case—much less a judicial determination that all of the elements of a preference were established. The garnished funds were also not property of the estate under section 541(a)(3). And the automatic stay was not violated by CAC’s refusal to immediately return the garnished funds to Debtor: CAC did not enforce the judgment post-petition or attempt to control property of the estate. 11 U.S.C. §§362(a)(2) and 362(a)(3).

V. CONCLUSION

Upon reconsideration, the Court finds there is no cause to reopen the case because: (1) the garnished funds were not property of the bankruptcy estate; (2) CAC did not, therefore, violate the automatic stay; and (3) CAC returned the garnished funds to Debtor

before an adversary proceeding was filed or a judicial determination was made that CAC's receipt of the garnished funds was a preference. CAC's motion for reconsideration is **GRANTED**; the Court's order reopening the case is **VACATED**.

IT IS ORDERED.

Signed on July 26, 2017



/s/ Mark A. Randon

**Mark A. Randon
United States Bankruptcy Judge**