

**IN THE UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF ARKANSAS
LITTLE ROCK DIVISION**

IN RE: STEFAN SHAW SPURLOCK, DEBTOR

**CASE NO.: 4:09-bk-13265
CHAPTER 13**

STEFAN SHAW SPURLOCK, DEBTOR

PLAINTIFF

v.

AP NO.: 4:09-ap-01136

**MERCHANTS AND PLANTERS BANK OF
CLARENDON, ARKANSAS**

DEFENDANT

**ORDER GRANTING IN PART AND DENYING IN PART
DEFENDANT'S MOTION TO DISMISS**

Before the court is Defendant's Motion to Dismiss and Authorities in Support or in the Alternative Answer [Motion] filed by the defendant, Merchants and Planters Bank of Clarendon, Arkansas [Merchants], and Plaintiff's Response to Defendant's Motion to Dismiss and Authorities in Support or in the Alternative to Answer [Response] filed by the debtor, Stefan Shaw Spurlock [Spurlock]. The court heard the Motion and Response on September 30, 2009. For the reasons stated herein, the Motion is granted in part and denied in part.

I. Jurisdiction

This court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334 and 157. This is a core proceeding under 28 U.S.C. § 157(b)(2)(E) & (F). The following order constitutes findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052.

II. Background

On May 8, 2009, Spurlock filed a voluntary petition for relief under Chapter 13. (Am. Compl. at 2, ¶ 6.) He filed his Amended Complaint to Recover Preference Payments by

Consumer Debtor and Motion for Turnover [Amended Complaint]¹ on July 31, 2009. In his Amended Complaint, Spurlock contends that on or about April 2, 2008, Merchants filed suit in the District Court of Clarendon, Monroe County, Arkansas to pursue a deficiency balance on a loan. (Am. Compl. at 2, ¶ 9.) Merchants obtained a default judgment for \$2867.85, plus court costs and fees. (Am. Compl. at 3, ¶ 9.) Merchants then obtained a Writ of Garnishment on December 29, 2008, thereby garnishing Spurlock's weekly wages. (Am. Compl. at 3, ¶ 9.) Merchants garnished approximately \$1917.45 from February 7, 2009 through the petition date, May 8, 2009.² (Am. Comp. at 3, ¶ 10.) Spurlock additionally claims that he was insolvent during the time period that his wages were garnished and that Merchants received more funds than it would have been entitled to in a chapter seven case. (Am. Compl. at 3, ¶ 10; Resp. at 2.) Both parties acknowledge that Merchants ceased garnishing Spurlock's wages after learning that he filed bankruptcy. (Mot. at 5, ¶ 10; Am. Compl. at 3, ¶ 10.)

Spurlock's Amended Complaint also asserts that his attorney contacted J. Baxter Sharp, III, counsel for Merchants during the Clarendon District Court matter, to request turnover of the funds garnished from February 7, 2009 through May 8, 2009. (Am. Compl. at 3-4, ¶¶ 12-16.) Following Merchants' refusal to return the garnished wages and because the trustee did not attempt to recover the wages, Spurlock filed a complaint alleging three causes of action: preferential transfer pursuant to 11 U.S.C. § 547, turnover pursuant to 11 U.S.C. § 542, and

¹ Spurlock filed his Complaint to Recover Preference Payments by Consumer Debtor and Motion for Turnover on June 5, 2009. Spurlock subsequently motioned the court and was granted permission to file his Amended Complaint pursuant to Federal Rule of Civil Procedure 15(a)(2), made applicable to the proceeding by Federal Rule of Bankruptcy Procedure 7015.

² The time period of February 7, 2009 through May 8, 2009 constitutes the ninety-day preference period described in 11 U.S.C. § 547(b)(4)(A).

violation of the automatic stay pursuant to 11 U.S.C. § 362. (Am. Compl. at 4-6.)

Merchants filed its Motion on August 10, 2009 asserting that Spurlock's Amended Complaint should be dismissed. Spurlock filed his Response on September 17, 2009. The court heard oral argument on September 30, 2009 and took the matter under advisement.

III. Discussion

A. Standard of Review

In its Motion, Merchants contends that Spurlock's Amended Complaint should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6) because it "fails on its face to state any claim upon which relief may be granted." (Mot. at 3, ¶ 10.)

Federal Rule of Civil Procedure 8(a)(2), made applicable to the proceeding by Federal Rule of Bankruptcy Procedure 7008, requires that a pleading contain "a short and plain statement of the claim showing that the pleader is entitled to relief." If a pleading fails to "state a claim upon which relief can be granted," the complaint can be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6), made applicable to the proceeding by Federal Rule of Bankruptcy Procedure 7012.

In *Ashcroft v. Iqbal*, the United States Supreme Court detailed the appropriate standard in considering a motion to dismiss:

[A] complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'"

129 S. Ct. 1937, 1949 (2009) (citations omitted) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S.

544 (2007)). Although the court “must accept as true all of the allegations contained in a complaint,” the court is “not bound to accept as true a legal conclusion couched as a factual allegation.” *Id.* at 1949-50. In determining whether a complaint meets the requirements of Federal Rule of Civil Procedure 8(a)(2), the court engages in a “context-specific task . . . draw[ing] on its judicial experience and common sense.” *Id.* at 1950.

B. Preferential Transfer

The first cause of action contained in Spurlock’s Amended Complaint is preferential transfer pursuant to 11 U.S.C. § 547. To prove a preferential transfer, a party must allege the following elements:

- (b) Except as provided in subsections (c) and (i) of this section, the trustee may avoid any transfer of an interest of the debtor in property—
 - (1) to or for the benefit of a creditor;
 - (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
 - (3) made while the debtor was insolvent;
 - (4) made—
 - (A) on or within 90 days before the date of the filing of the petition; or
 - (B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider;and
- (5) that enables such creditor to receive more than such creditor would receive if—
 - (A) the case were a case under chapter 7 of this title;
 - (B) the transfer had not been made; and
 - (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

11 U.S.C. § 547(b).

In its Motion, Merchants contends that “[t]he amended complaint fails to state sufficient facts to support a complaint under 11 U.S.C. § 547.” (Mot. at 1, ¶ 2.) Merchants later acknowledges, however, that “[t]he Debtor may have a cause of action to avoid an alleged

preferential transfer and nothing more.” (Mot. at 2, ¶ 3.) In the Amended Complaint, Spurlock alleges the following facts to support his claim for preferential transfer: (1) that the transfer was for the benefit of Merchants; (2) the transfer related to an antecedent debt; (3) Spurlock was insolvent at the time of the transfer; (4) the transfer was made within ninety days prior to Spurlock’s bankruptcy petition being filed; and (5) Merchants received more funds than it would have been entitled to in a chapter 7 proceeding. (Am. Compl. at 2-4.) The underlying facts involve a simple garnishment; brevity does not exclude the possibility that the garnished stream of payments may constitute a preference. The court finds that Spurlock’s Amended Complaint alleges sufficient facts to support a cause of action for preferential transfer. As such, Merchants’ Motion is denied in part.

C. Turnover

In his second claim for relief, Spurlock states that Merchants “violated 11 U.S.C. §§ 550 and 542 by refusing to refund the preferential payments.” (Am. Compl. at 5, ¶ 23.) Spurlock also requests punitive damages in the sum of \$3000 and attorney’s fees and expenses. (Am. Compl. at 5, ¶ 25.) In its Motion, Merchants responds that “[t]he refusal of a creditor to comply with a debtor’s or trustee’s demand for payment in connection with an alleged preferential transfer does not support a complaint for turnover pursuant to 11 U.S.C. § 542.” (Mot. at 1, ¶ 3.) Merchants further contends that “until a transfer has been avoided there can be no liability for damages under 11 U.S.C. § 547, or any other code section.” (Mot. at 2, ¶ 4.)

The Bankruptcy Code provides for the turnover of property in 11 U.S.C. § 542(a):

Except as provided in subsection (c) or (d) of this section, an entity, other than a custodian, in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363 of this title, or that the debtor may exempt under section 522 of this title, shall deliver to the trustee, and account for,

such property or the value of such property, unless such property is of inconsequential value or benefit to the estate.

By referencing § 363, “the drafters of § 542(a) made it clear that the turnover obligation applies to property of the estate. Property of the estate is defined by 11 U.S.C. § 541(a)(1) as ‘all legal and equitable interests of the debtor in property as of the commencement of the case.’” *Brown v. Pyatt (In re Pyatt)*, 486 F.3d 423, 427 (8th Cir. 2007). As for § 522, the claimed property must first be property of the estate to be exempted.³ As such, before property can be used, sold, or leased under § 363 or exempted under § 522, it must be property of the estate.

In this case, Spurlock does not allege that the wages garnished pre-petition are property of the estate. Further, Spurlock acknowledges in his Response that he can only “exempt from property of the estate any property the trustee recovers *after the trustee avoids a transfer.*” (Resp. at 2, ¶ 3.) (emphasis added). Because Spurlock failed to plead that the garnished wages are property of the estate, the Amended Complaint fails to state a cause of cause of action for turnover, and Merchants’ Motion is granted in part.

D. Violation of the Automatic Stay

The third cause of action Spurlock sets forth in the Amended Complaint is violation of the automatic stay pursuant to 11 U.S.C. § 362. Spurlock contends that Merchants violated the automatic stay by exercising control over and failing to return the wages garnished pre-petition. (Am. Compl. at 6, ¶ 27.) The Amended Complaint also requests attorney’s fees and expenses as well as damages in the sum of \$3000 for loss of use of earned wages, embarrassment, and mental anguish. (Am. Compl. at 6, ¶ 28.) In its Motion, Merchants responds that Spurlock’s claim is

³ “[A]n individual debtor may exempt from property of the estate” 11 U.S.C. § 522(b)(1).

without merit because “no legal or factual authority [exists] for finding a party in violation of the automatic stay as a result of that party’s refusal to consent to the avoidance of a transfer alleged to be preferential under 11 U.S.C. § 547. There is also no allegation or evidence of [Merchants] exercising control over property of [Spurlock] after the bankruptcy filing.” (Mot. at 3, ¶ 8.)

Pursuant to 11 U.S.C. § 362(a)(3), the filing of a bankruptcy petition operates as a stay of “any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate.” If an individual or entity takes any action to violate the stay, “an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys’ fees, and, in appropriate circumstances, may recover punitive damages.” 11 U.S.C. § 362(k)(1). To allege a violation of automatic stay and seek damages for the violation, a party must establish the following elements: (1) a violation occurred, (2) the violation was committed willfully, and (3) the violation caused actual damages. *Hampton v. Yam’s Choice Plus Autos, Inc. (In re Hampton)*, 319 B.R. 163, 171 (Bankr. E.D. Ark. 2005).

In the present case, Spurlock contends that Merchants violated the automatic stay by retaining the garnished wages and failing to turn over the wages following the commencement of the bankruptcy. Spurlock fails, however, to allege that the garnished wages are property of the estate, which is a prerequisite to finding a violation of the automatic stay pursuant to 11 U.S.C. § 362(a)(3).

Based on the analysis contained in *In re James*, pre-petition garnished wages generally do not constitute property of the estate. *James v. Planters Bank (In re James)*, 257 B.R. 673 (8th Cir. B.A.P. 2001). In *In re James*, the court affirmed the ruling of Judge James G. Mixon by

holding that a garnishment judgment in Arkansas terminates any interest a debtor may have in wages earned and garnished pre-petition.⁴ *Id.* at 679. Because the debtor had no interest in the wages when the bankruptcy petition was filed, the court held that the creditor did not violate the automatic stay.⁵ *Id.*

Merchants' Motion is granted in part as to Spurlock's claim for violation of the automatic stay as the Amended Complaint fails to state a claim upon which relief can be granted; namely, that the garnished wages are property of the estate.

IV. Conclusion

For the reasons stated herein, the Motion is granted in part and denied in part. Should he elect to do so, Spurlock is hereby given twenty days from the date of the entry of this order to file an amended complaint. Otherwise, trial will be set on the remaining matters by subsequent notice of the court.

IT IS SO ORDERED .

Dated this 10th day of November, 2009.

⁴ The court specifically referenced Arkansas Code Annotated §§ 16-110-410 and 411.

⁵ The court's holding in *In re James* was echoed in *In re Bryner* where the court found that a creditor's post-petition retention of funds garnished pre-petition pending a resolution of the parties' dispute did not violate the automatic stay. *Bryner v. Xilinx, Inc. (In re Bryner)*, No. 08-2034, 2009 WL 2485756 (Bankr. D. Utah Aug. 11, 2009).



HONORABLE RICHARD D. TAYLOR
U.S. BANKRUPTCY JUDGE

cc: Charles T. Coleman, Counsel for Merchants and Planters Bank of Clarendon
Lyndsey D. Dilks, Counsel for the Debtor
Mark T. McCarty, Chapter 13 Standing Trustee
Stefan Shaw Spurlock, Debtor