

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION**

In re:

ALBERT CARL MAIER,

Case No.: 3:12-bk-283-JAF

Debtor.

Chapter 7

ALBERT CARL MAIER,

Plaintiff,

v.

Adv. No.: 3:12-ap-484-JAF

UNITED STATES OF AMERICA,
INTERNAL REVENUE SERVICE,

Defendant.

**ORDER GRANTING UNITED STATES' MOTION TO DISMISS ADVERSARY
COMPLAINT**

This proceeding came before the Court upon United States' Motion to Dismiss Adversary Complaint (the "Motion")(Doc. 4), Memorandum Opposing Motion to Dismiss (the "Response") (Doc. 5), and United States Reply in Support of Motion to Dismiss Adversary Complaint (the "Reply").

Background

Plaintiff filed the complaint in this adversary proceeding, Complaint for Avoidance of Preferential Transfers, seeking to avoid approximately \$18,314.13, which Plaintiff alleges that the Internal Revenue Service (the "IRS") seized from his wages and social security during the 90 day period before the filing of his bankruptcy petition. Specifically, Plaintiff alleges the following. Plaintiff filed a Chapter 13 bankruptcy petition on January 19, 2012 (the "Petition

Date”)(Comp. ¶ 6).¹ During the 90 day period before the Petition Date, the IRS seized the sum of \$17,534.28 from Plaintiff’s wages and the sum of \$779.85 from Plaintiff’s social security payments (Comp. ¶¶ 7,8). The IRS applied the \$18,314.13 seized in the 90 days before the Petition Date to non-priority dischargeable taxes for the 1998 and 1999 tax years, assessed in 2002 (Comp. ¶ 9). The IRS was a creditor of Plaintiff at all times from October 21, 2011 through the Petition Date (Comp. ¶ 11). The seizures of Plaintiff’s wages and social security payments effected transfers of those funds to the IRS totaling \$18,314.13 in the 90 days before the Petition Date (Comp. ¶ 12). The transfers were made 90 days, or less, before the Petition Date (Comp. ¶ 13). The transfers enabled the IRS to receive more than it would have received, if this case were a case under Chapter 7, the transfers had not been made, and the [IRS] had received the payments to which it would have been entitled under Chapter 7 (Comp. ¶ 14). The transfers were involuntary (Comp. ¶ 15). Plaintiff reported the transfers on his Statement of Financial Affairs (Comp. ¶ 16). The funds transferred were exemptible pursuant to 11 U.S.C. § 522(b)(Comp. ¶ 17). The Trustee has not attempted to avoid the transfers (Comp. ¶ 17).

In the Motion the IRS asserts the Complaint fails to state a claim upon which relief can be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure, made applicable by Rule 7012(b) of the Federal Rules of Bankruptcy Procedure (Doc. 4 at ¶1). The IRS asserts that the Complaint is not plausible on its face because the factual allegations fail to plausibly suggest that: 1) Plaintiff could have exempted the levied funds under 11 U.S.C. § 522(b); 2) Plaintiff was insolvent at the time of the levies; and 3) Plaintiff’s right to the funds was extinguished when the funds were both levied and collected by the Defendant. Because the Court finds that the factual

¹ On July 26, 2012 the case was converted to Chapter 7.

allegations in the Complaint fail to plausibly suggest that Plaintiff could have exempted the funds under 11 U.S.C. § 522(b), the Court finds it appropriate to grant the Motion to Dismiss.

Motion to Dismiss Standard

A motion to dismiss pursuant to Rule 12(b) tests the sufficiency of a complaint and asks the court to determine whether the complaint sets forth sufficient factual allegations to establish a claim for relief. When evaluating whether a plaintiff has stated a claim, a court must determine whether the complaint satisfies Rule 8(a)(2), which requires “a short and plain statement of the claim showing that the pleader is entitled to relief.” To survive a Rule 12(b) motion, the complaint must contain enough factual matter (taken as true) to “raise [the] right to relief above the speculative level.” Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). “[N]aked assertions devoid of further factual enhancement” will not satisfy Rule 8(a)(2)’s requirement of a short plain statement of the claim showing the pleader is entitled to relief. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (citing Twombly, 550 U.S. at 557) (internal quotations omitted). A “formulaic recitation of the elements for a cause of action will not do.” Id. Thus, a plaintiff must plead “factual content that allows the court to draw the reasonable inference that the defendant is liable for the conduct alleged.” Twombly, 550 U.S. at 555.

A mere possibility that the defendant acted in contravention of the law will not suffice. Id. Although a court must accept all well pleaded facts as true, it is not required to accept legal conclusions. Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252, 1260 (11th Cir. 2009). A complaint must contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face. Iqbal, 129 S.Ct. at 1949.

Analysis

While the Complaint refers only to 11 U.S.C. § 547, it appears that Plaintiff seeks to avoid the transfers pursuant to 11 U.S.C. §§ 522(h) and 547. Section 522(h) contains an exception to the general rule that the trustee, not the debtor, has to power to avoid preferential transfers. Pursuant to § 522(h), a debtor may avoid a transfer of his or her interest in property to the extent that the property could have been exempted under § 522(g), provided that the trustee could have avoided the transfer under § 547 and does not attempt to do so. See 11 U.S.C. § 522(h). Thus, the debtor must first demonstrate that he could have exempted the property under § 522(g)(1).

Section 522(g)(1) allows a debtor to exempt under § 522(b) property recovered by the trustee under various provisions of the Bankruptcy Code. To exempt property under § 522(g)(1), the debtor must satisfy three requirements. First, the debtor must show that, if the transfer had not occurred, he could have exempted the property under § 522(b). Second, the debtor must not have voluntarily transferred the property. Last, the debtor must not have concealed the transferred property.

Section 522(b) provides that a debtor may exempt property of the estate listed in either paragraph (2) or, in the alternative, paragraph 3 of subsection 522(b). Section 522(b)(2) provides that “[p]roperty listed in this paragraph is property that is specified under subsection (d), unless the State law that is applicable to the debtor under paragraph (3)(A) specifically does not so authorize.” Because the State of Florida has opted out of the exemptions set forth in § 522(d)², § 522(b)(2)(and the exemptions set forth in § 522(d)(with the exception of § 522(d)(10), which the Court will later

² Fla. Stat. § 222.20, entitled Nonavailability of federal bankruptcy exemptions, provides: “In accordance with the provision of [11 U.S.C. § 522(b)], residents of this state shall not be entitled to the

discuss)) do not apply. Section 522(b)(3) permits a debtor to exempt any property that is exempt under federal law (other than § 522(d)), or state or local law.

The IRS asserts that Plaintiff fails to allege any facts to support his legal conclusion that he could have exempted the wages collected by the IRS if the levies had not occurred. In the Response, Plaintiff asserts that his disposable earnings are exempt pursuant to Fla. Stat. § 222.11³ and that the Court may take judicial notice of the Plaintiff's Schedules I and J, together with the Means Test, which establish that he is head of the family and is eligible for the wage exemption set forth in Fla. Stat. § 222.11. In the Reply the United States points out that Fla. Stat. § 222.11 does not apply because IRS wage levies are governed by federal, not state, law.

Section 6331(a) of the Internal Revenue Code provides that “[i]f any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax.”
26 U.S.C. § 6331.

Section 6334 of the Internal Revenue Code sets forth property, which is exempt

federal exemptions provided in [11 U.S.C. § 522(d)]. Nothing herein shall affect the exemptions given to residents of this state by the State Constitution and the Florida Statutes.

³ Fla. Stat. § 222.11 provides in relevant part:

(2)(a) All of the disposable earnings of a head of family whose disposable earnings are less than or equal to \$750 a week are exempt from attachment or garnishment.

(b) Disposable earnings of a head of a family, which are greater than \$750 a week, may not be attached or garnished unless such person has agreed otherwise in writing.

from an Internal Revenue Service levy. Paragraph 9 of subsection (a) of § 6334 provides for a minimum exemption for wages, salary, and other income and states that “there shall be exempt from levy--[a]ny amount payable to or received by an individual as wages or salary for personal services, or as income derived from other sources, during any period, to the extent that the total of such amounts payable to or received by him during such period does not exceed the applicable exempt amount determined under subsection (d)”.

26 U.S.C. § 6334. Subsection (c) of § 6334 provides that “[n]otwithstanding any other law of the United States (including section 207 of the Social Security Act), no property or rights to property shall be exempt from levy other than the property specifically made exempt by subsection (a). “This language is specific and it is clear and there is no room in it for automatic exemption of property that happens to be exempt from state levy under state law.” U.S. v. Mitchell, 403 U.S. 190, 205 (1971). See also U.S. v. Estes, 450 F.2d 62, 65 (5th Cir. 1971)(“[n]o provision of a state law may exempt property from levy for the collection of” federal taxes owed.”)(quoting Treas. Reg. On Proc. Admin.

§ 301.6334-1(c)). The regulation goes on to state “[t]hus, property exempt from execution under State personal or homestead exempt laws is, nevertheless, subject to levy by the United States for collection of its taxes.” 26 C.F.R. § 301.6334-1(c).

Accordingly, Fla. Stat. § 222.11 does not apply to Internal Revenue Service wage levies.

Consequently, aside from the minimum exemptions set forth in § 6334(d) of the Internal Revenue Code, wages are not exempt from a federal tax levy.

As to the levied social security payments, the IRS asserts in the Reply that it does not have any record of receiving a levy payment from Plaintiff’s social security payments. Nonetheless, it concedes that Plaintiff’s social security payments are exempt

under 11 U.S.C. § 522(d)(10)(A) and Fla. Stat. § 222.201. That Court finds that concession to be incorrect. Section 222.201 of the Florida Statutes provides that “notwithstanding § 222.20, an individual debtor ... may exempt, in addition to any other exemptions allowed under state law, any property listed in [11 U.S.C. § 522(d)(10).]” As the Court previously noted, subsection (c) of § 6334 provides that “[n]otwithstanding any other law of the United States (including section 207 of the Social Security Act), no property or rights to property shall be exempt from levy other than the property specifically made exempt by subsection (a).” The Court discerns no distinction between the applicability of 26 U.S.C. § 6334 to state exemptions and to 11 U.S.C. § 522(d).⁴ While some of the property set forth in § 522(d)(10) is specifically made exempt by § 6334(a), the right to receive social security benefits is not among such exempted property. Consequently, aside from whatever exemptions are set forth in § 6334(d) of the Internal Revenue Code, social security benefits are not exempt from a federal tax levy.

Subsection (d) of § 6334 sets forth the amount of wages, salary, and other income (including social security benefits), which is exempt from levy. The IRS publishes the amount of a taxpayer’s income, which is exempt. See Publication 1494. That amount is based upon a taxpayer’s standard deduction, personal exemptions, and the frequency with which the taxpayer is paid. The taxpayer’s standard deduction takes into account a taxpayer’s filing status, whether the taxpayer is 65 years or older, and whether the taxpayer is blind. By way of example, the exempt amount for a notice of levy used to collect delinquent taxes in 2011 ranges from \$1,891.67 for a taxpayer who is married

⁴ The Court has conducted exhaustive research on the matter but has not found a case on point.

filing a joint return, claims three exemptions, is not 65 or older, is not blind, and is paid monthly to \$1,408.33 for a taxpayer who is married filing a separate return, claims one exemption, and is paid monthly. See Publication 1494. Any amount exceeding those figures is not exempt from levy.⁵

The Court finds that the Complaint is not plausible on its face because it does not contain any factual allegations to support the legal conclusion that Plaintiff could have exempted the funds collected by the IRS, either under state or federal law. Because Fla. Stat. § 222.11 and 11 U.S.C. § 522(d)(10) do not operate to exempt property from federal tax levies, to the extent that Plaintiff seeks to exempt his wages and social security benefits, pursuant to those respective statutes, the Complaint does not and cannot state a claim. The only factual allegation in the complaint as to the levy is that the IRS seized \$17,534.28 from Plaintiff's wages and \$779.85 from Plaintiff's social security benefits within the 90 period before the Petition Date. Because the determination of whether any portion of a taxpayer's wages or social security benefits is exempt from an IRS levy is dependent upon certain facts, none of which is alleged in the complaint, the complaint fails to state a cause of action to the extent that Plaintiff's seek to exempt his wages or social security benefits pursuant to § 6334(d) of the Internal Revenue Code.

Accordingly, the Court finds that the Complaint must be dismissed. Upon the foregoing, it is

ORDERED:

1. This adversary proceeding is dismissed.

⁵These figures are based upon a levy made pursuant to §§ 6331(a) and (b) of the Internal Revenue Code. The Internal Revenue Code also provides for a continuous levy on specified payments (which can include

2. The entry of this Order is without prejudice to the filing of an amended Complaint, within fourteen days of the date of this Order.

DATED this 30 day of January, 2013 in Jacksonville, Florida.

/s/

Jerry A. Funk
United States Bankruptcy Judge

social security benefits), subject to a 15% cap. See 26 U.S.C. §§ 6331(e), (h).