

UNITED STATES BANKRUPTCY COURT FOR THE  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION

In re:

MICHAEL DAVIS,

Case no. 8:08-bk-04348-MGW

Debtor.

**JB Vol 16**  
**#2307**

BRIAN DOWLING,

Plaintiff,

Adv. Pro. No. 08-451

v.

MICHAEL DAVIS, NORTH SHORE  
COMMUNITY BANK, DAVID S.  
PASULKA, MARY ANNE DAVIS, FIRST  
AMERICAN BANK and 4637 MANOR, LLC,

Defendants.

**FINAL JUDGMENT ON COUNT II OF COUNTERCLAIM  
FOR WRONGFUL GARNISHMENT OR ATTACHMENT**

This adversary proceeding came on for hearing on January 25, 2012, upon a status conference in connection with the District Court's Order (Doc. 157) remanding this case for specific findings regarding Michael Davis' claim for common law wrongful garnishment or attachment. The Court previously heard argument of counsel, and considered memoranda filed by the parties (Doc. 165, 169 and 170). For the reasons stated orally and recorded in open court, which are set forth in the attached transcript, it is -

**ORDERED** that a money judgment is hereby entered in favor of Michael Davis, 1934 Brightwaters Blvd. NE, St. Petersburg, FL 33704 and against Brian Dowling, 368 Fairbank Road, Riverside, IL 60548 in the amount of \$302,900.50<sup>1</sup>, for which sum let execution issue forthwith. This judgment shall bear interest at the federal judgment rate. The Court reserves jurisdiction to enter all orders necessary for the enforcement of this final judgment.

**DONE AND ORDERED** at Tampa, Florida, on February 16, 2012.



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Michael G. Williamson  
United States Bankruptcy Judge

Copies to:

All registered CM/ECF users

Brian Dowling  
368 Fairbank Road  
Riverside, IL 60548

591102

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<sup>1</sup> This figure is derived from Davis' Ex. 13 (detailed time records of Johnson Pope showing fees and expenses of \$52,900.50 on the retirement asset exemption issue) and Ex. 35 (deposition transcript of Gerald B. Lurie estimating fees at \$250,000 on the retirement asset exemption issue and composite exhibit 1 thereto showing total fees at \$402,205). See Lurie deposition transcript at pp. 9-11, 80 and composite exhibit 1).

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION

IN RE: :  
: :  
MICHAEL DAVIS : Case No. 8:08-bk-04348-MGW  
: :  
Debtor : Chapter 11  
: :  
----- :  
: :  
BRIAN DOWLING : Adv. No. 8:08-ap-00451-MGW  
: :  
vs. :  
: :  
MICHAEL DAVIS, et al :  
: :  
----- :

Sam M. Gibbons  
U.S. Courthouse  
801 N. Florida Avenue  
Tampa, Florida 33602  
Held January 25, 2012

TRANSCRIPT OF HEARING

[Re: 08-04348] Cont. Hrg. on Motion to Compel  
Filing of Post-Confirmation Quarterly Reports and  
Payment of Quarterly Fees, or in the Alternative,  
to Dismiss Case, filed by U.S. Trustee (Doc. #412);  
[Re: 08-00451] Judge's Ruling on Remand Issue

BEFORE THE HONORABLE MICHAEL G. WILLIAMSON  
UNITED STATES BANKRUPTCY JUDGE

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PROCEEDINGS DIGITALLY RECORDED BY COURT PERSONNEL.  
TRANSCRIPT PRODUCED BY TRANSCRIPTION SERVICE  
APPROVED BY ADMINISTRATIVE OFFICE OF U.S. COURTS.

## A P P E A R A N C E S

For the U.S. Trustee      NICOLE W. PEAIR, Esquire  
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For the Debtor and      MICHAEL C. MARKHAM, Esquire  
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Davis      Johnson Pope Bokor  
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For the Plaintiff,      LORETTA O'KEEFFE, Esquire  
Brian Dowling      Loretta Comiskey O'Keefe  
Gibbons Neuman Bello, et al  
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Tampa, Florida 33609  
813-877-9222  
lokeeffe@gibblaw.com

1 MS. PEAIR: Thank you, Your Honor.

2 THE COURT: Thank you. Okay, very well. That  
3 leaves for consideration the ruling on the remand issue,  
4 unless there's any housekeeping matters.

5 Yes, Ms. O'Keefe, did you -- oh, did you want  
6 to make argument or were you -- frankly, I thought it was  
7 just a ruling today. If you want to make argument, I  
8 always enjoy hearing from lawyers, and we've got time  
9 here.

10 MS. O'KEEFE: No, Your Honor. I had just  
11 gotten out of the way to let the Trustee speak, in case  
12 she needed to sit down, so I was just coming back to my  
13 seat.

14 THE COURT: Okay, thank you. Okay, very well,  
15 the Court has before it this adversary proceeding on  
16 remand from the District Court which concluded on the  
17 appeal that this Court should make specific findings  
18 regarding Davis' claim for common law wrongful garnishment  
19 or attachment. Indeed, I failed to adequately address  
20 that count of Davis' complaint in my original ruling from  
21 the bench.

22 By way of background, and as the parties are  
23 well familiar, this bankruptcy and the litigation that has  
24 consumed Mr. Dowling and Mr. Davis over many years, goes  
25 back to an action that was brought in the Illinois state

1 court many years ago. It resulted in a judgment against  
2 Davis in the approximate amount of \$817,000.

3 As part of Mr. Dowling's collection efforts, he  
4 served a number of citations, which are a device used in  
5 Illinois to discover assets, and during that process in  
6 fact he discovered that Davis had funds, over \$288,000, in  
7 an IRA account and in a 401K account.

8 In 2003, Dowling sought turnover orders for  
9 those funds and Davis did not initially participate in the  
10 hearings to claim the retirement funds as exempt. As a  
11 result, the Illinois state court issued turnover orders  
12 directing the retirement funds be turned over to Dowling.  
13 That occurred in 2004 when the retirement funds were in  
14 fact turned over to Dowling.

15 Davis appealed the turnover orders to the  
16 Illinois appellate court on the basis that the funds were  
17 exempt from collection under Illinois law, much as they  
18 would have been exempt under Florida law.

19 As a result of that appeal, in March of 2006,  
20 the appellate court remanded the case back to the trial  
21 court, directing the trial court to conduct an evidentiary  
22 hearing on the claim of exemptions. That case is reported  
23 as Dowling v. Chicago Options Associates at 847 N.E.2d  
24 741.

25 The trial court conducted a hearing at which

1 it determined that the funds in fact were exempt from  
2 collection and ordered Mr. Dowling to return the funds to  
3 Mr. Davis.

4 Rather than returning the funds, Mr. Dowling  
5 posted a bond and appealed the trial court's order. The  
6 order was, however, affirmed by the Illinois appellate  
7 court in 2008.

8 Thereafter, this bankruptcy case was initiated  
9 as an involuntary case by Mr. Dowling. Mr. Dowling also  
10 filed a claim in this case. Mr. Davis counterclaimed  
11 against the claim, asserting the theories that were before  
12 me at the trial of this adversary proceeding.

13 These are that Dowling's actions violated an  
14 Illinois statute that imposes liability on creditors that  
15 seize exempt property, common law wrongful garnishment or  
16 attachment, and common law conversion.

17 Simply stated, the gravamen of Davis' claims  
18 against Dowling are that Dowling wrongfully acquired  
19 Davis' exempt retirement funds and, as a result Davis has  
20 suffered damages, primarily composed of attorneys' fees,  
21 expended over the many years that Dowling persisted in his  
22 efforts to obtain and retain the retirement funds.

23 Included in Dowling's efforts to retain this  
24 fund was the filing of this adversary proceeding, which  
25 was originally brought as an interpleader action. In his

1 verified complaint, Dowling acknowledged that he did not  
2 wish to turn the funds over to Davis, and that brought us  
3 to trial.

4 At the conclusion of trial, I announced my  
5 ruling from the bench, focusing primarily on Davis' claim  
6 that Dowling violated what I'll call Illinois Statute  
7 12-1005, which is an Illinois statute that imposes  
8 liability on creditors that seize exempt property.

9 It was my view that that provision was intended  
10 to penalize an aggressive creditor that illegally seizes  
11 an exempt asset, levies on it, and sells it.

12 With respect to this count of the complaint,  
13 Davis argued that since the retirement funds were  
14 eventually found to be exempt from collection, that  
15 this Court was required to award damages. I disagreed,  
16 concluding that Dowling had acted properly and within the  
17 confines of the supplementary proceeding statute when he  
18 acquired Davis' retirement funds. Judge Bucklew affirmed  
19 my conclusion on that count.

20 The next count that I considered was whether  
21 or not Davis was entitled to damages for common law  
22 conversion due to Dowling's acquisition of the exempt  
23 retirement funds.

24 Under Illinois law, a conversion is an  
25 unauthorized act that deprives a person who has an

1 absolute and unconditional right to immediate possession  
2 of the property. I agreed with Dowling that since he  
3 acquired Davis' retirement funds pursuant to a court  
4 order, his actions were not unauthorized and the  
5 conversion claim could not stand. Accordingly, I  
6 entered judgment for Dowling on that count.

7           What I did not do is specifically deal with  
8 the common law wrongful garnishment or attachment. My  
9 recollection is that that was not a count that was argued  
10 strongly at the trial, and frankly I overlooked it in my  
11 ruling. And I also did not give due consideration to the  
12 case law that governs that common law cause of action as  
13 opposed to the case law that governed the two counts that  
14 Judge Bucklew affirmed this Court on.

15           It appears, on review of that law that, first,  
16 Illinois in fact does recognize a common law wrongful  
17 garnishment or attachment tort. Second, neither malice  
18 nor lack of probable cause are elements of a cause of  
19 action for wrongful garnishment or attachment. The  
20 quashing of a garnishment or attachment order establishes  
21 that the procedure was wrongful, even if it was obtained  
22 in good faith and with probable cause.

23           And finally, in a wrongful garnishment or  
24 attachment action, attorneys' fees incurred in  
25 establishing the right to the funds in question are

1 recoverable as damages.

2           Boiled down to its essence, it appears that  
3 under Illinois law, if you dispossess someone of their  
4 property under circumstances such as these, and you're  
5 wrong, you're liable for the damages.

6           It's no defense that you had a colorable  
7 argument. It's no defense that at one point a state court  
8 might have agreed with you, albeit erroneously. Simply  
9 put, if you cause damages, and you're wrong, you pay the  
10 Plaintiff or the party that has been damaged.

11           On this count, as opposed to the others, it  
12 makes no difference that Dowling employed the citation  
13 and turnover procedures provided by the proceedings  
14 supplementary statute in obtaining the improperly seized  
15 asset.

16           Matters were somewhat exacerbated in this case,  
17 moreover, in that Dowling didn't stop after the original  
18 turnover order was reversed. He fought and fought and  
19 fought to keep these retirement assets until every last  
20 potential argument had been exhausted, through appeals  
21 and even into this court and this action seeking an  
22 interpleader under very questionable grounds.

23           At the end of the day, Mr. Davis has had to  
24 expend considerable attorneys' fees, not only to establish  
25 an exemption that was rightfully his under Illinois law,

1 but also in obtaining back the money that was improperly  
2 taken from those accounts.

3 It's my conclusion, therefor, on remand, and I  
4 believe consistent with Judge Bucklew's decision, that  
5 Davis is entitled to judgment on the wrongful garnishment  
6 and attachment common law count for the attorneys' fees  
7 incurred by Davis in establishing his right to the funds  
8 in question and finally recovering the funds from Dowling.

9 At trial, there was evidence of what those  
10 attorneys' fees were, however neither party briefed that  
11 specific question, and so I will inquire of the parties  
12 what they believe the evidence that was introduced at  
13 trial supports with respect to an award of attorneys'  
14 fees.

15 Now, I do note there were a couple of exhibits  
16 which we had looked at that dealt with attorneys' fees,  
17 but there wasn't one table or anything that just broke it  
18 out simply for me.

19 MR. MARKHAM: Judge, there were two exhibits.  
20 One was --

21 THE COURT: I think it was 16 and 35 was --

22 MR. MARKHAM: Davis Exhibit 13 --

23 THE COURT: 13.

24 MR. MARKHAM: -- were my time records culled out  
25 with respect to the exemption issue. And so there was a

1 detailed -- there were detailed records that -- I don't  
2 have those exhibits with me unfortunately, but I think my  
3 time records added up to approximately \$50,000. I think  
4 it was a little bit shy of \$50,000, if my memory's right.

5 THE COURT: It was \$48,587 and -- no, wait a  
6 minute. I stand corrected. \$52,900.50.

7 MR. MARKHAM: And then, Judge, the other Exhibit  
8 35 were Illinois counsel's records, which I believe his  
9 deposition, Mr. Lurie, was placed into evidence as well as  
10 his time records, and then a summary of the time that he  
11 spent, in his testimony.

12 Now, admittedly, Judge -- and this was gone  
13 into in the deposition, which was taken up in Illinois.  
14 And Ms. Stevenson, I think, appeared at that, and not  
15 Ms. O'Keefe. Because, you know, the file encompassed  
16 more than just the exemption issue, he was asked in his  
17 deposition to essentially estimate the time that he spent  
18 on the exemption issue.

19 And so there was testimony to that effect  
20 back and forth on direct and cross-examination, and I  
21 believe his testimony was that he would allocate \$250,000  
22 of --

23 THE COURT: I think there was a total of --

24 MR. MARKHAM: Again, I'm guessing it was over --  
25 I think over \$400,000 of --

1 THE COURT: It was \$402,205. That was  
2 Composite Exhibit 1 to the deposition, which is at Docket  
3 No. 117-45.

4 MR. MARKHAM: Right. And, again, Judge, all  
5 of the time records were exhibits, you know, to the  
6 deposition, therefore exhibits to the trial.

7 THE COURT: Right.

8 MR. MARKHAM: The summary was just adding them  
9 all up on a summary page --

10 THE COURT: Was that an ex --

11 MR. MARKHAM: -- so that you could see the total  
12 amount.

13 THE COURT: Well, was that an exhibit as well?  
14 Because I didn't see that reference.

15 MR. MARKHAM: Judge, the -- what should have  
16 been in the record, I believe, was the deposition  
17 transcript and the exhibits to the deposition.

18 THE COURT: Right. No, that's in -- that is  
19 an exhibit that was introduced at trial.

20 MR. MARKHAM: It may be that the separate  
21 Exhibit 35 -- and I don't have my exhibit binders with me  
22 -- was that summary page that added up all of those.

23 THE COURT: And that's where you get -- it's  
24 about 300,000?

25 MR. MARKHAM: Well, that add -- no, that adds

1 up to the total of the 402 or whatever the total was, and  
2 then you have to go into Mr. Lurie's testimony --

3 THE COURT: Okay. No, I have the --

4 MR. MARKHAM: -- to see that he thought it was  
5 250 grand was what he was allocating to the fight over --

6 THE COURT: Okay.

7 MR. MARKHAM: -- these IRAs, or the retirement  
8 assets.

9 THE COURT: I have the 402 summary; that was  
10 Composite Exhibit 1 to the deposition.

11 MR. MARKHAM: Okay.

12 THE COURT: And that does -- it says 402,205.

13 MR. MARKHAM: What the Debtor was seeking,  
14 Judge, as damages, were \$250,000 of Mr. Lurie's time,  
15 together with all of my time, reflected on Exhibit 13.

16 THE COURT: Right.

17 MR. MARKHAM: So it would have been a little  
18 over \$300,000, was what the Debtor was seeking at trial.  
19 Those exhibits were put in. There were no other counter  
20 exhibits entered into evidence. And whatever cross-  
21 examination was done of Mr. Lurie is in the transcript.

22 THE COURT: Okay, well, then --

23 MR. MARKHAM: He was out of the district,  
24 obviously, Judge, so I couldn't subpoena him to come here.  
25 That was --

1 THE COURT: Well, why don't we proceed forward  
2 on the assumption that you and Ms. O'Keefe will confirm  
3 what your recollection is, that the deposition did come  
4 into evidence, that -- and I believe they all did because  
5 we actually looked at them.

6 MR. MARKHAM: I'm certain that it did, Judge --

7 THE COURT: Okay.

8 MR. MARKHAM: -- because I double-checked it ten  
9 times.

10 THE COURT: Okay.

11 MR. MARKHAM: I mean, I'm certain that all that  
12 came in.

13 THE COURT: Okay. Then what I will do is, for  
14 the reasons stated orally and recorded in open court -- if  
15 you could get a transcript of my ruling here in open court  
16 today and attach it to a final judgment. I'll enter a  
17 final judgment on Davis' claim for \$302,900. And run  
18 that by Ms. O'Keefe and make sure that our collective  
19 understanding on the evidence of fees is consistent with  
20 the record.

21 MR. MARKHAM: I will, Your Honor.

22 THE COURT: Ms. O'Keefe?

23 MS. O'KEEFE: Yes, Your Honor. I'd like  
24 to take a closer look at Mr. Lurie, only because the  
25 exemption issue up and to the appeal included other assets

1 that the appellate court found were not exempt.

2 So if Mr. Lurie was including anything else in  
3 the exemption fight, not of these IRAs, those were found  
4 to be not exempt assets by the appellate court and they  
5 were not remanded.

6 So I'd like to see when he totals up his --  
7 what he includes as part of this \$302,900 because those  
8 would not be included. I mean, the appellate court only  
9 returned these two specific assets. The others were  
10 allowed to be kept by Mr. Dowling. They were found to  
11 be not exempt.

12 THE COURT: And I think that's fine, but  
13 understand that all you can do at this point is argue as  
14 to what the evidence that's in the record supports. And  
15 this is not the time to create new evidence or to make  
16 arguments about other factors that should be taken into  
17 account.

18 What we have in evidence is Mr. Lurie's  
19 deposition. And if it's his opinion it was 250 -- unless  
20 there was some, you know, impeachment in there where he  
21 conceded, "Oh, okay, well, I should give credit for this  
22 or credit" -- that's the kind of thing I'm looking at you  
23 -- it's fair for you to bring up because then the  
24 deposition wouldn't support the 250. But you can't  
25 go into new areas that aren't in the record.

1 I've got no problem with your concept here, but  
2 let's keep it to what's in the record because we're here  
3 on remand and not for additional evidence of any sort. We  
4 have to live with the record that was before the appellate  
5 court.

6 MR. MARKHAM: That's fine. When I prepare the  
7 judgment, I'll make specific references to the transcript,  
8 if you like --

9 THE COURT: Yes, please do.

10 MR. MARKHAM: -- of that specific evidence where  
11 he testified about that number. I'm fairly confident that  
12 he was asked very specifically about the fight over the  
13 IRA and 401(k).

14 THE COURT: Okay, and what you could --

15 MR. MARKHAM: And that's where his estimate came  
16 from.

17 THE COURT: Yeah, in the -- well, the judgment  
18 will be for the reasons stated orally in open court, plus  
19 can include a paragraph or two on the derivation of the  
20 damages referencing these exhibits which are already of  
21 record and --

22 MR. MARKHAM: I'll keep it simple, Judge,  
23 and share it with Ms. O'Keefe.

24 THE COURT: Okay. Okay, very well. Is  
25 there anything else that we can accomplish in the

1 Dowling v. Davis adversary here?

2 MR. MARKHAM: No, Judge.

3 THE COURT: Does that conclude -- I think that  
4 would conclude the adversary; correct?

5 MR. MARKHAM: It will, Your Honor, once you  
6 enter that judgment directed by Judge Bucklew's order to  
7 then file a copy of it with the District Court.

8 THE COURT: Okay. Okay, very well. Thank you,  
9 Court will be in recess.

10 THE COURTROOM DEPUTY: All rise.

11 (Proceedings concluded at 2:14 p.m.)

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## C E R T I F I C A T E

I certify that the foregoing is the official verbatim transcript, prepared to the best degree possible from the digital audio recording and logs provided by the court.

I further certify that I am neither counsel for, nor related to, nor an employee of, any of the parties to the action in which this hearing was taken.

I further certify that I have no personal interest in the outcome of the action.

Dated this 3rd day of February, 2012.

  
\_\_\_\_\_

Cheryl Culver, CCR, B-1281  
Certified Court Reporter  
State of Florida Notary Public

Administrative Office of U.S. Courts  
Approved Transcriber