

DOCKET NUMBER: 98-14530

ADV. NUMBER: None

JUDGE: M. A. Mahoney

PARTIES: Beverly Jean Powe Washington, Albert Harper

CHAPTER: 7

ATTORNEYS: J. M. Ross, I. Grodsky, C. Kern

DATE: 3/25/99

KEY WORDS:

PUBLISHED: Yes

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF ALABAMA

IN RE

BEVERLY JEAN POWE WASHINGTON

Case No. 98-14530-MAM-7

**ORDER AND JUDGMENT PARTIALLY GRANTING RELIEF FROM THE  
STAY TO HARPER AND DENYING DEBTOR'S EXEMPTION REQUEST  
AND REQUEST FOR LIEN AVOIDANCE PURSUANT TO 11 U.S.C. § 522(f)**

Jay M. Ross, Mobile, AL, Attorney for the Debtor  
Irvin Grodsky, Mobile, AL, Attorney for Albert Harper  
Christopher Kern, Mobile, AL, Trustee

This matter came before the Court on the motion of Albert Harper for relief from the automatic stay. The Court has jurisdiction to hear this matter pursuant to 28 U.S.C. §§ 1334 and 157 and the Order of Reference of the District Court. This is a core proceeding pursuant to 28 U.S.C. § 157(b) and the Court has the authority to enter a final order. The trustee and the debtor both responded to the Harper motion for relief and objected to it. When it became apparent that the only unsecured creditor of the debtor was Harper, the trustee withdrew his objection to allow the only two interested parties--the debtor and Harper--resolve their dispute. The following opinion shall constitute the Court's finding of fact and conclusions of law in accordance with Bankruptcy Rule 7052 made applicable to contested matters by Bankruptcy Rule 9014. For the reasons set forth below, the Court concludes that: (1) the execution lien on Ms. Washington's interest in the Mobile property is an avoidable preference pursuant to 11 U.S.C. § 547; (2) the transfers of the 11/06/98 and 11/30/98 checks are avoidable preferences pursuant to 11 U.S.C. § 547 to the extent that they are comprised of wages earned by Ms. Washington during the 90 day preference period; (3) the transfers of the 12/29/98, 1/28/99, and 2/22/99 checks by PHA subsequent to the filing of Ms. Washington's case are void because

they violated 11 U.S.C. § 362; and (4) the garnishment lien on Ms. Washington’s wages is not avoidable pursuant to 11 U.S.C. § 522(f).

FACTS

1. On April 3, 1998, Albert Harper obtained a default judgment against Beverly Jean Washington and others for the sum of \$300,000.00.

2. On September 8, 1998, pursuant to a writ of execution the Sheriff of Mobile County levied on the right, title and interest of Ms. Washington in real property described as lots 19 and 20, Block 5 of Midland Terrace, Deed Book 156N.S., page 582-587, Probate Court Records Mobile County, Alabama (“the Mobile property”). Mr. Harper filed a notice of Lis Pendens on this property with the Judge of Probate Court for Mobile County, Alabama on September 22, 1998.

3. On September 8, 1998, Mr. Harper had a process of garnishment served on Ms. Washington’s employer, the Prichard Housing Authority (“PHA”).

4. In response, PHA made the following remittances to the Clerk for the Circuit Court of Mobile County, Alabama:

<u>DATE OF CHECK</u>	<u>AMOUNT</u>
11/06/98	\$1,126.86
11/30/98	\$ 375.62
12/29/98	\$ 751.24
01/28/99	\$ 751.24
02/22/99	\$ 751.24

These amounts constitute twenty-five percent (25%) of the wages earned by Ms. Washington during the applicable time period.

5. The Clerk of Court has not distributed or condemned any of the funds remitted by PHA.

6. On December 11, 1998, Ms. Washington filed for relief pursuant to chapter 7 of the Bankruptcy Code.

### PROCEDURE

In this contested matter, Albert Harper seeks relief from the automatic stay to allow him to proceed with the levy and execution sale on Beverly Jean Washington's real property and to obtain an order condemning wages withheld by Ms. Washington's employer. The trustee filed a response in which he moved to set aside as preferential transfers the payments of Ms. Washington's wages and the lien on her real property. Preferential transfer issues are normally determined in an adversary proceeding pursuant to Bankruptcy Rules of Procedure 7001 *et seq.* Notwithstanding that this is a motion for relief from stay, the Court is determining the issues raised by the trustee and debtor for the following reasons: (1) due process concerns have been satisfied; (2) none of the parties are prejudiced by the Court's determination of these issues in this contested matter format; (3) a determination of these issues is a more efficient use of the judicial system; (4) the principal issues are closely related and this determination avoids duplication of efforts; (5) the parties have participated in these proceedings without objection. *T.G. Motors, Inc. of Houston v. C.M. Turtur Investments, Inc. (In re C.M. Turtur Investments, Inc.)*, 93 B.R. 526, 528 (Bankr. S.D. Tex. 1988).

## LAW

The facts raise four issues: (1) was the establishment of the execution lien on Ms. Washington's interest in the Mobile property a preferential transfer under 11 U.S.C. § 547; (2) were any of the garnishment payments a preferential transfer under 11 U.S.C. § 547; (3) were any of the garnishment payments made in violation of the automatic stay provision of the Bankruptcy Code; and (4) is the garnishment lien on Ms. Washington's wages a judicial lien subject to avoidance because it impairs an exemption pursuant to 11 U.S.C. § 522? The Court will address each issue in turn below.

### A.

Section 547 of the Bankruptcy Code governs whether the execution lien on the real property and the garnished wages are avoidable preferences. The elements of a preferential transfer are:

- (1) a transfer of an interest of the debtor in property;
- (2) on account of an antecedent debt;
- (3) to or for the benefit of a creditor;
- (4) made while the debtor was insolvent;
- (5) made on or within 90 days (or one year for transfers to insiders) before the filing date; and
- (6) the transfer resulted in a preferential effect for the transferee.

11 U.S.C. § 547(b). Based on the evidence provided and the briefs of the parties, the Court concludes that the only element at issue regarding whether the execution and/or garnishment lien is a preferential transfer is whether the transfers were made "on or within 90 days before the date of the filing" of Mr. Washington's bankruptcy petition.

In general, a transfer for purposes of § 547 (whether real or personal property was transferred) is made at the time the transfer is perfected. 11 U.S.C. § 547(e)(2). Perfection of a

transfer of real property differs from perfection of a transfer of personal property under § 547(e)(1).

1.

According to § 547(e)(1)(A) of the Bankruptcy Code, “a transfer of real property . . . is perfected when a bona fide purchaser of such property from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest that is superior to the interest of the transferee.” The reference to “applicable law” in § 547(e)(1)(A) means that perfection as it is defined under that section is determined by state law.

A writ of execution becomes a lien on real property under Alabama law when the writ of levy is served and proper notice of the levy is filed for record in the probate court. ALA. CODE § 6-9-60 (1993). If a writ levy covering real property has been served, but the proper notice has not been filed, a bona fide purchaser will have rights superior to the rights of the party that served the writ of levy. *Id.*; ALA. CODE § 35-4-132 (notice of levy) (1991); ALA. CODE § 35-4-135 (1991) (protection of bona fide purchaser upon failure to record notice of levy). In determining whether the requirements to obtain an execution lien have been met, the applicable Alabama statutory provisions must be strictly construed. *Thompson v. Yuan (In re Yuan)*, 178 B.R. 273, 274 (Bankr. N.D. Ala. 1995).

The sheriff served the writ of levy covering the Mobile property on September 8, 1998. Mr. Harper did not file the notice of the levy or *lis pendens* with the probate court until September 22, 1998. Accordingly, Mr. Harper’s interest in the Mobile property was not perfected pursuant to 11 U.S.C. §§ 547(e)(1)(A) and (e)(2) until September 22, 1998, which was

less than 90 days immediately preceding the date Ms. Washington filed her petition (December 11, 1998). Consequently, the lien is avoidable because it was a preferential transfer.

Mr. Harper contends that the execution lien was established upon levy. The levy occurred on September 8, 1998, outside the 90-day preference period. Mr. Harper cites *In re Pouncey*, 59 B.R. 615 (Bankr. M.D. Ala. 1986) in support of his position. In *Pouncey*, the court found that “[t]he lien is created as of the date of levy.” *Id.* at 618. This is a correct statement of the law regarding the property that was subject to levy in *Pouncey* (a 1985 Ford Bronco), but not as to real property. Section 6-9-60 of the Alabama Code (1993) provides that:

A writ of execution is a lien only within the county in which it is received by the officer authorized to execute it on the lands of the defendant in such county subject to levy and sale from the time the writ is levied by him and notice of levy as provided in Section 35-4-132 is filed for record with the judge of probate of such county. Such writ is a lien upon the personal property of the defendant subject to levy and sale from the time only that the writ is levied upon such personal property.

The Alabama legislature clearly delineated distinct methods to obtain an execution lien on real and personal property. Contrary to Mr. Harper’s claim, levy pursuant to the writ of execution on September 8, 1998, did not create a lien on the real property. Filing of the notice of levy is a prerequisite to the establishment of a lien on real property and upon filing, the lien does not relate back to the date upon which the writ of levy was served.

2.

a.

The transfer of personal property like Ms. Washington’s wages is perfected when a creditor of the debtor on a simple contract cannot obtain a judicial lien that is superior to the interest of the transferee. 11 U.S.C. § 547(e)(1)(B). State law determines whether perfection has occurred under § 547(e)(1)(B). *Askin Marine Company v. Conner (In re Conner)*, 733 F.2d

1560, 1561 (11th Cir. 1984); 5 COLLIER ON BANKRUPTCY ¶ 547.08 (15th ed. 1998). According to Alabama law, a garnishment lien is created on the date of service of the garnishment. ALA. CODE 6-6-76 (1993). Subsequent to the date of service, a creditor cannot obtain a judicial lien that is superior to the interest of the garnishment creditor. *Foshee v. Lloyds of New York*, 643 F.2d 1162, 1166 (5th Cir.1981). Therefore, pursuant to §§ 547(e)(1)(B) and (e)(2), the transfer to Mr. Harper was perfected and made on September 8, 1998, the date the process of garnishment was served. However, the general rule in § 547(e)(2) regarding when a transfer is made is subject the exception contained in § 547(e)(3). *See, Malone v. Fidelity National Bank (In re Dunn)*, 56 B.R. 275, 278 (Bankr. M.D. La. 1985) (to determine the effective date of a transfer, first look at § 547(e)(2) to determine when a transfer is made; second, look at § 547(e)(1) for the definition of perfection; and third, look to § 547(e)(3) for an exception to § 547(e)(2)).

Section 547(e)(3) states that “a transfer is not made until the debtor has acquired rights in the property transferred.” 11 U.S.C. § 547(e)(3). A debtor does not acquire rights in wages until the debtor has performed the service for which the debtor is paid, i.e., until the wages have been earned. *Wade v. Midwest Acceptance Corporation (In re Wade)*, 219 B.R. 815, 821 (8th Cir. BAP 1998); *Ellenberg v. General Motors Acceptance Corporation (Matter of Morton)*, 44 B.R. 750, 751-52 (Bankr. N.D. Ga. 1984); *Evans v. CIT Financial Services, Inc. (In re Evans)*, 16 B.R. 731, 733 (Bankr. N.D. Ga. 1982); COLLIER, *supra*, at ¶ 547.06[1]. Thus, for purposes of § 547, the transfer of Ms. Washington’s wages occurred when she earned such wages.

The Court has been provided with the dates on which Ms. Washington’s employer remitted her wages to the Mobile County Court, but it was not provided with evidence sufficient



to determine when the wages were actually earned. The parties will be given an opportunity to provide this evidence or they may agree as to when the wages were earned. To the extent the wages were earned within the 90-day preference period, the garnishment of such wages is avoidable.

In *Conner*, the Eleventh Circuit reversed a bankruptcy court's decision finding that the transfer of garnished funds occurred within the 90 day preference period. The Court of Appeals and the lower Courts relied upon Georgia law which, like ALA. CODE § 6-6-76 (1993), provides that a lien attaches to garnished funds upon service of the summons of garnishment. In Georgia, like Alabama, a contract creditor cannot obtain a superior judicial lien once the lien attaches. Thus, the transfer is perfected pursuant to § 547(e)(1)(B) once the garnishment is served. The Eleventh Circuit concluded that the transfer occurred when debtor's employer was served with the summons of garnishment, outside the 90 day preference period.<sup>1</sup>

Curiously, there is no mention of § 547(e)(3) in *Conner*, despite the fact that this provision was drafted in response to preference cases involving continuously perfected liens (e.g., garnishment liens and security interests in after-acquired property). Senate Report No. 95-989, U.S. Code Cong. & Admin. News 1978, p. 5787 (provision meant to overrule cases such as *DuBay v. Williams*, 417 F.2d 1277 (9th Cir. 1969) and *Grain Merchants of Indiana, Inc. v. Union Bank & Sav. Co.*, 408 F.2d 209 (7th Cir. 1969) holding that a "floating lien" is perfected for purposes of preference determination at time lien is perfected under state law). Nonetheless, this court does not necessarily believe that the conclusion in *Conner* is incorrect. The garnished

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<sup>1</sup> Both the Bankruptcy and District Courts found that the transfer occurred when the state court distributed the funds to the garnishment creditor. *Conner*, 733 F.2d at 1561-1562.

wages in *Conner* were paid into the state court more than 90 days before the filing of the bankruptcy petition. The wages likely were earned prior to the garnishee's payment into court. Thus, the wages were earned, and the debtor acquired rights in the wages, outside the 90-day preference period. Whether the transfer was made at the time it was "perfected" pursuant to § 547(e)(1) and (2) as was found by the Eleventh Circuit or when the debtor acquired rights in the wages pursuant to § 547(e)(3), the transfer in *Conner* was not made within the 90-day preference period. The Eleventh Circuit correctly determined that none of the garnishments could be avoided pursuant to § 547.<sup>2</sup>

In sum, the transfer of the garnished wages was made when Ms. Washington acquired rights in the wages. The garnishment is an avoidable preference to the extent the garnished wages were earned within the 90-day preference period.

b.

Even to the extent Ms. Washington's wages were earned within the preference period, their transfer cannot be avoided if excepted from avoidance under § 547(c). Section 547(c)(8) precludes avoidance of a transfer if the case involves a debtor whose debts are primarily consumer debts and "the aggregate value of all property that constitutes or is affected by such transfer is less than \$600." 11 U.S.C. § 547(c)(8) (the "small preference" exception). The 11/30/98 remittance of \$375.62 is the only transfer that could possibly be excepted from avoidance pursuant to § 547(c)(8) because it was the only transfer for an amount less than \$600.

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<sup>2</sup> This Court respectfully disagrees with *Conner*, if, and only to the extent that, it stands for the proposition that garnished wages are "transferred" on the date the garnishment was served, regardless of when the wages were earned. *See*, 5 COLLIER ON BANKRUPTCY ¶ 547.05[7][b] (15th ed. 1998) (questioning analysis of court in *Conner*).

However, even assuming Ms. Washington's debts are primarily consumer debts, this Court finds that none of the transfers fall within the "small preference" exception because the aggregate of the transfers to Mr. Harper exceed \$600.

Whether a court may aggregate all of the transfers to a single creditor to determine if the creditor received less than \$600 for purposes of § 547(c)(8) has divided the courts that have considered the issue. *Compare, Electric City Merchandise Company v. Hailes (Matter of Hailes)*, 77 F.3d 873 (5th Cir. 1996) (each transfer of garnished wages could be aggregated); *Christians v. American Express Travel Related Services (In re Djerf)*, 188 B.R. 586 (Bankr. D. Minn. 1995) (same); *In re Brunner*, 145 B.R. 266 (Bankr. C.D. Ill. 1992) with *Wilkey v. Credit Bureau Sys., Inc. (In re Clark)*, 171 B.R. 563 (Bankr. W.D. Ky. 1994); *Howes v. Hannibal Clinic (In re Howes)*, 165 B.R. 270 (Bankr. E.D. Mo. 1994). This Court adopts the well-reasoned statutory and policy analyses of the Fifth Circuit in *Hailes* and Judge Dreher in *Djerf* and concludes that transfers to a single creditor can be aggregated under § 547(c)(8). *In re Hailes*, 77 F.3d at 874-875; *In re Djerf*, 188 B.R. at 589. The aggregate of the garnished funds that constitute the prepetition transfers to Mr. Harper exceed \$600.<sup>3</sup> None of the prepetition transfers fall within the "small preference" exception.

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<sup>3</sup> Section 547 only applies to prepetition transfers. From the evidence presented, the court cannot definitively determine the amount of wages that were transferred prior to the filing Ms. Washington's bankruptcy petition. However, the first two checks, which totaled \$1,502.48, were remitted prepetition. Thus, the wages that makeup these checks were earned prepetition, and as a corollary, transferred prepetition.

B.

Three checks (12/29/98, 1/28/99, 2/22/99), totaling \$2,253.72, were remitted by PHA in response to the garnishment while the automatic stay was in effect. 11 U.S.C. § 362(c) (duration of automatic stay). Continuation of a garnishment proceeding violates the automatic stay. *In re Mims*, 209 B.R. 746, 748 (Bankr. M.D. Fla. 1997). Actions taken in violation of the stay are void. *Borg-Warner Acceptance Corp. v. Hall*, 685 F.2d 1306 (11th Cir. 1982). Accordingly, the transfer of the three checks are void, regardless of when the wages that constitute the checks were earned.

The amount remitted while the automatic stay was in effect must be turned over to Ms. Washington to the extent such amount was earned postpetition. 11 U.S.C. § 541(a)(6) (property of the estate does not include wages earned from services performed after commencement of the case). To the extent the amount remitted consisted of wages earned by Ms. Washington prior to commencement of her bankruptcy case, such wages must be turned-over to the trustee because they are property of Ms. Washington's bankruptcy estate. *Id.*

C.

Ms. Washington contends that regardless of whether the transfer occurred within the 90-day preference period, the lien on her wages can be avoided pursuant to 11 U.S.C. § 522(f). To succeed under this provision, Ms. Washington must demonstrate that: (1) the lien to be avoided is a "judicial lien"; and (2) the property subject to the lien would be exempt but for the lien. 11 U.S.C. § 522(f).

Section 522(f) only applies to "judicial liens." Judicial lien is broadly defined in §101(36) of the Bankruptcy Code as a lien "obtained by levy, sequestration, or other legal or

equitable process or proceeding.” This definition includes a garnishment lien. *See, In re Baum*, 15 B.R. 538 (Bankr. E.D. Va. 1981) (garnishment lien is subject to § 522(f)).

Mr. Harper’s garnishment lien can be avoided only if it impairs an exemption. 11 U.S.C. § 522(f). Pursuant to 11 U.S.C. § 522(b) and ALA. CODE § 6-10-11 (1993), Alabama opted-out of the federal bankruptcy exemptions in favor of the exemptions provided under Alabama law. The exemption of wages is governed by ALA. CODE § 6-10-7 (1993). In this case, PHA deducted the 75% portion of Ms. Washington’s wages that are exempt prior to remitting the wages to the Clerk of Court. Consequently, Ms. Washington’s exemption pursuant to ALA. CODE § 6-10-7 (1993) has been satisfied and it is not impaired by the garnishment lien.

Ms. Washington can also to exempt up to \$3,000 in value of personal property pursuant to ALA. CODE § 6-10-6 (1993). However, this provision explicitly excepts from its coverage “wages, salaries, or other compensation.” ALA. CODE 6-10-6 (1993). Clearly, Ms. Washington cannot invoke § 6-10-6 to exempt any portion of her wages. *Sink v. Advanced Collection Services, Inc.*, 607 So.2d 246 (Ala. Civ. App. 1992).

Article X, § 204 of the Alabama Constitution (1977) provides each resident with an exemption of \$1,000 in value of personal property. This provision is not an additional exemption to Ala. Code § 6-10-6, but a minimum exemption. *Sink*, 607 So.2d at 248; *Trimble v. Greater Gadsden Housing Authority*, 603 So.2d 1102 (Ala. Civ. App. 1992). A debtor may be able to exempt more than 75% of her wages if the 75% exempt portion of her wages combined with any personal property claimed as exempt does not exceed the \$1,000 minimum exemption. *See, Sink*, 607 So.2d at 248 (minimum personal property exemption reached without exempting the 25% of wages that cannot be claimed as exempt under ALA. CODE § 6-10-7). The personal

property claimed as exempt by Ms. Washington in her bankruptcy schedules and the 75% portion of her wages that were exempted from garnishment exceed \$1,000. Therefore, Ms. Washington cannot exempt any additional portion of her wages pursuant to the minimum personal property exemption contained in Article X § 204 of the Alabama Constitution (1977).

### CONCLUSION

The parties did not provide evidence regarding when the garnished wages were earned by Ms. Washington. This evidence is necessary to determine: (1) what amount of the wages that comprise the 11/06/98 and 11/30/98 checks were earned within the 90 day preference and are therefore an avoidable preference; and (2) what amount of the wages that comprise the 12/29/98, 1/28/99, and 2/22/99 checks were earned prior to the commencement of this bankruptcy case and are therefore property of Ms. Washington's bankruptcy estate.

The parties can either: (1) stipulate as to what amount of the wages were earned on or before September 12, 1998 (90 days from date of the petition) and what amount were earned before and after December 11, 1998 (petition date); or (2) submit evidence regarding when the wages were earned for the Court's determination.

#### THEREFORE IT IS ORDERED AND ADJUDGED:

1. The execution lien on the interest of Beverly Jean Washington in the Mobile, Alabama real property is a preference avoidable by the trustee;
2. To the extent that the wages comprising the 11/06/98 and 11/30/98 checks were earned within the 90 day preference period (before December 11, 1998 and on or after September 12, 1998), the transfer of such wages is a preference avoidable by the trustee;

3. To the extent the wages comprising the 11/06/98 and 11/30/98 checks were earned prior to the first day of the preference period (September 12, 1998), the transfer of such wages is not a preferential transfer subject to avoidance;

4. The transfers of the 12/29/98, 1/28/99, and 2/22/99 checks to the Clerk of Court for Mobile County, Alabama are void;

5. To the extent the 12/29/98, 1/28/99, and 2/22/99 checks are comprised of wages earned subsequent to the commencement of this case, such wages are to be turned-over to Beverly Jean Washington;

6. To the extent the 12/29/98, 1/28/99, and 2/22/99 checks were earned prior to the commencement of this case, such wages are to be turned-over to the trustee for administration as an asset of Beverly Jean Washington's bankruptcy estate;

7. The garnishment lien obtained by Albert Harper cannot be avoided pursuant to 11 U.S.C. § 522(f); and

8. A further hearing on the remaining issues will be held on **April 13, 1999 at 8:30 a.m.** if necessary.

Dated: March 25, 1999

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MARGARET A. MAHONEY  
CHIEF BANKRUPTCY JUDGE