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NOV 23 2015

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

In re:) Case No. 15-25582-B-13
)
 ASHWANI MAYER and POOJA VERMA,) Adversary No. 15-2154
)
) DC No. SBM-1
 Debtor(s).)
)
)
 ASHWANI MAYER and POOJA VERMA,)
)
)
 Plaintiff(s),)
)
 v.)
)
)
 WELLS FARGO BANK, N.A.,)
)
)
 Defendant(s).)
)
)

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Introduction

Plaintiffs Aswani Mayer and Pooja Verma are debtors in the underlying chapter 13 case. This adversary proceeding involves an offset by defendant Wells Fargo Bank, N.A., against plaintiffs' checking account identified in Schedule B and claimed as exempt in Schedule C. Defendant offset \$3,482.74 from that checking account to satisfy plaintiffs' related VISA account. Defendant refunded the offset funds several weeks after the chapter 13 petition was filed and before it was served with the summons and complaint in this adversary proceeding.

1 Plaintiffs allege that defendant violated the automatic stay
2 of 11 U.S.C. § 362(a) and defendant is liable for damages under
3 11 U.S.C. § 362(k). Plaintiffs also allege that defendant's
4 offset is an avoidable preference under 11 U.S.C. § 547(b).

5 The court concludes that defendant did not violate the
6 automatic stay, either by its initial offset against the
7 plaintiffs' checking account or by its post-petition retention of
8 the offset funds. The court also concludes there is no avoidable
9 preference because the offset funds have been refunded.

10 Therefore, because there is no genuine issue of material fact and
11 because defendant is entitled to judgment as a matter of law,
12 summary judgment will be granted for defendant on all claims for
13 relief alleged in the amended complaint.

14 15 Jurisdiction and Venue

16 Federal subject-matter jurisdiction is founded on 28 U.S.C.
17 § 1334. This matter is a core proceeding that a bankruptcy judge
18 may hear and determine. 28 U.S.C. §§ 157(b)(2)(A), (G) and (O).
19 To the extent it may ever be determined to be a matter that a
20 bankruptcy judge may not hear and determine without consent, the
21 parties nevertheless consent to such determination by a
22 bankruptcy judge. 28 U.S.C. § 157(c)(2). Venue is proper under
23 28 U.S.C. § 1409.

24 25 Background

26 The amended complaint alleges four causes of action: (1)
27 declaration of relief based on the premise of a purported
28 continuing stay violation; (2) violation of the automatic stay

1 under § 362(a); (3) damages under § 362(k)(1); and (4) preference
2 avoidance under § 547(b). Defendant moves for summary judgment
3 on all claims for relief alleged in the amended complaint.
4 Plaintiffs have opposed defendant's motion and defendant has
5 replied to plaintiffs' opposition. The court has taken judicial
6 notice of its docket in this adversary proceeding and of the
7 dockets in two related cases filed in this court, nos. 15-25582
8 and 15-21850.

9 The court held a hearing on the defendant's motion on
10 November 4, 2015. Proper notice of the hearing was given.
11 Appearances were noted on the record. The court continued that
12 hearing to November 18, 2015, and then to November 25, 2015.
13 This order disposes of the defendant's motion and renders the
14 continued hearing on November 25, 2015, unnecessary.

15

16 **Statement of Facts**

17 Plaintiffs are debtors in the underlying chapter 13 case,
18 case no. 15-25582. Plaintiffs filed their chapter 13 petition on
19 July 13, 2015, at 4:48:12 p.m.

20 Plaintiffs maintained a pre-petition checking account with
21 defendant. The last four numbers of that checking account are
22 "2012." Plaintiffs list that checking account on Schedule B with
23 a balance of \$4,700. They also claim it as exempt under Cal.
24 Civ. Code Proc. § 703.140(b)(5) on Schedule C.

25 At 4:04 p.m. on July 13, 2015, defendant offset plaintiffs'
26 checking account ending in "2012" in the amount of \$3,482.74.
27 That offset resulted in a payment to plaintiffs' related VISA
28 account. Defendant had no record of notice of the plaintiffs'

1 bankruptcy case prior to its offset.

2 Plaintiff Mayer received a letter confirming defendant's
3 offset on July 14, 2014, following an in-person visit to
4 defendant. After receiving that letter, plaintiffs, their
5 attorney, and the attorney's staff spent several hours attempting
6 to contact defendant by telephone to no avail. At some point
7 after July 14, 2015, plaintiffs' attorney called another attorney
8 who represents defendant (but not in this matter). There is no
9 evidence the two actually spoke about the offset, reversal of the
10 offset, or that they even spoke at all. Plaintiffs' attorney
11 sent defendant a "cease and desist" letter on July 17, 2015,
12 which defendant received on July 23, 2015.

13 After consulting with its counsel and without any request
14 from the plaintiffs or their attorney, and also without any
15 notice of this adversary proceeding, defendant refunded the
16 offset funds to plaintiffs on August 7, 2015. Plaintiffs served
17 defendant with the summons and complaint in this adversary
18 proceeding the following day on August 8, 2015.

19

20 Legal Standard

21 Summary judgment is appropriate if documents, depositions,
22 answers to interrogatories, admissions on file, and declarations,
23 if any, show that there is "no genuine issue of fact and that the
24 moving party is entitled to judgment as a matter of law." Fed.
25 R. Civ. P. 56(a), (c); see also Celotex Corp. v. Catrett, 477
26 U.S. 317, 323 (1986). All reasonable inferences to be drawn from
27 the underlying facts must be viewed in the light most favorable
28 to the nonmoving party. Matsushita Elec. Indus. Co. v. Zenith

1 Radio Corp., 475 U.S. 574, 587 (1986).

2 The initial burden of showing the absence of a material
3 factual issue is on the moving party. Celotex, 477 U.S. at 330;
4 DeHorney v. Bank of America N.T.& S.A., 879 F.2d 459, 464 (9th
5 Cir. 1989). When the moving party does not bear the burden of
6 proof at trial, it may discharge that burden by demonstrating
7 there is an absence of evidence to support the nonmoving party's
8 case. Celotex, 477 U.S. at 325. Once that burden is met, the
9 opposing party must come forward with specific facts, and not
10 allegations, to show a genuine factual issue remains for trial.
11 Celotex, 477 U.S. at 324-25. Summary judgment is appropriate if
12 the nonmoving party fails to make a sufficient showing of an
13 element of its case with respect to which it has the burden of
14 proof. Nissan Fire & Marine Ins. Co. v. Fritz Cos., 210 F.3d
15 1099, 1106 (9th Cir. 2000).

16
17 **Discussion**

18 **The Initial Offset Did Not Violate the Automatic Stay.**

19 The first issue is whether defendant's offset violated the
20 automatic stay of § 362(a). It did not. Defendant's offset of
21 \$3,482.74 from plaintiffs' checking account did not violate the
22 automatic stay because plaintiffs had not yet filed their chapter
23 13 petition, which means the automatic stay was not yet in
24 effect, when the offset occurred.

25 The offset at issue occurred on July 13, 2015, at 4:04 p.m.
26 The court's docket reflects that the plaintiffs filed their
27 chapter 13 petition on July 13, 2015, at 4:48:12 p.m. Section
28 362(a) states that except as provided in subsection (b) of that

1 section, "a petition filed under section 301 ... operates as a
2 stay, applicable to all entities[.]" Thus, the automatic stay
3 was not triggered until the petition was filed which was 44
4 minutes after the offset from plaintiff's checking account
5 occurred. Consequently, it would not be possible for defendant
6 to have received notice of the plaintiffs' bankruptcy filing
7 before the offset took place, much less violate the automatic
8 stay which was not even in effect when the offset occurred.¹
9 Therefore, summary judgment on this aspect of plaintiffs'
10 § 362(a) claim will be granted for the defendant.

11
12 Defendant's Post-Petition Retention of the Offset Funds Did Not
13 Violate the Automatic Stay.

14 Plaintiffs also allege that defendant violated the automatic
15 stay by retaining the offset funds after it learned of the
16 plaintiffs' bankruptcy filing. Defendant did not know of
17 plaintiffs' bankruptcy filing until it received plaintiffs'
18 "cease and desist" letter on July 23, 2015. Defendant
19 unilaterally reversed the offset and refunded the offset funds to
20 plaintiffs on August 7, 2015. For the reasons explained below,
21 the court concludes that defendant's post-petition retention of
22 the offset funds did not violate the automatic stay.

23 Inasmuch as defendant's offset from plaintiffs' checking
24 account occurred pre-petition, the offset funds were not property
25 of the estate under § 541(a). Defendant's retention of those

26 ¹Not only was the stay triggered after the offset occurred, but
27 the clerk did not enter the bankruptcy in the public record until
28 July 14, 2015, at 7:43 a.m., which is the earliest time at which
defendant could have had notice of plaintiffs' bankruptcy and, thus,
notice of the automatic stay.

1 funds, therefore, was not possession or control over property of
2 the estate or from the estate. In fact, the offset funds would
3 become property of the estate when returned to the estate on
4 August 7, 2015, or otherwise recovered as a preference under
5 § 547(b). But even if the offset funds were property of the
6 estate, defendant's post-petition retention of those funds would
7 not violate the automatic stay.

8 The court initially rejects defendant's suggestion that
9 Citizens Bank of Maryland v. Strumpf, 516 U.S. 16 (1995), imposed
10 an obligation on the plaintiffs to demand that defendant return
11 the offset funds. Defendant has it backwards. The automatic
12 stay imposes an affirmative duty on the creditor to discontinue
13 actions in violation of the stay. Eskanos & Adler, P.C. v.
14 Leetien, 309 F.3d 1210, 1215 (9th Cir. 2002). Thus, when
15 property of the estate is held in violation of the automatic
16 stay, the onus is on the creditor to turn over the property and
17 not for the debtor to chase the creditor and force correction of
18 the continuing violation. Emp't Dev. Dep't v. Taxel (In re Del
19 Mission Ltd.), 98 F.3d 1147, 1151 (9th Cir. 1996). Strumpf also
20 authorizes a bank's temporary administrative freeze in order to
21 permit a bank to effectuate setoff rights. Since the offset in
22 this case occurred pre-petition, defendant no longer had setoff
23 (or offset) rights to effectuate when it held plaintiffs' funds
24 after it learned of plaintiffs' bankruptcy. Strumpf, therefore,
25 is of no assistance to the defendant.

26 Nevertheless, in In re Mwangi, 764 F.3d 1168 (9th Cir.
27 2014), the Ninth Circuit upheld a bank's post-petition retention
28 of funds in a deposit account the debtors claimed as exempt.

1 Although the court recognized those funds were property of the
2 estate from the petition date until the debtors' claim of
3 exemption was resolved or the exemption objection period expired,
4 the court concluded that the bank did not violate the automatic
5 stay by holding those funds pending direction from the trustee.
6 Id. at 1177.

7 In reaching its decision, the Ninth Circuit distinguished
8 the case before it from Taxel, supra. The court noted that
9 whereas Taxel involved an unconditional turnover obligation under
10 § 542(a), because of the unique nature of a deposit account and
11 the relationship between the bank and its customers, the bank's
12 turnover obligation in the case before it was governed instead by
13 § 542(b). Id. at 1178. That meant the bank's turnover
14 obligation was not unconditional and, in fact, was subject to
15 direction from the trustee pending resolution of the exemption or
16 expiration of the exemption objection period. Id. In other
17 words, the Ninth Circuit recognized that the bank could hold the
18 debtors' funds - as property of the estate - pending direction
19 from the party entitled to those funds which, in the case before
20 it, was the trustee.

21 In this case, the offset funds were taken from the
22 plaintiffs' checking account ending in "2012." Plaintiffs
23 claimed that account and the funds in it as exempt in Schedule C
24 filed with the petition. Plaintiffs' claim of exemption to that
25 account was not resolved before the offset funds were returned to
26 plaintiffs on August 7, 2015. And based on a § 341 meeting that
27 was first set for August 20, 2015, the exemption objection period
28 would not have expired until September 19, 2015. See Fed. R.

1 Bankr. P. 4003(b)(1).

2 Plaintiffs also provided defendant with no direction
3 regarding disposition of the offset funds prior to August 7,
4 2015, when defendant took it upon itself to return the offset
5 funds to the plaintiffs after consulting with its counsel.² In
6 fact, the only direction defendant received from plaintiffs
7 regarding disposition of the offset funds came on August 8, 2015,
8 when defendant was served in this adversary proceeding. By that
9 time, however, the offset funds had already been returned.

10 In sum, in the absence of direction from the plaintiffs
11 regarding disposition of the offset funds which plaintiffs
12 claimed as exempt, defendant's post-petition retention of those
13 funds would not violate the automatic stay even if those funds
14 remained property of the estate after defendant's offset.
15 Therefore, summary judgment on this aspect of plaintiffs' claim
16 alleged under § 362(a) is warranted and will be granted.

17

18 Return of the Offset Funds Negates any Avoidable Preference.

19 Finally, there is no dispute that defendant refunded the
20 offset funds on August 7, 2015. Funds that were offset within
21 the 90 days before the petition was filed having been returned to
22 the plaintiffs, there is nothing for the plaintiffs to avoid and
23 recover as a preference under § 547(b). Therefore, summary
24 judgment on plaintiffs' claim alleging a preferential transfer
25 under § 547(b) will also be granted.

26

27 ²Since this is a chapter 13 case, direction regarding the
28 disposition of the offset funds would come from the plaintiffs who,
as chapter 13 debtors, have the right to use property of the estate
exclusive of the trustee. See 11 U.S.C. § 1303.

1 **Conclusion**

2 There is no genuine issue of material fact on any of the
3 claims for relief alleged in the amended complaint and defendant
4 is entitled to judgment as a matter of law. Therefore, the court
5 will grant summary judgment for the defendant on all claims for
6 relief alleged in the amended complaint.

7 A separate judgment for the defendant shall enter.

8 Dated: November 23, 2015.

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12 UNITED STATES BANKRUPTCY JUDGE
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**INSTRUCTIONS TO CLERK OF COURT
SERVICE LIST**

The Clerk of Court is instructed to send the attached document, via the BNC, to the following parties:

Peter G. Macaluso
7230 South Land Park Drive #127
Sacramento CA 95831

Steven B. Mains
267 Locust Ave.
Suite A
San Rafael CA 94901