

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)
)
MARK FRANCIS JAMES and) CASE NO. 02-35561 HCD
LISA ANN JAMES,) CHAPTER 7
)
DEBTORS.)

Appearances:

Mark F. James, Esq., debtor, appearing pro se, 914 East Jefferson Boulevard, South Bend, Indiana 46617;
Donald J. Berger, Esq., creditor, 108 N. Main Street, Suite 800, South Bend, Indiana 46601;
J. Richard Ransel, Esq., Trustee, Thorne Grodnik Ransel, 228 West High Street, Elkhart, Indiana 46516; and
Jordan P. Williams, Esq., Thorne Grodnik Ransel, 228 West High Street, Elkhart, Indiana 46516.

MEMORANDUM OF DECISION

At South Bend, Indiana, on August 25, 2003.

The issue before the court is the status of an attorney fee payment to the debtor Mark Francis James (“debtor”). The debtor was counsel for the Estate of Elmer E. Bredensteiner. He anticipated attorney fees in the amount of \$25,000 for his services. After he filed bankruptcy, the debtor claimed that those attorney fees were exempt property pursuant to Indiana Code § 24-4.5-5-105. *See* Amended Schedule C. The Chapter 7 Trustee, J. Richard Ransel, Esq. (“Trustee”), filed his Objection to Exemption, claiming that the attorney fees were not entitled to an exemption. The first question for the court, therefore, is whether the attorney fees are property of the estate entitled to an exempt status. The second issue concerns the lien placed on those attorney fees by the debtor’s former law partners, Donald J. Berger and Andre B. Gammage (“creditors”). The debtor filed a Motion to Avoid Lien, seeking to avoid the Attorney Lien on his fees on the ground that the lien impaired the exempt status of his fees. The law partner creditors filed their Objection to Motion to Avoid Lien, asserting that they had perfected their Attorney Lien on his fees. The Trustee responded by filing his Objection to Motion to Avoid Lien. The second question therefore has two components: Is the Attorney Lien of the creditors valid; and if it

is, is it avoidable by the debtor or the Trustee. Following a hearing on the issues, the court directed the parties to file briefs and then took the matters under advisement on May 30, 2003.

Jurisdiction

Pursuant to 28 U.S.C. § 157(a) and Northern District of Indiana Local Rule 200.1, the United States District Court for the Northern District of Indiana has referred this case to this court for hearing and determination. After reviewing the record, the court determines that the matter before it is a core proceeding within the meaning of § 157(b)(2)(B) over which the court has jurisdiction pursuant to 28 U.S.C. §§ 157(b)(1) and 1334. This entry shall serve as findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52, made applicable in this proceeding by Federal Rule of Bankruptcy Procedure 9014. Any conclusion of law more properly classified as a factual finding shall be deemed a fact, and any finding of fact more properly classified as a legal conclusion shall be deemed a conclusion of law.

Background

Debtor Mark James is an attorney. He had been a partner in the law firm Berger, James & Gammage. On March 22, 2002, the three attorneys entered into a dissolution agreement. James was performing legal services for an estate client, the Estate of Bredensteiner, at or about the time the partnership dissolved. As part of the agreement to dissolve the partnership, James stated that he would turn over to the partnership all of the fees he earned from the Bredensteiner estate. The parties contemplated that James would receive a fee of \$25,000 for his work on the Estate. The partnership was dissolved voluntarily on March 24, 2002.

According to the debtor's former law partners, James owed the partnership money. James therefore agreed to assign his attorney fees in the Bredensteiner Estate to the other two partners as partial payment of his outstanding obligation to the partnership. Pursuant to that agreement, on or around July 16, 2002, Berger and Gammage filed a Notice of Attorney Lien in the Bredensteiner Estate case pending in the Hamilton County Superior Court. The creditors claimed that, by so filing, they had a perfected lien on the debtor's attorney fees.

On September 27, 2002, Mark and Lisa James filed their chapter 7 petition in bankruptcy. The anticipated \$25,000 attorney fee was not listed on the bankruptcy schedules. However, at the debtors' § 341 hearing, the Trustee learned of the outstanding fee. The debtors filed an amended voluntary petition on October 31, 2002, and an amended Schedule C on December 19, 2002. The amended Schedule C listed a claimed exemption of \$25,000 for Mark James' "attorney's fees." The Trustee filed his Objection to Exemption on December 27, 2002, contending that attorney fees were not entitled to an exemption.

On December 11, 2002, Mark James filed a motion to avoid the Attorney Lien claimed by Berger and Gammage. It was his position that his attorney fees were income from his employment and that he owed each former law partner only \$5,000, as the debtor had listed in Schedule F. He contended that the creditors' Notice of Attorney Lien, filed in the Bredensteiner Estate case in the Hamilton County Superior Court, impaired the exempt status of his wages, which were the attorney fees. He further asserted that the lien did not comply with Indiana Code § 33-1-3-1, the state attorney lien statute.

Berger and Gammage filed their Objection to Motion to Avoid Lien on December 26, 2002. They asserted that the debtor owed the partnership over \$54,000, of which \$32,000 was the partnership's federal tax liability. They claimed that the Order of the Hamilton County Superior Court stated that James' attorney fees were \$25,000. They further pointed out that, by filing their Notice of Attorney Lien in that case, they perfected their claim to the fee in the Bredensteiner Estate. They insisted that the lien should not be avoided.

On the next day, December 27, 2002, the Trustee filed his Objection to Motion to Avoid Lien. He asserted that the Attorney Lien filed by Berger and Gammage was not a valid lien. He contended that the lien could be avoided by the Trustee but not by the debtor "because it does not impair a valid exemption." R. 31. He further claimed that the \$25,000 attorney fee constituted an asset of the bankruptcy estate and should be turned over to the Trustee.

On March 6, 2003, the parties filed a stipulation, signed by James, Berger, Gammage, and the Trustee, stating that the attorney fee should be deposited in the Trustee's account for safekeeping pending a final

determination of the ultimate distribution of the fee. Creditors Berger and Gammage first signed the agreement. When the debtor received the stipulation for his signature, however, he told the Trustee that his fee from the Estate would be \$17,829 rather than \$25,000. The debtor then edited the language of the stipulation, redacting the references to \$25,000 and deleting one paragraph. At the hearing on the debtors' claimed exemption and Motion to Avoid Lien, held the same day, Mark James' changes to the Stipulation created a new issue – the amount of compensation the debtor actually would receive for his legal services to the Estate of Bredensteiner – but the parties agreed in principle that the attorney fees, in whatever amount, should be held by the Trustee until the court determined the proper disposition of the fees.

The hearing on March 6, 2003, focused on the Trustee's objection to the debtors' claimed exemption and on the debtor's and Trustee's motions to avoid the lien of the former law partners. The debtor stated his position that attorney fees are wages and that Indiana Code § 24-4.5-5-105(2) allows an exemption of 75% of wages or income. The Trustee disagreed; he asserted that the fees are property of the estate that are not entitled to an exemption. The debtor's former law partner, Donald Berger, agreed that the fees were not exempt property and explained that the debtor had assigned the attorney fees in the Bredensteiner Estate to the partnership in partial payment of his debt to the partnership. He further stated that the two former law partners filed a Notice of Attorney Lien in the Estate of Bredensteiner case in order to perfect their lien on the debtor's fees. The debtor conceded that a document assigning the attorney fees to the partnership was signed by the three law partners and was filed with the Estate. He denied, however, that the filing created a perfected lien.

The court required evidence from the creditors that the lien was valid and was perfected. It noted that there was a factual dispute between the debtor and his two former partners concerning the amount of the attorney fees – \$25,000 or \$17,829 – but determined that the core of the dispute was a legal one. The court listed the issues before it: whether the attorney fee is property of the estate; whether it is exempt property; whether the creditors' lien on the attorney fee is a valid lien; and whether the Trustee or debtor may avoid the lien. The court approved the Stipulation of the parties and directed that the fee paid from the Estate of Bredensteiner to James,

whether \$25,000 or \$17,829, be turned over to the Trustee to be held in his escrow account pending the disposition of the fee.¹ It then established a briefing schedule on the issues and stated that the court would take the matters under advisement at the conclusion of the briefing period.

Discussion

The court considers first the debtors' claimed exempt status of Mark James' attorney fees (compensation for his services to the Estate of Bredensteiner) and the Trustee's objection to the claimed exemption. A debtor's entitlement to a bankruptcy exemption is a question of law. *See In re Yonikus*, 996 F.2d 866, 868 (7th Cir. 1993).

It is a bedrock principle of bankruptcy law that, when a debtor files his petition in bankruptcy, all of the property in which the debtor has a legal or equitable interest becomes property of the bankruptcy estate, subject to certain exceptions not involved in this case. *See* 11 U.S.C. § 541; *In re Kazi*, 985 F.2d 318, 320 (7th Cir. 1993). A "claim for attorneys' fees and costs is considered property of the estate." *Price v. U. S.* (*In re Price*), 42 F.3d 1068, 1072 (7th Cir. 1994) (citing cases); *see In re Carlson*, 263 F.3d 748, 750 (7th Cir. 2001) (stating that the fair value of an attorney's services up to the day he files bankruptcy is property of his estate); *In re Yonikus*, 966 F.2d at 869 ("A debtor's contingent interest in future income has consistently been found to be property of the bankruptcy estate."); *Banner v. Bagen (In re Bagen)*, 201 B.R. 642, 643 (S.D.N.Y. 1996) (determining that the trustee may recover, on behalf of the estate, the fees attributable to the attorney-debtor's pre-petition services); *In re Banks*, 170 B.R. 942, 946 (Bankr. E.D. Tenn. 1994) (finding that attorney fees awarded before the bankruptcy filing were accounts receivable and were property of the estate); *cf. Turner v. Avery*, 198 B.R. 192, 198 (E.D. La. 1996) (finding that money obtained through a prepetition partnership dissolution agreement is property of the bankruptcy estate). Once the property becomes part of the bankruptcy

¹ The court notes that, on August 12, 2003, the Trustee reported that he had taken constructive possession of the proceeds of an estate, in the amount of \$17,829, and that those proceeds were deposited in a bank account and would be available for distribution to creditors. *See* R. 58, Trustee's Inventory and Request for Notice, filed August 12, 2003.

estate, the debtor may claim as exempt certain property interests and the trustee or creditors may object to the claimed exemptions. See 11 U.S.C. § 522(l); Fed. R. Bankr. P. 4003(b); *In re Kazi*, 985 F.2d at 320. Thus the debtor, by claiming the exemption, first must include the attorney's fees as property of the estate; he then can assert that property's exempt status. See *In re Yonikus*, 996 F.2d at 869.

“The nature and extent of allowable exemptions is a matter of state law.” *In re Salzer*, 52 F.3d 708, 711 n.3 (7th Cir. 1995), *cert. denied*, 516 U.S. 1177 (1996) (citing cases). The debtor in this case claimed that the exemption was permitted under Indiana's garnishment statute, Indiana Code § 24-4.5-5-105. He asserted that the attorney fees claimed are the debtor's wages or earnings and that the statute allows an exemption of 75% of earned wages.

The party objecting to the claimed exemption has the burden of proving that the exemption was not properly claimed. See Fed. R. Bankr. P. 4003(c). In this case, the Trustee properly filed his objection within thirty days of the debtors' filing of their amended exempt property list. See Fed. R. Bankr. P. 4003(b). He contended that the garnishment statute applies “to garnishments of the earnings of an individual,” as Indiana Code § 24-4.5-5-102 states, and does not apply to these circumstances. The court finds that the debtor has fundamentally misunderstood or misconstrued the role of a trustee in a chapter 7 bankruptcy case. See, e.g., *Lawrence v. Jahn (In re Lawrence)*, 219 B.R. 786, 802 (E.D. Tenn. 1998) (“[W]hen the Bankruptcy Trustee seeks to collect [the debtor's] accounts receivable on behalf of the bankruptcy estate, the Trustee is not the same as a judgment creditor of [the debtor] who is trying to collect a debt owed by [the debtor] through the garnishment of his earnings in the possession of third party garnishees.”); see also *Keaton v. Fort Wayne Neurosurgery*, 780 N.E.2d 1183, 1185 (Ind. Ct. App. 2003) (“A garnishment proceeding is a means by which a judgment-creditor seeks to reach property or credits of a judgment-debtor which are in the hands of a third person so that they may be applied in favor of the judgment.”). Nevertheless, the court considers whether the debtor can claim an exemption that arises from the Indiana garnishment statute.

The debtor relies on Indiana Code § 24-4.5-5-105, a provision of Indiana’s Uniform Consumer Credit Code (“UCCC”), found at Indiana Code § 24-4.5-5-101 *et seq.* The UCCC applies to garnishments of the disposable earnings of an individual. *See Fisher Body v. Lincoln Nat’l Bank & Trust Co.*, 563 N.E.2d 149, 150 (Ind. Ct. App. 1990). It establishes a ceiling on the amount a creditor can reach through the garnishment of weekly wages. *See Mims v. Commercial Credit Corp.*, 307 N.E.2d 867, 868 (Ind. 1974). The state statute is modeled on the federal Consumer Credit Protection Act, 15 U.S.C. § 1671 *et seq.* (“CCPA”), and its definition of “disposable earnings” is virtually identical to Indiana’s definition. *See Fisher Body*, 563 N.E.2d at 150. Under the state statute, a percentage of the individual’s weekly disposable earnings of an individual can be withheld. *See Ind. Code § 24-4.5-5-105.* “However, if the property of the defendant does not fall within the definition of ‘disposable earnings,’ the exemption will not apply and the entire property can be subject to garnishment.” *Fisher Body*, 563 N.E.2d at 150.

In *Fisher Body*, the Indiana Court of Appeals distinguished between periodic compensation payments and lump sum payments. It then held that a lump sum severance payment did not constitute “disposable earnings” and thus did not fall within the terms of the Indiana garnishment statute. *See id.* at 151. The state appellate court relied upon the reasoning of the United States Supreme Court in *Kokoszka v. Belford*, 417 U.S. 642, 651, 94 S. Ct. 2431, 2436, 41 L.Ed.2d 374 (1974) (holding that an income tax refund was not “earnings” or “disposable earnings” under the CCPA because it was not a periodic payment of compensation) and on the federal district court decision *Pallante v. International Venture Investments, Ltd.*, 622 F. Supp. 667 (N.D. Ohio 1985) (concluding that a lump sum severance payment was not entitled to the garnishment limitations of the CCPA). *See Fisher Body*, 563 N.E.2d at 150-51.

The Ninth Circuit Bankruptcy Appellate Panel, as well, considered whether the Oregon garnishment statute (also modeled on the CCPA, with identical definitions for “earnings,” “disposable earnings,” and “garnishment”) should be interpreted “more broadly than the CCPA, indeed broadly enough to protect the account receivable owed to the Debtors from garnishment.” *Yaden v. Osworth (In re Osworth)*, 234 B.R. 497,

499 (9th Cir. B.A.P. 1999). In that case, the debtors were self-employed real estate agents who claimed that a commission was exempt as earnings. The court determined that nothing in Oregon’s garnishment statute suggested that the Oregon legislature intended to expand the CCPA protections. It concluded that the debtors could not use the garnishment statute to exempt the commission, which was categorized as an account receivable, and upheld the trustee’s objection to the exemption claim.

Finding the analyses in those cases persuasive, this court determines that the debtor’s attorney fee payment is a lump sum account receivable and not a periodic payment of compensation. The fee does not qualify as “aggregate disposable earnings of an individual for any workweek,” as Indiana Code § 24-4.5-5-105(2) describes the earnings subject to garnishment. The fee payment therefore is outside the statutory definition of “disposable earnings” and the exemption does not apply.² The court therefore determines that the debtor’s attorney fee payment, compensation for services performed on behalf of the Bredensteiner Estate before the debtor filed bankruptcy, was property of the debtors’ estate as of the commencement of the case, *see* 11 U.S.C. § 541(a)(1), to be turned over to the Trustee, and is not entitled to an exempt status pursuant to Indiana Code § 24-4.5-5-105. The debtors’ claimed exemption is disallowed.

Having determined that the attorney fee payment is not exempt property, the court considers whether it is property of the estate on which the creditors have a lien.³ The former law partners of Mark James, Berger and Gammage, filed their Notice of Attorney Lien in the Estate of Bredensteiner after the debtor assigned his attorney fees to them as partial payment of his outstanding obligation to the partnership. They originally claimed,

² Moreover, the garnishment statute expressly states that, “[p]rior to entry of judgment . . . , no creditor may attach unpaid earnings of the debtor by garnishment or like proceedings.” Ind. Code § 24-4.5-5-104. Having reviewed the record in this case, the court finds that there has been no judgment in the Bredensteiner Estate case from which to collect the attorney fees. For that reason, as well, the attorney lien cannot attach to the unpaid attorney fees of the debtor and the exemption does not apply.

³ The procedural posture of this case is noteworthy. The debtor filed a motion to avoid the creditors’ lien on property he considered exempt under § 522(f) of the Bankruptcy Code. The creditors objected, claiming that they have a perfected attorney lien on the debtor’s attorney fees. “A proceeding by the debtor to avoid a lien or other transfer of property exempt under § 522(f) of the Code shall be by motion.” Fed. R. Bankr. P. 4003(d). The court addresses the creditors’ lien claim in the context of the debtor’s motion.

in their objection to the debtor's motion to avoid their lien, that they perfected their claim to the attorney fees by filing notice. *See* R. 30 at 2. However, in their brief they acknowledged that, once the debtors filed bankruptcy and the automatic stay went into effect, the creditors took no further action to perfect their lien. *See* R. 52 at 3.

The debtor asserted that the attorney lien should be avoided because it impaired the exempt status of his wages (that is, his attorney fees) and because the lien did not comply with the attorney lien statute, Indiana Code § 33-1-3-1.⁴ The Trustee claimed that the attorney lien of Berger and Gammage did not constitute a valid lien because it was founded on an avoidable insider preference, pursuant to 11 U.S.C. § 547, and because the lien itself was not a properly executed, filed or perfected document. The court, having determined that the debtor's attorney fees are not entitled to an exempt status, finds that the debtor may not avoid the creditors' lien on that ground. It considers the question of law before it, whether the creditors filed a valid attorney lien.

The Bankruptcy Code looks to state law to determine whether an agreement creates a valid lien, *see Merchants Grain*, 93 F.3d at 1352, or whether a creditor has a properly perfected security interest, *see Smoker v. Hill & Assocs, Inc.*, 204 B.R. 966, 972 (N.D. Ind. 1997); *In re Our Own Hardware Co.*, 194 B.R. 199, 201 (S.D. Ind. 1996). In this case, the creditors maintained, without reference to statutory or case law authority, that they have a perfected lien on the assignment of the debtor's attorney fee. The state statute concerning attorney liens is Indiana Code § 33-1-3-1. The statute grants an attorney the authority to hold an attorney fee lien on his client's judgment. *See Stroup v. Klump-O'Hannes*, 749 N.E.2d 622, 625 (Ind. Ct. App.2001). However, the lien can be held only on a judgment rendered in favor of the attorney's client. *See id.* In the record in this case, there is no judgment to which the lien attached. *See Greenfield v. Greenfield*, 591 N.E.2d 1057, 1060 n.4 (Ind. Ct. App. 1992) (noting that the attorney filed notice before any judgment was rendered and thus there was no

⁴ The statute provides: "Any attorney practicing his profession in any court of record in this state shall be entitled to hold a lien, for his fees, on any judgment rendered in favor of any person or persons employing such attorney to obtain the same: Provided, That such attorney, within sixty (60) days from the time such judgment shall have been rendered, enter in writing upon the docket or record wherein the judgment is recorded, his intention to hold a lien thereon, together with the amount of his claim. . . ." Ind. Code § 33-1-3-1.

judgment to which the lien attached). Had there been a judgment, the attorney lien would be considered an assignment of that judgment from the client to the attorney. *See id.* Moreover, had there been a judgment, and had the attorney's intention to hold a lien been entered "in writing upon the docket or record wherein the judgment is recorded," within sixty days of the date of the judgment, the lien would have been perfected. *See Stroup*, 749 N.E.2d at 626; *see also In re Innkeepers of New Castle, Inc.*, 671 F.2d 221, 227 (7th Cir.) (finding that perfection of the attorney lien statute required the attorney to timely record on the face of the judgment his intention to hold the lien in the amount called for by his valid fee contract), *cert. denied*, 459 U.S. 908 (1982). However, without a judgment there is no entitlement to a lien, and no perfection of a lien is possible. Indeed, without a judgment there is no lien to be avoided in bankruptcy. The court finds that the creditors' Notice of Attorney Lien, filed in the Estate of Bredensteiner state court cause of action, as a matter of law did not create a valid lien on the debtor's attorney fee in that case.

Remaining to be considered by the court is the status of the debtor's assignment of his fees to his two former partners, an assignment executed two days before the partners dissolved their law partnership. The Trustee contended that the assignment constituted an insider preferential transfer of the fees to his former law partners under § 547(b)(4)(B). The creditors insisted that they, as partners, shared expenses but did not commingle the funds they received. Moreover, they claimed that the assignment of James' fees was a payment of a debt incurred in the ordinary course of business and therefore was a transfer protected from avoidance under § 547(c)(2). These contentions are not properly before the court. Actions to determine the validity of a preferential transfer must be litigated in an adversary proceeding. *See Fed. R. Bankr. P. 7001.*

CONCLUSION

For the reasons presented above, the court finds that the attorney fee payment owed to the debtor Mark James is property of the debtors' estate and is not entitled to an exemption pursuant to Indiana Code § 24-4.5-5-105. The court denies the exemption claimed by the debtors in their Amended Schedule C. It upholds the Trustee's Objection To Exemption.

The court also determines that the creditors did not create a valid lien by filing their Notice of Attorney Lien in the Estate of Bredensteiner case in Hamilton County Superior Court. It thus is in agreement with the position taken by both the debtor and the Trustee. Because the court finds that the creditors' lien was not valid and therefore could not be perfected, the court denies the creditors' Objection to Motion to Avoid Lien. However, the court also denies the debtor's Motion to Avoid Lien on the ground that the debtor's attorney fees are not exempt property and cannot be impaired. Finally, the court upholds the Trustee's Objection to Motion to Avoid Lien in part: The attorney fee payment constitutes an asset of the debtors' bankruptcy estate and is not entitled to an exemption. However, the court denies the Trustee's Objection in part, as well: The transfer by assignment of the debtor's attorney fees may be avoided by the Trustee only in an adversary proceeding initiated by the filing of a complaint.

SO ORDERED.



HARRY C. DEES, JR., CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT