Honorable Mike K. Nakagawa
United States Bankruptcy Judge

Entered on Docket
September 25, 2020

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

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In re:	)	Case No.: 20-11971-MKN
	)	Chapter 7
ROLANDO CHAVEZ VALIENTE and KIMBERLY MANEJA-PARADO VALIENTE,	)	Date: September 23, 2020
	)	Time: 1:30 p.m.
Debtors.	)	

ORDER ON HAWAII STATE FEDERAL CREDIT UNION'S MOTION FOR RELIEF FROM AUTOMATIC STAY RE: SHARE ACCOUNT FUNDS AND DEBTOR'S [sic] COUNTERMOTION FOR SANCTIONS FOR VIOLATIONS OF THE STAY[1]

On September 23, 2020, the court heard Hawaii State Federal Credit Union's Motion for Relief From Automatic Stay Re: Share Account Funds and Debtor's [sic] Countermotion for Sanctions for Violations of the Stay ("Motion"). The appearances of counsel were noted on the record. After arguments were presented, the matter was taken under submission.

BACKGROUND

On April 16, 2020, a voluntary Chapter 7 petition was filed by Rolando Chavez Valiente and Kimberly Maneja-Parado Valiente ("Debtors"). (ECF No. 1).

On April 29, 2020, Debtors filed their schedules of assets and liabilities ("Schedules") along with their statement of financial affairs ("SOFA"). (ECF No. 14). In Part IV of their

[1] In this Order, all references to "ECF No." are to the numbers assigned to the documents filed in the case as they appear on the docket maintained by the clerk of the court. All references to "Section" are to provisions of the Bankruptcy Code, 11 U.S.C. §§ 101, et seq., unless otherwise indicated. All references to "Local Rule" are to the bankruptcy provisions of the Local Rules of Practice for the District of Nevada.

property Schedule "A/B," Debtors listed checking, savings, or other financial accounts with Bank of America and Venmo. Debtors also listed as money or property owed to them a 2019 federal tax refund in an unknown amount as well as a 2019 federal earned income credit in an unknown amount. On their exemption Schedule "C," Debtors claimed the Bank of America and Venmo accounts, as well as the federal tax refund and earned income credit, as exempt under Section 522(d)(5). On their unsecured creditor Schedule "E/F," Debtors listed Hawaii State Federal Credit Union ("HSFCU") as having four separate claims, including the amount of $41,000 based on an unpaid line of credit ending in account number 7390 ("LOC"). None of the claims are designated as contingent, unliquidated or disputed. Additionally, Debtors attest that none of the claims of HSFCU are subject to offset. In Part 8 of their SOFA, Debtors attest that they closed a checking account with HSFCU in August 2019.

On May 13, 2020, Debtors' meeting of creditors was concluded.

On May 14, 2020, the assigned Chapter 7 bankruptcy trustee reported that there are no funds available for distribution in the case.

On July 21, 2020, HSFCU filed the instant Motion. (ECF No. 24). The Motion alleges that a tax refund in the amount of $3,400.00 was deposited into a share account on April 15, 2020, i.e., one day before the Chapter 7 petition was filed. HSFCU maintains that the amount in the share account on April 15, 2020, is subject to a setoff against the $41,000 owed on that date under the LOC. HSFCU seeks relief from the automatic stay to apply the setoff.

On August 10, 2020, Debtors filed an amended Schedule "A/B" disclosing $3,400 deposited into their checking account at HSFCU, believed to be "Stimulus funds." (ECF No. 28). Debtors also amended their Schedule "C" to claim an exemption in those funds under Section 522(d)(5) ("Amended Exemptions").

On August 12, 2020, Debtors filed an opposition to the Motion ("Opposition") that included a "countermotion" seeking sanctions against HSFCU under Section 362(k). (ECF No.

29).[2] The Opposition is supported by the Declarations of Kimberly Maneja-Paredo ("Debtor Declaration") and Dasi Klappholz-Compton. (ECF Nos. 30 and 31).

On August 20, 2020, an order of discharge was entered. (ECF No. 34).

On September 9, 2020, HSFCU filed an objection to the Amended Exemptions. (ECF No. 39).[3]

On September 10, 2020, HSFCU filed a reply in support of the Motion as well as an opposition to the countermotion ("Reply"). (ECF No. 40). A declaration of HSFCU's credit resolution manager, Michael Akana ("Akana Declaration"), accompanies the Reply. (ECF No. 41).

DISCUSSION

There is no dispute that the $3,400 deposited in the checking account was not a federal tax refund, but instead was a "stimulus" check issued to various qualified federal taxpayers under the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020. See Exhibit 3 to Motion and Akana Declaration at ¶ 10. See also Debtor Declaration at ¶ 11 and Exhibit 1 thereto. There is no dispute that the stimulus funds were deposited on April 15, 2020.[4]

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[2] Under Local Rule 7056(e), countermotions for summary judgment are permitted in adversary proceedings. Local Rule 9014(d) does not permit countermotions to be included in response to other motions or requests made to the court. Instead, separate motions may be brought and may be heard concurrently, on shortened time if requested, with the previously noticed motion.

[3] HSFCU's objection to the Amended Exemptions has not been noticed for a hearing.

[4] HSFCU's credit manager attests that the stimulus funds on deposit "were cleared and available as of April 15, 2020." Akana Declaration at ¶¶ 10 and 12. Debtors argue that the deposit of the stimulus funds had not cleared by April 15, 2020, see Opposition at 6:7-24, and attached a copy of a "Funds Availability Policy" to their Opposition. Debtors concede, however, that the stimulus funds were deposited electronically, see Opposition at 7:26 to 8:5, and the same funds policy specifies that "[e]lectronic direct deposits will be available on the day we receive the deposit." April 15, 2020, fell on a Wednesday and was not a legal holiday. Debtors offer no evidence that the electronic deposit was not received on April 15, 2020. HSFCU therefore has carried its burden of proof on this factual question by a preponderance of the evidence.

There is no dispute that the LOC agreement with HSFCU was executed by the Debtors on or about March 20, 2017, in the amount of $41,000. See Exhibit 1 to Motion. There is no dispute that the "Security for Agreement" provision of the LOC agreement grants a lien against any funds in the Debtors' deposit accounts, and that those funds may be applied against the amount owed in the event of nonpayment. There is no dispute that on the bankruptcy petition date, the amount owed to HSFCU on the LOC far exceeded the amount of the stimulus deposit.

The record establishes that on the day before the voluntary Chapter 7 petition was filed, Debtors had an unpaid debt owing the HSFCU in the approximate amount of $41,000. The record also establishes that when the stimulus funds were deposited at HSFCU on the Debtors' behalf on April 15, 2020, see note 4, supra, Debtors also had a claim against HSFCU for the amounts that had been deposited to the account. See Barnhill v. Johnson, 503 U.S. 393, 398 (1992) ("A person with an account at a bank enjoys a claim against the bank for funds in an amount equal to the account balance."); Mitsuo Tagawa v. Karimoto, 43 Haw. 1, 11 (Haw. 1958) ("Where money is deposited in a bank, it constitutes a loan to the bank of the money deposited, subject to the undertaking by the bank to repay the same in money to the depositor . . . upon demand conformable to the contract of deposit in respect to the time of repayment and amount."). See also Parker v. Community First Bank (In re Bakersfield Westar Ambulance, Inc.), 123 F.3d 1243, 1246-47 (9th Cir. 1997) ("By depositing money into a bank account, the depositor enters into a debtor-creditor relationship with the bank . . . Title to the funds passes to the bank, and the depositor receives a contract claim against the bank . . .). In other words, the Debtors and HSFCU had claims against each other that were in existence on the bankruptcy petition date.

Section 553 addresses the concept of setoff in bankruptcy cases. With exceptions not applicable to the instant case, that section states in pertinent part: "Except as otherwise provided in this section and in sections 362 and 363 . . . , this title does not affect any right of a creditor to offset a mutual debt owing by such creditor to the debtor that arose before the commencement of the case . . . against a claim of such creditor against the debtor that arose before the commencement of the case . . ." 11 U.S.C. § 553(a). The Ninth Circuit has explained: "Under

setoff, mutual debts cancel each other. These debts may arise from separate transactions or a single transaction but must be incurred prior to the filing of a bankruptcy petition." Sims v. U.S. Dep't of Health and Human Svcs. (In re TLC Hospitals, Inc.), 224 F.3d 1008, 1011 (9th Cir. 2000).

When a bankruptcy case is filed, the automatic stay precludes the creditor from exercising any right of setoff against property of the bankruptcy estate. See 11 U.S.C. § 362(a)(7); Gardens Reg'l Hosp. & Med. Ctr. Liquidating Trust v. State of California (In re Gardens Reg'l Hosp. & Med. Ctr., Inc.), 2020 WL 5541387, at *5 (9th Cir. Sep.16, 2020). It is well established that relief from stay to exercise a setoff right may be obtained for cause under Section 362(d)(1). See, e.g., U.S. v. Gould (In re Gould), 401 B.R. 415 (B.A.P. 9th Cir. 2009) (cause established under 362(d)(1) for Internal Revenue Service to exercise setoff). There is no dispute that HSFCU has not exercised any such setoff rights and that the stimulus funds have not been applied to the prepetition debt. HSFCU currently seeks relief from stay for cause under Section 362(d)(1) to exercise those rights.

The parties do not dispute that three elements must exist for a right of setoff to be recognized in bankruptcy: (1) a prepetition debt owed to the creditor; (2) a prepetition debt owed by the creditor to the debtor; and (3) mutuality. See United States v. Carey (In re Wade Cook Fin. Corp.), 375 B.R. 580, 594 (B.A.P. 9th Cir. 2007). As discussed above, the first two elements are met: Debtors owe $41,000 to HSFCU and HSFCU owes $3,400 to the Debtors. As discussed below, the third element – mutuality – also is met.

"Mutuality for purposes of offset requires that the debts be 'in the same right and between the same parties, standing in the same capacity and same kind or quality.'" In re Cook Inlet Energy, LLC, 580 B.R. 842, 850 (Bankr. D. Alaska 2017) (citations and quotations omitted), aff'd, 583 B.R. 494 (B.A.P. 9th Cir. 2018). "For debts to be owed in the same right under § 553 they must both be pre-petition debts." 580 B.R. at 850. "'Courts construing [the same capacity] requirement have generally held that the concept of 'capacity' refers to the nature of the relationship between the parties.'" Id. (citations and quotations omitted). In this instance, there is no dispute the subject claims between the parties arose prepetition and that the rights

between the same parties arose from the same LOC agreement.

Debtors argue that setoff should not be permitted due to the extraordinary nature of the stimulus funds provided under the CARES Act. See Opposition at 7:6 to 8:23. There is no apparent dispute that the COVID-19 pandemic is historically catastrophic and that the United States' only worldwide leadership is in the resulting number of deaths. Unfortunately, Debtors have identified no provision in the CARES Act that exempts stimulus funds from collection activity. Compare Tom v. First American Credit Union, 151 F.3d 1289 (10th Cir. 1998)(credit union setoff of civil service pension funds violated anti-assignment provisions 5 U.S.C. § 8346(a)). Nor has the court independently found in the CARES Act an equivalent protection for such funds. So while the national response to the COVID-19 pandemic by the executive branch has been historically inept, the failure of the legislative branch to protect the CARES Act stimulus funds, for the taxpayers most in need, also is inexplicable. As a result, nothing in the CARES Act changes the kind or quality of the relationship between the current parties. Under these circumstances, the court concludes that mutuality also exists in this case. In short, all of the elements necessary for a setoff are established by the record.

For these reasons, the court concludes that HSFCU has met its burden of demonstrating that the subject stimulus funds are subject to setoff and that cause exists under Section 362(d)(1) to permit setoff to be exercised. Because setoff will be permitted, the court also will deny the Debtors' "countermotion" for sanctions under Section 362(k) without prejudice.

IT IS THEREFORE ORDERED that the Hawaii State Federal Credit Union's Motion for Relief From Automatic Stay Re: Share Account Funds, Docket No. 24, be, and the same hereby is, **GRANTED.**

IT IS FURTHER ORDERED that Debtor's [sic] Countermotion for Sanctions for Violations of the Stay, Docket No. 29, be, and the same hereby is, **DENIED** without prejudice.

Copies sent via CM/ECF ELECTRONIC FILING

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