

UNITED STATES DISTRICT COURT

DISTRICT OF NEW MEXICO

Clerk's Minutes

Before the Honorable Lorenzo F. Garcia

CASE NO. CIV 97cv266 MCA/LFG

DATE: March 25, 2008

TITLE: *William H. Payne and Arthur Morales v. National Security Agency*

COURTROOM CLERK: M. Woodward

COURT REPORTER: Julie Sanchez

COURT IN SESSION: 9 a.m.

COURT IN RECESS: 9:30 a.m

TOTAL TIME: 30 min.

TYPE OF PROCEEDING: Hearing on United States' objections to exemptions

COURT'S RULINGS/DISPOSITION: Report and Recommendation to issue Writs of Garnishment.

ORDER CONSISTENT WITH COURT'S RULING TO BE PREPARED BY: Government will provide revised Writs to Court

ATTORNEYS PRESENT FOR PLAINTIFF(S):

Neither pro se Plaintiff was present

Kevin Hammar, for Garnishee

ATTORNEYS PRESENT FOR DEFENDANT(S):

John Zavitz

Greg Fouratt

PROCEEDINGS:

Court in Session: 9 a.m.

Court: Calls case; asks for appearances of counsel

Asks if either Plaintiff is present. Neither responds. Court Security Officer directed to check outside courtroom for Plaintiffs. Neither located.

Court: Summarizes procedural history of case. Plaintiffs were previously ordered to pay sanctions. Doc 41.

Judge Campos, originally assigned to the case, dismissed the lawsuit initiated by Plaintiffs. That decision was affirmed by the Tenth Circuit. The case was closed for years, at which point, but Plaintiffs commenced filing numerous pleadings seeking to re-assert dismissed claims. Docs. 81, 82, 84, 85, 91. Judge Armijo was assigned to the case and issued an order of reference in this case. Pursuant to that Order, the undersigned Magistrate Judge issued an Order to Show Cause. Doc. 92. Neither Payne nor Morales responded. In a Report and Recommendation, this Court recommended sanctions be assessed for Plaintiffs' abusive and frivolous pleadings, and directed the United States Attorney to proceed to enforce and collect the sanctions imposed on Plaintiffs. Doc. 95. Plaintiffs filed no objections. Judge

Armijo adopted the report and recommendation and imposed sanctions on each Plaintiff. No appeal was taken from that Order. The United States initiated collections proceedings to enforce judgment. Writs of garnishment were issued, including on Sandia Credit Union, where Plaintiffs each held accounts. Notices of writs of garnishment were issued to Plaintiffs. Both plaintiffs contacted the credit union to complain of the garnishment proceeding. However, neither Plaintiff filed objections with Court. Sandia Credit Union filed affidavits from Plaintiffs in the proceeding. Doc. 133. United States filed objections to the claimed exemption and sought a hearing. Doc. 135. Judge Armijo issued a new order of reference [doc. 141] directing the magistrate judge to conduct a hearing and issue a report and recommendation.

Zavitz: Explains that the United States' objection is being heard today. While Plaintiffs have filed pleadings, they did not file objections to the garnishment, nor did Plaintiffs request hearing. Plaintiffs indicated they did not want a hearing and objected to a hearing.

Debtor/Plaintiff has burden to show exemption applies, but the only evidence presented by debtors/Plaintiffs are the affidavits filed by the credit union. Plaintiffs came forward with no other information on their behalf. Government clarified that Plaintiffs may be able to claim an exemption under state law if they could prove monies in credit union accounts are retirement proceeds. However, Plaintiffs did not show that all monies in these accounts were from retirement sources.

Hammar: On behalf of Sandia Credit Union, the credit union filed, in an abundance of caution, the affidavits Plaintiffs submitted to the credit union. Plaintiffs/debtors incorrectly claimed that credit union had burden to show that the funds were not subject to garnishment. Credit Union informed Plaintiffs/debtors otherwise on numerous occasions.

Court: Garnishee (credit union) has obligation only to respond to Court's Writ and to state whether garnishee holds funds. Credit Union is then required to freeze those assets if held in accounts and await Court's determination on exemptions, if any, and the Court's disposition under federal and state garnishment laws. Credit Union is under no obligation to adjudicate this matter, or to determine applicability of exemptions.

Zavitz: Tenders writs of garnishment for District Court to sign.

Court: Makes findings. Plaintiffs were aware of today's hearing and proceeding, and Debtors/Plaintiffs have chosen not to attend the hearing. Court finds that debtors were served with the appropriate pleadings and notice of this hearing. Plaintiffs/debtors sent emails and other correspondence to the U.S. Attorney acknowledging receipt of the relevant information. Court rejects debtors' claims of improper service and finds that service was proper.

Court acknowledges Plaintiffs'/Debtors' claim that funds in pertinent accounts should not be garnished because they are retirement funds or wages of a spouse. The monies in both Payne's and Morales' accounts were commingled with other funds in those accounts. It was the burden of debtors to demonstrate the source of the funds and any legitimate claim of exemption. They have wholly failed to do so. Thus, under the pertinent law, garnishment may proceed. Court looks at New Mexico law to determine if there are exemptions under state law and federal law. Garnishment may be made from communal funds, to the extent the laws of New Mexico permit. Debts incurred during course of

marriage may be garnished. Community property may be used to satisfied communal debt. Court recognizes that retirement funds may not be garnished. However, if those retirement funds are paid to the retiree and then commingled with other funds, they are subject to garnishment. Plaintiffs must demonstrate which funds are retirement funds. Plaintiffs failed to do so.

Zavitz: Tenders writs to Court which Court reviews.

Court: In addition to the amounts ordered to be paid by Plaintiffs, the garnishee is entitled to attorney's fees related to responding to the writs. There are funds sufficient and there is no showing of an applicable exemption. Based on these determinations, Court concludes that the writs of garnishment should issue directing garnishee to pay the amounts to the United States. Once Sandia Credit Union makes payments to the United States, the garnishee is discharged and free of any other obligations in this matter.

A report will issue recommending entry of an order directing payment.

Zavitz: Will submit revised Writs to correct typographical error.

Hammar: Nothing further. Credit Union seeks reimbursement for attorney's fees related to this matter.

Zavitz: Amount of attorney's fees will be added to the amounts to be paid.

Court: In recess, 9:30 a.m.