

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA

SUBBARAO PINAMANENI,  
VIJAYA PINAMANENI,

Debtors.

Case No. 92-5-5009-MM

Chapter 7

SUBBARAO PINAMANENI,  
VIJAYA PINAMANENI,

Plaintiffs,

Adversary No. 92-5-596

vs.

**MEMORANDUM OPINION AND  
ORDER THEREON**

DESERT PALACE, INC. dba CAESARS  
PALACE,

Defendants.

**I. INTRODUCTION**

Debtor, Subbarao Pinamaneni, filed this adversary proceeding against Desert Palace, Inc., dba Caesars Palace, to avoid the transfer of \$4,201.71 in wages which were garnished during the ninety day preference period prior to filing his bankruptcy case. All facts have been stipulated. On July 25, 1991, Desert Palace obtained a judgment for \$62,434.80 against Pinamaneni in the state of Nevada. After registering the judgment in California, Desert Palace secured an earnings withholding order. It served the order on his employer on or about January 6, 1992, and Pinamaneni's wages were regularly garnished until he filed a Chapter 7 petition on July 15, 1992.

1 The only question in this case is when the transfer of Pinamaneni's wages occurred. In order  
2 for the transfer of a debtor's property to be avoidable, section 547(b) requires that the transfer occur  
3 within ninety days before filing of a petition. However, pursuant to section 547(e)(3), a transfer is  
4 not made until the debtor has acquired rights in the property.

5 Desert Palace contends that the service of the garnishment order on Pinamaneni's employer  
6 eliminated any property rights that Pinamaneni had in the wages. This argument asserts that the  
7 transfer took place outside of the ninety day period specified in section 547(b) and is not avoidable as  
8 a preference. Conversely, Pinamaneni argues that the transfer could not occur until he had obtained a  
9 right to his wages. Under this analysis, the transfers in question would have taken place during the  
10 preference period.

## 11 II. DISCUSSION

### 12 A. The Continuing Lien Theory Obviates the Debtor's 13 Interest in Garnished Wages

14 Desert Palace argues that the decision in this case is controlled by In re Coppie, 728 F.2d 951,  
15 952 (7th Cir.), cert. denied, sub nom. Gouveia v. Hammond Clinic, 469 U.S. 1105, 105 S. Ct. 777  
16 (1984). In Coppie, the Seventh Circuit held that when a garnishment order was entered before the  
17 preference period, wages withheld pursuant to the order within the ninety day period were not a  
18 preference. This decision was based on that court's determination that Indiana law created a continuing  
19 lien on both present and future wages, depriving the garnishee of any interest in the wages. Therefore,  
20 the Coppie court held that section 547(e)(3) was inapplicable:

21 Section 547(e)(3) does not come into play in this case simply because after a garnishment order  
22 providing for a continuing lien is entered . . . a debtor will never acquire rights in the portion of  
23 his or her wages to be garnished in the future. Once a garnishment order has been entered by a  
24 court, the debtor's rights in 10% of his or her future wages are irrevocably transferred to the  
garnishment plaintiff.

25 Coppie, 728 F.2d at 953.

26 Two other circuit court cases have ruled that wages withheld during the 90 day preference period  
27 are not preferential transfers if withheld pursuant to a prepetition writ of garnishment entered prior to the  
28 preference period. Like the Coppie court, both held that state law created a "continuing levy" which

1 terminated all property interests the debtor could obtain in the garnished portion of his future wages.  
2 See, Askin Marine Co. v. Conner (In re Conner), 733 F.2d 1560 (11th Cir. 1984); Riddervold v. Saratoga  
3 Hospital (In re Riddervold), 647 F.2d 342 (2nd Cir.1981). However, neither of these decisions addressed  
4 the applicability of section 547(e)(3).

5 The Coppie court suggests that section 547(e)(3) is applicable only to security interests in after-  
6 acquired property. Coppie, 728 F.2d at 953. The legislative history of section 547(e)(3) shows that it  
7 was added to overrule Grain Merchants of Indiana, Inc. v. Union Bank & Savings Co., 408 F.2d 209 (7th  
8 Cir.) cert. denied, 396 U.S. 827, 90 S. Ct. 75, 24 L. Ed. 2d 78 (1969) and DuBay v. Williams, 417 F.2d  
9 1277 (9th Cir.1969)<sup>1</sup>. See, H.R. Rep. No. 595, 95th Cong., 1st Sess. 374 (1978); S. Rep. No. 989, 95th  
10 Cong., 1st Sess. 88 (1978). In addition, the legislative history indicates that section 547(e)(3) was  
11 enacted to conform the Bankruptcy Code to the commercial practices applied under the Uniform  
12 Commercial Code.<sup>2</sup> Id.

13 Nothing in the statutory language or the legislative history limits section 547(e)(3) to security  
14 interests in after-acquired property. The discussion in the legislative history is merely illustrative of, not  
15 the exclusive application of, section 547(e)(3). The language of section 547(e)(3) unambiguously applies  
16 to all allegedly preferential transfers.

17 **B. A Transfer Can Only Occur When the Debtor**  
18 **Has an Interest in Wages**

19 The reasoning of the Coppie, Conner, and Riddervold courts has not been widely accepted. Most  
20 courts which have considered the question have held that, under section 547(e)(3), the debtor's wages  
21 cannot be transferred until they have been earned, notwithstanding the time of the service of the writ of  
22 garnishment. Therefore, wages earned, withheld, and paid to the garnishing creditor within 90 days  
23 preceding bankruptcy can constitute avoidable preferences even if the writ of garnishment were served  
24 before the preference period commenced. See, Taylor v. Mississippi Learning Institute (In re Taylor),

---

25 <sup>1</sup>These cases held that collateral transferred to the secured party pursuant to an after-acquired property clause within  
26 four months preceding the filing of the bankruptcy petition was not a preference if the creditor had perfected a security  
27 interest in after-acquired property more than four months prior to the bankruptcy petition.

28 <sup>2</sup>Section 547(e)(3) is similar to the Uniform Commercial Code provision that a security interest cannot attach until "the  
debtor has rights in the collateral." See, e.g., Cal. Com. Code § 9204 (West 1990).

1 151 B.R. 772 (Bankr. N.D. Miss. 1993); Larson v. Laing (In re Castleton), 84 B.R. 743 (Bankr. D. Colo.  
2 1988); Holdway v. Duvoisin (In re Holdway), 83 B.R. 510 (Bankr. E.D. Tenn. 1988); Harrington v.  
3 Limbey (In re Harrington), 70 B.R. 301 (Bankr. S.D. Fla. 1987); Schlossberg v. Finance America Corp.  
4 (In re Krumpe), 60 B.R. 575 (Bankr. D. Md. 1986); Malone v. Fidelity National Bank (In re Dunn), 56  
5 B.R. 275 (Bankr. M.D. La. 1985); Perry v. General Motors Acceptance Corp. (In re Perry), 48 B.R. 591  
6 (Bankr. M.D. Tenn. 1985); In re Smith, 45 B.R. 100 (Bankr. E.D. Va. 1984); Roberts v. Household  
7 Finance Corp. of Georgia (In re Roberts), 44 B.R. 752 (Bankr. N.D. Ga. 1984); Ellenberg v. General  
8 Motors Acceptance Corp. (In re Morton), 44 B.R. 750 (Bankr. N.D. Ga. 1984); Tressler v. Tressler (In  
9 re Tressler), 41 B.R. 779 (Bankr. D. Del. 1984); Tabita v. I.R.S. (In re Tabita), 38 B.R. 511 (Bankr. E.D.  
10 Pa. 1984); Straight v. Willamette Collection Service, Inc. (In re Straight), 35 B.R. 445 (Bankr. D. Or.  
11 1983); Barnes v. McCarthy (In re Barnes), 29 B.R. 677 (Bankr. W.D. Va. 1983); Button v. Noe (In re  
12 Button), 29 B.R. 118 (Bankr. E.D. Tenn. 1983); In re Fagan, 26 B.R. 212 (Bankr. W.D. Ky. 1982);  
13 Larson v. Olympic Finance Co. (In re Larson), 21 B.R. 264 (Bankr. D. Utah 1982); Cobb v. Household  
14 Finance Corp. (In re Cobb), 17 B.R. 687 (Bankr. E.D. Tenn. 1982); Cox v. General Electric Credit Corp.  
15 (In re Cox), 10 B.R. 268 (Bankr. D. Md. 1981); Mayo v. United Service Auto Association (In re Mayo),  
16 19 B.R. 630 (Bankr. E.D. Va. 1981). For the following reasons, this court joins those that have held that  
17 the date the wages are earned, not the date the garnishment order is served, is determinative for  
18 avoidance purposes.

19 California wage garnishment law, like the Indiana law applied in Coppie, provides that: "[s]ervice  
20 of an earnings withholding order creates a lien upon the earnings of the judgment debtor. . ." The lien  
21 then continues for one year, or until the debtor pays the creditor in full. Cal. Code Civ. Proc. § 706.029  
22 (West 1987). However, any analysis which holds that this statute creates a continuing lien which deprives  
23 the debtor of any right to wages subject to garnishment is faulty for several reasons.

24 A transfer of debtor's wages cannot occur until the debtor has actually acquired rights in the  
25 wages. The debtor acquires rights in the wages when he or she is entitled to be paid. At that point, and  
26 only at that point, a transfer of the debtor's wages occurs. When a garnishment is executed, the creditor  
27 obtains nothing more than a lien on the debtor's right to receive wages if and when services are rendered  
28 and the wages are earned. As one court has explained:

1 [A] writ of garnishment may well be a duly perfected lien on wages yet to be earned such that a  
2 creditor on a simple contract cannot acquire a judicial lien that is superior to the rights of the  
3 judgment creditor . . . . Nonetheless, the avoidance powers under section 547(b) extend to the  
4 avoidance of transfers rather than perfection of liens. Inasmuch as section 547(e)(3) establishes  
5 that a transfer does not occur until the debtor has rights in the collateral, the transfer of wages  
6 garnished pursuant to a writ of garnishment cannot occur until the judgment debtor has earned  
7 the wages garnished. Thus, a payment on the garnishment attributable to wages earned by the  
8 debtor within ninety days of the filing of a bankruptcy petition is a preferential transfer to a  
9 judgment creditor.

6 Cox v. General Electric Credit Corp., 10 B.R. at 271-272.

7 In commenting on the Riddervold decision, another court emphasized that for the purposes of  
8 section 547(e)(3), a transfer is not made until the debtor has acquired rights in the property transferred:

9 [C]ontrary to the reasoning expressed by the Second Circuit in Riddervold, we find that section  
10 547(e)(3) of the Code "requires" us to hold that the portion of the debtor's salary subject to the  
11 wage attachment vests in the debtor-employee when he has performed the services for which he  
12 is entitled to be paid. Until that time, the debtor has not "acquired rights" in his wages.  
13 Consequently, since, as a matter of federal bankruptcy law, the debtor acquired rights in his  
14 wages when he earned them, those wages collected . . . within the preference period are avoidable  
15 under section 547(b) of the Code.

13 Tabita v. Internal Revenue Service, 38 B.R. at 515.

14 A "continuing levy" is a procedural concept, not a substantive right, such as would create a super  
15 priority lien. Once a debt exists, a creditor's lien can attach to it, but without a debt, there is nothing to  
16 which the lien may attach. The fact that the garnishment lien continues and attaches to future earnings  
17 under California law does not dispose of the question whether the debtor has an interest in unearned  
18 wages.

19 This analysis is consistent with the way garnished wages are treated in other contexts. Wages  
20 subject to a garnishment lien are still considered to be the judgment debtor's property for many other  
21 purposes. The wages are taxed to the debtor, Social Security deductions are made from them, and they  
22 are counted in determining the debtor's potential entitlement to benefit programs.

23 **C. Finding a Preference is Consistent With the Fresh Start and Equal**  
24 **Treatment Policies of the Bankruptcy Code**

25 A debtor whose wages have been garnished is entitled to personal exemptions under either state  
26 or federal law. The historical purpose of these federal exemptions has been to protect a debtor from  
27 creditors by providing the debtor with such basic necessities of life that, even if creditors levy on all  
28 nonexempt property, the debtor will not be left "destitute and a public charge." H.R. Rep. No 95-595,

1 95th Cong., 1st Sess. 126 (1977). There are similar policies behind California's personal exemptions.  
2 See In re Norman, 157 B.R. 460 (Bankr. C.D. Cal.). The availability of garnished wages as exempt  
3 property is a significant element in the debtor's "fresh start." Application of section 547(e)(3) to avoid  
4 transfers pursuant to a prepetition garnishment order makes garnished wages available for the debtor's  
5 fresh start.

6 Finally, the purpose of section 547 is to allow all creditors to share in an equal distribution of the  
7 estate. See In re Taylor, 151 B.R. at 778; In re Perry, 48 B.R. at 600. Desert Palace's proposed  
8 interpretation of the preference statute and California garnishment law would make a garnishment lien  
9 a sort of "superlien." If the date of the service of the writ of garnishment is held to be the effective date  
10 for all successive withholding of debtor's wages, a creditor holding a garnishment lien would realize  
11 greater recovery in bankruptcy than other judicial lienholders. Such a result would encourage a "race to  
12 the courthouse" to obtain garnishments and effectuate execution.

13  
14 **CONCLUSION**

15 For the foregoing reasons, the transfer of \$4,201.71 to Desert Palace is avoided. Desert Palace  
16 is ordered to immediately remit the \$4,201.71 withheld postpetition to Subbarao Pinamaneni.

17 IT IS SO ORDERED.  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28