



STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

INDEPENDENT BANK,

Plaintiff,

vs.

Case No. 2014-1908-CK

DEVILLE PLAZA, LLC, BENEDETTO
SORRENTINO REVOCABLE LIVING
TRUST DATED JULY 8, 2005, and
BENEDETTO SORRENTINO,

Defendants.

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OPINION AND ORDER

Defendants Benedetto Sorrentino Revocable Living Trust UTAD July 8, 2005 (“Defendant Trust”) and Benedetto Sorrentino (“Defendant Sorrentino”)(collectively, “Movants”) have filed objections to Plaintiff’s garnishment and motion to compel payment of claim. Plaintiff has filed a response and request’s that the Court deny Movants’ objections.

I. Factual and Procedural History

On July 21, 2014, the Court entered a default judgment against Defendants, in favor of Plaintiff, in the amount of \$130,426.20 and awarding attorney fees of \$9,003.85.

On March 25, 2015, writs of garnishment were entered by the Court (“Writs”). One of the Writs was issued to UBS Financial, Inc. (“UBS”) (“UBS Writ”). In response to the UBS Writ, UBS prepared a garnishee disclosure (“Disclosure”) in which it disclosed two items:

- 1) "Traditional IRA account number IZxx471 held in the name of Benny Sorrentino. This account current balance of \$258,254.03 consisting of cash and securities." ("IRA Account")
- 2) "Joint account number IZxx464 held in the names of Benedetto Sorrentino II and Benny Sorrentino. This account has a current balance of \$8,087.37 consisting of securities." ("Joint Account").

On April 24, 2015, Movants filed their instant objections requesting that the Court determine that the IRA Account is exempt from execution, and that the funds in the Joint Account are not either of Movants' property, and therefore not subject to garnishment in this matter.

On May 6, 2015, Plaintiff filed its response to the instant objections, and requested that the Court deny Movants' objections and enter an order holding that it is entitled to payment from the UBS accounts for the full amount of the indebtedness set forth in the Writs.

On May 11, 2015, the Court held a hearing on connection with Movants' objections and took the matter under advisement.

On May 20, 2015, Movants filed a supplement to their objections.

II. Arguments and Analysis

(1) The IRA Account

In their objections, Movants contend that the IRA Account is fully exempt from garnishment under MCL 600.6023. MCL 600.6023 provides:

Sec. 6023. (1) The following property of a judgment debtor and the judgment debtor's dependents is exempt from levy and sale under an execution:

(j) An individual retirement account or individual retirement annuity as defined in section 408 or 408a of the internal revenue code of 1986, 26 USC 408 and 408a, and the payments or distributions from the account or

annuity. This exemption applies to the operation of the federal bankruptcy code as permitted by section 522(b)(2) of the bankruptcy code, 11 USC 522. This exemption does not apply to any amounts contributed to the individual retirement account or individual retirement annuity if the contribution occurs within 120 days before the debtor files for bankruptcy. This exemption does not apply to an individual retirement account or individual retirement annuity to the extent that any of the following occur:

(i) The individual retirement account or individual retirement annuity is subject to an order of a court pursuant to a judgment of divorce or separate maintenance.

(ii) The individual retirement account or individual retirement annuity is subject to an order of a court concerning child support.

(iii) Contributions to the individual retirement account or premiums on the individual retirement annuity, including the earnings or benefits from those contributions or premiums, exceed, in the tax year made or paid, the deductible amount allowed under section 408 of the internal revenue code of 1986, 26 USC 408. This limitation on contributions does not apply to a rollover of a pension, profit-sharing, stock bonus, or other plan that is qualified under section 401 of the internal revenue code of 1986, 26 USC 401, or an annuity contract under section 403(b) of the internal revenue code of 1986, 26 USC 403.

Movants contend that the IRA Account is properly denominated by UBS as an individual retirement account in the Disclosure, and that the exceptions listed in subsections (i)-(iii) do not apply. In support of their position, Movants rely on an affidavit executed by Defendant Sorrentino in which he testified that there have not been any contributions to the account in years and that no contributions in excess of the deductible amount permitted by the Internal Revenue Code have ever been made. (See Movants' Exhibit B.)

In its response, Plaintiff contends that the IRA Account is not exempt under MCL 600.6023(j) because the amounts that were rolled over into the IRA Account from other accounts do not qualify within the exception set forth in subsection (iii).

The IRA Account balance includes funds, *inter alia*, that moved over from two other accounts. The first is an IRA account previously maintained with Morgan Stanley (“MS IRA”). (See Exhibit A to Movants’ Supplement.) While Plaintiff concedes that IRAs are generally exempted from garnishment under MCL 600.6023(1)(j), it asserts that such funds lose their exempt status if they are rolled over into another IRA.

It appears undisputed that the IRA Account and MS IRA are both traditional IRAs. Plaintiff contends that the MS IRA was rolled into the IRA Account. However, a transfer of funds in a traditional IRA from one account directly to another, either at the account holder’s or trustee’s request, is not a rollover; rather, it is referred to as a “trustee-to-trustee transfer”. See IRS Publication 590-A (2014), *Individual Retirement Arrangements (IRAs)*, <http://www.irs.gov/publications/p590a/>. Further, because there is no distribution to the account holder, the transfer is tax free. *Id.* Accordingly, because the transfer is tax free, the amount of the transfer cannot exceed the tax-deductible contribution limit referenced in the first sentence of MCL 600.6023(1)(j)(iii). Moreover, this interpretation is consistent with MCL 600.6023(1)(j), which exempts 408 plans in general from garnishment. Further, interpreting the statute in the manner Plaintiff advanced would operate to transform accounts that would be exempt if they remained separate into non-exempt accounts merely because the account holder desired to combine the accounts for his convenience. The Court is convinced that such an interpretation is illogical and would lead to obscure results. Consequently, the Court is satisfied that the IRA Account is exempt from Plaintiff’s garnishment efforts.

The second account that was rolled over into the IRA Account was over \$50,000.00 in December 2010 from a Multi-Financial Profit Plan. (See Movants’ Exhibit

F to their supplement.) The documentation for the Multi-Financial Profit Plan identifies the plan as a 403 plan. (Id.) As a 403 plan, the rollover is exempt under section 6023(j)(iii). Consequently, the funds from the rollover of the Multi-Financial Profit Plan are exempt from Plaintiff's garnishment efforts.

Plaintiff also questions whether some of the contributions to the IRA Account exceeded the annual limits. However, Plaintiff has not provided the Court with any evidence that the limits were exceeded. Consequently, the Court denies Plaintiff's position at this time on the basis that it is unsupported.

(2) The Joint Account

It is undisputed that the Joint Account is held jointly by Defendant Sorrentino and his son, Benedetto Sorrentino, II ("Sorrentino II."). Nevertheless, Defendant Sorrentino and Sorrentino II both testified that Defendant Sorrentino is only on the Joint Account as insurance in case something happens to Sorrentino II that would render Sorrentino II unable to manage his finances. (See Movants' Exhibits B and C, affidavits of Defendant Sorrentino and Sorrentino II.)

Defendant Sorrentino and Sorrentino II are presumed to be equal contributors and equal owners and that, under the presumption, a garnishment order regarding Defendant Sorrentino's assets only applies to his half of the Joint Account. See *Dep't of Treasury v Comerica Bank*, 201 Mich App 318, 328; 506 NW2d 283 (1993), citing *Sussex v Snyder*, 307 Mich 30, 38; 11 NW2d 314 (1943). However, the presumption may be rebutted by either co-owner. *Danielson v Lazoski*, 209 Mich App 623, 629; 531 NW2d 799 (1995).

In this case, Movants assert that Defendant Sorrentino gifted the funds within the Joint Account to Sorrentino II, and that as such Sorrentino II owns all of the funds within the Joint Account. "It may be stated generally that the three elements necessary to constitute a valid gift are these: (1) that the donor must possess the intent to pass gratuitously title to the donee; (2) that actual or constructive delivery be made; and (3) that the donee accept the gift." *In re Rudell Estate*, 286 Mich App 391, 404; 780 NW2d 884 (2009), quoting *Osius v Dingell*, 375 Mich 605, 134 NW2d 657 (1965).

In support of their position, Movants rely on two affidavits: one affidavit executed by Defendant Sorrentino (See Movants' Exhibit B), and one executed by Sorrentino II. (See Affidavit filed on April 30, 2015) In addition, Movants also rely on Form 1099s for 2009-2014 reporting income to Sorrentino II. (See Exhibit H to Movants' Supplement.)

Sorrentino II testified in his affidavit that in 1995 Defendant Sorrentino gave him and his brothers each money in the form of separate bank accounts. (See April 30, 2015 Affidavit, at ¶3.) Sorrentino II also testified that he and Defendant Sorrentino agreed to keep Defendant Sorrentino's name on the account so that he could access the account if something happened to Sorrentino II. (Id.)

In his affidavit, Defendant Sorrentino testified that in 1995 he deposited funds into accounts with Morgan Stanley for each of his sons, and that each accounts were in his name, as well as one of his sons' names. (See Movants' Exhibit B.) Defendant Sorrentino also testified that Sorrentino II his only son that has not withdrawn the funds originally placed in the accounts. (Id.) Further, Defendant Sorrentino testified that he has not deposited or withdrawn any funds into the Joint Account since 1995, that Sorrentino II transferred the Joint Account to UBS, and that he was not aware that his

name was still on the account. (Id.) Finally, Defendant Sorrentino testified that he has not exercised any control over the Joint Account and that Sorrentino II has had the authority to do whatever he wants with the funds. (Id.)

Lastly, while Movants' have attached form 1099s for Sorrentino II from 2009 to 2014 that report that Sorrentino II had taxable income in those years, the forms do not establish that Defendant Sorrentino was not also receiving taxable income from the Joint Account, and do not evidence that the funds solely belonged to Sorrentino II.

After reviewing the evidence Movants have presented, the Court is convinced that an evidentiary hearing is needed with respect to the ownership of the Joint Account, and as to whether Defendant Sorrentino has gifted the funds within the Joint Account to Sorrentino II. While Movants have provided evidence as to Defendant Sorrentino's intent when he formed the Joint Account, the Court is satisfied that Plaintiff should be given an opportunity to examine Defendant Sorrentino and/or Sorrentino II in order to assist the Court in determining whether the funds within the Joint Account should be subject to Plaintiff's garnishment efforts.

III. Conclusion

Based upon the reasons set forth above, Defendants Benedetto Sorrentino Revocable Living Trust UTAD July 8, 2005 and Benedetto Sorrentino's objections to Plaintiff's garnishment are UPHeld with respect to the "Traditional IRA account number IZxx471 held in the name of Benny Sorrentino" as that account is exempt from execution under MCL 600.6023(1)(j).

In addition, the portion of Movants' motion addressing whether the "Joint account number IZxx464 held in the names of Benedetto Sorrentino II and Benny Sorrentino" is

subject to Plaintiff's garnishment efforts will be addressed at an evidentiary hearing hereby set for: September 14, 2015 at 1:30 pm. At the hearing, the parties will be given an opportunity to present testimony and other evidence regarding whether the Joint Account should be subjected to Plaintiff's garnishment efforts. In compliance with MCR 2.602(A)(3), the Court states this matter remains CLOSED.

IT IS SO ORDERED.

Date: JUL 08 2015

Kathryn A. Viviano
Hon. Kathryn A. Viviano, Circuit Court Judge