

STATE OF WISCONSIN

CIRCUIT COURT

DANE COUNTY

LEONARD POZNER,

Plaintiff,

vs.

Case No. 18CV3122

JAMES FETZER, Ph.D. et al.,

Defendant.

PLAINTIFF'S REPLY IN SUPPORT OF HIS MOTION TO DISBURSE FUNDS

Plaintiff, Leonard Pozner ("Plaintiff"), by his attorneys, Quarles & Brady LLP, hereby files this reply in support of his motion to disburse funds, following Defendant Dr. James Fetzer's Request to Take Judicial Notice of certain portions of his opening brief that he filed with the Wisconsin Court of Appeals District IV (Case No. 2023AP1002) on July 24, 2023 as his response. In reply, Plaintiff states:

Brief Background

1. On December 15, 2022, Plaintiff filed the present Non-Earnings Summons and Complaint ("Complaint") against the Defendant James Fetzer, Ph.D. (the "Debtor"), and Garnishee Defendants, State Bank of Cross Plains, Summit Credit Union, and UW Credit Union.
2. On December 21, 2022, Summit Credit Union filed an answer stating it had control or possession of \$46.06 of the Debtor's assets. (Doc. No. 543 at 1).
3. On December 27, 2022, State Bank of Cross Plains filed an answer stating it had control or possession of \$2,437.60 of the Debtor's assets (the "SBCP Account"). (Doc. No. 546 at 1).

4. On December 30, 2022, UW Credit Union filed an answer stating it had control or possession of \$11,305.72 of the Debtor's assets (the "UW Account"), but such amounts were subject to an exemption. (Doc. No. 550 at 1).

5. On January 3, 2023, the Debtor filed an answer claiming a \$5,000 deposit account exemption under Wis. Stat. § 815.18(3)(k) and represented "the UWCU accounts are for Social Security and Retirement Account payouts and therefore exempt." (Doc. No. 549 at 1). Fetzer did not cite any statutory provision or case law for these exemptions. *Id.*

6. On January 18, 2023, the Plaintiff filed an Objection to the above answers and requested a hearing on the matter. (Doc. No. 558 at ¶ 2).

7. On March 17, 2023, the Court held a hearing on whether any funds in the UW Account were non-exempt. *Id.* at ¶ 3.

8. At the March 17, 2023, hearing the Debtor's spouse, Janice Fetzer, testified that both she and Fetzer deposited certain non-exempt funds into the Debtor's UW Account. *Id.* at ¶ 4.

9. After argument from both parties, the Court ordered the Debtor to provide the Plaintiff with copies of the UW Account bank statements for the last 12 months. *Id.* at ¶ 5.

10. Following the March 17, 2023, hearing Ms. Fetzer provided Plaintiff's counsel with 12 months of bank statements of the UW Account together with an itemized list of non-exempt deposits. (Affidavit of Randy J. Pflum ("Pflum Aff.") at ¶ 4, Ex. A).

11. After reviewing the UW Account statements, Plaintiff filed a Motion to Disburse Funds on April 25, 2023, arguing the following amounts, taken from Ms. Fetzer's itemized list, are subject to the garnishment action less the \$5,000 exemption:

Deposit Date	Deposit Account	Amount
3/3/2022	UW Account (Deposit)	\$549.59
3/21/2022	UW Account (Deposit from Daughter)	\$65.32
3/30/2022	UW Account (WI Tax Return)	\$1,486.00

4/6/2022	UW Account (Fed. Tax Return)	\$521.00
5/6/2022	UW Account (the Debtor's reimbursement for lawsuit)	\$391.05
6/15/2022	UW Account (Deposit from Daughter)	\$159.00
8/8/2022	UW Account (Deposit from Daughter)	\$153.88
9/2/2022	UW Account (Deposit from the Debtor for Fed Ex)	\$94.96
9/23/2022	UW Account (Deposit)	\$100.00
12/1/2022	UW Account (Deposit from the Debtor for Fed Ex)	\$1,000.00
12/21/2022	Summit Credit Union Answer	\$46.06
12/27/2022	SBCP Answer	\$2,437.60
	Claimed Exemption Wis. Stat. § 815.18(3)(k)	-\$5,000.00
	Amount Subject to Garnishment	\$2,004.46

Id. at. ¶ 6. By relying on Ms. Fetzer's list of non-Social Security and pension depositions, Plaintiff made sure his request did not include exempt retirement benefits.

12. The above amount is hereinafter referred to as the "Disputed Amount."

13. On May 1, 2023, the Court granted Plaintiff's Motion to Disburse and Fetzer appealed.

14. On February 8, 2024, the Court of Appeals agreed with Fetzer's arguments that he was entitled to a hearing on the April 25, 2023, Motion to Disburse, and remanded the case back to the Court.

15. On April 25, 2024, Fetzer filed a request for the Court to take judicial notice of certain portions of his opening brief that he filed with the Wisconsin Court of Appeals District IV (Case No. 2023AP1002) on July 24, 2023 (the "Objection").

16. In the Objection, Fetzer reviews each of the above depositions, and, without citing any specific statutory exemption under Wis. Stat. § 815.18 (or otherwise), he concludes that these depositions are subject to a variety of unidentified exemptions. Fetzer argues that Plaintiff cannot garnish deposits from (1) a USAA bonus; (2) a refund for dental surgery; (3) various reimbursements from family; (4) legal defense fund "donations"; (5) reimbursements for "legal expenses"; and (6) payment by the Internal Revenue Service for income tax refunds.

ARGUMENT

The Court should grant the Plaintiff's Motion to Disburse Funds for two reasons (1) the Plaintiff established that the Disputed Amount is subject to garnishment; and (2) Fetzer has failed to show that the Disputed Amount is subject to one or more exemptions under section 815.18 of the Wisconsin Statutes.

I. Plaintiff has made a prima facie showing that he is entitled to the above non-exempt funds.

Non-earnings garnishments are a statutory remedy available to creditors "against any person who is indebted to or has any property in his or her possession or under his or her control belonging to such creditor's debtor." Wis. Stat. § 812.01(1). In a garnishment action, the plaintiff has the burden to establish the essential facts entitling the plaintiff to recovery. *See Maxey v. Peavy Publ'g Co.*, 178 Wis. 401, 405, 190 N.W. 84 (1922). Once the plaintiff establishes that a disputed amount is non-exempt and subject to garnishment, the burden then shifts to the defendant. *See Reinke v. Personnel Bd.*, 53 Wis. 2d 123, 133, 191 N.W.2d 833 (1971); *see also Capital One Bank v. Gabriel*, 2014 WL12669784, *2 (Wis. App. Ct. July 9, 2014) (unpublished)¹.

Here, Plaintiff commenced a non-earnings garnishment proceeding against Fetzer to collect on a money judgment he obtained on December 12, 2019. Plaintiff also named SBCP, Summit, and UW Credit Union as garnishee defendants. After receiving answers from Fetzer, SBCP, Summit, and UW Credit as well as Fetzer's bank records from Janice Fetzer, Plaintiff identified the following amounts as subject to garnishment:

- The ten (10) deposits totaling \$4,520.80 in the UW Account;
- The entire \$2,437.00 held in the SBCP Account; and

¹ Plaintiff cites *Capital One Bank v. Gabriel*, 2014 WL12669784 (Wis. App. Ct. July 9, 2014) under Wis. Stat. § 809.23(3)(b) for its persuasive value only.

- The entire \$46.06 held in the Summit Credit Union Account.

(Doc. No. 590 at 8).

The above amounts are based on the answers on file as well as Janice Fetzer's own review of her and Fetzer's UW Account where she specifically identified ten (10) deposits that were not associated with Fetzer's pension or social security benefits. Thus, Plaintiff has met his burden that the Disputed Amount is subject to garnishment. The burden then shifts to Fetzer to establish certain exemptions apply to the Disputed Amount.

II. The Disputed Amount is not exempt under Wisconsin law.

In his Answer, Fetzer claimed a \$5,000 exemption in his deposit accounts together with asserted claims of exemptions in his UW Account(s) for any retirement and/or social security distributions. Under Wis. Stat. §§ 815.18(3)(k) Fetzer is entitled to an *aggregate* \$5,000 deposit account exemption, as well as an exemption for any retirement distributions and social security distributions. *See* Wis. Stat. §§ 815.18(3)(ds) and (j) and 42 U.S.C. § 407(a) (protecting Social Security Benefits).

However, by Janice Fetzer's own summary of Fetzer's bank records, the ten (10) deposits into the UW Account were not deposits associated with Fetzer's retirement distributions nor his social security distributions. The origin of these deposits was unrelated to Fetzer's retirement or social security distributions. In such instances, under Wis. Stat. 815.18(4), the ten deposits are not traceable to an exemption under Wis. Stat. § 815.18(3)(j) thereby making such deposits not exempt property in the form of a cash reimbursement. *See Gabriel*, 2014 WL12669784, *2 (Wis. App. Ct. July 9, 2014) (unpublished)². In other words, the ten deposits totaling \$4,520.80 in the UW Account represent a cash deposit that was no longer traceable to an exempt source such as Fetzer's

² Plaintiff cites *Capital One Bank v. Gabriel*, 2014 WL12669784 (Wis. App. Ct. July 9, 2014) under Wis. Stat. § 809.23(3)(b) for its persuasive value only.

retirement account or social security benefits. Accordingly, these deposits are subject to garnishment. *See id.* and Wis. Stat. § 815.18(4).

However, Fetzer argues the ten deposits in the UW Account are exempt. Citing no specific reference to the list of exemptions under Wis. Stat. 815.18(3) (or otherwise), he wrongly concludes the following deposits are exempt:

1. The March 3, 2022 deposit in the amount of \$549.59 is exempt based on a USAA senior bonus, a refund for dental surgery, and a “reimbursement for Dr. Fetzer’s lawsuit expenses”;
2. The March 21, 2022 deposit was a reimbursement from family and therefore exempt;
3. The March 30, 2022 and April 6, 2022 deposits are for income tax returns and therefore exempt;
4. The May 6, 2022 deposit of \$391.05 is a reimbursement for lawsuit expenses;
5. The June 15, 2022 deposit of \$159.00 was a reimbursement from family;
6. The August 8, 2022 deposit of \$153.88 was a reimbursement from family;
7. The September 2, 2022 deposit of \$94.96 was a reimbursement for Fetzer’s lawsuit expenses;
8. The September 23, 2022 deposit of \$100 was a gift from family;
9. The December 1, 2022 deposit of \$1,000 was a reimbursement for “the use of the UWCU credit card to pay for lawsuit expenses[.]”;
10. The \$2,437 in the SBCP Account represents Fetzer’s legal defense fund, which is derived from public gifts.

(Doc. No. 590 at 8-12.)

The Wisconsin “legislature has determined that certain property, in reasonable amounts, should be exempt from seizure or sale for the benefit of creditors.” *See* 12 Wis. Prac., Wis. Collection Law § 15:3 (2d ed.). If the legislature did not identify a type of property as exempt, the property is not exempt. *Id.* Further, “A debtor shall affirmatively claim an exemption or select specific property in which to claim an exemption.” *See* Wis. Stat. 815.18(6).

Reviewing the above deposits, Fetzer does not and cannot cite a single exemption under Wis. Stat. § 815.18(3) (or any other statutory exempt) for any of them. None of the deposits originate from Fetzer’s retirement benefits or his social security benefits, or some other exempt source. As such, these deposits are not protected by an exemption under Wis. Stat. § 815.18 or otherwise. Taking these asserted exemptions one-by-one:

1. Fetzer argues that his legal defense fund and reimbursements (totaling \$4,103.61) are exempt because the people who donated the monies did so with the intent to donate to his legal defense. The Court of Appeals noted that this argument, “appears to have no merit.” (Doc. No. 538 at ¶ 25). Even though the Court of Appeals did not definitely rule on this issue, Wisconsin law does not protect donations made for a litigant’s defense. Again, the only exemption that *may* apply is the \$5,000 deposit account exemption under Wis. Stat. § 815.18(3)(k).

2. Similarly, there is no specific Wisconsin exemption for Fetzer’s \$253.59 “USAA Senior Bonus” nor his \$116.00 refund for dental surgery. Once again, Fetzer cites no law that would render either of these deposits as exempt. Further, he fails to provide any explanation of bonus and whether or not it is in any way related to his retirement or his social security distributions. Likewise, a refund for an overpayment on a medical procedure also lacks any statutory basis for an exemption. Again, the only exemption that *may* apply is the \$5,000 deposit account exemption under Wis. Stat. § 815.18(3)(k), which Plaintiff already accounted for.

3. Next, Fetzer claims monies received from his family (totaling \$478.20) are also exempt. Fetzer claims that “reimbursements of exempt funds remain exempt.” (Doc. 590 at 9 ¶ 2). But, he never explains how these reimbursements were for exempt funds. Ms. Fetzer identified these reimbursements as being for Costco purchases. Pflum Aff. at ¶ 4, Ex. A; *see also* (Doc. No. 562, March 17, 2023, Hrg. Tr. at 11:6-22). And, he misunderstands how tracing works under Wis. Stat. § 815.18(4). That section provides “[p]roperty traceable to property that would be exempt under this section in the form of cash proceeds or otherwise is not exempt unless expressly provided for in this section.” In other words, Fetzer cannot claim an exemption for cash proceeds made from exempt property unless another exemption under Wis. Stat. § 815.18(3) applies. *See id.* He does not identify another exemption.

As Ms. Fetzer testified, their daughter provided these deposits. (Doc. No. 562, March 17, 2023, Hrg. Tr. at 11:6-22). As such, he has no basis for claiming they are related to his retirement or social security distributions. He cannot claim these reimbursements are traceable to an exemption under Wis. Stat. § 815.18(3). Deposits for a reimbursement from exempt property are not exempt funds in the form of a cash reimbursement. *See Gabriel*, 2014 WL12669784, *2 (Wis. App. Ct. July 9, 2014) (unpublished).

4. Lastly, citing no specific statute or other law that exempts tax refund deposits, Fetzer claims one-half of the Wisconsin and IRS tax refunds are marital property and thus exempt. While Fetzer is right that the tax refunds are marital property, he misses the point. By depositing these funds into an account with thousands of dollars of deposits from non-exempt funds, including \$1,606.01 in deposits (between February 28, 2022 thru December 2022) from a “legal defense fund,” he has co-mingled them in a way that makes it impossible to identify any given amount as marital property. Further, Fetzer’s “legal defense fund” are merely gifts to him. In general, gifted

property to an individual is not marital property. *See Steinmann v. Steinmann*, 2008 WI 43, ¶ 38, 309 Wis. 2d 29, 55, 749 N.W.2d 145, 157. Thus, after applying the \$5,000 exemption across *all* of Fetzer's deposit accounts, including his legal defense fund account, there remained \$2,004.46 not subject to any other exemption under Wisconsin law.

Conclusion

Based on the foregoing, the Plaintiff respectfully requests that the Court overrule Fetzer's objection and grant Plaintiff's Motion to Disburse Funds in the amount of \$2,004.46.

Dated May 13, 2024

Quarles & Brady LLP

Electronically signed by Randy J. Pflum

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