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IT IS SO ORDERED.

Dated: October 25, 2024




Mina Nami Khorrami
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:

Jean E. Little,
Debtor.

Case No. 24-52397

Chapter 13

Judge Nami Khorrami

ORDER ON MOTION FOR RELIEF FROM AUTOMATIC STAY
REGARDING A TAX OVERPAYMENT SETOFF (DOC. #12)

Before the Court is *Motion for Relief from Automatic Stay Regarding a Tax Overpayment Setoff* (Doc. #12) (the “Motion”) filed by the United States of America on behalf of the United States Army and Air Force Exchange Service (“USA”) on July 25, 2024, the *Memorandum Contra to Motion for Relief from Stay* (Doc. #24) filed by Jean E. Little (the “Debtor”) on September 6, 2024, the *Stipulation of Facts for Hearing* (Doc. 25) on *Motion for Relief from Automatic Stay* (Doc. 12) (Doc. #30) (the “Stipulations”) filed on September 19, 2024.

On September 24, 2024, the Court held a preliminary hearing (the “Hearing”) to consider the Motion at which Joseph McCandlish appeared on behalf of USA and Athena Inembolidis

appeared on behalf of the Debtor. At the Hearing, the Debtor and USA (collectively the “Parties”) agreed that a final hearing on the Motion was not necessary and that the Court could make a determination based on the Stipulations. Based on the representations at the Hearing, the Court allowed the Parties additional time to file supplemental briefs in support of their positions. Accordingly, the Debtor filed her *Amended Memorandum Contra to Motion for Relief from Stay* (Doc. #36), and USA filed *USA’s Response to Debtor’s Amended Memo Contra Relief from Stay* (Doc. #37).

Having considered the record and for the reasons stated below, the Court concludes that it is unable to render a decision at this time due to insufficient evidence and legal argument.

I. Jurisdiction

This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334 and the Amended General Order 05-02 entered by the United States District Court for the Southern District of Ohio, referring all bankruptcy matters to this Court. A motion for relief from the automatic stay under 11 U.S.C. § 362 is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(G) and (O) and 28 U.S.C. §1334(b). Venue properly lies in this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

II. Findings of Facts and Procedural Background

The Debtor filed a voluntary petition for relief under Chapter 13 of the Bankruptcy Code on June 19, 2024. The Debtor claimed a total of \$1,103 in exemptions for an anticipated 2023 federal tax refund in the amount of \$8,818. No objections were filed in response to the Debtor’s claimed exemptions. The Stipulations filed by the Parties provide as follows:

The debt in the amount of \$2,853.03 was placed with Treasury April 18, 2024. \$54.94 in finance charges posted to the account on May 16, 2024. \$56.76 posted on June 16, 2024. The offset fee was \$24.28, bringing the total amount requested in Movant’s relief from / annulment of stay to \$2,989.01. The Debtor filed for relief on June 19, 2024. The Movant received the funds on June 26, 2024.

The offset was from Debtor's 2023 Tax refund, in the amount of \$8,818.

III. Positions of the Parties

USA contends that cause exists to annul and terminate the automatic stay because it has a right of setoff under 11 U.S.C. 553(a) and does not fall within any of the three exceptions provided in § 553(a)(1)-(3). USA further argues that the portion of the Debtor's 2023 tax refund (the "Refund") that is subject to its right of setoff was not property of the bankruptcy estate, and as such, the Debtor only has an interest in the Refund that remains after the USA applies the setoff. USA also asserts that its right to setoff supplants the Debtor's claimed exemption in the Refund and suggests that an income tax overpayment is not exemptible against the government's setoff right.

In contrast, the Debtor maintains that even if USA can show that it is entitled to setoff, it cannot establish the elements necessary to be granted relief from the automatic stay because the Debtor has equity in the Refund.

IV. Legal Analysis

The filing of a voluntary petition under the Bankruptcy Code imposes an automatic stay that prohibits all entities from continuing essentially all activities in furtherance of collecting a debt from the debtor. *See* 11 U.S.C. § 362(a). The court, upon request of a party in interest, may terminate, modify, annul, or condition the automatic stay pursuant to 11 U.S.C. § 362(d) upon a showing of cause. 11 U.S.C. § 362(d)(1). Section 362(d) provides as follows:

- (d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—
 - (1) for cause, including the lack of adequate protection of an interest in property of such party in interest;
 - (2) with respect to a stay of an act against property under subsection (a) of this section, if—
 - (A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization[.]

11 U.S.C. § 362(d). The party requesting relief from the automatic stay has the initial burden to show that cause exists. *In re Spencer*, 568 B.R. 278, 280 (Bankr. W.D. Mich. 2017) (“In a contested stay relief motion, the initial showing that a moving party must make under § 362(g) has been described as a ‘prima facie case,’ which is to say, an evidentiary showing.”) (citation omitted). If the party requesting relief from the automatic stay establishes cause, the burden then shifts to the respondent who has the burden of proof on all other issues except “the debtor’s equity in property.” 11 U.S.C. § 362(g); *see also Spencer*, 568 B.R. at 280.

The automatic stay applies to an attempt to setoff “any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor[.]” 11 U.S.C. § 362(a)(7). Section 553(a) of the Bankruptcy Code governs the rights of a creditor to offset mutual obligations that existed between it and the debtor prior to the bankruptcy case being filed. “Section 553(a) . . . sets forth a general rule, with certain exceptions, that any right of setoff that a creditor possessed prior to the debtor’s filing for bankruptcy is not affected by the Bankruptcy Code.” *Citizens Bank v. Strumpf*, 516 U.S. 16, 20, 116 S. Ct. 286, 133 L. Ed. 2d 258 (1995). “To establish a valid right of setoff in bankruptcy, the creditor must establish four conditions: (1) the creditor’s claim must arise before the commencement of the case; (2) the creditor must have a debt to the debtor that arose before the commencement of the case; (3) the claim and debt must be mutual; and (4) the claim must be valid and enforceable.” *U.S. Dep’t of Agric. Rural Hous. Serv. v. Riley*, 485 B.R. 361, 364-365 (W.D. Ky. 2012) (citations omitted). The Bankruptcy Code does not create a right of setoff, but instead simply preserves the right that already existed pre-petition under applicable nonbankruptcy law. *See French v. Bank One, Lima N.A. (In re Rehab Project, Inc.)*, 238 B.R. 363, 373 (Bankr. N.D. Ohio 1999) (citation omitted). The Parties have not

established the elements outlined in *Riley* with any admissible evidence such as an affidavit or stipulation.

USA argues, among other things, that the portion of the Debtor's tax refund that was subject to setoff never became property of the estate.

Upon the filing of a petition in bankruptcy an estate is created which consists of all the debtor's legal and equitable interests in property wherever located and by whomever held. 11 U.S.C. 541(a). When a petition is filed under Chapter 13, the estate is also comprised of all property which the debtor may acquire after the commencement of the case but before the closing, dismissal or conversion of the case. 11 U.S.C. 1306(a).

In re Homan, 116 B.R. 595, 599 (Bankr. S.D. 1990). A debtor may claim certain property exempt from the bankruptcy estate under 11 U.S.C. § 522(b). *Holland v. Star Bank, N.A. (In re Holland)*, 151 F.3d 547, 548 (6th Cir. 1998). Property claimed exempt under § 522 is “withdrawn from the estate (and hence from the creditors) for the benefit of the debtor.” *Owen v. Owen*, 500 U.S. 305, 308, 111 S. Ct. 1833, 114 L. Ed. 2d 350 (1991). Courts are divided on the issue of whether an overpayment of taxes constitutes property of the estate in which a debtor may claim an exemption. *See In re Scales*, 477 B.R. 679, 684 (Bankr. N.D. 2012) (“[T]he debtor's interest in a refund does not necessarily extend to the full value of any overpayment of taxes in a given tax year.”); *see also In re Baucom*, 339 B.R. 504, 507 (“In essence, the debtor only has a right to the refund after the government has credited the refund to other underpaid taxes. The part of the refund subject to offset, therefore, never became property of the estate.”). *But see Sexton v. Dep't of Treasury, IRS (In re Sexton)*, 508 B.R. 646, 664 (Bankr. W.D. Va. 2014) (“Under bankruptcy law, any property interest not expressly excluded becomes property of the bankruptcy estate—including a debtor's tax overpayment.”).

USA further argues that its right to setoff is superior to the Debtor's right to a claimed exemption in her tax refund. Bankruptcy courts are split on the issue of whether the right of setoff

takes priority over the protections found in § 522(c) which provides that, subject to certain exceptions not relevant here, exempt property “is not liable during . . . the case for any debt of the debtor that arose . . . before the commencement of the case.” 11 U.S.C. § 522(c). See *Wood v. U.S. Dep’t of Hous. & Urban Dev. (In re Wood)*, 993 F.3d 245, 251 (4th Cir. 2021) (“[T]he Treasury’s authority to exercise its right to offset the [debtors’] tax overpayment . . . supersedes the general exemption protections of § 522(c). As against the government’s right to setoff, the [debtors’] income tax overpayment is not exemptible. The [debtors] have no right to demand turnover of the overpayment.”). But see *Addison v. U.S. Dep’t of Agric. (In re Addison)*, 533 B.R. 520, 531 (Bankr. W.D. Va. 2015) (“Debtor’s properly claimed exemption in [his tax overpayment] trumps the USDA’s setoff rights preserved under Section 553.”).

Having considered the record, the Court finds that it lacks sufficient evidence for the Court to be able to decide the issues presented in this case summarily and without the benefit of a final evidentiary hearing. In addition, the lack of legal argument and/or the failure to fully develop legal argument in support of the parties’ positions or to counter the other party’s position is also impeding the Court’s ability to make a ruling on the Motion as a matter of law.

Specifically, USA contends that it is entitled to setoff, but the record contains no evidence of that nor did the Parties stipulate to that effect. The Stipulations merely recite that a “debt in the amount of \$2,853.03 was placed with the Treasury¹” pre-petition. The Motion discusses how the Debtor incurred the debt to USA, but those allegations are not supported by any admissible evidence such as an affidavit or stipulation by the Parties. There is no evidence in the record as to when the debt incurred by the Debtor became delinquent and what impact that has on USA’s right

¹ The Court notes that the Parties used a capitalized term in the Stipulations without providing a definition for same. The Court cannot make assumptions regarding material facts in this case no matter how apparent they may be. The Parties have an obligation to develop the record sufficiently for the Court if they wish to proceed on their briefs and without a final hearing.

to setoff. A copy of the Exchange Credit Program Agreement is attached to the Motion, however, it has not been properly authenticated by affidavit or stipulation. There is no evidence in the record that the setoff involves a mutual debt, that the mutual debts arose pre-petition or that none of the exceptions listed in § 553(a) apply in this case. The Motion contains a number of factual allegations and conclusory statements addressing the statutory requirements of § 553(a), but those allegations and statements are not evidence. In addition, the Debtor does not expressly concede that USA is entitled to setoff under § 553(a) nor does she assert any arguments contra to USA having a right to setoff. Nonetheless, the Court will not assume that the Debtor's silence on the issue equates to a concession on that legal point. Thus, the Parties need to stipulate to facts or otherwise provide admissible evidence sufficient for the Court to make a determination regarding whether USA is entitled to a right of setoff and set forth a fully developed legal argument in support of each party's position regarding same.

With respect to the request for relief from the automatic stay, USA has the initial burden to establish cause under § 362. USA alleges that its right to setoff satisfies this burden of showing cause. The Parties have not stipulated that cause is not contested in this case, nor has the Debtor set forth any legal argument to the contrary. Again, the Court is not willing to assume that the Debtor's silence equates to a concession on this point either. In addition, USA, who has the burden to show that the Debtor lacks equity in the Refund, fails to provide any evidence supported by affidavit or stipulation on this point or provide any legal argument in support of its assertion that the Debtor lacks equity in the Refund. Similarly, the Debtor fails to provide any evidence supported by affidavit or stipulation regarding the Refund being necessary to an effective reorganization or provide any legal argument regarding same.

And finally, USA argues that the Debtor's income tax overpayment that is subject to setoff is not part of the Debtor's bankruptcy estate, however, the Debtor fails to set forth any legal argument to the contrary. USA further contends that its right of setoff supersedes the Debtor's exemption in the income tax overpayment, but again, the Debtor fails to set forth any legal argument to counter that.

Based on the foregoing, the Court is not able to make a determination as a matter of law whether USA is entitled to relief from the automatic stay.

Therefore, **IT IS ORDERED** that no later than 30 days from the date of entry of this Order, the Parties shall either file (1) amended stipulations and briefs in support of their positions or (2) a request for a final evidentiary hearing on the Motion. It is further,

ORDERED that the stay imposed by 11 U.S.C. § 362(a) is hereby continued in effect until a hearing is held or the Court orders otherwise.

IT IS SO ORDERED.

Service List:

Default List