



**UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION**

In re

**MAYRA ELIZABETH MONTELLANO
and JORGE FRANCISCO VAZQUEZ,**

Debtors.

Case No. 2:15-bk-11049-RK

Chapter 7

**ORDER DENYING WITHOUT
PREJUDICE DEBTOR MAYRA
MONTELLANO'S MOTION TO
RECOVER WAGES GARNISHED
PREPETITION**

Date: June 23, 2015
Time: 2:30 p.m.
Place: Courtroom 1675
255 East Temple Street
Los Angeles, CA 90012

Pending before the court is debtor Mayra Montellano's Motion Pursuant to 11 U.S.C. § 522(h) to Recover Wages Garnished Prepetition ("Motion"). ECF 31. Having considered the moving papers, the court determines that oral argument and hearing are not necessary to rule on the motion, dispenses with oral argument and hearing, takes the motion under submission, vacates the hearing on the Motion set for June 23, 2015 at 2:30 p.m. and rules as follows.

Through the Motion, debtor Mayra Montellano ("debtor") seeks to avoid and recover a prepetition involuntary transfer of her wages garnished prepetition through the bankruptcy trustee's avoidance powers under 11 U.S.C. § 547(b), granted to the debtor

1 pursuant to 11 U.S.C. § 522(h). Under Federal Rule of Bankruptcy Procedure 7001(1),
2 this would be “a proceeding to recover money or property” which is required to be
3 brought in an adversary proceeding. See 10 Resnick and Sommer, *Collier on*
4 *Bankruptcy*, ¶ 7001.02 at 7001-4 – 7001-8 (16th ed. 2015) (“Proceedings within Rule
5 7001(1) include actions by trustees or debtors . . . to recover property that was the
6 subject of avoided preferences under section 547 [of the Bankruptcy Code, 11 U.S.C.]
7 . . .”).

8 Thus, it appears that debtor impermissibly seeks relief by motion when that relief
9 requires an adversary proceeding under Rule 7001, as shown by the controlling case law
10 in this circuit. *In re Commerical Western Finance Corp.*, 761 F.2d 1329, 1336-1338 (9th
11 Cir. 1985); accord, *In re Golden Plan of California, Inc.*, 829 F.2d 705, 711-712 (9th Cir.
12 1987); see also, 4 March, Ahart and Shapiro, *California Practice Guide: Bankruptcy*, ¶
13 21:1530 at 21-173 (2014) (“In exercising the trustee’s avoidance powers, the debtor must
14 file an adversary proceeding. . .”), citing, Fed. R. Bankr. P. 7001(1). To the extent that
15 debtor seeks to proceed by motion by way of the court’s equitable powers under 11
16 U.S.C. §105, the court observes that it cannot disregard the express command of Federal
17 Rule of Bankruptcy Procedure 7001 in light of the well-established and controlling case
18 law of the circuit in *Commercial Western Finance Corp.* and *Golden Plan of California*.
19 See also, *Law v. Siegel*, 134 S.Ct. 1188, 1194 (2014) (the bankruptcy court lacks
20 authority to grant relief under 11 U.S.C. §105 when the Bankruptcy Code specifically
21 provides otherwise); see also, 10 Resnick and Sommer, *Collier on Bankruptcy*, ¶ 7001.01
22 at 7001-4 (“Failure to commence an adversary proceeding when seeking the relief of the
23 kind listed in Rule 7001 has resulted in denial of the motion or dismissal of the
24 proceeding.”) (footnote and citations omitted). Although the court must deny the motion
25 as procedurally defective in light of these authorities, such denial is without prejudice, and
26 debtor may properly seek relief by instituting an adversary proceeding pursuant to Rule
27 7001.

1 For the reasons stated above, IT IS HEREBY ORDERED that:

2 1) The MOTION is DENIED without prejudice.

3 2) The hearing on the Motion, currently set for June 23, 2015 at 2:30 p.m., is
4 vacated and taken off calendar. No appearances are required.

5 IT IS SO ORDERED

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23 Date: June 19, 2015



24 Robert Kwan
25 United States Bankruptcy Judge
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