

FOR PUBLICATION

FILED & ENTERED

OCT 28 2015

CLERK U.S. BANKRUPTCY COURT
Central District of California
BY jeanmari DEPUTY CLERK

**UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
RIVERSIDE DIVISION**

In re

Lamar Jermain Byrd and
Latrice Dalaine Byrd,

Debtors.

Case No. 6:12-bk-35754-SY

Chapter 7

Lisa Noak and
Equity Trust Company dba Sterling
Trust Custodian FBO Lisa G. Noak IRA,

Plaintiffs,

v.

Lamar Jermain Byrd and
Latrice Dalaine Byrd,

Defendants.

Adv. No. 6:13-ap-01078-SY

**MEMORANDUM DECISION ON
PLAINTIFF LISA NOAK'S MOTION
FOR DEFAULT JUDGMENT
UNDER LBR 7055-1**

Before the court is a motion by plaintiff Lisa Noak ("Noak")¹ requesting entry of a default judgment against defendants Lamar and Latrice Byrd (collectively, the "Debtors") on her three claims for relief under 11 U.S.C. §§ 523(a)(2)(A), 727(a)(4)(A),

¹ Due to a potential standing issue, Equity Trust Company dba Sterling Trust Custodian FBO Lisa G. Noak IRA ("Equity Trust") was joined as a plaintiff in the adversary proceeding. Equity Trust, however, has not formally joined in the present motion.

1 and 727(a)(5).² For Noak to succeed in this adversary proceeding on any of her three
2 claims, she must first establish that the contract between her and Lamar Byrd is an
3 enforceable claim. Because the court concludes that their contract is void for violating
4 the statutory prohibition against the assignment of military pensions, Noak's motion
5 for default judgment must be denied and this adversary proceeding dismissed.

6 1. FACTUAL BACKGROUND.

7 Lamar Byrd ("Lamar") was an enlisted member in the armed services but has
8 since retired. For his services, he receives a military pension from the Defense
9 Finance and Accounting Service (the "DFAS") in the form of \$1,696 monthly
10 payments for the rest of his life.

11 In May 2011, Lamar entered into an agreement with Noak entitled Contract
12 for Sale of Cash Flow, where Lamar would receive a lump sum payment from Noak
13 in exchange for Noak receiving the monthly stream of payments from Lamar's
14 military pension (the "Contract").³ Specifically, the Contract provides that Noak pay
15 Lamar a lump sum of \$170,986.32 while Noak would receive \$1,500 every month for
16 20 years, the payments ultimately totaling \$360,000.

17 The Contract sets forth in detail the interest that Noak was acquiring in the
18 transaction. It initially states, "Buyer [Noak] . . . acknowledges and agrees that
19 Buyer is hereby acquiring only the Cash Flow hereafter derived from the Asset [the
20 military pension] and is not acquiring title or ownership interest to the underlying
21 Asset, and that title and ownership interest to the Asset will remain with Seller
22 [Lamar]." However, the Contract later states, "Seller hereby transfers and sells to
23 Buyer one hundred percent (100%) of Seller's right, title, and interest in, to, and
24

25 _____
26 ² Unless otherwise indicated, all chapter, section, and rule references are to the
27 Bankruptcy Code, 11 U.S.C. §§ 101–1532, and to the Federal Rules of Bankruptcy Procedure,
28 Rules 1001–9037.

³ The "buyer" to the Contract was actually listed as Equity Trust. However, Noak
signed the Contract in her individual capacity, rather than as the agent for Equity Trust.

1 under the Cash Flow from the Asset described below and from all Related Assets,
2 including all related contractual and transaction documents.”

3 Along with the Contract, the parties executed a security agreement dated May
4 25, 2011 (“Security Agreement”), which provides,

5 Seller/Debtor [Lamar] hereby grants and assigns to Secured Party
6 [Noak] a continuing security interest in, lien upon, and a right of set-
7 off against, all of Seller/Debtor’s right, title, and interest in and to the
8 Collateral referred to in Paragraph 2 and defined in “Exhibit A”
hereof,⁴ to secure the prompt payment, performance, and observance of
all indebtedness, obligations, liabilities, and agreements of any kind of
Seller/Debtor to the Secured Party.

9 Exhibit A of the Security Agreement further describes the manner in which Noak’s
10 security interest attaches to the pension payments: “The security interest in this
11 collateral attaches after the funds have been disbursed from DFAS to Seller/Debtor
12 and immediately upon receipt of the Seller/Debtor of these specific funds in any form,
13 fashion, account, or location; and after the funds have left the purview of any ERISA
14 regulated organization.” Lastly, the Security Agreement includes the following anti-
15 alienation provision:

16 Seller/Debtor warrants, represents and covenants that . . . the
17 Seller/Debtor will not assign, sell, lease, transfer, or otherwise dispose
18 of or abandon, nor will Seller/Debtor suffer or permit any of the same
to occur with respect to, the Collateral, and the inclusion of ‘proceeds’
19 of the Collateral under the security interest granted herein shall not be
deemed a consent by Secured Party to any sale or other disposition of
any Collateral.

20 To perform under the Contract, Lamar agreed to set up an escrow account in
21 his name, where DFAS would deposit the military pension payments, and grant the
22 escrow agent First Reliant Group, LLC (“First Reliant”) power of attorney to transfer
23 \$1,500 to Noak every month.

24
25 _____
26 ⁴ Paragraph 2, in turn, states, “The ‘Collateral’ is defined as an account receivable,
27 more fully described in Exhibit ‘A’ hereto. By these premises Seller/Debtor agrees and
consents to the pledge of the Collateral as security for the Agreement,” and Exhibit A, in
28 turn, states, “The Collateral is the right to receive the income stream in the amount of
\$1,500.00; associated with Account/Annuity #XXXXX5021 with DFAS; payable monthly as
an account receivable.”

1 At some point, Noak deposited \$170,986.32 into Lamar's escrow account and,
2 in August 2011, First Reliant transferred \$91,055.81 to Lamar.⁵ Beginning in
3 September 2011, Noak received the \$1,500 monthly payments from First Reliant and
4 continued receiving them until October 2012. The payments stopped when Lamar
5 diverted the deposit of the monthly pension payments from the escrow account into
6 another account. Altogether, Noak received thirteen payments totaling \$19,500. The
7 sum of \$340,500 remains unpaid under the Contract.

8 On November 17, 2012, the same month that Noak stopped receiving her
9 payments, Lamar and Latrice Byrd filed a joint chapter 7 petition. Noak timely filed
10 a complaint against both the Debtors. The complaint asserts that Noak's claim for
11 the unpaid amounts under the Contract should be nondischargeable under
12 § 523(a)(2)(A) for fraud and that the Debtors' discharge should be denied under
13 § 727(a)(4)(A) and (a)(5) for failing to disclose the monthly pension payments and
14 failing to satisfactorily explain how the Debtors spent the \$91,055.81 lump sum.

15 The Debtors filed an answer, but it was later stricken after they failed to
16 respond to discovery or appear at status conferences. Noak filed the present motion
17 for default judgment following the clerk's entry of default against the Debtors.

18 2. JURISDICTION.

19 This memorandum decision contains the court's findings of fact and
20 conclusions of law required by Federal Rule of Civil Procedure 52(a), made applicable
21 to this adversary proceeding by Bankruptcy Rule 7052. The court has jurisdiction
22 under 28 U.S.C. § 1334 and 11 U.S.C. §§ 523 and 727, and this is a core proceeding
23 under 28 U.S.C. § 157(b)(2)(I) and (J).

24 ///

25 ///

26 ///

27
28 ⁵ It is unclear what happened to the remaining \$79,930.51.

1 3. DISCUSSION.

2 3.1. **Motion for Default Judgment.**

3 “Entry of default does not entitle the non-defaulting party to a default
4 judgment as a matter of right.” Valley Oak Credit Union v. Villegas (In re Villegas),
5 132 B.R. 742, 746 (9th Cir. B.A.P. 1991). Instead, “[t]he court has wide discretion in
6 determining whether to enter a default judgment under Rule 55.” Id. In this
7 discretion, the court may consider several factors:

8
9 (1) the possibility of prejudice to the plaintiff, (2) the merits of the
10 plaintiff’s substantive claim, (3) the sufficiency of the complaint, (4) the
11 sum of money at stake in the action, (5) the possibility of a dispute
concerning material facts, (6) whether the default was due to excusable
neglect, and (7) the strong policy underlying the Federal Rules of Civil
Procedure favoring decisions on the merits.

12 Cashco Fin. Servs., Inc. v. McGee (In re McGee), 359 B.R. 764, 771 (9th Cir. B.A.P.
13 2006). Here, the court considers only the second factor – the merits of Noak’s claims.

14 3.2. **Prerequisite of Holding an Enforceable Obligation.**

15 Before the court can determine the nondischargeability of a debt under
16 § 523(a) or deny the discharge of all debts under § 727(a), the court must first find
17 that the prosecuting creditor holds an underlying enforceable obligation against the
18 debtor.

19 A “creditor” has standing to pursue claims for nondischargeability of a debt or
20 denial of discharge. See Fed. R. Bankr. P. 4007 (“[A]ny creditor may file a complaint
21 to obtain a determination of the dischargeability of any debt.”); 11 U.S.C. § 727(c)(1)
22 (“[A] creditor . . . may object to the granting of a discharge under [§ 727(a)].”). Section
23 101(10)(A) defines a “creditor” as an “entity that has a claim against the debtor.” A
24 “claim” is defined as a “right to payment.” 11 U.S.C. § 101(5)(A). A “right to
25 payment,” in turn, means “nothing more nor less than an enforceable obligation.” Pa.
26 Dep’t of Pub. Welfare v. Davenport, 495 U.S. 552, 559 (1990), superseded by statute
27 on other grounds, Criminal Victims Protection Act of 1990, Pub. L. No. 101-581, 104
28 Stat. 2865, as recognized in Johnson v. Home State Bank, 501 U.S. 78 (1991). It

1 follows that if Noak does not hold an enforceable obligation against the Debtors, then
2 there is no need to determine the nondischargeability of an otherwise unenforceable
3 debt and no standing for Noak, as a non-creditor who does not hold a claim against
4 the debtor, to assert a § 727 claim.

5 **3.3. Prohibition Against Assignment of Military Pensions.**

6 Section 701(c) of title 37 of the United States Code provides, “[a]n enlisted
7 member of the Army, Navy, Air Force, or Marine Corps may not assign his pay, and
8 if he does so, the assignment is void.” 37 U.S.C. § 701(c). This provision represents an
9 “absolute prohibition of pay assignments by enlisted men.” Dorfman v. Moorhous (In
10 re Moorhous), 108 F.3d 51, 54–55 (4th Cir. 1997). And such “pay” includes military
11 pensions. See 37 U.S.C. § 101(21) (stating that the “term ‘pay’ includes . . . retired
12 pay”); cf. Barker v. Kansas, 503 U.S. 594, 605 (1992) (concluding that “military
13 retirement benefits are to be considered deferred pay for past services” for purposes
14 of 4 U.S.C. § 111).

15 Here, the court must determine whether Noak and Lamar’s contractual
16 relationship represented an assignment of Lamar’s military pension. If so, then the
17 Contract and Security Agreement are illegal and void, and Noak does not hold an
18 enforceable obligation against the Debtors.

19 **3.3.1. Survey of the Relevant Case Law.**

20 A number of bankruptcy courts have dealt with cases involving debtors who
21 have pledged their monthly military pension payments to an entity in exchange for a
22 lump sum payment on a variety of issues. Many of these courts have invalidated such
23 transactions, often concluding that they violate 37 U.S.C. § 701(c). See, e.g.,
24 Structured Invs. Co., Inc. v. Webb (In re Webb), 376 B.R. 765, 767–68 (Bankr. W.D.
25 Okla. 2007) (concluding summarily that contract was unenforceable); Bowden v.
26 Structured Invs. Co. LLC (In re Bowden), 315 B.R. 903, 909 (Bankr. W.D. Wash.
27 2004) (rejecting creditor’s argument that contract represented a valid trust since a
28 trust would transfer an equitable interest in pension payments to the creditor,

1 violating 37 U.S.C. § 701(c)); Structured Invs. Co., LLC v. Price (In re Price), 313 B.R.
2 805, 809–11 (Bankr. E.D. Ark. 2004).

3 However, other courts have reached the opposite conclusion, often delving into
4 the facts to find that the transactions are not assignments. See, e.g., In re Pierson,
5 447 B.R. 840, 848 (Bankr. N.D. Ohio 2011) (finding no assignment where debtor
6 “retain[ed] ultimate authority and control over the disposition of his military
7 pension”); Structured Invs. Co., L.L.C. v. Weber (In re Weber), 2009 WL 983311,
8 at *3 (Bankr. D. Neb. Apr. 10, 2009) (concluding that contract was not void because
9 anti-assignment statute does not apply once funds are deposited into debtor’s bank
10 account and creditor’s contract only required debtor to submit his pension payments
11 into designated account after originally receiving funds). Noak has primarily relied
12 on Pierson to argue that the Contract does not represent an assignment.

13 In Pierson, the debtor entered into an agreement with the creditor where the
14 debtor would pay the creditor \$849 a month, the source of which was his monthly
15 military pension payments, for 96 months in exchange for a lump sum of \$28,810.
16 447 B.R. at 844. Their agreement required the debtor to establish a deposit account
17 and cause his pension payments to be placed into that account while the creditor was
18 granted a security interest in any deposit account used by the debtor to maintain his
19 pension. Id. Given this arrangement, the bankruptcy court in Pierson found that
20 there was no assignment under California law and thus no violation of 37 U.S.C.
21 § 701(c). See id. at 847–48. The court noted that the debtor “retained full control over
22 his military pension up until the time it was transferred to [the creditor] [and] [the
23 debtor] was always free to direct the payor of his military pension to deposit the
24 pension into an account over which [the creditor] had no interest and control.” Id. at
25 848. Since the debtor was “able to control, at all times, the disposition of his military
26 pension,” there was no assignment of that pension. See id.

27 ///

28 ///

1 3.3.2. Assignments under California Law.

2 To determine whether there has been an assignment in this case, the court
3 must first turn to the applicable state law. As in Pierson, the applicable law here
4 appears to be California law.⁶

5 Under California law, “[a]n assignment is a ‘transfer or setting over of
6 property, or of some right or interest therein, from one person to another’” Noble
7 v. Draper, 160 Cal. App. 4th 1, 13 (2008). It “requires very little by way of formalities
8 and is essentially free from substantive restrictions.” Amalgamated Transit Union,
9 Local 1756 v. Superior Court, 46 Cal. 4th 993, 1002 (2009). An assignment typically
10 means transferring title or ownership of property. Recorded Picture Co. v. Nelson
11 Entm’t, Inc., 53 Cal. App. 4th 350, 368 (1997). However,

12 “[i]t is the substance and not the form of a transaction which
13 determines whether an assignment was intended If from the
14 entire transaction and the conduct of the parties it clearly appears that
the intent of the parties was to pass title to the [property], then an
assignment will be held to have taken place.”

15 Id. (quoting McCown v. Spencer, 8 Cal. App. 3d 216, 225 (1970)).

16 3.3.3. The Parties’ Contract Represents an Assignment.

17 Here, when focusing on the substance over the form of the transaction, the
18 court finds that, unlike in Pierson, the Contract between Noak and Lamar represents
19 an improper assignment of Lamar’s military pension. Cf. Kenneth N. Klee &
20 Whitman L. Holt, Bankruptcy and the Supreme Court: 1801–2014, at 174–75 (2015)
21 (citing Pepper v. Litton, 308 U.S. 295, 305 (1939) for the proposition that “a
22 bankruptcy court, as a court of equity, may look through form to substance when
23 determining the true nature of a transaction as it relates to the rights of parties
24 against a bankrupt’s estate”).

25
26
27 ⁶ The Contract itself does not include a choice-of-law provision. However, the Security
28 Agreement provides that it is governed by California law. Also, in her motion, Noak cites to
only California case law on the assignment issue.

1 First, the Contract does in fact transfer a title or ownership interest to Noak.
2 It attempts to limit Noak's interest in the pension by stating that Noak "is hereby
3 acquiring only the Cash Flow hereafter derived from the [pension] and is not
4 acquiring title or ownership interest to the underlying [pension], and that title and
5 ownership interest to the [pension] will remain with [Lamar]." Nevertheless, the
6 Contract subsequently provides, "[Lamar] hereby transfers and sells to [Noak] one
7 hundred (100%) of [Lamar's] right, title, and interest in, to, and under the Cash Flow
8 from the [pension]."(emphasis added). Under the Contract, Noak appears to have an
9 ownership interest in the stream of pension payments.

10 While Noak wants the court to distinguish the stream of pension payments
11 from the pension itself, that distinction is immaterial. As 37 U.S.C. § 701(c) plainly
12 states, the assignment of an enlisted member's "pay" is prohibited, and Lamar's pay
13 comes in the form of the monthly cash flow from the DFAS. For purposes of the
14 statute, the court fails to see a material difference between the pension and the
15 monthly pension payments. They are one and the same and the transfer of the
16 ownership interest in the "Cash Flow from the [pension]" to Noak constitutes an
17 illegal assignment of Lamar's pension.

18 Second, even if the above-mentioned provisions of the Contract do not outright
19 transfer to Noak an ownership interest in the pension, other provisions in the
20 Security Agreement suggest that the parties intended to effect an assignment of
21 Lamar's pension. These provisions do not allow Lamar to exert the same level of
22 control in his pension as the debtor in Pierson had and indicate that Noak intended
23 to take away as many rights from Lamar as possible.

24 Unlike in Pierson, where the creditor was only granted a limited security
25 interest in the deposit accounts used by the debtor to maintain his military pension
26 payments, see 447 B.R. at 844, Noak's security interest is much more expansive.
27 Specifically, the Security Agreement grants Noak a "continuing security interest in
28 . . . all of [Lamar's] right, title, and interest in and to the Collateral" (which is defined

1 as the “right to receive the income stream in the amount of \$1,500” associated with
2 Lamar’s pension). Noak’s security interest directly attached to the money itself,
3 rather than just to the account where the money is deposited.

4 Additionally, the Security Agreement sets forth that Noak’s security interest
5 “attaches after the funds have been disbursed from DFAS to [Lamar] and
6 immediately upon receipt [by Lamar] of these specific funds in any form, fashion,
7 account, or location.” (emphasis added). The debtor in Pierson could “direct the payor
8 of his military pension to deposit the pension into an account over which [the
9 creditor] had no [security] interest.” Pierson at 848. But Lamar could not do the same
10 in this case. Wherever Lamar redirected the pension payments, Noak would
11 maintain her security interest in the payments (no matter where they end up) due to
12 the broad language in the Security Agreement.

13 Further, the Security Agreement includes an anti-alienation provision
14 requiring Lamar “not [to] assign, sell, lease, transfer, or otherwise dispose of or
15 abandon” his monthly pension payments. Again, in contrast to the debtor in Pierson,
16 Lamar no longer had the right to transfer his pension payments without breaching
17 the Security Agreement, thereby losing one of his rights of ownership. See Fink v.
18 Shemtov, 210 Cal. App. 4th 599, 610 (2012) (“It is a fundamental principle of law that
19 one of the chief incidents of ownership in property is the right to transfer it.”
20 (internal quotation marks omitted)).

21 Taken altogether, these provisions from the Security Agreement show that
22 Noak intended to strip away as much of Lamar’s ownership interest in the pension as
23 possible without explicitly providing that Lamar was transferring his ownership. Due
24 to the restrictions placed on Lamar and the loss of full control over his pension, when
25 looking at substance over form, the parties’ transaction amounted to an assignment
26 of Lamar’s pension.

27 Lastly, these provisions show that Noak and Lamar’s transaction was
28 structured in a way to evade or circumvent the anti-assignment statute. Allowing the

1 Contract and the Security Agreement to now remain enforceable would be
2 inconsistent with the public policy behind 37 U.S.C. § 701(c) of “protecting the income
3 of service members from unscrupulous financial arrangements.” Pierson, 447 B.R. at
4 848.

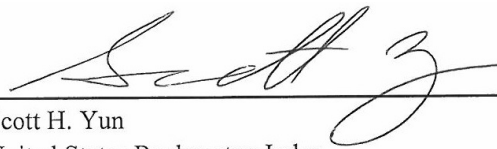
5 4. CONCLUSION.

6 For the foregoing reasons, the court concludes that the contractual
7 relationship between Noak and Lamar constitutes a void assignment of Lamar’s
8 military pension in violation of 37 U.S.C. § 701(c). Since Noak does not hold an
9 enforceable obligation, her claims for relief under 11 U.S.C. §§ 523(a)(2)(A),
10 727(a)(4)(A), and 727(a)(5) must fail, and her motion for default judgment must be
11 denied. Accordingly, this adversary proceeding must also be dismissed.

12 The court will enter an order consistent with this memorandum decision.

13 ###
14
15
16
17
18
19
20
21
22
23
24

25 Date: October 28, 2015

26 
27 Scott H. Yun
28 United States Bankruptcy Judge