

DEC 14 2012

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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

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UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP Nos. SC-12-1209-JuMkPa
)	SC-12-1217-JuMkPa
JOSE J. HERNANDEZ,)	(consolidated appeals)
)	
Debtor.)	Bk. No. 11-15921
)	
<hr/> COLLECT ACCESS LLC,)	
)	
Appellant,)	
v.)	O P I N I O N
)	
JOSE J. HERNANDEZ,)	
)	
Appellee.)	
<hr/>)	

Argued and Submitted on November 15, 2012
at Pasadena, California

Filed - December 14, 2012

Appeal from the United States Bankruptcy Court
for the Southern District of California

Honorable Margaret M. Mann, Bankruptcy Judge, Presiding

Appearance: Tappan Zee, Esq., Zee Law Group, P.C. argued for
appellant Collect Access LLC. Jorge Halperin,
Esq. and Elizabeth P. Swiller, Esq.,
submitted on brief for appellee Jose J.
Hernandez.

Before: JURY, MARKELL, and PAPPAS Bankruptcy Judges.

1 JURY, Bankruptcy Judge:
2

3 Appellant-creditor, Collect Access LLC (Collect), levied
4 on funds in chapter 7¹ debtor's deposit account in the amount of
5 \$712.39. Twenty days later, debtor filed his bankruptcy
6 petition and claimed the funds exempt. Debtor sought an ex
7 parte turnover order requiring Collect to surrender the funds.
8 The bankruptcy court found that debtor had an interest in the
9 funds despite the levy and ordered turnover. Collect moved to
10 vacate the turnover order which the bankruptcy court denied.
11 Collect appeals from that order.²

12 For the reasons stated, we AFFIRM the bankruptcy court's
13 result, but we rely on different grounds.
14

15
16 ¹ Unless otherwise indicated, all chapter and section
17 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
18 "Rule" references are to the Federal Rules of Bankruptcy
19 Procedure.

20 ² The bankruptcy court treated Collect's motion to vacate as
21 a timely motion for reconsideration under Rule 9023, which tolled
22 the time to appeal the original order. Accordingly, we have
23 jurisdiction to review both the underlying order and the order
24 denying reconsideration. Wall St. Plaza, LLC v. JSJF Corp. (In
25 re JSJF Corp.), 344 B.R. 94, 99 (9th Cir. BAP 2006). Further,
26 Collect's Notice of Appeal (NOA) designates only the order
27 denying its motion to vacate and does not attach the underlying
28 turnover order. Rule 8001(a) does not require the NOA to
designate the order or judgment from which an appeal is taken,
but our local rule, 9th Cir. BAP Rule 8001(a)-1, does. We may
depart from our local rule absent prejudice. In re JSJF Corp.,
344 B.R. at 100. There is no prejudice here as the parties have
briefed the issues with respect to the turnover order. We thus
review the turnover order.

1 **I. FACTS**

2 On August 30, 2002, the California state court entered a
3 judgment in favor of First Select, Inc. (First Select) and
4 against Jose J. Hernandez, the debtor in this case.

5 On January 22, 2008, First Select recorded an abstract of
6 judgment for the sum of \$2,091.71 in the County of San Diego.

7 On May 19, 2008, First Select renewed the judgment for the
8 sum of \$3,723.19.

9 On July 12, 2011, apparently as a successor to First
10 Select,³ Collect submitted a writ of execution to the Los
11 Angeles County Sheriff's Department (Sheriff). On August 26,
12 2011, the writ was served on Wells Fargo Bank (Bank). On
13 September 7, 2011, the Sheriff received from the Bank \$712.39
14 that was in debtor's deposit account.

15 On September 27, 2011, debtor filed his bankruptcy
16 petition. At the time of his filing, the levied funds were in
17 the Sheriff's possession. Debtor claimed the funds exempt under
18 Cal. Civ. Proc. Code (CCP) § 703.140(b)(5).⁴

19 On October 29, 2011, the chapter 7 trustee filed her report
20 of no distribution.

21 _____
22 ³ The standing of Collect to pursue execution on the
23 judgment has not been challenged.

24 ⁴ CCP § 703.140(b)(5) is referred to as the "wild card"
25 exemption because it can be used to protect any kind of property.
26 Goswami v. MTC Distrib. (In re Goswami), 304 B.R. 386, 390 (9th
27 Cir. BAP 2003). The wild card exemption allows debtors to exempt
up to \$925, along with any unused portion of the \$17,425
exemption amount under CCP § 703.140(b)(1).

1 Debtor responded to Collect's opposition, this time
2 alleging that he had the right to recover the funds under
3 § 522(g) and (h) rather than § 542. Debtor maintained that he
4 listed the levied funds in Schedule B and claimed them exempt in
5 Schedule C, the trustee filed a report of no distribution
6 thereby abandoning the asset and, as a result, debtor could seek
7 to recover the funds. Debtor further argued that the levy
8 constituted a preference under § 547. He also maintained that
9 he did not waive his exemption in the funds, because he claimed
10 them exempt under CCP § 703.140(b)(5) when he filed his
11 petition. Finally, debtor alleged that Collect violated the
12 automatic stay by continually refusing to turn over the funds
13 and requested \$1,100 in attorneys' fees.

14 On January 17, 2012, the bankruptcy court issued a
15 tentative ruling indicating its reasons for entering the
16 turnover orders. The court explained that under CCP § 697.710,
17 a levy on property under a writ of execution creates a lien on
18 the property from the time of the levy until the expiration of
19 two years after the date of issuance of the writ unless the
20 judgment is sooner satisfied. The court reasoned that because
21 Collect's execution lien was unsatisfied on the date of debtor's
22 bankruptcy filing, the funds remained part of debtor's estate
23 under the holdings in United States v. Whiting Pools, Inc., 462
24 U.S. 198, 207, 76 L.Ed. 2d 515, 103 S.Ct. 2309 (1983) and
25 Ramirez v. Fuselier (In re Ramirez), 183 B.R. 583, 591 (9th Cir.
26 BAP 1995). In the end, the bankruptcy court opined that debtor
27

1 may be eligible to recover actual fees and costs associated with
2 his two motions seeking a turnover order.

3 On January 19, 2012, the bankruptcy court heard oral
4 argument from the parties and took the matter under submission.

5 On March 19, 2012, the bankruptcy court entered a
6 Memorandum of Decision which essentially adopted its earlier
7 tentative ruling. See In re Hernandez, 468 B.R. 396 (Bankr.
8 S.D. Cal. 2012).

9 On April 3, 2012, the bankruptcy court entered the order
10 denying Collect's Motion to Vacate Turnover Order II. On April
11 9, 2012, Collect timely appealed.⁵

12 Meanwhile, on April 4, 2012, debtor filed a motion for
13 costs, damages and fees. On April 26, 2012, debtor filed a
14 motion to avoid Collect's lien under § 522(f) and a motion for
15 contempt.

16 On June 14, 2012, the bankruptcy court heard the three
17 motions. The court (1) granted debtor's motion to avoid
18 Collect's lien; (2) denied his motion for contempt because
19 Collect had complied with Turnover Order II by that time, and
20 (3) granted debtor's motion for costs, damages and fees,

21
22 ⁵ This appeal was transmitted to the Panel and assigned BAP
23 No. SC-12-1209. On April 18, 2012, Collect filed a second NOA
24 which was also transmitted to the Panel and assigned BAP No. SC-
25 12-1217. A notice of Deficient Appeal and Impending Dismissal
26 (NOD) was issued in this later appeal, since it appeared
27 untimely. On May 23, 2012, this Panel determined that the NOD
was satisfied and that appellant had filed a timely NOA. Since
Collect's NOAs were identical and requested review of the same
set of orders, the Panel entered an order consolidating the
appeals on the same date.

1 awarding debtor \$3,572.06 in actual damages and \$1,000 in
2 punitive damages for Collect's failure to turn the funds over to
3 debtor pursuant to the court's orders.

4 On June 19, 2012, the bankruptcy court entered the order
5 awarding the fees and damages.

6 On June 20, 2012, debtor filed a motion to dismiss this
7 appeal as moot on the grounds that Collect complied with
8 Turnover Order II and its lien was avoided under § 522(f). On
9 July 25, 2012, the Panel issued an order denying debtor's motion
10 to dismiss the appeal as moot, but authorized the parties to
11 further address the issue in their briefs. We discuss the
12 mootness issue below.

13 II. JURISDICTION

14 The bankruptcy court had jurisdiction over this proceeding
15 under 28 U.S.C. §§ 1334 and 157(b)(2)(A), (B) and (E). We have
16 jurisdiction under 28 U.S.C. § 158.

17 III. ISSUES

18 A. Whether this appeal is moot;

19 B. Whether the bankruptcy court erred in finding that the
20 levied funds held by the Sheriff were property of debtor's
21 estate subject to turnover;

22 C. Whether the bankruptcy court erred in denying
23 Collect's Motion to Vacate Turnover Order II; and

24 D. Whether the bankruptcy court erred by granting
25 debtor's ex parte motion for turnover of the funds without an
26 adversary proceeding.

1 (9th Cir. 1992).

2 **V. DISCUSSION**

3 **A. Mootness**

4 Before reaching the merits, we consider debtor's mootness
5 argument. An appeal is constitutionally moot when events occur
6 during the pendency of the appeal that make it impossible for
7 the appellate court to grant effective relief. Clear Channel
8 Outdoor, Inc. v. Knupfer (In re PW, LLC), 391 B.R. 25, 33 (9th
9 Cir. BAP 2008). Debtor contends that the following events
10 render this appeal moot: (1) the funds are now in the hands of
11 the debtor; (2) the lien which gave rise to Collect's claim has
12 been avoided; and (3) the underlying debt has been discharged.
13 Under these circumstances, debtor argues, effective relief is no
14 longer available. On the other hand, Collect maintains that if
15 the Panel reverses the bankruptcy court and finds that debtor's
16 interest in the funds was extinguished after the levy, we can
17 order debtor to return the funds to Collect. Collect further
18 argues that it would not have been a violation of the automatic
19 stay for Collect to retain the funds postpetition if, under
20 California law, ownership of the funds passed from debtor to the
21 judgment creditor once the Bank released the funds to the
22 Sheriff. On these grounds, Collect contends effective relief is
23 available.

24 Debtor, as the party arguing for dismissal based on
25 mootness, "has the heavy burden of establishing that there is no
26 effective relief remaining for a court to provide." Suter v.

1 Goedert, 504 F.3d 982, 986 (9th Cir. 2007). Debtor has not met
2 his burden here. Where the order appealed involves the
3 distribution of money and the party who received the funds is a
4 party to the appeal, the appeal is not moot because we have the
5 power to fashion effective relief by ordering the party to
6 return the money. See Spirtos v. Moreno (In re Spirtos), 992
7 F.2d 1004, 1007 (9th Cir. 1993). Under this rule, we can
8 implement effective relief because debtor is a party to the
9 appeal, and we can order him to repay the money to Collect upon
10 reversal of the bankruptcy court's ruling. Debtor's discharge
11 also would not impact the return of the funds to Collect. If
12 debtor had no interest in the funds after the levy, they would
13 have been rightfully in the Sheriff's possession. In addition,
14 under these facts, no stay violation would have occurred.
15 Accordingly, we conclude that the appeal is not moot.

16 **B. Property of the Estate**

17 A bankruptcy court may order turnover of property to the
18 debtor's estate if, among other things, such property is
19 considered "property of the estate." See §§ 541(a) (defining
20 property of the estate), 542(a) (authorizing turnover of
21 property that the trustee may use, sell, or lease under section
22 363 of this title, or that the debtor may exempt under section
23 522 of this title). Section 541(a) provides that property of
24 the estate includes all legal or equitable interests of the
25 debtor in property as of the commencement of the case. The
26 primary question on appeal is whether the prepetition levied
27

1 funds in the hands of the Sheriff on the petition date were in
2 fact property of debtor's bankruptcy estate. We hold that they
3 were.

4 Whether a debtor's interest constitutes "'property of the
5 estate' is a federal question to be decided by federal law."
6 McCarthy, Johnson & Miller v. N. Bay Plumbing, Inc. (In re
7 Pettit), 217 F.3d 1072, 1078 (9th Cir. 2000). However, the
8 nature and extent of the debtor's interest in property must be
9 determined by nonbankruptcy law. Travelers Cas. & Sur. Co. of
10 Am. v. Pac. Gas & Elec. Co., 549 U.S. 443, 451, 127 S.Ct. 1199,
11 167 L.Ed.2d 178 (2007) (citing Butner v. United States, 440 U.S.
12 48, 54-55, 99 S.Ct. 914, 59 L.Ed.2d 136 (1979)). California law
13 applies to this case.

14 California statutory law governs generally the rights and
15 obligations of debtors and creditors with respect to the
16 enforcement of money judgments. In examining the statutory
17 scheme, the bankruptcy court first found that the Sheriff's levy
18 under Collect's writ of execution resulted in an execution lien,
19 rather than a transfer of the ownership of the funds. In re
20 Hernandez, 468 B.R. at 402; see also CCP § 697.710 ("A levy on
21 property under a writ of execution creates an execution lien on
22 the property from the time of levy . . ."). Next, the court
23 found that before the execution lien could be transformed into
24 ownership of the funds, the Sheriff had to release the funds to
25 the judgment creditor. Id. In reaching this conclusion, the
26 court relied on CCP §§ 697.710 and 724.010(b). Under CCP

1 § 697.710, entitled "Creation and Duration of Execution Lien",
2 an execution lien created by levy "survives for the earlier of
3 two years, or when the judgment is satisfied." Id. Under CCP
4 § 724.010(b),⁶ the court reasoned, the judgment is not fully
5 satisfied until the creditor receives the levied funds from the
6 levying officer and files an acknowledgment of satisfaction. On
7 this basis, the bankruptcy court concluded that since the
8 Sheriff still held the funds when debtor filed his petition,
9 Collect only held a lien on the funds because the second step of
10 satisfaction had not yet occurred. Id. at 402-03.

11 The bankruptcy court's analysis relies on the incorrect
12 statutory scheme. The California legislature has enacted a
13 "comprehensive and precisely detailed scheme governing
14 enforcement of money judgments." Ford Motor Credit Co. v.
15 Waters, 166 Cal.App.4th Supp. 1, 7 (Cal. App. Dep't Super. Ct.
16 2008). In CCP §§ 700.010-700.200, "the judgment creditor is
17 advised of all methods of levy available to enforce a money
18 judgment. Those statutes tell the judgment creditor and levying
19 officer how to levy on assets . . . , as here relevant, bank
20 accounts." Id.

21 CCP § 700.140 entitled "Deposit accounts" provides in
22 relevant part:

23
24
25

⁶ This subsection provides: "Where a money judgment is
26 satisfied by levy, the obligation of the judgment creditor to
27 give or file an acknowledgment of satisfaction arises only when
the judgment creditor has received the full amount required to
satisfy the judgment from the levying officer."

1 (a) [T]o levy upon a deposit account, the levying
2 officer shall personally serve a copy of the writ of
3 execution and a notice of levy on the financial
4 institution with which the deposit account is
5 maintained The execution lien reaches only
6 amounts in the deposit account at the time of service
7 on the financial institution, including any item in
8 the deposit account that is in the process of being
9 collected, unless the item is returned unpaid to the
10 financial institution.

11 . . .

12 (e) When the amount levied upon pursuant to this
13 section is paid to the levying officer, the execution
14 lien on the deposit account levied upon terminates.

15 Under the plain language of CCP § 700.140, Collect obtained
16 an execution lien on the amounts in the deposit account at the
17 time of the service on the financial institution. These amounts
18 were not available for debtor's use. The lien was terminated
19 under subsection (e) at the time the funds were paid to the
20 levying officer. The termination of Collect's execution lien
21 occurred well before debtor's bankruptcy. Given this statutory
22 framework that applies to deposit accounts, the bankruptcy
23 court's reliance on CCP §§ 697.710 and 724.010(b) for its
24 analysis was misplaced.

25 Nonetheless, we do not think the plain language of CCP
26 § 700.140 provides an answer to the ownership question Collect
27 raises on appeal. Although the statute suggests that debtor's
28 interest in the funds was transferred when the funds were paid
to the levying officer and the lien terminated, the statute does
not plainly say so. Compare In re Ramirez, 183 B.R. at 589
(noting that although relevant California statute stated when
levy was complete, it did not state that a completed levy
transferred ownership of the property).

1 Collect relies on Del Riccio, 115 Cal.App.2d 29, to support
2 its position that the transfer of funds to the Sheriff
3 extinguished all rights that debtor had in the property
4 prepetition. Although Collect urges the Panel to rely on Del
5 Riccio to adopt a bright line rule, we decline to read the case
6 so broadly. In Del Riccio, after a judgment was obtained, a
7 writ of execution was issued and levied upon a bank in which the
8 defendant had the sum of \$6,426.66. While the sheriff had the
9 money in his possession, defendant applied for and obtained a
10 court order prohibiting the sheriff from paying any money to the
11 plaintiffs. The plaintiffs moved to vacate the order which the
12 court denied. The defendant then moved for an order staying
13 execution upon posting a cash undertaking in the action. After
14 defendant posted a satisfactory bond, the court made a further
15 order staying the execution. Plaintiffs appealed.

16 The California Court of Appeal found that the trial court
17 had the power to impose a stay of execution, but had no power to
18 undo what had already been done so as to deprive the creditor of
19 ownership and use of the money collected under the writ. The
20 appellate court discussed the parties' interest held in money in
21 levy as follows:

22 When the writ has been regularly issued and executed,
23 money collected, while in the hands of the officer, is
24 property of the judgment creditors and not the debtor.
25 Nothing can be done with it other than to turn it over
26 to the creditor. The possession of the officer solely
27 for the use and benefit of the creditor is possession
28 by the latter Correspondingly, when the
debtor's money is taken on a valid execution it ceases
to be his and he immediately becomes entitled to
partial or full satisfaction of the judgment.

Del Riccio has not been overruled, but the rule of law it

1 established is not a complete answer to the bankruptcy issue
2 before us. Although Del Riccio does say that money collected
3 while in the hands of the Sheriff is the property of the
4 judgment creditor, the decision discussed only the trial court's
5 power with respect to a valid execution. The court had no
6 reason to examine the various statutory rights and obligations
7 of the judgment creditor vis-a-vis the debtor after the
8 execution. Therefore, we do not read Del Riccio as stating a
9 per se rule that the levying officer's possession of money after
10 a valid execution accomplishes a complete transfer of ownership
11 of the property, without limitation, and in disregard of other
12 statutes in the enforcement of money judgment scheme.

13 The bankruptcy court's analysis in In re Caldwell, 111 B.R.
14 836 (Bankr. C.D. Cal. 1990), sheds further light on the property
15 of the estate analysis. There, the bankruptcy court partially
16 relied on Del Riccio in analyzing the conflicting claims of the
17 debtors and the State Board of Equalization in funds held by a
18 bank. Under Cal. Rev. & Tax Code § 6703, a notice of levy was
19 the equivalent of a levy. The Caldwell court found that "[a]
20 levy transfers ownership in property. This usually takes place
21 when a law enforcement officer seizes the property." Id. at
22 838. Citing Del Riccio, the bankruptcy court noted that under
23 Cal. Rev. & Tax Code § 6703, the bank in effect became the
24 executing officer for the benefit of the Board.⁷ Id.

26
27 ⁷ See also McCaffey Canning Co. v. Bank of Am., 109 Cal.
28 App. 415, 423-24 (Cal. Ct. App. 1930) ("While the property was in
the custody of the sheriff, it was constructively in the
possession of plaintiff through the sheriff as his agent.").

1 Accordingly, the court concluded that under California law, the
2 Board's notice of levy (which was the equivalent of a levy)
3 extinguished the debtors' property interest in the funds. "In
4 other words, the Notice of Levy transferred ownership of the
5 Funds from debtors to the Board." Id. Finally, because the
6 debtors had no right of redemption under Cal. Rev. & Tax Code §
7 6703, the court observed that "a levy under [this statute]
8 terminates any and all interests a debtor may have in the
9 property." Id. at n.2.

10 If anything, Caldwell's analysis instructs us to delve
11 further into whether the effect of the levy was to divest debtor
12 of all interests in the property seized for purposes of a
13 property of the estate analysis.⁸ Use of the term "ownership"
14 to identify the interests of the parties does not help because
15 the term is not defined. The Bankruptcy Code does not define
16 property, ownership, or owner; however, dictionary definitions
17 provide guidance. Property is defined as "[t]he right to
18 possess, use, and enjoy a determinate thing . . .; the right of

19
20 ⁸ Here, just as in Caldwell, debtor had no redemption rights
21 with respect to the funds. Likewise, although the bankruptcy
22 court partially relied on Whiting Pools for its decision, debtor
23 had none of the interests which were identified by the Supreme
24 Court in Whiting Pools as interests sufficient to consider the
25 seized property part of the debtor's estate. There, the IRS's
26 levy was on tangible property that was subject to the
27 requirements of a statutory tax sale which provided the debtor
28 with notice rights, redemption rights, and rights to the surplus
from the sale. 462 U.S. at 211. Thus, although Whiting Pools
provides a summary of the law in the turnover/property of the
estate analysis, its facts are distinguishable from those here.
Whiting Pools is also distinguishable in that it was a debtor-in-
possession in a reorganization that sought turnover. As
discussed below, a chapter 7 debtor generally does not have
standing to seek a turnover order under § 542.

1 ownership Also termed bundle of rights." Black's Law
2 Dictionary 1335 (9th ed. 2009). Ownership is defined as "[t]he
3 bundle of rights allowing one to use, manage, and enjoy
4 property, including the right to convey it to others. . . ."
5 Id. at 1215. An owner is "[o]ne who has the right to possess,
6 use, and convey something; a person in whom one or more
7 interests are vested." Id. at 1214. Taken together, these
8 definitions demonstrate that a debtor's "bundle of rights" in
9 property must be identified on a case-by-case basis.

10 It appears from the bankruptcy court's findings of fact
11 that virtually all of the funds in debtor's account on the day
12 of the levy consisted of social security benefits.⁹ The
13 bankruptcy court found that debtor's only source of income other
14 than \$100 of family contributions was \$636 in monthly social
15 security benefits. In re Hernandez, 468 B.R. at 404. Collect
16 does not dispute this finding on appeal.¹⁰

17
18 ⁹ The Code of Federal Regulations (CFR), which govern state
19 and federal financial institutions, sets forth rules regarding
20 social security benefits in a debtor's deposit account. "State
21 and federal financial institutions must, before complying with a
22 creditor's garnishment order, determine whether certain exempt
23 federal benefits (e.g., social security, supplemental security
24 income, etc.; see 31 CFR § 212.2(b)) have been electronically
25 deposited into the debtor's account within the preceding two
26 months and, if so, protect whatever amount was deposited during
27 that period. In short, banks may not freeze the entire account
28 and the debtor retains access to the exempt funds. [See 31 CFR
§ 212.1 et seq.; see also 31 CFR § 212.3 (definitions)]." Hon.
Alan M. Ahart, Cal. Prac. Guide: Enforcing Judgments and Debts
§ 6:560.10 (2012). It is not apparent from the record whether
these regulations were followed in this case and, therefore,
whether the execution here was valid.

¹⁰ CCP § 703.080 provides:

(continued...)

1 Under California law, government benefits such as social
2 security are intended exclusively for the benefit and support of
3 qualified recipients. These funds are exempt and cannot be
4 subject to collection. See Kruger v. Wells Fargo Bank, 521 P.2d
5 441, 458-60 (Cal. 1974).¹¹ Under CCP § 704.080(b), social
6 security benefits in deposit accounts are exempt in the amount
7 of \$2,425 and the exemption is automatic. The debtor need not
8 make a claim and thus there could be no transfer of ownership in
9 the funds by waiver or by operation of law. See CCP

10
11 ¹⁰(...continued)

12 (a) Subject to any limitation provided in the
13 particular exemption, a fund that is exempt remains
14 exempt to the extent that it can be traced into deposit
15 accounts or in the form of cash or its equivalent.

16 (b) The exemption claimant has the burden of tracing an
17 exempt fund.

18 (c) The tracing of exempt funds in a deposit account
19 shall be by application of the lowest intermediate
20 balance principle unless the exemption claimant or the
21 judgment creditor shows that some other method of
22 tracing would better serve the interests of justice and
23 equity under the circumstances of the case.

24 Collect raised no issue in the bankruptcy court regarding
25 debtor's burden of tracing his exempt social security benefits
26 which were made into his deposit account. Consequently, any
27 tracing issue is waived on appeal. Campbell v. Verizon Wireless
28 S-CA (In re Campbell), 336 B.R. 430, 434 n.6 (9th Cir. BAP 2005)
(citing O'Rourke v. Seaboard Sur. Co. (In re E.R. Fegert, Inc.),
887 F.2d 955, 957 (9th Cir. 1989) ("The rule in this circuit is
that appellate courts will not consider arguments that are not
'properly raise[d]' in the trial courts.")).

¹¹ Federal statutes also provide that social security and
supplemental security income benefits (whether paid or payable)
ordinarily are not subject to execution, levy, attachment,
garnishment or other legal process; or to the operation of
bankruptcy laws. See 42 U.S.C. §§ 407, 1382(d).

1 § 703.030(b).¹² “Some exemptions need not be claimed. They are
2 automatic and are denoted by the statutory terms of art ‘exempt
3 without making a claim,’ which has the effect of eliminating the
4 applicability of the procedure for enforcing a money judgment.”
5 In re Hernandez, 468 B.R. at 404 (citing In re Petruzzelli, 139
6 B.R. 241, 243 (Bankr. E.D. Cal. 1992)). One treatise further
7 explains:

8 Theoretically, a claim of exemption should never have
9 to be filed for property ‘exempt without making a
10 claim.’ In practice, however, if such property is
11 levied upon by the judgment creditor, a claim of
12 exemption may have to be filed to obtain its
13 release—unless the creditor can be persuaded to order
14 it released. [CCP § 703.510(b)] (But so long as no
15 sale has occurred, the levying officer should release
16 the property whether or not the exemption filing is
17 timely.).

18 Hon. Alan M. Ahart, Cal. Prac. Guide: Enforcing Judgments and
19 Debts § 6:870 (2012).

20 Exemptions under California law are wholly statutory and
21 cannot be enlarged [or diminished] by the courts. Ford Motor
22 Credit Co., 166 Cal. App. 4th Supp. at *8. Furthermore, “the
23 exemption laws are designed to facilitate the debtor’s financial
24 rehabilitation and have the effect of shifting social welfare
25 costs from the community to judgment creditors. Consequently,
26 the exemption statutes should be construed, so far as
27

28 ¹² CCP § 703.030(b) provides:

Except as otherwise specifically provided by statute,
property that is described in this chapter or in any
other statute as exempt without making a claim is not
subject to any procedure for enforcement of a money
judgment.

1 practicable, to the benefit of the judgment debtor." Id. at *9.
2 California's exemption philosophy is echoed in bankruptcy law.

3 Because debtor had an exempt property interest in the
4 funds, we conclude that Collect's levy did not operate to
5 extinguish those interests. See In re Hernandez, 468 B.R. at
6 404 (debtor's exemption rights in the funds had not been
7 terminated prepetition). To adopt Collect's argument for a
8 bright line ownership rule under these circumstances would
9 render the automatic exemption for social security benefits
10 meaningless and allow creditors to levy on exempt funds that
11 they are not entitled to under both state and federal law. In
12 short, debtor had grounds to recover the exempt funds and could
13 have challenged the levy in the state court prepetition on that
14 basis.¹³

15 As property in which debtor held a legal or equitable
16 interest when his petition was filed, the bankruptcy court's
17 conclusion that the funds in question constituted property of
18 the estate was correct. See In re Varney, 449 B.R. 411 (Bankr.
19 D. Idaho 2011) (even potentially exempt assets nonetheless
20 become property of the estate upon the commencement of the
21 bankruptcy case); In re McAlister, 56 B.R. 164, 166 (Bankr. D.
22 Or. 1985) (even exempt property must initially be regarded as
23 property of the estate and then claimed and distributed as
24 exempt).

25
26 ¹³ Even if the ten-day rule to claim an exemption did apply
27 to some or all of the funds, the state court had authority "to
28 relieve a person upon such terms as may be just from failure to
claim an exemption within the time and in the manner prescribed
in the applicable enforcement procedure." CCP § 703.030(c).

1 Although we conclude that the funds were property of
2 debtor's estate, we note a procedural irregularity with debtor's
3 motion for a turnover order under § 542. Section 542(a) enables
4 the bankruptcy trustee, or the debtor-in-possession in a
5 reorganization case to seek turnover of the debtors' assets, for
6 the benefit of the estate. Indeed, in Whiting Pools, it was the
7 debtor-in-possession in a reorganization case that sought
8 turnover. Under the statute, a chapter 7 debtor is not
9 mentioned and generally has no standing to bring an action for
10 turnover. See In re Freeman, 331 B.R. 327, 329 (Bankr. N.D.
11 Ohio 2005) (the general provision in the Bankruptcy Code
12 governing turnover, confers this right upon the trustee); Price
13 v. Gaslowitz (In re Price), 173 B.R. 434, 440 (Bankr. N.D. Ga.
14 1994) (turnover action is one facet of a chapter 7 trustee's
15 general duties under § 704(1)).

16 The procedural irregularity was remedied however by
17 debtor's response to Collect's opposition. The ultimate relief
18 that debtor sought was to preserve his exemption in the levied
19 funds by invoking § 522(g) and/or by exercising the trustee's
20 avoiding powers under § 522(h).¹⁴ Moreover, as of the

21
22 ¹⁴ Sections (g) and (h) provide:

23 (g) Notwithstanding sections 550 and 551 of this title,
24 the debtor may exempt under subsection (b) of this
25 section property that the trustee recovers under
26 section 510(c)(2), 542, 543, 550, 551, or 553 of this
27 title, to the extent that the debtor could have
28 exempted such property under subsection (b) of this
section if such property had not been transferred, if--

(1)(A) such transfer was not a voluntary transfer of

(continued...)

1 commencement of the case, the automatic stay under § 362(a)
2 arises, which enjoins any and all collection efforts against the
3 debtor. As an enforcement mechanism, a debtor is afforded a
4 private right of action to seek redress under § 362(k)(1).
5 "Section 522's right to claim exemptions in property of the
6 estate bestows standing on debtors for purposes of § 362(k)(1)."
7 In re Mwangi, 432 B.R. at 822. Therefore, debtor's statutory
8 standing to seek the return of the funds levied upon was
9 conferred by statutes other than § 542(a). Further, debtor's
10 procedural irregularity did not in any way affect the bankruptcy
11 court's ability to enter an order that required Collect to
12 surrender the funds to debtor. Since this is a protection of
13 exemption case rather than one for turnover, the bankruptcy
14

15 ¹⁴(...continued)
16 such property by the debtor; and

17 (B) the debtor did not conceal such property; or

18 (2) the debtor could have avoided such transfer under
19 subsection (f)(1)(B) of this section.

20 (h) The debtor may avoid a transfer of property of the
21 debtor or recover a setoff to the extent that the
22 debtor could have exempted such property under
23 subsection (g)(1) of this section if the trustee had
24 avoided such transfer, if--

24 (1) such transfer is avoidable by the trustee under
25 section 544, 545, 547, 548, 549, or 724(a) of this
26 title or recoverable by the trustee under section 553
27 of this title; and

26 (2) the trustee does not attempt to avoid such
27 transfer.

28 Eventually, debtor did avoid the lien under § 522(f).

1 court had the authority to enter an order requiring Collect to
2 surrender the funds to debtor under § 105(a). See § 105(a)
3 ("The court may issue any order, process, or judgment that is
4 necessary or appropriate to carry out the provisions of this
5 title."). Once the property came into the estate, it revested
6 in debtor when his exemption claim went unchallenged. See In re
7 Mwangi, 432 B.R. at 821 (noting that "[p]roperty claimed as
8 exempt leaves the estate and reverts in the debtor.>").
9 Finally, debtor's ex parte motion seeking the return of his
10 exempt funds was a contested matter under Rule 9014 requiring
11 reasonable notice and opportunity for a hearing. No adversary
12 proceeding was required under Rule 7001. Here, Collect had
13 ample opportunity to contest Turnover Order II through written
14 opposition and oral argument at the eventual hearing on its
15 Motion to Vacate. That said, Collect does not contend on appeal
16 that it was prejudiced in any way by the procedure used.

17 **VI. CONCLUSION**

18 Accordingly, we AFFIRM the bankruptcy court's order, albeit
19 for different reasons, and hold that the prepetition levied
20 funds in the hands of the Sheriff on the petition date were
21 property of debtor's estate under § 541(a) due to debtor's
22 exemption rights in the funds. Therefore, the bankruptcy court
23 properly ordered Collect to surrender the funds.