



Dated: April 17, 2020
The following is ORDERED:

Jennie D. Latta

Jennie D. Latta
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re
IVAN K. PHILLIPS and
LINDA A. PHILLIPS,
Debtors.

Case No. 17-30589-L
Chapter 7

Ivan K. Phillips and Linda A. Phillips,
Plaintiffs,
v.
Internal Revenue Service,
Defendant.

Adv. Proc. No. 18-00143

**ORDER GRANTING DEFENDANT'S MOTION
FOR PARTIAL SUMMARY JUDGMENT**

BEFORE THE COURT is the United States' Motion for Partial Summary Judgment filed December 6, 2019. [Dkt. No. 24]. The United States asks the court to rule that federal tax liens against Debtor/Plaintiff Ivan K. Phillips attached pre-petition to annuity payments owed to

Mr. Phillips under a contract with TIAA-CREF and that these liens will continue to attach to future annuity payments whether or not Mr. Phillips receives a discharge of his pre-petition tax liabilities.

With its Motion for Partial Summary Judgment, the United States filed a Memorandum in Support of its Motion for Partial Summary Judgment together with Exhibits A through C. [Dkt. No. 24]. Exhibit A consists of federal tax liens: (1) Recorded May 16, 2017, in the amount of \$165,747.03; (2) Recorded October 24, 2017, in the amount of \$50,956.68; (3) Recorded May 16, 2017, in the amount of \$20,206.11; (4) Recorded September 3, 2014, in the amount of \$84,664.51; (5) Recorded February 13, 2017, in the amount of \$67,755.42; (6) Recorded May 16, 2014, in the amount of \$49,511.85; (7) Recorded December 23, 2014, in the amount of \$2,956.38; and (8) Recorded December 23, 2014, in the amount of \$22,939.99. Exhibit B consists of excerpts from (1) College Retirement Equities Fund (“CREF”) Rules of the Fund Effective as of May 1, 2019; (2) Teachers Insurance and Annuity Association of America (“TIAA”) Retirement Annuity Contract; (3) TIAA Rate Schedule To Be Effective on July 1, 2001 for all TIAA Retirement Annuity Contracts; (4) TIAA Endorsement to Your TIAA Retirement Annuity Contract; and (5) CREF Retirement Unit-Annuity Certificate. Exhibit C consists of the Plaintiffs’ Answer to the United States’ Second Set of Interrogatories and Requests for Production dated June 26, 2019.

The Plaintiffs filed an objection to the motion on January 7, 2020. [Dkt. No. 27]. The Plaintiffs do not assert that there is a genuine issue of material fact in dispute, but rather that they, rather than the United States, are entitled to judgment as a matter of law. The Debtors argue that: (1) the federal tax liens did not attach to pre-petition annuity payments; (2) the tax liabilities of the Debtors are dischargeable; (3) the federal tax liens did not attach to post-petition annuity payments because the annuity payments are not property of the bankruptcy estate; (4) because the amounts

of the payments from the annuities vary, there is no right to payment, and thus, there can be no attachment until a payment is actually distributed.

Together with their Objection to the Motion for Partial Summary Judgment [Dkt. No. 27], the Plaintiffs have submitted for consideration by the court copies of: (1) TIAA Retirement Annuity Contract; (2) CREF Retirement Unit-Annuity Certificate; and (3) CREF Rules of the Fund Effective as of May 1, 2019.

The parties were given an opportunity to file additional reply briefs before the matter was decided by the court. The United States filed its Reply Brief on March 17, 2020 [Dkt. No. 30], which contained additional case citations for the court's consideration. The Plaintiffs did not file a sur-reply.

ISSUES PRESENTED

In the motion for partial summary judgment, the following issues are presented for consideration:

- (1) Whether federal tax liens attached to Mr. Phillips' right to receive annuity payments before the filing of his bankruptcy petition?
- (2) Whether the federal tax liens continue to attach to post-petition annuity payments notwithstanding the discharge of the Debtors' personal tax liability?

JURISDICTION

Jurisdiction over a complaint arising under the Bankruptcy Code lies with the district court. 28 U.S.C. § 1334(b). Pursuant to authority granted to the district courts at 28 U.S.C. § 157(a), the district court for the Western District of Tennessee has referred to the bankruptcy judges of this district all cases arising under title 11 and all proceedings arising under title 11 or arising in or related to a case under title 11. *In re Jurisdiction and Proceedings Under the Bankruptcy*

Amendments Act of 1984, Misc. No. 81-30 (W.D. Tenn. July 10, 1984). Proceedings to determine the dischargeability of particular debts are core proceedings arising under the Bankruptcy Code as are proceedings to determine the validity, extent, or priority of liens. *See* 28 U.S.C. § 157(b)(2)(I) and (K). Accordingly, the bankruptcy court has authority to enter its judgment granting the United States' motion for partial summary judgment subject only to appellate review under section 158 of title 28. 28 U.S.C. § 157(b)(1).

SUMMARY JUDGMENT STANDARD

Federal Rule of Civil Procedure 56 made applicable in bankruptcy proceedings by Federal Rule of Bankruptcy Procedure 7056 provides that summary judgment is appropriate if the movant can show that there is no genuine dispute as to any material fact and thus, the movant is entitled to judgment as a matter of law. Substantive law will identify which facts are material and a genuine issue of material fact exists only when, "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986). When deciding a motion for summary judgment, the court does not weigh the evidence to determine the truth of the matter asserted but to determine whether a genuine issue for trial exists. *Id.* In reaching its decision, the court views the evidence in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).

The moving party bears the initial burden of proof that there are no genuine issues that might affect the outcome of the action under governing law. *In re Oliver*, 414 B.R. 361, 367 (Bankr. E.D. Tenn. 2009), citing, *Owens Corning v. Nat'l Union Fire Ins. Co.*, 257 F.3d 484, 491 (6th Cir. 2001); Fed. R. Civ. P. 56(a), incorporated at Fed. R. Bankr. P. 7056.

The Court of Appeals for the Sixth Circuit has described the standards for granting summary judgment as follows:

A genuine issue of material fact exists when, “there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). In deciding whether this burden has been met by the movant, this court views the evidence in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). However, to survive summary judgment, the Plaintiff must present affirmative evidence sufficient to show a genuine issue for trial. *Anderson*, 477 U.S. at 249, 106 S. Ct. 2505. Therefore, “[i]f evidence is merely colorable, or is not significantly probative, summary judgment may be granted.” *Id.* at 249-50, 106 S. Ct. 2505.

White v. Wyndham Vacation Ownership, Inc., 617 F.3d 472, 475-76 (6th Cir. 2010).

Only disputes over facts that might affect the outcome of the suit under governing law will preclude the entry of summary judgment. *Id.* ““Summary judgment is proper if the evidence, taken in the light most favorable to the nonmoving party, shows that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law.”” *Pazdzierz v. First American Title Ins. Co. (In re Pazdzierz)*, 718 F.3d 582, 586 (6th Cir. 2013), quoting *Mazur v. Young*, 507 F.3d 1013, 1016 (6th Cir.2007).

Although the Plaintiffs did not file a cross motion for summary judgment, they assert that they are entitled to judgment on the issues raised by the United States as a matter of law. When cross motions for summary judgment are filed, the court must consider each motion in turn to determine whether it may be granted. *Westfield Ins. Co. v. Tech Dry, Inc.*, 336 F.3d 503, 506 (6th Cir. 2003); *Taft Broadcasting Co. v. U.S.*, 929 F.2d 240, 248 (6th Cir. 1991).

UNCONTESTED FACTS

The Plaintiffs filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code on December 4, 2017, Case No. 17-30589.

At the time of the filing of their petition, the Plaintiffs were indebted to the United States for unpaid income tax liabilities in an amount in excess of \$230,000.

Prior to the filing of the petition, the United States recorded tax liens in Indiana and Tennessee. [Dkt. No. 24, Ex. A].

Mr. Phillips is an annuitant under contracts with TIAA and CREF.

The starting date for both annuities was October 10, 2008, before the Plaintiffs filed their bankruptcy petition.

Monthly annuity payments under the TIAA contract are calculated based upon a guaranteed interest rate and any “Additional Amounts” declared by the TIAA Board of Trustees. [Dkt. No. 24, Ex. B, p. 6.] Under the TIAA contract, the guaranteed life income is a specified number of dollars per payment period. [CREF Rules of Fund, Dkt. No. 24, Ex. B, p. A2.]

Monthly annuity payments under the CREF contract are calculated based upon the value of “Accumulation Units” purchased by the participant during his lifetime. The Accumulation Units represent the participant’s proportionate share in CREF. [Dkt. No. 24, Ex. B, p. 7.] Under CREF, the guaranteed life income is a specified number of annuity units per payment period. [CREF Rules of Fund, Dkt. No. 24, Ex. B, p. A2].

The original complaint filed by the Plaintiffs asks that the court declare that tax obligations for the years 2008, 2009, and 2005-2013 are dischargeable under 11 U.S.C. §§ 523(a)(1) and 507(a)(8); that the United States’ seizure of Mr. Phillips’ Social Security benefits in January 2018 violated the automatic stay of 11 U.S.C. § 362(a); and that the United States’ seizure of annuity benefits owed to Mr. Phillips on April 2, 2018, also violated the automatic stay. [Dkt. No. 1].

In its Amended Answer [Dkt. No. 7], the United States admits that the Plaintiffs’ federal income tax debt for the years 2005, 2007, 2009, 2011, 2012, and 2013 are dischargeable but denies

that the liens filed for those years may be avoided. The United States further denies that the civil penalty assessments for trust fund recovery penalties against the Plaintiffs are subject to discharge. Lastly, the United States avers that the assessments made in September 2017 for tax years 2008 and 2009 are non-dischargeable under 11 U.S.C. § 523(a)(1)(A). The United States admits that it received one post-petition Social Security payment on December 18, 2017, in the amount of \$1,469.30, as the result of its levy. The United States also admits that it received four annuity payments from April 29, 2015 through April 23, 2018. The United States has pending motions for relief from the automatic stay with respect to annuity payments received in the past and those anticipated in the future. [AP Dkt. No. 8 and BK Dkt. No. 28].

DISCUSSION

The United States argues that Mr. Phillips' contractual rights to receive monthly annuity payments during his lifetime are "rights to property" to which its liens attached and will attach in the future. It further argues that even though Mr. Phillips may discharge some of his personal tax obligations, the tax liens survive and will attach to monthly annuity payments as they are paid to him in the future.

Pre-petition Annuity Payments

The Plaintiffs' first argument appears to be limited to pre-petition activities. The Plaintiffs state:

Debtors object to the Motion for Partial Summary Judgment by IRS and asserts [sic] that the Court should rule that no federal tax liens pursuant to several years of pre-petition tax year liabilities and penalties against the Debtors attached to pre-petition payments under a TIAA-CREF contract. Debtors specifically deny and assert many of the tax liabilities in issue are dischargeable and such taxes should be discharged by the Court pursuant to the bankruptcy code.

[Dkt. No. 27, ¶ 1]. The Plaintiffs provide no explanation for why the tax liens did not attach to pre-petition annuity payments. The second sentence refers to post-petition events. The United

States does not dispute that the Plaintiffs' federal income tax debts for the years 2005, 2007, 2009, 2011, 2012, and 2013 are dischargeable. That fact, however, has no impact upon the attachment of the pre-petition tax liens to pre-petition annuity payments.

The tax liens of the United States arose under 26 U.S.C. § 6321, which provides:

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

The Supreme Court has said, "Stronger language could hardly have been selected to reveal a purpose to assure the collection of taxes." *Glass City Bank v. United States*, 326 U.S. 265, 267, 66 S. Ct. 108 (1945). Moreover, 26 U.S.C. § 6322 provides:

Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed (or a judgment against the taxpayer arising out of such liability) is satisfied or becomes unenforceable by reason of lapse of time.

These two sections read together, says the Court, "indicate that a continuing lien covers property or rights to property in the delinquent's hands at any time prior to expiration." *Glass City Bank*, 326 U.S. at 267. A federal tax lien "attaches to all property and rights to a taxpayer's property, including property subsequently acquired by the taxpayer." *United States v. Dishman Independent Oil, Inc.*, 46 F.3d 523, 525 (6th Cir. 1995); *Internal Revenue Service v. Orr (In re Orr)*, 180 F.3d 656, 660 (5th Cir. 1999) (same).

The TIAA Contract and CREF Certificate held by Mr. Phillips conform to the tax requirements of the Employee Retirement Income Security Act of 1977 ("ERISA"). [TIAA Retirement Annuity Contract, Endorsement 7-77; CREF Retirement Unit-Annuity Contract, Endorsement 7-77]. As required at 29 U.S.C. § 1056(d)(1), each contract contains a prohibition against assignment which states: "Any assignment or pledge of this contract or of any benefits

hereunder will be void and of no effect,” [TIAA Retirement Annuity Contract, ¶ 15; CREF Retirement Unit-Annuity Contract, ¶ 15], and protection against the claims of creditors [TIAA Retirement Annuity Contract, ¶ 16; CREF Retirement Unit-Annuity Contract, ¶ 16]. Outside of bankruptcy, most creditors cannot attach a debtor’s interests in an ERISA-qualified plan.

The United States is a special sort of creditor, however. Under section 6331 of the Internal Revenue Code, the United States is permitted to collect delinquent taxes by levy upon all property and rights to property except property that is specifically exempt under section 6334. 26 U.S.C. § 6331. Section 6334 exempts certain annuity and pension payments from federal levy but no others. *See* 26 U.S.C. § 6334(c).¹ TIAA and CREF annuity payments are not among those that are exempt from federal levy. *See* 26 U.S.C. § 6334(a)(6).² Pursuant to Treasury Regulation section 1.401(a)-13(b)(2), a provision in a plan that satisfies ERISA’s anti-alienation requirement does not preclude the enforcement of a federal tax levy pursuant to section 6331 or the collection by the United States of a judgment resulting from an unpaid tax assessment. Outside of bankruptcy, there is little question that the United States may reach payments made to an annuitant pursuant to a TIAA contract or CREF certificate to collect unpaid taxes.

Nor is there any question that the federal tax lien attaches to the Plaintiffs’ present right to receive annuity payments in the future. Revenue Ruling 55-210 (1955) provides:

¹ Section 6334(c) provides: “No other property exempt. – Notwithstanding any other law of the United States (including section 207 of the Social Security Act), no property or rights to property shall be exempt from levy other than the property specifically made exempt by subsection (a).” 26 U.S.C. § 6334(c). No other property or rights to property are exempt from levy except the property specifically exempted by Section 6334(a). Neither may any provision of a State law exempt property or rights to property from levy for the collection of any Federal tax. Thus, property exempt from execution under State personal or homestead exemption laws is, nevertheless, subject to levy by the United States for collection of its taxes.

² Section 6334(a)(6) exempts: “Annuity or pension payments under the Railroad Retirement Act, benefits under the Railroad Unemployment Insurance Act, special pension payments received by a person whose name has been entered on the Army, Navy, Air Force, and Coast Guard Medal of Honor roll (38 U.S.C. 1562), and annuities based on retired or retainer pay under chapter 73 of title 10 of the United States Code.”

Where a taxpayer has an unqualified fixed right, under a trust or a contract, or through a chose in action, to receive periodic payments or distributions of property, a Federal lien for unpaid tax attaches to the taxpayer's entire right, and a notice of levy based on such lien is effective to reach, in addition to payments or deductions then due, any subsequent payments or distributions that will become due thereunder.

Moreover, “[e]ven if the payments under a contract are contingent or due to be received in the future, the federal tax lien still attaches to the contractual right to receive those payments.” *Wessel v. United States (In re Wessel)*, 161 B.R. 155, 160 (Bankr. D. S.C. 1993), citing *Randall v. H. Nakashima & Co.*, 542 F.2d 270 (5th Cir.1976) (federal tax lien attached to contractual right to receive telephone equipment system). *See also In re Blackerby*, 208 B.R. 136, 141 (Bankr. E.D. Pa. 1997) (federal tax lien attached to right to receive annuity payments where right is “not contingent on the debtor’s provision of future services or some future occurrence.”); *Tillery v. United States (In re Tillery)*, 204 B.R. 575 (Bankr. D. Okla. 1996) (federal tax lien attached to disability retirement annuity payments); *In re Wesche*, 193 B.R. 76, 77 (Bankr. M.D. Fla. 1996) (federal tax lien attached to civil service retirement).

As the Plaintiffs have failed to provide any argument to the contrary, their argument that the pre-petition tax liens did not attach to pre-petition annuity payments is overruled.

Post-petition Annuity Payments

The Plaintiffs’ second argument relates to post-petition annuity payments. The Plaintiffs state:

Debtors assert that any annuity payments payable to Debtors after the filing of the bankruptcy petition are not property of the estate and a federal tax lien could not attach to such post petition payments. Contrary to the assertion of IRS Debtors were not entitled to receive any payments from the TIAA-CREF as the annuities varied and are determined each year by the administrator if there will be a distribution. There can be no attachment to a payment until it is distributed by TIAA-CREF.

[Dkt. No. 27, ¶ 2].

The Plaintiffs appear to argue that the tax liens cannot attach to post-petition annuity payments because the amounts of future payments are uncertain. In support of their argument, the Plaintiffs rely upon a decision of the Arkansas Supreme Court, *Walker v. Walker*, 791 S.W.2d 710 (Ark. 1990). In that case, an ex-wife sought to obtain her ex-husband, Walker's, interest in TIAA and CREF retirement programs to satisfy a divorce judgment. A writ of garnishment was served upon TIAA, which answered that the annuity contracts did not represent goods, chattels, or monies belonging to the ex-husband. The trial court quashed the writ and the Arkansas Supreme Court affirmed relying upon Arkansas statutes that explicitly exempt benefits under annuity and variable annuity contracts from execution, garnishment, or attachment. *Id.* at 711. The ex-wife argued that these exemptions were personal to Walker (who did not participate in the proceedings) and could not be raised by the garnishee. The court held that TIAA had standing to raise the Arkansas exemption statutes as an affirmative defense, and further that the premiums paid by Walker were assets of TIAA-CREF, not assets of Walker.

The argument of the Plaintiffs is incomplete, and their quotation is inaccurate. The Plaintiffs' memorandum states: "The Courts in Arkansas interpreting the same type of annuities under similar Arkansas law as Tennessee law held that the TIAA-CREF's arguments that the "...annuities are assets of TIAA-CREF, not assets of Walker, and TIAA-CREF has certain obligations to perform according to the contract terms of the annuities." [Dkt. No. 27, ¶ 3.] The sentence is incomplete in that the phrase following the words "held that" does not contain a verb. The phrase merely restates TIAA-CREF's argument. It does not say what the court's holding was concerning that argument. Moreover, the quotation is incomplete in a materially misleading way. The full sentence from the opinion is, "As pointed out by TIAA, the **premiums** remitted on Mr. Walker's annuities are assets of TIAA-CREF, not assets of Walker, and TIAA-CREF has certain

obligations to perform according to the contract terms of the annuities.” *Walker*, 791 S.W.2d at 712 (emphasis added). Indeed, the premiums paid to an insurance company or financial services company for an insurance policy or annuity contract are the property of the company, and the company has certain obligations to fulfill in exchange for the payment of those premiums. Among those duties is the payment of benefits according to the contractual terms. Significantly, the court goes on to say that, “If, however, [ex-husband’s] total benefits under the annuities were due and payable and exceeded the exemptions granted to him by law ... a court could order the annuitant to pay to a judgment creditor such portion of the excess benefits as the court found just and proper.” *Id.* The Arkansas court never said that the annuitant’s right to receive benefit payments under an annuity contract is not property or a right to property.

The Plaintiffs’ argument that Mr. Phillips’ interest in his annuity contracts is not property of the bankruptcy estate because it is not property or a right to property must fail. As noted in the cases discussed above, even if the right to receive annuity payments is contingent, so long as they are not contingent on a debtor’s provision of future services, there is a right to property to which a federal tax lien may attach. The filing of a petition in bankruptcy does not change that result. Although there is an interesting question whether annuity payments under an ERISA-qualified plan are excluded from the bankruptcy estate pursuant to 11 U.S.C. §541(c)(2),³ that question is not before this court. The only question here is whether federal tax liens attached to Mr. Phillips’ right to receive annuity payments under his TIAA and CREF contracts. The court finds that they

³ See, e.g., *Bailey v. United States (In re Bailey)*, 592 B. R. 400, 412 (B.A.P., 1st Cir. 2018), but that dispute appears to have been resolved, at least as to ERISA-qualified trusts by the decision of the Ninth Circuit Court of Appeals in *IRS v. Snyder*, 343 F.3d 1171, 1178 (9th Cir. 2003) (excluding debtor’s interest in an ERISA-qualified trust from property of the estate); *TIAA v. Bareham (In re Quinn)*, 327 B.R. 818 (W.D. Mich. 2005) (interest in retirement plan excluded from property of the estate as being tantamount to an interest in a trust); *Rhiel v. OhioHealth Corp. (In re Hunter)*, 380 B.R. 753 (Bankr. S.D. Ohio 2008) (debtor’s interest in variable annuity is not a beneficial interest in a trust and thus not excluded from estate).

did. As a result, the filing of the bankruptcy petition makes no difference to the outcome because valid, pre-petition liens pass through a bankruptcy notwithstanding the discharge of the personal liability of the debtor. *Johnson v. Home State Bank*, 501 U.S. 78, 83, 111 S. Ct. 2150 (1991) (Discharge extinguishes only the personal liability of the debtor; the creditor's right to foreclose a mortgage survives or passes through the bankruptcy.); *Wrenn v. American Cast Iron Pipe Co. (In re Wrenn)*, 40 F.3d 1162, 1164 (11th Cir. 1994) (“[D]ischarge does not affect liability *in rem*, and pre-petition liens remain enforceable after discharge.”); *Isom v. United States (In re Isom)*, 901 F.2d 744, 745 (9th Cir. 1990) (Property of the debtor remains liable for debt secured by a valid lien, including a tax lien, even when underlying tax debt is discharged in bankruptcy.).

CONCLUSION

For the foregoing reasons, partial summary judgment is **GRANTED** for the United States and against the Plaintiffs, Ivan K. Phillips and Linda A. Phillips, on the question of whether its tax liens attached to Mr. Phillips' annuity payments in his TIAA and CREF annuity contracts pre-petition. They did, and as a result, pass through the bankruptcy case notwithstanding the discharge of the Plaintiffs' personal liability for tax debts secured by those liens.

cc: Debtors/Plaintiffs
Attorney for Debtors/Plaintiffs
Defendant
Attorneys for Defendant
Chapter 7 Trustee