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OPINION OF THE UNITED STATE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT (NOVEMBER 13, 2019)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

KEARNEY CONSTRUCTION COMPANY, LLC,

Plaintiff-Third Party Defendant-Counter Defendant,

v.

TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA,

Defendant-Third Party Plaintiff-Counter Claimant-Appellee,

BING CHARLES W. KEARNEY,

Interested Party-Defendant-Third Party Defendant-Counter Defendant-Appellant,

TONYA NUHFER KEARNEY, CLAYTON KEARNEY, ET AL.,

Interested Parties-Appellants.

No. 18-13143

D.C. Docket No. 8:09-cv-01850-JSM-CPT

Appeals from the United States District Court
for the Middle District of Florida

Before: JILL PRYOR, GRANT, and
ANDERSON, Circuit Judges.

PER CURIAM:

This appeal arose out of a complicated set of facts, and is only the most recent of several appeals by one or more of the Appellants. However, the appellants present for our decision on appeal only two discrete issues,[1] both of which are readily resolved.

We have had the benefit of oral argument, and have carefully reviewed the several opinions of the Magistrate Judge and district court below, as well as the briefs of the parties and relevant parts of the record. Because we write only for the benefit of the parties, who are already familiar with the facts, we mention only such facts as are necessary to understand our reasoning.[2] We address the two issues in turn.

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[1] Appellant's jurisdictional challenge is rejected as wholly without merit.

[2] The two most significant rulings below were made by the Magistrate Judge in Docket 711 and Docket 865, both of which were adopted by the district court. Unless otherwise stated, when we refer to a ruling of the district court, we mean one of those rulings of the Magistrate Judge.

A.

The first issue is presented by Appellant Bing Charles W. Kearney, Jr. (hereinafter referred to as "Bing Kearney"). The issue involves Bing Kearney's IRA Account No.-1122 at US AmeriBank (now known as Valley National Bank), and his pledge of collateral as security for the line of credit he obtained from Moose Investments of Tampa LLC[3] (hereinafter referred to as "Moose Investments") pursuant to his March 1, 2012 Security Agreement with Moose Investments. The issue is purely factual: did that pledge of collateral include his IRA Account No.-1122.[4] In this summary judgment posture, the issue then is whether Bing Kearney adduced sufficient evidence to create a genuine issue of material fact to support his argument that the collateral pledged did not include his IRA Account No.-1122.

We begin with the plain language of the Security Agreement. The collateral conveyed as security stated as follows:

> Grant of Security Interest. As security for any and all Indebtedness (as defined below), the Pledgor hereby irrevocably and uncondi-

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[3] Moose Investments was owned by Bing Kearney's son, Clayton. The opinion of this Court in Appeal No. 17-11368 noted that Bing Kearney exercised considerable control over Moose Investments.

[4] With one minor exception addressed below, Bing Kearney does not challenge the district court's holding that, if, as a matter of fact, Bing Kearney did pledge the IRA account, the legal consequence was that the IRA account was not exempt under Fla. Stat. § 222.21(2)(a). We address the one exception below in footnote 7, concluding that Bing Kearney's argument in that regard is totally without merit.

> tionally grants a security interest in the collateral described in the following properties[:] all assets and rights of the Pledgor, wherever located, whether now owned or hereafter acquired or arising, and all proceeds and products thereof, all goods (including inventory, equipment and any accessories thereto), instruments (including promissory notes)[,] documents, accounts, chattel paper, deposit accounts, letters of credit, rights, securities and all other investment property, supporting obligation[s], any contract or contract rights or rights to the payment of money, insurance claims, and proceeds, and general intangibles (the "Collateral").

We agree with the district court that the above language constitutes an unambiguous pledge of "all assets and rights of the Pledgor," including his IRA Account No.-1122. *See* Magistrate Judge's Report and Recommendation, Docket 865, at 26 ("[T]he language of the Security Agreement is clear, unambiguous, and without exception.").

The only evidence Bing Kearney adduces to support his argument that he did not intend to include his IRA account as part of the collateral is his own affidavit and that of James Reed, the manager of Moose Investments. Both affidavits asserted that neither Bing Kearney nor Moose Investments intended that the IRA Account No.-1122 would be included as part of the collateral. However, the district court[5] struck Reed's affidavit as a sham because it was

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[5] *See* Magistrate Judge Report and Recommendation, Docket 865 at 23 n.11 and related text.

inconsistent with his prior sworn testimony earlier in the same litigation.[6] Although the district court did not actually strike Bing Kearney's similar affidavit, the district court rejected its assertion with respect to the intent of the parties because the affidavit was self-serving, conclusory, and contradicted by other evidence in the record. *See* Magistrate Judge Report and Recommendation, Docket 865 at 24-25. The district court noted that Bing Kearney's affidavit was inconsistent with the earlier affidavit of Reed, discussed above, and also inconsistent with Bing Kearney's own earlier court filings in support of Moose Investments' claim to a superior lien to the garnished funds. *Id.* at 26.

In light of the unambiguous language of the Security Agreement, and the circumstances described above, we agree with the district court that "no genuine issue of material fact exists as to whether the 'IRA' funds currently found in Account-1122 were encompassed and pledged by virtue of Mr. [Bing] Kearney's Security Agreement with Moose [Investments]." *Id.* at 29.

Bing Kearney also argues[7] on appeal that there was no pledge of the IRA account because it was not

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[6] That earlier sworn statement was in support of the effort by Moose Investments to establish that it had a superior lien on the garnished funds (including the IRA account) by virtue of Bing Kearney's Security Agreement and its UCC-1 perfection thereof prior to Travelers' writ of garnishment. That position of course assumed that Bing Kearney owned the IRA account and granted a security interest in it.

[7] The one non-factual argument, *see* footnote 4, Bing Kearney makes with respect to this IRA issue is as follows. He argues that, even if we hold that the IRA account was pledged, he nevertheless is protected by Fla. Stat. §§ 222.21(2)(a)1 and 2 because it has never been determined that his IRA does not qualify as exempt from taxation. In other words, Bing Kearney

delivered to Moose Investments, which never possessed or controlled the account. Thus, he argues that the security interest was not perfected. However, the crucial issue is whether the IRA account was used as security for a loan, not whether the security interest was perfected. It is well established that an unperfected security interest is nevertheless enforceable as between the parties. *See* Fla. Stat. § 679.2031(2).

For the foregoing reasons, we conclude that the district court properly held that Bing Kearney's IRA Account No.-1122 was in fact pledged as security for his loan, and therefore was not exempt under § 222.21.[8] We turn now to the only other issue presented to us on appeal.

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argues that the "unless" clauses of §§ 222.21(2)(a)1 and 2 save his exemption. Sections 222.21(2)(a)1 and 2 provide that when an IRA plan has been preapproved or determined to be exempt by the Internal Revenue Service, then, if the plan is maintained in accordance with its governing instrument, it is exempt from creditors' claims, unless the plan has subsequently been determined not to be exempt from taxation. We readily reject this argument as wholly without merit. Section 222.21(2)(a)1 applies only if the Internal Revenue Service has "pre-approved" an IRA as exempt from taxation, and there is no evidence of any such "pre-approval" of Bing Kearney's IRA. Similarly, § 222.21(2)(a)2 applies only if the Internal Revenue Service has "determined" that an IRA is exempt from taxation, and there is no evidence of any such "determination" with respect to Bing Kearney's IRA. *See In re Yerian*, 927 F.3d 1223, 1229 (11th Cir. 2019). The burden of proving such "pre-approval" or "determination" was on Bing Kearney. *See Kane v. Stewart Tilghman Fox & Bianchi, P.A.*, 197 So.3d 137, 141 (Fla. 4th DCA 2016) ("[T]he party seeking an exemption from garnishment has the burden of proving entitlement to the exemption.").

[8] Bing Kearney's other arguments with respect to his IRA account are rejected without need for further discussion.

B.

The second issue in this appeal is presented to us by the Interested Parties. The Interested Parties argue on appeal that the six joint accounts at USAmeri-Bank—Accounts Nos. -0056, -3695, -0129, -0302, -0020, and -7939—are subject to garnishment as property of Bing Kearney only to the extent of Bing's actual ownership of the several joint accounts, and that Florida law provides a presumption, in the absence of evidence to the contrary, that the ownership of a joint account is pro rata in proportion to the number of names on the joint account. We conclude that this "proportionate share" argument has not been preserved for appeal by the Interested Parties. They did not make this argument in their motion to dissolve the writ of garnishment or in their motion for summary judgment. Rather, they argued to the magistrate judge that Bing Kearney owned no part at all of the joint accounts, but rather that he was a mere "convenient signor" of the several joint accounts.[9] After the Magistrate Judge rejected those arguments, Magistrate Judge R&R, Doc. 711, the Interested

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[9] The Interested Parties also argued that Travelers' judgment lien and writ of garnishment on all of the garnished funds was an inferior lien, inferior to a superior lien held by Moose Investments pursuant to its UCC-1 and security interest as granted by Bing Kearney. They also argued that Travelers' judgment lien and writ of garnishment was an inferior lien, inferior to a superior lien held by FTBB as assignee of the judgment obtained against Bing Kearney by Regions Bank and its previously served garnishment lien on all of the garnished funds. Of course, both such arguments necessarily assume that Bing Kearney owned the entirety of all of the garnished funds, an argument inconsistent with the Interested Parties' belated "proportionate share" argument.

Parties again failed to make the "proportionate share" argument in their objections to the Magistrate Judge's Report and Recommendation. The Interested Parties made their "proportionate share" argument for the first time in their Motions for Release of Funds, Docket 852-55, which were filed only after the district court adopted the Magistrate Judge's R&R. In other words, the Interested Parties raised their "proportionate share" argument for the first time after the district court had finally rejected their arguments to date. The district court denied the Interested Parties' belated "proportionate share" argument without discussion. The Interested Parties repeat their "proportionate share" argument on appeal as their only challenge to the judgment of the district court.

We conclude that the Interested Parties have not preserved for appeal their belated "proportionate share" argument because they did not raise this argument in accordance with Florida garnishment procedures. Fla. Stat. § 77.07(2) requires any party with an interest in a garnished property to make its specific objections to the writ of garnishment known within 20 days of the writ's execution through a motion to dissolve the writ. The motion must state which allegations in the plaintiff's motion for a writ of garnishment are untrue. "On such motion this issue shall be tried, and if the allegation in plaintiff's motion which is denied is not proved to be true, the garnishment shall be dissolved." *Id.* (emphasis added). Thus, the statute provides that the issues considered in the trial shall be those raised in the motion to dissolve.[10] If a party fails to raise an issue in its

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[10] Florida law requires that garnishment procedures are strictly construed. *See Zivitz v. Zivitz*, 16 So.3d 841, 847 (Fla. 2d DCA

motion to dissolve, it loses the opportunity to try that issue. The issues raised in the motion to dissolve define the scope of both pre-trial discovery and the issues litigated before the factfinder. In essence, the garnishment persists unless the challenges to its factual underpinnings that are specified in the motion to dissolve have merit.

Here, the Interested Parties did not raise the argument they now present on appeal—that Florida law presumes that parties to a joint account each own a pro rata share of the account, in the absence of evidence to the contrary—until after they filed their motions to dissolve under Fla. Stat. § 77.07(2). Travelers sought discovery on, and actually litigated, the issue that the Interested Parties initially raised in their motions—whether Bing Kearney had any interest at all in the garnished accounts. Under Florida's garnishment procedures, nothing more was, or should have been, required of them.[11]

2009) (Florida garnishment procedures require "strict adherence to the provisions of the statute*"); Akerman Senterfitt & Eidson, P.A. v. Value Seafood, Inc.*, 121 So.3d 83, 86 (Fla. 3d DCA 2013) ("It is fundamental that garnishment statutes must be strictly construed.").

[11] Although we need not, and do not, address the merits of the Interested Parties' belated "proportionate share" argument, we note that there is considerable evidence in the record that Bing Kearney owned or controlled at least the major portion of the amounts at issue. *See* Magistrate Judge's Report and Recommendation, Docket 711, at 24-29 (describing evidence to that effect, including earlier testimony of Bing Kearney and others, as well as other evidence of his control).

C.

For the foregoing reasons,[12] the judgment of the district court is

AFFIRMED.

[12] Other arguments of Bing Kearney or the Interested Parties are rejected without need for further discussion.

FINAL JUDGMENT OF GARNISHMENT IN A CIVIL CASE (JUNE 29, 2018)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

KEARNEY CONSTRUCTION COMPANY, LLC,

Plaintiff,

v.

TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA, FLORIDA SOIL CEMENT, LLC, FLORIDA TRUCKING CO., INC., ALAN PAYNE, BRIAN W. SEEGER, ISLEWORTH GOLF & COUNTRY CLUB, INC., and OLD MEMORIAL CLUB, INC.,

Defendants.

Case No. 8:09-cv-1850-T-30CPT

Decision by Court. This action came before the Court and a decision has been rendered.

IT IS ORDERED AND ADJUDGED final judgment of garnishment in favor of Travelers Casualty & Surety Company of America (Travelers) and against the garnishee, USAmeriBank, in the amount of $1,158,037.38. for which sum let execution issue.

Elizabeth M. Warren
Clerk

/s/ B.Napier
Deputy Clerk

ORDER OF THE UNITED STATES DISTRICT COURT OF FLORIDA TAMPA DIVISION (JUNE 28, 2018)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

KEARNEY CONSTRUCTION COMPANY, LLC,

Plaintiff,

v.

TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA,

Defendant,

v.

KEARNEY CONSTRUCTION COMPANY, LLC, ET AL.,

Third Party Defendants,

v.

USAMERIBANK,

Garnishee.

Case No. 8:09-cv-1850-T-30CPT

Before: James S. MOODY, JR.,
United States District Judge.

THIS CAUSE came on for consideration upon the Report and Recommendation submitted by Magistrate Judge Christopher P. Tuite (Dkt. 930). A limited Objection was filed by Garnishee Valley National Bank, as successor-in-interest to USAmeriBank (Dkt. 931). Objections were also filed by Interested Parties Tonya Kearney, Charles W. Kearney, Clayton Kearney, and Bryan Kearney (Dkt. 932) and Defendant Bing Charles W. Kearney, Jr. and Interested Party Tonya Kearney (Dkt. 933).

After careful consideration of the Report and Recommendation of the Magistrate Judge, the Objections to the Report and Recommendation, and an independent examination of the file, the Court is of the opinion that the Magistrate Judge's Report and Recommendation should be adopted, confirmed, and approved in all respects with the limited exception that the Court will sustain USAmeriBank's limited Objection, which seeks thirty-five (35) days (rather than the thirty (30) days recommended in the Report and Recommendation) after entry of Final Judgment in which to make the disbursement.

ACCORDINGLY, it is therefore, ORDERED AND ADJUDGED:

1. The Report and Recommendation (Dkt. 930) of the Magistrate Judge is adopted, confirmed, and approved in all respects and is made a part of this order for all purposes, including appellate review, with the limited exception explained herein.

2. USAmeriBank's Amended Renewed Motion to Recover Attorneys' Fees and Costs Incurred (Dkt. 909) is denied as moot.

3. The Clerk shall enter a Final Judgment of Garnishment in favor of Travelers Casualty & Surety Company of America (Travelers) and against the garnishee, USAmeriBank, in the amount of $1,158,037.38.

4. Within thirty-five (35) days of the date of entry of the Final Judgment of Garnishment, USAmeriBank shall disburse the funds it is holding in the Accounts pursuant to the Writ.

5. USAmeriBank may withhold from the disbursement the amount agreed upon by and between it and Travelers as payment for USAmeriBank's attorneys' fees and costs.

6. Upon payment of the funds, Travelers shall credit Kearney with the full amount of the Final Judgment of Garnishment.

7. Within thirty (30) days of payment of the funds, Travelers shall file a Notice of Partial Satisfaction of Judgment indicating that it has received the amount of $1,158,037.38 (or more, if appropriate) in partial satisfaction of the Judgment (Dkt. 244).

DONE and ORDERED in Tampa, Florida on June 28, 2018.

/s/ James S. Moody, Jr.
United States District Judge

ORDER ADOPTING REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT OF FLORIDA TAMPA DIVISION (FEBRUARY 7, 2018)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

KEARNEY CONSTRUCTION COMPANY, LLC,

Plaintiff,

v.

TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA,

Defendant,

v.

KEARNEY CONSTRUCTION COMPANY, LLC, ET AL.,

Third Party Defendants,

v.

USAMERIBANK,

Garnishee.

Case No. 8:09-cv-1850-T-30TBM

Before: James S. MOODY, JR.,
United States District Judge.

THIS CAUSE came on for consideration upon the Report and Recommendation submitted by Magistrate Judge Thomas B. McCoun, III (Dkt. 894). Objections to the Report and Recommendation were filed on February 6, 2018, by Defendant Bing Charles W. Kearney (Dkt. 901) and Interested Parties' Tonya Kearney, Bryan Kearney, Clayton Kearney, and Charles W. Kearney (Dkt. 902).

After careful consideration of the Report and Recommendation of the Magistrate Judge, the Objections to the Report and Recommendation, and an independent examination of the file, the Court is of the opinion that the Magistrate Judge's Report and Recommendation should be adopted, confirmed, and approved in all respects.

ACCORDINGLY, it is therefore, ORDERED AND ADJUDGED that:

1. The Report and Recommendation (Dkt. 894) of the Magistrate Judge is adopted, confirmed, and approved in all respects and is made a part of this order for all purposes, including appellate review.

2. Travelers Casualty & Surety Company of America's Motion for Final Judgment in Garnishment as to the IRA Account (Dkt. 874), as orally amended at hearing to include all seven accounts, is GRANTED.

3. Final Judgment of Garnishment in favor of Travelers Casualty & Surety Company of America and against the garnishee USAmeriBank should be

issued for the amounts in the accounts ending in -0056, -3695, -0129, -0302, -0020, -7939, and -1122, in the total amount of $1,158,037.38, subject to offset for USAmeriBank's statutory attorney's fees.

4. Jurisdiction is retained by this Court to determine USAmeriBank's claim for statutory attorney's fees and costs.

5. Disbursement of the funds held by USAmeriBank are deferred, pending resolution of USAmeriBank's claim for statutory attorney's fees.

6. Mr. Kearney's *ore tenus* request for a stay of disbursement or enforcement of the Final Judgment pending his appeal concerning the IRA Account is DENIED WITHOUT PREJUDICE. Such request may be renewed if and when Mr. Kearney files a notice of appeal.

7. The Renewed Requests for Release of Garnished Funds in USAmeriBank Joint Accounts (Dkts. 903, 904, 905, 906) are DENIED AS MOOT.

DONE and ORDERED in Tampa, Florida, this 7th day of February, 2018.

/s/ James S. Moody, Jr.
United States District Judge

REPORT AND RECOMMENDATION BY THE UNITED STATES MAGISTRATE JUDGE THOMAS B. McCOUN III (JANUARY 23, 2018)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

KEARNEY CONSTRUCTION COMPANY, LLC,

Plaintiff,

v.

TRAVELERS CASUALTY & SURETY COMPANY OF AMERICA,

Defendant,

v.

KEARNEY CONSTRUCTION COMPANY, LLC, ET AL.,

Third Party Defendants,

v.

USAMERIBANK,

Garnishee.

Case No. 8:09-cv-1850-T-30TBM

Before: Thomas B. McCOUN III,
United States Magistrate Judge.

THIS CAUSE is before the Court following a status conference conducted January 11, 2018.

Pending before the Court is Travelers Casualty & Surety Company of America's Motion for Final Judgment in Garnishment as to the IRA Account. (Doc. 874). By the motion, Travelers seeks final judgment in its favor and an order directing USAmeriBank to release the funds in the "IRA Account" ending -1122. It claims disbursement of these funds is now appropriate given that the Eleventh Circuit has affirmed the district court's ruling that voided FTBB's priority lien and given the ruling that this account is not exempt from garnishment. Id.

The garnishee USAmeriBank has filed a limited response in opposition, asserting it is entitled to a determination of its attorneys' fees expended on the garnishment issue and to recoup same from the funds prior to disbursement. (Doc. 876).[1]

Bing Charles W. Kearney also filed a response in opposition. (Doc. 877). Mr. Kearney sets out the procedural history and disputes that he has elected to forego

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[1] USAmeriBank has made a demand for statutory attorneys' fees. Section 77.28 provides, "On rendering final judgment, the court shall determine the garnishee's costs and expenses, including a reasonable attorney fee, and in the event of a judgment in favor of the plaintiff, the amount shall be subject to offset by the garnishee against the defendant whose property or debt owing is being garnished. In addition, the court shall tax the garnishee's costs and expenses as costs." Fla. Stat., § 77.28.

his legal right to challenge the Court's rulings on the IRA account. He maintains his claim of exemption to the IRA funds and asserts he is entitled to file an appeal of any final judgment in garnishment. *Id.*

At hearing, Travelers indicated that final judgment is now appropriate on the entirety of the USAmeriBank funds held subject to the Writ of Garnishment issued by the Clerk on July 24, 2015. (Doc. 556, hereinafter "the Writ").[2] The parties agreed that consistent with

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[2] On August 12, 2015, USAmeriBank answered the Writ, declaring that it was indebted to Mr. Kearney in the total amount of $1,158,037.38, such amount comprised of several accounts. (Doc. 577). USAmeriBank identified seven accounts:

Account No.	Account Holders	Amount Held
-0056	Bing Kearney, Jr. Tonya Nuhfer-Kearney	$625,305.39
-3695	Bing Kearney, Jr. Tonya Nuhfer-Kearney Charles Wesley Kearney III Clayton Whitman Kearney	$28,345.60 (plus an additional $111.67 held pursuant to a state court writ of garnishment)
-0129	Bing Kearney, Jr. Tonya Nuhfer-Kearney Charles Wesley Kearney III Clayton Whitman Kearney	$4,426.41
-0302	Bing Kearney, Jr. Charles Wesley Kearney III Clayton Whitman Kearney	$1,185.17 (plus an additional $59.61 held pursuant to a state court writ of garnishment)
-0020	Bing Kearney, Jr. Charles Wesley Kearney III Clayton Whitman Kearney	$39,722.31
-7939	Bing Kearney, Jr. Bryan G. Kearney	$1,037.41

the statute, the matter of USAmeriBank's fees should be determined prior to disbursement of the funds, but such does not necessarily impede the Court's ability to enter final judgment, provided, however, the Court defer disbursement and reserve jurisdiction to determine such fees.[3] In addition, at hearing, Mr. Kearney requested that disbursement of the funds and enforcement of any final judgment be stayed pending its anticipated appeal of the judgment.

Garnishment proceedings in Florida are governed by Chapter 77 of the Florida Statutes. Florida Statute § 77.083 states, "Judgment against the garnishee on the garnishee's answer or after trial of a reply to the garnishee's answer shall be entered for the amount of his or her liability as disclosed by the answer or trial." Fla. Stat., § 77.083.

As noted above, USAmeriBank is indebted to Mr. Kearney in the total amount of $1,158,037.38. (Doc. 577). There is no dispute as to the amount being held by USAmeriBank. While Mr. Kearney and others have raised various legal and factual issues, including claims of exemption, in opposition to the garnishment of these accounts, all such issues (apart from USAmeriBank's claim for fees) have now been resolved by the Court.

Six of the accounts (-0056, -3695, -0129, -0302, -0020, and -7939) held pursuant to the Writ were previously addressed in the Report and Recom-

-1122	Bing Kearney, Jr.	$457,493.81

Id.

[3] USAmeriBank was directed to file its renewed motion for attorneys' fees within fourteen (14) days of the hearing.

mendation entered on March 17, 2016 (Doc. 711) and adopted by the district judge on April 8, 2016 (Doc. 719). Therein, the Court granted Travelers' motion for summary judgment in part and determined that these six accounts were not exempt from garnishment.[4]

With regard to the seventh account, the nominal IRA account, such was addressed in the Report and Recommendation entered on August 26, 2017 (Doc. 865) and adopted by the district judge on September 21, 2017 (Doc. 872). By that Order, the Court ruled that the USAmeriBank account ending in -1122 is not exempt from garnishment.[5]

Furthermore, the matter of priority to the USAmeriBank accounts was addressed in the proceedings supplementary associated with this case. In those proceedings, the Court ruled that the purported assignment of Regions' priority lien position to the USAmeriBank garnished funds to FTBB, LLC, is voided; that FTBB, LLC, is prohibited from asserting a priority lien position to these funds in any pending collection action, including this case and the Regions case (Case No 8:09-cv-1841); and that Travelers, as against FTBB, be granted a superior lien position to the USAmeriBank funds. (Docs. 828, 831). FTBB appealed the ruling, but such was affirmed by the Eleventh Circuit. (Docs. 837, 873).

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[4] Mr. Kearney and several of his family members appealed the ruling (Doc. 738), but voluntarily dismissed that appeal on December 11, 2017. *See Kearney Construction Company v. Bing Kearney, Jr., et al.*, No. 16-12252-W (11th Cir.).

[5] This ruling has not yet been appealed.

Given the above and upon review of the pleadings and papers filed in this action, the Court finds that Travelers has satisfied the procedural and notice requirements of the Florida Statutes. The various claims of exemption and ownership, as well as FTBB's claim of priority, have been resolved by the Court in Travelers' favor, and there remains no impediment to entry of judgment as to the USAmeriBank accounts.[6] As such, the undersigned finds that final judgment in garnishment is now appropriate on all seven of the accounts subject to the Writ.

Accordingly, I RECOMMEND that:

(1) Travelers Casualty & Surety Company of America's Motion for Final Judgment in Garnishment as to the IRA Account (Doc. 874), as orally amended at hearing to include all seven accounts, be granted;

(2) Final Judgment of Garnishment in favor of Travelers Casualty & Surety Company of America and against the garnishee, USAmeriBank, should be issued for the amounts in the accounts ending in -0056, -3695, -0129, -0302, -0020, -7939, and -1122, in the total amount of $1,158,037.38, subject to offset for USAmeriBank's statutory attorney's fees;

(3) the district judge retain jurisdiction to determine USAmeriBank's claim for statutory attorneys' fees and costs;

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[6] For the sake of brevity and given that these matters have been thoroughly addressed previously, the undersigned incorporates its findings and conclusions made in its previous reports and recommendations, which have been adopted by the district judge. (*See* Docs. 711, 719, 828, 831, 865, 872).

(4) the district judge defer disbursement of the funds being held by USAmeriBank, pending resolution of USAmeriBank's claim for statutory attorneys' fees;

(5) the district judge deny without prejudice Mr. Kearney's *ore tenus* request for a stay of disbursement or enforcement of the Final Judgment pending his appeal concerning the IRA Account. Such request may be renewed if and when Mr. Kearney files a notice of appeal.

Respectfully submitted this 23rd day of January 2018.

/s/ Thomas B. McCoun III
United States Magistrate Judge

ORDER ADOPTING REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT OF FLORIDA TAMPA DIVISION (SEPTEMBER 21, 2017)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

KEARNEY CONSTRUCTION COMPANY, LLC,

Plaintiff,

v.

TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA ET AL.,

Defendants.

Case No. 8:09-CV-1850-T-30TBM

Before: James S. MOODY, JR.,
United States District Judge.

THIS CAUSE came on for consideration upon the Report and Recommendation submitted by Magistrate Judge Thomas B. McCoun, III (Dkt. 865), FTBB, LLC's Objections (Dkt. 869), Travelers Casualty & Surety Company of America's Response in Opposition to FTBB, LLC's Objections (Dkt. 870), and Defendant Bing Charles W. Kearney's Objections (Dkt. 871).

After careful consideration of the Report and Recommendation of the Magistrate Judge, the Response, and Objections, and in conjunction with an independent examination of the file, the Court is of the opinion that the Magistrate Judge's Report and Recommendation should be adopted, confirmed, and approved in all respects.

ACCORDINGLY, it is therefore, ORDERED AND ADJUDGED that:

1. The Report and Recommendation (Dkt. 865) of the Magistrate Judge is adopted, confirmed, and approved in all respects and is made a part of this Order for all purposes, including appellate review.

2. FTBB, LLC's Second Motion for Summary Judgment on Travelers' Second Writ of Garnishment of Bing Kearney's US AmeriBank IRA Account (Dkt. 805) is DENIED.

3. Bing Charles W. Kearney's Motion for Summary Judgment Finding IRA Funds Maintained in US AmeriBank Account Ending -1122 Exempt from Garnishment Pursuant to § 222.21, Florida Statutes (Dkt. 811) is DENIED.

4. Travelers' Motion for Final Summary Judgment in Garnishment as to the IRA Account (Dkt. 815) is GRANTED in part and DENIED in part as described in the Report and Recommendation (Dkt. 865).

5. The subject USAmeriBank Account Ending in -1122 is not exempt from garnishment pursuant to Florida Statute § 222.21(2)(a).

DONE and ORDERED in Tampa, Florida on September 21, 2017.

/s/ James S. Moody, Jr.
United States District Judge

REPORT AND RECOMMENDATION BY THE UNITED STATES MAGISTRATE JUDGE THOMAS B. McCOUN III (AUGUST 16, 2017)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

KEARNEY CONSTRUCTION COMPANY, LLC,

Plaintiff,

v.

TRAVELERS CASUALTY & SURETY COMPANY OF AMERICA,

Defendant,

v.

KEARNEY CONSTRUCTION COMPANY, LLC, ET AL.,

Third Party Defendants,

v.

USAMERIBANK,

Garnishee.

Case No. 8:09-cv-1850-T-30TBM

Before: Thomas B. McCOUN III,
United States Magistrate Judge.

THIS CAUSE is before the Court on referral for a Report and Recommendation on three summary judgment motions relating to a bank account held by USAmeriBank and subject to a writ of garnishment:

(1) FTBB, LLC's Second Motion for Summary Judgment on Travelers' Second Writ of Garnishment of Bing Kearney's USAmeriBank IRA Account (Doc. 805) and Travelers' response in opposition (Doc. 817);

(2) Bing Charles W. Kearney's Motion for Summary Judgment Finding IRA Funds Maintained in USAmeriBank Account Ending-1122 Exempt from Garnishment Pursuant to § 222.21, Florida Statutes (Doc. 811) and Travelers' response in opposition (Doc. 818); and

(3) Travelers' Motion for Final Summary Judgment in Garnishment as to the IRA Account (Doc. 815), FTBB's response in opposition (Doc. 816) and Kearney's response in opposition (Doc 819).

I.

The pertinent procedural history has been detailed previously in a Report and Recommendation on several other motions related to the USAmeriBank garnishment (*see* Doc. 711), and for the sake of brevity will not be repeated in detail here.

The three motions currently at issue relate to Account-1122, which is held by USAmeriBank subject to a Writ of Garnishment issued by the Clerk on July 24, 2015. (Doc. 556, hereinafter "the Writ").[1]

On August 12, 2015, USAmeriBank answered the Writ, declaring that it was indebted to Mr. Kearney in the total amount of $1,158,037.38, such amount comprised of several accounts. (Doc. 577).

USAmeriBank identified the following seven accounts:

Account No.	Account Holders	Amount Held
-0056	Bing Kearney, Jr. Tonya Nuhfer-Kearney	$625,305.39
-3695	Bing Kearney, Jr. Tonya Nuhfer-Kearney Charles Wesley Kearney III Clayton Whitman Kearney	$28,345.60 (plus an additional $111.67 held pursuant to a state court writ of garnishment)

[1] The pleadings and motions sometimes refer to this as the "Second Writ of Garnishment." Travelers' first writ of garnishment directed to USAmeriBank was issued on September 26, 2014. (Doc. 279). For a variety of reasons, no judicial resolution or final judgment in garnishment was reached on this first writ and it dissolved by operation of law.

-0129	Bing Kearney, Jr. Tonya Nuhfer-Kearney Charles Wesley Kearney III Clayton Whitman Kearney	$4,426.41
-0302	Bing Kearney, Jr. Tonya Nuhfer-Kearney Charles Wesley Kearney III Clayton Whitman Kearney	$1,185.17 (plus an additional $59.61 held pursuant to a state court writ of garnishment)
-0020	Bing Kearney, Jr. Tonya Nuhfer-Kearney Charles Wesley Kearney III Clayton Whitman Kearney	$39,722.31
-7939	Bing Kearney, Jr. Bryan G. Kearney	$1,037.41
-1122	Bing Kearney, Jr.	$457,493.81

Id.

On October 21, 2015, Mr. Kearney filed an Amended Claim of Exemption and Request for Hearing. (Doc. 623).[2] Therein, he asserted exemptions from garnishment under the "head of family wages" exemption, "retirement or profit-sharing benefits or pension

[2] Mr. Kearney initially filed a timely filed a Claim of Exemption and Request for Hearing on August 17, 2015, asserting exemption from garnishment under the "head of family wages" exemption and "other exemptions as provided by law." (Doc. 583). Travelers filed a motion to strike the Amended Claim of Exemption (Doc. 626), which this Court denied (Doc. 680).

money," and "other exemptions as provided by law." *Id.*[3]

Six of the accounts (-0056, -3695, -0129, -0302, -0020, and -7939) were previously addressed in the Report and Recommendation entered on March 17, 2016 (Doc. 711) and adopted by the district judge on April 8, 2016 (Doc. 719). In that Report and Recommendation, the undersigned recommended deferring ruling on the claim of exemption as to the alleged IRA account (Account -1122) to permit additional discovery. (Doc. 711 at 13, n.10). Discovery was completed, and the instant motions are now ripe for review.

II.

In accordance with Federal Rule of Civil Procedure 56, summary judgment is appropriate when the movant can show that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. *Fennell v. Gilstrap*, 559 F.3d 1212, 1216 (11th Cir. 2009) (citing *Welding Servs., Inc. v. Forman*, 509 F.3d 1351, 1356 (11th Cir. 2007)). Which facts are material depends on the substantive law applicable to the case. *Anderson v. Liberty Lobby,*

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[3] In the explanation section, Mr. Kearney states:

> The funds are tenants-by-the-entireties funds with my wife. Plaintiff does not have a judgment against my wife and, as a result, the funds are not susceptible to garnishment, as a matter of law.
>
> Also, there are numerous issues involved with such funds as a result of my (and my wife's) recent settlement with Regions Bank, which can be explained in more detail upon a hearing of my claim of exemption.

Id. at 2.

Inc., 477 U.S. 242, 248 (1986). The moving party bears the burden of showing that no genuine issue of material fact exists. *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991).

Evidence is reviewed in the light most favorable to the non-moving party. *Fennell*, 559 F.3d at 1216 (citing *Welding Servs., Inc.*, 509 F.3d at 1356). A moving party discharges its burden on a motion for summary judgment by showing or pointing out to the court that there is an absence of evidence to support the non-moving party's case. *Denney v. City of Albany*, 247 F.3d 1172, 1181 (11th Cir. 2001) (citation omitted). When a moving party has discharged its burden, the non-moving party must then designate specific facts (by its own affidavits, depositions, answers to interrogatories, or admissions on file) that demonstrate there is a genuine issue for trial. *Porter v. Ray*, 461 F.3d 1315, 1320-1321 (11th Cir. 2006) (citation omitted). The party opposing a motion for summary judgment must rely on more than conclusory statements or allegations unsupported by facts. *Evers v. Gen. Motors Corp.*, 770 F.2d 984, 986 (11th Cir. 1985) ("conclusory allegations without specific supporting facts have no probative value."). "If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact . . . the court may . . . grant summary judgment if the motion and supporting materials . . . show that the movant is entitled to it." Fed. R. Civ. P. 56(e).

III.

FTBB moves for summary judgment asserting, "In the event the Court determines that the USAmeriBank IRA funds are <u>not</u> exempt from garnishment, then

[FTBB] asserts a priority claim to the funds." (Doc. 805 at 5) (emphasis in original). FTBB's claim of priority is based factually on Regions' sale and assignment of its judgment against Mr. Kearney and others to FTBB in April 2015. It argues because the Regions writ was first in time, FTBB takes Regions' position and, thus, has priority over Travelers' Writ.[4] (*See generally* Doc. 805).

Travelers opposes the motion and moves to strike FTBB's motion for summary judgment on the bases that FTBB lacks standing to present its claim; that FTBB disclaimed its interest in the IRA account and is equitably estopped from asserting a priority claim; and Travelers is entitled to a priority interest in the IRA account under the "diligent creditor rule." (Doc. 817).

This Court has previously found that FTBB has failed to present a valid claim to the garnished funds in accordance with Florida's garnishment statutes. (See Doc. 711 at 33). On that basis alone, FTBB's motion should be denied.

In any event, FTBB has no valid basis to claim priority to the IRA account. The Writ in the Regions case did not include the IRA account. According to USAmeriBank's Answer, Account-1122 is not subject to any prior writ of garnishment. (Doc. 577; *see also* Regions case, Doc. 212). Thus, FTBB has no perfected priority position to these funds.

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[4] The motion is supported by copies of the settlement documents, the Assignment of the Regions Judgment, and pleadings in the Regions case. (Docs. 805-1–805-5).

In addition, in the proceedings supplementary this Court recommended that FTBB should be prohibited from asserting a priority lien position to the USAmeri-Bank funds. (Doc. 828). The district judge adopted the recommendation, ordering, in pertinent part:

> The purported assignment of Regions' priority lien position to the USAmeriBank garnished funds to FTBB, LLC is hereby VOIDED.
>
> FTBB, LLC is prohibited from asserting a priority lien position to the USAmeriBank garnished funds in any pending collection action, including this case and the Regions case (case number 8:09-cv-1841-T-17MAP).
>
> TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA, as against FTBB, LLC, is GRANTED a superior lien position to the USAmeriBank funds.

(Doc. 831).

FTBB has no present ability to claim a priority lien position to the USAmeriBank funds, including the alleged IRA account. Accordingly, FTBB's Motion for Summary Judgment (Doc. 805) should be denied.

IV.

A.

Next, Mr. Kearney and Travelers submit cross-motions for summary judgment. (Docs. 811, 815). The cross-motions raise two main issues: (1) whether or not the funds were properly rolled over to an IRA account within the sixty-day period provided in Section 408 of the Internal Revenue Code or otherwise qualify for a waiver of the sixty-day rollover period; and (2)

whether or not the funds lost their exempt status on the basis of Mr. Kearney's pledge of collateral in his security agreement with Moose Investments.

By his motion (Doc. 811), Mr. Kearney argues that the funds held in Account-1122 are exempt from garnishment pursuant to Florida Statute § 221.21(2) and the applicable provisions of the Internal Revenue Code. He urges that even where funds are "rollover contributions," such as in this case, they do not lose their exempt status if they are deposited into a new individual retirement account or individual retirement annuity "not later than the 60th day after the day on which [the person] receives the payment or distribution" from the previous individual retirement account or annuity. And, even if they were not rolled-over within the sixty day period, Mr. Kearney is entitled to a waiver of that deadline pursuant to 26 U.S.C. § 408(d)(3)(I). Mr. Kearney claims that the undisputed facts show that he fully intended and did everything required under the law to maintain his IRA funds in an exempt IRA account, and any failure to comply with the sixty-day provision for rollover of the funds was beyond his control and does not invalidate the exempt status of these funds.[5]

By its cross-motion and in its response (Docs. 815, 818), Travelers claims Mr. Kearney failed to maintain the alleged IRA account in accordance with the tax code. Travelers argues Mr. Kearney has failed

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[5] In support, Mr. Kearney has filed the Deposition of Mr. Kearney's CPA Justin Rowlson (Doc. 802), the Deposition of USAmeriBank employee Cami Gibertini and exhibits (Docs. 803, 806-810), as well as the affidavits of Bing Kearney (Doc. 811-1) and Justin Rowlson (Doc. 811-2).

to establish that a waiver of the sixty-day deadline for rollover of the funds is warranted. By this argument, Mr. Kearney must establish that the untimely rollover was solely USAmeriBank's fault and he has not done so. Rather, Travelers argues the evidence shows Mr. Kearney failed to follow the bank's instructions to effectuate the rollover in a timely manner. Travelers further argues Mr. Kearney pledged the IRA as security to Moose Investments of Tampa, LLC, pursuant to the Promissory Note and Security Agreement, in which he pledged all accounts or rights to payments as collateral. It asserts the pledge of the account as collateral caused the account to lose its tax-exempt status and thus lose its exempt status from garnishment.

Mr. Kearney responds that he did not pledge or intend to pledge his tax-exempt IRA funds to Moose. He argues there is a latent ambiguity in the Promissory Note and Security Agreement as to whether the IRA account was included and the evidence shows the intent of the parties was not to include exempt assets in the pledge. He again urges that the failure to comply with the sixty-day rollover period was the fault of USAmeriBank and he has presented substantial evidence supports his claim that the error was due to USAmeriBank's delay, not his own. (Doc. 819).[6]

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[6] FTBB also filed a response in opposition to Travelers' motion for summary judgment. (Doc. 816). However, given the findings and conclusions above with regard to FTBB, I find no reason to address its arguments.

B.

The timeline of events pertinent to these motions is largely undisputed.

On March 1, 2012, Mr. Kearney executed a Revolving Line of Credit Promissory Note in favor of his son Clayton's company, Moose Investments of Tampa, LLC ("Moose"). (Doc. 815-18). The Promissory Note is collateralized by a Security Agreement in which Mr. Kearney pledged a security interest in:

> . . . all assets and rights of the Pledgor, wherever located, whether now owned or hereafter acquired or arising, and all proceeds and products thereof, all good (including inventory, equipment and any accessories thereto), instruments (including promissory notes) documents, accounts, chattel paper, deposit accounts, letters of credit, rights, securities and all other investment property, supporting obligation, any contract or contract rights or rights to the payment of money, insurance claims, and proceeds, and general intangibles (the "Collateral").

(Doc. 815-18 at 4).

On August 6, 2012, Moose recorded a UCC-1 with the Florida Secured Transaction Registry as to the above assets. (Doc. 815-19).

On October 25, 2012, Mr. Kearney deposited $448,646.03 into IRA account at USAmeriBank ending in-0374. (Doc. 806 at 11-15; Doc. 815-4). The deposit was comprised of $403,601.89 rolled over from Kearney's previously existing IRA account at USAmeriBank, account-0871, and $45,044.14 deposited as a

rollover contribution from Mr. Kearney's IRA account at Platinum Bank. (*Id.*, *see also* Doc. 815-5).

On October 27, 2014, Mr. Kearney, through his bookkeeper, Amber Lastres (a/k/a Amber Proctor), requested that the funds from his IRA account be transferred into a day-to-day money market account held jointly by he and his wife Tonya Nuhfer-Kearney as tenants by the entirety. (See Doc. 808 at 6-7) ("Bing does not want to renew the attached IRA, please transfer funds into a day to day money market account. Bing & Tonya Kearney signers Tenants by entireties. Thanks, Amber"). The following day, $455,119.97 was withdrawn from the IRA account -0374 and transferred to a money market account -0223. (Docs. 815-7–815-8). On October 29, 2014, Mr. Kearney signed an IRA Distribution Form authorizing USAmeriBank to distribute the $455,119.97 in the IRA account ending-0374 via official check. (Doc. 807 at 18-19; Doc. 815-9). The date of distribution listed on that form was October 28, 2014. *Id.*

Also on October 29, 2014, Amber Lastres requested via email that the money market account be changed to an IRA money market account with only Mr. Kearney on the account. (Doc. 808 at 10). She also stated, "I have the IRA distribution form signed and will bring the original to you. Thank you, Amber." *Id.*

Thereafter, Amber Lastres exchanged several emails with USAmeriBank representatives regarding the funds, wherein there appears confusion about the status of the funds and where the funds were being held. On November 6, 2014, in an email exchange between Amber Lastres and Jennifer Havener of USAmeriBank, Ms. Lastres asked, "When does he [Kearney] need to let you know before the IRA auto-

matically renews? Thanks. Amber." (Doc. 808 at 11). Ms. Havener responded, "The funds were transferred to the Money Market on the 28th. From that date he has 60 days to roll those funds over into a new IRA." *Id.* Ms. Lastres replied, "Why were they transferred to a money market? He did not sign anything yet." *Id.*

Again on November 13 and 14, 2014, Ms. Lastres and USAmeriBank representatives exchanged emails regarding the status of the funds. *Id.* at 16-23. In that exchange, Cami Gibertini stated:

> OK, Bing will have 60 days under the rules of an IRA Transfer before he has to consider any tax implications. So, I need that form signed and returned so we can make certain there is none. That's first.
>
> Secondly, we'll get the funds back in a IRA/ CD today. Please confirm the term.

(Doc. 808 at 18).

Ms. Lastres replied, "Sorry 12 mos. If that one is the shortest and same as last one." *Id.* With regard to the form, Ms. Lastres stated, "He is not in the office today, so next week for the form." (Doc. 809 at 4).

On December 1, 2014, after apparently receiving a statement from the money market account dated November 16, 2014, reflecting a $455,244.68 balance, Ms. Lastres inquired about the status of the funds. (Doc. 809 at 1-3). Ms. Lastres, Havener, and Gibertini exchanged several emails over the course of the next days; Mr. Kearney was copied on several of these emails. (Doc. 809 at 10-26). On December 2, 2014, Ms. Lastres sent an email to Ms. Gibertini, which stated:

> Regarding your email to Bing today asking if he wanted to still move funds from the money market to his IRA.
>
> I returned the signed originals (attached) that you requested to the bank the day we talked in your email below. We thought the funds were already moved from the money market on November 14th back to the IRA per your email below?
>
> Please see attached copies. Please move funds from the money market to the IRA.

(Doc. 809 at 16-17).

Ms. Gibertini responded: "Recall that in that time-frame from signing and returning the paperwork the garnishment came in, so funds were held. We will generate the IRA/CD and send for signatures tomorrow. We cannot move funds until we receive originals back." *Id.* at 15. Ms. Lastres replied: "We did not know about a garnishment/funds held on that account, I brought the originals to the bank and asked that (the teller that day either Yuri or Kriscinda) give to you. . . . " *Id.*

The following day, Ms. Gibertini sent an email to Ms. Lastres and Mr. Kearney, which stated:

> Amber/Bing–OK, let's try and get on the same page today. On 10/27, upon Bing's IRA/CD maturity we were directed to open a new Joint TBE account with Bing & Tonya (via e-mail to Jennifer). We proceeded and sent for signatures. We waited with no return of originals, then as your initial e-mail below references he decided to place into a CD on

> 11/13. We asked repeatedly for the signature card and IRA distribution form to be signed and that we needed originals before we could proceed with a new IRA/CD. Then on 11/18, we received the garnishment and the funds were placed on hold. Here's the activity and as you can see it matches his statement.
>
> So, we can setup his IRA/CD for 12 mos. at 0.90% apy today however we will not move the funds until all original forms are signed and back in our hands at the bank.
>
> Please tell me how to proceed.

(Doc. 809 at 11-12).

> The same day, Ms. Lastres replied:
>
> Yes please move funds to IRA/CD today, send signature docs I will get them back to you a.s.a.p. I am not sure why you never received the original docs that I brought on Friday 11/14/14 I gave to Yuri, the teller that day. We did request a money market to move IRA funds, but when we found out it was not an IRA money market Bing did not want to move funds, that is why we did not return the signature cards for the money market. You asked to return the money market signature docs since the funds were already moved. I returned the IRA/money market originals 11/14/14 per your email you said you would move the funds that day 11/14/14 that is why I brought the originals over right away. If the funds where (sic) moved that day or even on the 17th the funds would not have

> been garnished/placed on hold. We were unaware of the funds garnished/placed on hold, we thought they were moved back to IRA on 11/14/14 per your email.

(Doc. 809 at 11).

Ms. Gibertini then forwarded the email to Ms. Havener on December 3, 2014, and instructed her to "Please open a 12 mos IRA/CD for Bing at 0.09% apy." *Id.*

Later that day, Ms. Havener emailed Ms. Lastres, stating "Amber, Please see the attached IRA documents. Please have Bing sign where indicated and drop the originals off to us. We will transfer funds upon receipt of the paperwork." *Id.* at 25. Ms. Lastres acknowledged receipt. *Id.*

On December 8, 2014, Ms. Havener requested: "Amber, Can you please have Bing initial under the ownership sections and scan back to us?" Ms. Lastres responded: "Will do, can you please check on the email I sent this morning, regarding funds released back into his accounts?" (Doc. 809 at 27).

The IRA Application is signed by Bing Kearney and is dated December 29, 2014.[7] (Doc. 807 at 1-2).

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[7] Mr. Kearney and Travelers disagree about what date this form was actually signed and/or returned to USAmeriBank.

Ms. Gibertini testified that the date appearing next to Mr. Kearney's signature looks like Jennifer Havener's handwriting. She believed she had an email indicating that the bank received the form on December 30th from Amber Lastres. (Doc. 806 at 81-83).

Ms. Lastres (Proctor) testified as follows:

> Q In the e-mail on the bottom of Page 1 dated December 30th, 2014 at 11:46, she asks you to—she's following

The "Contribution Date" that appears on the Application is December 3, 2014. *Id.*

On January 2, 2015, USAmeriBank deposited the funds into a new IRA account ending-1122. (Doc. 815-15).

C.

As noted above, Mr. Kearney claims the funds in Account-1122 are exempt from garnishment pursuant to § 222.21(2) of the Florida Statutes. This statute provides for an exemption from creditors' claims of funds and accounts maintained in accordance with a plan or governing instrument that has been determined by the Internal Revenue Service to be exempt from taxation under Section 408 (among other provisions) of the Internal Revenue Code. Fla. Stat., § 222.21(2)(a).

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up with you to see if Bing has signed the original IRA paperwork. Do you know what original IRA paperwork she is referencing?

A I would guess the one that they were renewing.

Q Then you respond that, yes, you'll bring to the bank today. And then it appears—you sent that e-mail at 11:47. Correct?

A Yes.

Q And then at 1:15, she writes back, "Thank you. I received it." So did you go to the bank with the paperwork that day?

A I guess so.

(Doc. 812 at 62-63).

An email exchange between Ms. Havener and Ms. Lastres on December 30, 2014, appears to confirm that USAmeriBank received the original "IRA paperwork" on December 30, 2014. *Id.* at 133.

Such accounts must be maintained in accordance with a plan or governing instrument in compliance or substantial compliance with section 408 of the Internal Revenue Code. *Id.*

The applicable portion of § 222.21(2)(a) provides as follows:

> Except as provided in paragraph (d), any money or other assets payable to an owner, a participant, or a beneficiary from, or any interest of any owner, participant, or beneficiary in, a fund or account is exempt from all claims of creditors of the owner, beneficiary, or participant if the fund or account is:
>
> 1. Maintained in accordance with a master plan, volume submitter plan, prototype plan, or any other plan or governing instrument that has been preapproved by the Internal Revenue Service as exempt from taxation under s. 401(a), s. 403(a), s. 403(b), s. 408, s. 408A, s. 409, s. 414, s. 457(b), or s. 501(a) of the Internal Revenue Code of 1986,1 as amended, unless it has been subsequently determined that the plan or governing instrument is not exempt from taxation in a proceeding that has become final and nonappealable;
>
> 2. Maintained in accordance with a plan or governing instrument that has been determined by the Internal Revenue Service to be exempt from taxation under s. 401(a), s. 403(a), s. 403(b), s. 408, s. 408A, s. 409, s. 414, s. 457(b), or s. 501(a) of the Internal Revenue Code of 1986,1 as amended, unless it has been subsequently determined that the plan

or governing instrument is not exempt from taxation in a proceeding that has become final and nonappealable; or

3. Not maintained in accordance with a plan or governing instrument described in subparagraph 1. or subparagraph 2. if the person claiming exemption under this paragraph proves by a preponderance of the evidence that the fund or account is maintained in accordance with a plan or governing instrument that:

   a. Is in substantial compliance with the applicable requirements for tax exemption under s. 401(a), s. 403(a), s. 403(b), s. 408, s. 408A, s. 409, s. 414, s. 457(b), or s. 501(a) of the Internal Revenue Code of 1986,1 as amended; or

   b. Would have been in substantial compliance with the applicable requirements for tax exemption under s. 401(a), s. 403(a), s. 403(b), s. 408, s. 408A, s. 409, s. 414, s. 457(b), or s. 501(a) of the Internal Revenue Code of 1986,1 as amended, but for the negligent or wrongful conduct of a person or persons other than the person who is claiming the exemption under this section.

Fla. Stat., § 222.21(2)(a).

Section 408 of the Internal Revenue Code sets forth six requirements with which a trust instrument or account must comply to qualify as an IRA, providing, in pertinent part:

Individual retirement account.—For purposes of this section, the term "individual retirement account" means a trust created or organized in the United States for the exclusive benefit of an individual or his beneficiaries, but only if the written governing instrument creating the trust meets the following requirements:

(1) Except in the case of a rollover contribution described in subsection (d)(3) in (internal footnote omitted) section 402(c), 403(a)(4), 403(b)(8), or 457(e)(16), no contribution will be accepted unless it is in cash, and contributions will not be accepted for the taxable year on behalf of any individual in excess of the amount in effect for such taxable year under section 219(b)(1)(A).

(2) The trustee is a bank (as defined in subsection (n)) or such other person who demonstrates to the satisfaction of the Secretary that the manner in which such other person will administer the trust will be consistent with the requirements of this section.

(3) No part of the trust funds will be invested in life insurance contracts.

(4) The interest of an individual in the balance in his account is nonforfeitable.

(5) The assets of the trust will not be commingled with other property except in a common trust fund or common investment fund.

(6) Under regulations prescribed by the Secretary, rules similar to the rules of section 401(a)(9) and the incidental death benefit

> requirements of section 401(a) shall apply to the distribution of the entire interest of an individual for whose benefit the trust is maintained.

26 U.S.C. § 408(a).

In addition, the Internal Revenue Code contains provisions governing the rollover of IRA accounts. Specifically, § 408(d)(3) of the Internal Revenue Code provides:

> Rollover contribution.—An amount is described in this paragraph as a rollover contribution if it meets the requirements of subparagraphs (A) and (B).
>
> (A) In general.—Paragraph (1) does not apply to any amount paid or distributed out of an individual retirement account or individual retirement annuity to the individual for whose benefit the account or annuity is maintained if—
>
> (i) the entire amount received (including money and any other property) is paid into an individual retirement account or individual retirement annuity (other than an endowment contract) for the benefit of such individual <u>not later than the 60th day after the day on which he receives the payment or distribution</u>; or
>
> (ii) the entire amount received (including money and any other property) is paid into an eligible retirement plan for the benefit of such individual <u>not later than the 60th day after the date on which</u>

> the payment or distribution is received, except that the maximum amount which may be paid into such plan may not exceed the portion of the amount received which is includible in gross income (determined without regard to this paragraph). For purposes of clause (ii), the term "eligible retirement plan" means an eligible retirement plan described in clause (iii), (iv), (v), or (vi) of section 402(c)(8)(B).

26 U.S.C. § 408(d)(3) (emphasis added).

And, § 408(e)(4) provides:

> Effect of pledging account as security.—If, during any taxable year of the individual for whose benefit an individual retirement account is established, that individual uses the account or any portion thereof as security for a loan, the portion so used is treated as distributed to that individual.

26 U.S.C. § 408(e)(4).

As explained by Florida's Third District Court of Appeal, "the purpose of [Florida Statute § 222.21] is to confer on retirement plans a broad exemption from the claims of creditors" and the Florida Legislature "made the policy decision that it should protect the assets of IRA's and pension plans." *Dunn v. Doskocz*, 590 So. 2d 521, 522, n.2 (Fla. Dist. Ct. App. 1991).

Under Florida law, "[e]xemption statute . . . should be liberally construed in favor of a debtor so that he and his family will not become public charges." *Killian v. Lawson*, 387 So. 2d 960, 962 (Fla. 1980)

(citations omitted); *see also Ulisano v. Ulisano*, 154 So. 3d 507, 508 (Fla. Dist. Ct. App. 2015), reh'g denied (Jan. 23, 2015); and *see In re Stevenson*, 374 B.R. 891, 894 (Bankr. M.D. Fla. 2007) (citing *Tramel v. Stewart*, 697 So. 2d 821 (Fla. 1997) and *Graham v. Azar*, 204 So. 2d 193 (Fla. 1967)) ("[T]he Court is mindful of the general proposition that laws governing exemptions in Florida are designed to assist debtors to retain properties which are deemed necessary for the debtor's support and support of the debtor's dependents, and generally shall be liberally construed and broadly interpreted in favor of the claim of exemption, and strictly against the objecting party's claim.")). The debtor bears the burden of proving entitlement to an exemption. *See, e.g.*, *Cullen v. Marsh*, 34 So. 3d 235, 242 (Fla. Dist. Ct. App. 2010); *Brock v. Westpost Recovery Corp.*, 832 So. 2d 209 (Fla. Dist. Ct. App. 2002); *In re Parker*, 147 B.R. 810, 812 (Bankr. M.D. Fla. 1992).

D.

With regard to the first issue—whether or not the funds were properly rolled over to an IRA account within the sixty-day period provided in § 408 of the Internal Revenue Code or otherwise qualify for a waiver of the sixty-day rollover period—I find genuine issues of material fact preclude summary judgment. On the record presented, while it appears clear that the funds did not land in an IRA account within the sixty-day window permitted, it remains unclear to this Court whether the rollover of funds qualifies for a waiver of the sixty-day deadline or that the account is otherwise in substantial compliance with § 408 of the Internal Revenue Code.

Based on the timeline of events set forth above, Mr. Kearney, through his bookkeeper Amber Lastres (Proctor), directed USAmeriBank to withdraw IRA funds to establish a money market account on October 28, 2014. Almost immediately after the funds were moved by USAmeriBank, Mr. Kearney attempted to re-established an IRA account. Ms. Lastres communicated with USAmeriBank representatives about the transfer. Despite some confusion and miscommunication between the parties, in a light favorable to Mr. Kearney, USAmeriBank representatives made representations that the funds would be transferred within the sixty day rollover period but such did not occur. For example, as of the email exchange on December 2, 2014, Ms. Lastres indicated that she had returned signed, original forms for the transfer on November 14, 2014. (*See* Doc. 809 at 11, 16-17). The bank, for reasons unexplained on this record, did not receive those forms at that time and did not transfer the funds on that date.

Thereafter, it does appear there was a delay in submitting or re-submitting the signed IRA contribution forms until December 29 or 30, and it is undisputed that the funds were not actually transferred until January 2, 2015. However, the "Contribution Date" on the signed IRA form was December 3, 2014 (Doc. 807 at 1-2), the bank has continued to treat the account as an IRA, and Mr. Kearney claims he has continued to claim the funds as tax-exempt on his filings with the IRS. Mr. Kearney and his representatives certainly could have been more diligent in their efforts to ensure the timely transfer of the funds back into an IRA. Nonetheless, there were miscommunications, conflicting instructions, and arguable delay by the bank in getting

the funds transferred back into an IRA account. At a minimum, USAmeriBank representatives conveyed somewhat mixed messages about when exactly the funds would be transferred and what Kearney needed to do to effectuate the transfer.[8]

Although the funds did not ultimately transfer within the sixty-day period, by my consideration, factual issues remain as to whether the funds should nonetheless be entitled to protection from creditors under Florida law. Under the applicable exemption statute, the debtor need only be in "substantial compliance" with the Internal Revenue Code. Fla. Stat., § 221.21(2)(a)(3)(a). In light of the admonition that exemption statutes should be liberally construed in favor of a debtor, I am constrained to conclude that the facts surrounding the late transfer of the funds are in need of further development to determine whether such substantial compliance has been met. As such, on this record and as to this issue, I cannot definitively say that Mr. Kearney is not entitled to the benefit of the retirement funds exemption under Florida Statute § 221.21(2)(a).

Accordingly, the cross-motions for summary judgment on the issue of Account-1122's compliance with

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[8] For instance, on November 14, 2014, Ms. Gibertini stated:

> OK, Bing will have 60 days under the rules of an IRA Transfer before he has to consider any tax implications. So, I need that form signed and returned so we can make certain there is none. That's first.
>
> Secondly, we'll get the funds back in a IRA/CD today. Please confirm the term.

(Doc. 808 at 18) (emphasis added).

the sixty-day rollover provision of § 408 of the Internal Revenue Code should be denied.

E.

With regard to Travelers' second argument—whether Mr. Kearney pledged the account as security for a loan—I find no material issue of fact to preclude summary judgment in Travelers' favor. On the record presented, Mr. Kearney pledged his IRA funds as collateral to Moose and thereby forfeited those funds' exempt status. Mr. Kearney fails to present evidence supported by specific facts that demonstrate there is a genuine issue for trial.

The Internal Revenue Code provides: "If, during any taxable year of the individual for whose benefit an individual retirement account is established, that individual uses the account or any portion thereof as security for a loan, the portion so used is treated as distributed to that individual." 26 U.S.C. § 408(e)(4). The Fifth Circuit has explained, "Pledging IRA funds as security for a loan thus has the same tax effect as withdrawing the same funds from an IRA and investing them in non-IRA CDs." *Lewis v. Bank of Am.*, 343 F.3d 540, 545 (5th Cir. 2003). Courts have determined that the pledge of such funds means that they are no longer exempt. *See, e.g., In re Roberts*, 326 B.R. 424, 426 (Bankr. S.D. Ohio 2004) ("a debtor's pledge of his IRA as collateral for a loan, especially a business loan, is inconsistent with the need to protect that money as a future income stream for the debtor as against the debtor's creditors."); *XL Specialty Ins. Co. v. Truland*, 2015 WL 2195181, at *11-13 (E.D. Va., May 11, 2015) (finding an unqualified pledge of all assets in an indemnity agreement encompassed

retirement accounts, the pledge of the § 408 (IRA) account was valid, and the funds could be used to satisfy the judgment).[9]

As discussed above, the Promissory Note made by Mr. Kearney for his payment obligations to Moose provides that it "is collateralized by a pledge of all of [Kearney's] personal property and intangibles." (Doc. 815-18 at 2). In the associated Security Agreement, Mr. Kearney pledged:

> . . . all assets and rights of the Pledgor, wherever located, whether now owned or hereafter acquired or arising, and all proceeds and products thereof, all good (including inventory, equipment and any accessories thereto), instruments (including promissory notes), documents, accounts, chattel paper, deposit accounts, letters of credit, rights, securities and all other investment property, supporting obligation, any contract or contract rights or rights to the payment of money, insurance claims, and proceeds, and general intangibles (the "Collateral").

Id. at 4.

In his response to Travelers' motion for summary judgment, Mr. Kearney claims that there is latent ambiguity in the Security Agreement with respect to what he and Moose intended to be pledged as collateral

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[9] Neither side cites any Florida case law specifically on the issue of pledging a retirement account as collateral. However, as discussed above, the Florida Statutes provide that retirement accounts are exempt if in substantial compliance with the applicable Internal Revenue Code provisions. *See* Fla. Stat., § 222.21.

pursuant to his loan from Moose. (Doc. 819 at 5). He also argues that the documents do not specify whether the IRA account was intended to be pledged as a "deposit account." *Id.*[10] Because a "latent ambiguity" exists, he urges the Court to look to extrinsic evidence, such as the parties' intent. *Id.* at 5-6.

In his Affidavit in opposition to Travelers' motion, Mr. Kearney states, in pertinent part:

> I did not, at any time, pledge my exempt IRA funds previously maintained in USAmeri-Bank account ending-0374 to Moose Investments of Tampa, LLC, as collateral for any loan and/or extension of credit. . . .
>
> At all times, it was always understood by me personally, and [Moose] that this pledge of collateral would not encompass any exempt retirement funds owned by me . . . It was never my intent to pledge these exempt retirement funds as collateral to Moose, nor was it my intent to have the Loan Documents construed in a manner that would result in the exempt retirement funds . . . being pledged as collateral to Moose.
>
> It was never the intent of Moose Investments of Tampa, LLC, that the exempt retirement funds . . . would be pledged as collateral pursuant to the execution of the Loan Documents. At all times, Moose understood that

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[10] Mr. Kearney also argues that Travelers cannot argue that he pledged his IRA account as collateral because it previously argued that the pledge was insufficient to create a superior lien position. Such argument is entirely unpersuasive.

> those agreements would not encompass my exempt retirement funds, and that those funds would in no way be pledged as collateral for the extension of the $5,000,000.00 line of credit from Moose.

(Doc. 819-1 at ¶¶ 3-6).[11]

At summary judgment, the court must draw all reasonable inferences in favor of the nonmovant, should not weigh the evidence, and should refrain from making credibility determinations about competing affidavits. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150-51 (2000). An entirely self-serving affidavit may overcome summary judgment. *Price v. Time, Inc.*, 416 F.3d 1327, 1345 (11th Cir.), as modified on denial of reh'g, 425 F.3d 1292 (11th Cir. 2005) ("Courts routinely and properly deny summary judgment on the basis of a party's sworn testimony even though it is self-serving."); *see also Feliciano v. City of Miami Beach*, 707 F.3d 1244, 1252 (11th Cir. 2013) ("To be sure, [plaintiff's] sworn statements are self-serving, but that alone does not permit us to disregard them at the summary judgment stage."). However, "[c]onclusory, uncorroborated allegations . . . in an affidavit or deposition will not create an issue of fact for trial sufficient to defeat a well supported summary judgment motion. *Solliday v. Fed. Officers*, 413 F. App'x

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[11] James Reed, manager of Moose, signed a similar affidavit. (Doc. 819-2). However, on Travelers' motion, this Court struck Mr. Reed's affidavit as inconsistent with prior sworn testimony under the "sham affidavit" rule. (Doc. 861).

As more fully discussed below, Mr. Kearney's statements about the intent of Moose are entirely unpersuasive, given that he provides no foundation for such statement and particularly in light of Moose's prior statements to the contrary.

206, 207 (11th Cir. 2011) (citing *Earley v. Champion Int'l Corp.*, 907 F.2d 1077, 1081 (11th Cir. 1990); *see also Goodman v. Kimbrough*, 718 F.3d 1325, 1332 (11th Cir. 2013) (recognizing that "to defeat a motion for summary judgment, [the party] must adduce specific evidence from which a jury could reasonably find in his favor; [t]he mere existence of a scintilla of evidence in support of [his] position will be insufficient" (quotations and citation omitted)); *Kesinger v. Herrington*, 381 F.3d 1243, 1247 (11th Cir. 2004) (stating that "a mere scintilla of evidence in support of the nonmoving party's position is insufficient to defeat a motion for summary judgment") (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986)).

Mr. Kearney's statements submitted here are contradicted by the plain, unambiguous language of the Security Agreement he signed, in which he pledged all of his personal property without exception. And, despite Mr. Kearney's current position that he never pledged or intended to pledge his IRA account as collateral to Moose, his statements are not only self-serving but also are conclusory, uncorroborated, and indeed contradicted by other evidence record. As set forth below, Moose affirmatively took a contrary position when seeking to dissolve the Writ. And, when it suited his interest in September 2015, Mr. Kearney moved in support of Moose's claim to the funds held by reason of the Writ.

The undisputed facts show that Moose made a claim in this action to a superior interest in the USAmeriBank garnished funds (including the IRA funds). In an affidavit filed in support of Moose's Motion to Dissolve Travelers' Second Writ of Garnishment (Doc. 595), Mr. Reed stated:

> By virtue of the fact that Moose Investments' UCC-1 was filed with the Florida Secured Transaction Registry on August 6, 2012, Moose Investments' UCC-1 is a superior security agreement and maintains a priority position to that of Travelers' Second Writ of Garnishment to USAmeriBank. . . .
>
> Based upon the priority position of Moose Investments' perfected UCC-1 to that of Travelers' Second Writ of Garnishment to USAmeribank, Moose Investments claims entitlement to the garnished funds subject to Travelers' Second Writ of Garnishment.

(Doc. 598 at ¶¶ 7-8).

The sworn statements made by Mr. Reed in his September 2015 affidavit were made for the purpose of seeking affirmative relief in this Court to have the Writ of Garnishment dissolved. Mr. Reed made no distinction or exception in making Moose's claim to the entirety of the garnished funds. *Id.* Thus, at least as of September 2015, Moose believed that it had a claim to the alleged IRA account by virtue of its Security Agreement and UCC-1. This is inconsistent with the position Mr. Kearney now asks the Court to accept—that both he and Moose understood the agreement did not encompass his retirement funds.

In addition, Mr. Kearney himself previously took a contrary position. In his court filing in September 2015, Mr. Kearney supported Moose's claim to a superior lien position to the garnished funds held by USAmeriBank. (*See* Doc. 596 at 3) ("By virtue of the fact that Moose Investments' UCC-1 was filed with the Florida Secured Transaction Registry on August 6,

2012, Moose Investments' UCC-1 is a superior security agreement and maintains a priority position to that of Travelers' Second Writ of Garnishment to USAmeriBank.").[12] Mr. Kearney made no distinction or exception in supporting Moose's claim to the entirety of the garnished funds. Rather, in that instance, he supported Moose's claim to the funds now at issue, which significantly undermines his current position.

Furthermore, the language of Security Agreement is clear, unambiguous, and without exception that Mr. Kearney pledged all of his personal property, wherever found and whether then owned or thereafter acquired. Despite Mr. Kearney's assertions to the contrary, I find no ambiguity, latent or otherwise, in the Security Agreement.

Ambiguities can either be patent or latent. *Saenz v. Campos*, 967 So. 2d 1114, 1117 (Fla. Dist. Ct. App. 2007). A patent ambiguity is one that appears on the face of the document. *Id.* "A latent ambiguity . . . arises where the language employed is clear and intelligible and suggests but a single meaning, but some extrinsic fact or extraneous evidence creates a necessity for interpretation or a choice among two or more possible meanings." *Mac-Gray Services, Inc. v. Savannah Associates of Sarasota, LLC*, 915 So. 2d 657, 659 (Fla. Dist. Ct. App. 2005) (internal quotations and citation omitted). A latent ambiguity thus exists "[i]f a con-

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[12] As discussed previously, Mr. Kearney's motion to dissolve the Writ was unverified and unsworn. As such, on Travelers' request, the Court determined that Mr. Kearney's Affidavit was not inconsistent with prior sworn testimony and did not strike it as a "sham affidavit." (*See* Doc. 861).

tract fails to specify the rights or duties of the parties under certain conditions or in certain situations, [and] the occurrence of such condition or situation reveals an insufficiency in the contract not apparent from the face of the document." *Hunt v. First Nat'l Bank of Tampa*, 381 So. 2d 1194, 1197 (Fla. Dist. Ct. App. 1980). Under Florida law, "when a contract is rendered ambiguous by some collateral matter, it has a latent ambiguity, and the court must hear parol evidence to interpret the writing properly." *RX Solutions, Inc. v. Express Pharmacy Servs., Inc.*, 746 So. 2d 475, 476 (Fla. Dist. Ct. App. 1999).

Mr. Kearney asserts, "it is clear that . . . a latent ambiguity exists with respect to what [he] and Moose intended to be pledged as collateral [because] the documents do not specify whether Bing Kearney's exempt IRA account with USAmeriBank was intended to be pledged as a 'deposit account' for purposes of those agreements." (Doc. 819 at 5-6). But the issue of whether or not the alleged IRA account is a "deposit account" is something of a red herring. Whether the IRA funds or account qualify as a "deposit account" or what the parties understood by the term "deposit account" is not material given the breadth of this Security Agreement. Mr. Kearney pledged much more than just deposit accounts; he pledged "all assets and rights of the Pledgor, wherever located, whether now owned or hereafter acquired or arising . . . accounts, . . . deposit accounts, . . . rights, . . . or rights to payment of money . . . " (Doc. 815-18 at 2). Further, the failure to specify which assets or rights were included in the

pledge does not render it ambiguous.[13] Nor does the failure to specifically identify the IRA account or funds render the Security Agreement ambiguous.

Rather, Mr. Kearney argues that because it is unclear what the true intent of the parties was, the agreement is ambiguous and the Court must look to extrinsic evidence of their intent. This circular argument is unavailing. Mr. Kearney's bare assertion about what the parties intended does not suggest a latent ambiguity (particularly given that Mr. Kearney's statements about what he and Moose purportedly intended is contradicted by the record, addressed above). He points to no collateral matter or insufficiency in the contract that renders any term or provision ambiguous. Nor does he point to a term or provision that has more than one meaning. This is simply not a case where "a contract is rendered ambiguous by some collateral matter," *RX Solutions, Inc.*, 746 So. 2d at 476, or where extraneous circumstances have revealed an "insufficiency in the contract," *Hunt*, 381 So. 2d at 1197. By its plain and unambiguous terms, the broad language of the contract encompassed potential retirement accounts or funds, such as the account at issue here. Because I find no latent ambiguity in the Agreement, there is no bar to summary judgment on the matter of the parties' intent nor a need for the Court to look at additional extrinsic evidence of same.

Finally, I have considered the opinion of Justin Rowlson, Mr. Kearney's CPA (Doc. 821-1), and find

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[13] Indeed, Mr. Kearney's accountant Justin Rowlson agrees that the IRA is a "retirement account" or a "right to a payment of money." (Doc. 802 at 99-100).

that it too fails to create a genuine issue of material fact. His conclusions, framed as "expert opinion," are not helpful to the Court on this issue. Mr. Rowlson summarily asserts that the Security Agreement "is very detailed as to what accounts are encompassed in the agreement" but does not specifically mention the IRA account. *Id.* at 11. The fact that the Security Agreement does not specifically mention the IRA account is of no moment, given the language of the Agreement itself. In addition, Mr. Rowlson relies on Mr. Reed's previously stricken affidavit for his conclusion that the parties did not intend that the funds be included in the pledge. *Id.* at 10-11. Mr. Reed's statements have been deemed inconsistent with prior sworn testimony and thus provide an insufficient basis for Mr. Rowlson's opinion on the parties' intent. As a result, Mr. Rowlson's opinions on this matter are entirely unsupported, do not bolster Mr. Kearney's position, and provide no basis to deny summary judgment.

In sum, I find Mr. Kearney has failed to present sufficient evidence to overcome Travelers' motion for summary judgment. By my consideration, for the reasons explained above, no genuine issue of material fact exists as to whether the "IRA" funds currently found in Account-1122 were encompassed and pledged by virtue of Mr. Kearney's Security Agreement with Moose. Because Mr. Kearney pledged such funds, they lost their tax-exempt status and do not fall within the protections of Florida's retirement funds exemption statute. Accordingly, I recommend that Travelers' motion for summary judgment on this issue be granted and that the district judge enter a ruling that Account-1122 is not exempt pursuant to Florida Statute § 222.21(2)(a).

V.

Upon consideration, as set forth above, I RECOMMEND that:

(1) FTBB, LLC's Second Motion for Summary Judgment on Travelers' Second Writ of Garnishment of Bing Kearney's USAmeriBank IRA Account (Doc. 805) be DENIED;

(2) Bing Charles W. Kearney's Motion for Summary Judgment Finding IRA Funds Maintained in USAmeriBank Account Ending -1122 Exempt from Garnishment Pursuant to § 222.21, Florida Statutes (Doc. 811) be DENIED; and

(3) Travelers' Motion for Final Summary Judgment in Garnishment as to the IRA Account (Doc. 815) be GRANTED in part and DENIED in part as described above.

Respectfully submitted this 16th day of August 2017.

/s/ Thomas B. McCoun III
United States Magistrate Judge

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR PANEL REHEARING (JANUARY 23, 2020)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

KEARNEY CONSTRUCTION COMPANY, LLC,

Plaintiff-Third Party Defendant-Counter Defendant,

v.

TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA,

Defendant-Third Party Plaintiff-Counter Claimant-Appellee,

BING CHARLES W. KEARNEY,

Interested Party-Defendant-Third Party Defendant-Counter Defendant-Appellant,

TONYA NUHFER KEARNEY, CLAYTON KEARNEY, BRYAN KEARNEY, CHARLES WESLEY KEARNEY, III,

Interested Parties-Appellants,

FLORIDA SOIL CEMENT, LLC, ET AL.,

Defendants.

No. 18-13143-EE

Appeals from the United States District Court
for the Middle District of Florida

Before: Jill PRYOR, GRANT,
and ANDERSON, Circuit Judges.

PER CURIAM:

The Petition for Panel Rehearing filed by Bing Charles W. Kearney, Jr. and Interested Party Appellants is DENIED.

APPELLANTS' COMBINED PETITION FOR PANEL REHEARING (JANUARY 23, 2020)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BING CHARLES W. KEARNEY, JR. AND INTERESTED PARTIES, TONYA NUHFER-KEARNEY, CHARLES WESLEY KEARNEY, III, CLAYTON WHITMAN KEARNEY, AND BRYAN G. KEARNEY

Third-Party Defendant and Interested Parties/ Appellants

v.

TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA,

Defendant/Third Party Plaintiff/Appellee

Appeal No: 18-13143
(Consolidated with Case No. 18-13145)

Trial Court No. 8:09-CV-01850-JSM-CPT

On Appeal from the United States District Court
Middle District of Florida Tampa Division

Edward W. Collins
The Law Offices of William Collins, P.A.
503 E. Jackson Street, #332
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Attorney for Appellants Bing Charles W. Kearney, Jr. and Interested Party Appellants

APPELLANTS' CERTIFICATE OF INTERESTED PARTIES

The Appellants, BING CHARLES W. KEARNEY, JR. and INTERESTED PARTIES, pursuant to Fed. R. App. P. 26.1 and 11th Cir. R. 26.1-1, 26.1-2, and 26.1-3, file this Certificate of Interested Persons and Corporate Disclosure Statement, stating as follows:

- Adams, Alberta L., attorney for Defendant/ Third Party Plaintiff/Appellee Travelers Casualty & Surety Company of America
- Davis, Matthew G., attorney for Defendant/ Third Party Plaintiff/Appellee Travelers Casualty & Surety Company of America
- DeBeaubien, Hugo S., attorney for USAmeriBank
- Kearney, Bing Charles W., Jr.,— Third Party Defendant/Appellant
- Kearney, Bryan G.,— Interested Party/Appellant
- Kearney, Charles W., III,— Interested Party/Appellant
- Kearney, Clayton W.,— Interested Party/Appellant

- Kovachevich, Elizabeth A.,
  U.S. District Judge
- Moody, James S.,
  U.S. District Judge
- Nuhfer-Kearney, Tonya,—
  Interested Party/Appellant
- Collins, William attorney for Third Party Defendant/Appellant Bing Charles W. Kearney, Jr. and Appellants Interested Parties
- Travelers Casualty & Surety Company of America, Defendant/Third Party Plaintiff/ Appellee
- Tuite, Christopher P.,
  U.S. Magistrate Judge
- USAmeriBank,
  Garnishee[1]
- Valley National Bank,
  Garnishee[2]

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[1] USAmeriBank merged with and into Valley National Bank as of January 1, 2018.

[2] Valley National Bank is the successor by merger to USAmeriBank as of January 1, 2018.

APPELLANTS' CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1(a), the Appellants are unaware of any corporate or other entity, other than the parties in this case, who have any interest in this matter. Appellant asserts that no parent or publicly held corporation owns 10% or more stock in any of the parties or law offices representing parties in this case. The Defendant/Third-Party Plaintiff/ Appellee, Travelers Casualty & Surety Company of America, is wholly owned by Travelers Casualty and Surety Company, which is wholly owned by Travelers Insurance Group Holdings Inc., which is wholly owned by Travelers Property Casualty Corp., which is wholly owned by the Travelers Companies, Inc. The Travelers Companies, Inc. is the only publicly held company in the corporate family (NYSE: TRV).

PETITION FOR PANEL REHEARING

Pursuant to FRAP 40, the Appellants request rehearing of the panel's November 13, 2019, unpublished Opinion in the above-captioned case, *Kearney Construction Company, LLC v. Travelers Casualty and Surety Company of America, et al.*, docket 18-13143. Appellants have included a copy of the opinion sought to be reheard, attached as an addendum hereto, as required by 11th Cir. R. 40-1.

A party may petition the Court for panel rehearing when the "court has overlooked or misapprehended a point of law or fact. FRAP 40(a)(2); *see also* 11th Cir. I.O.P. 40-2 ("A petition for rehearing is intended to bring to the attention of the panel errors of fact or law in the opinion.").

In its Opinion, the Court affirmed the summary judgment order entered by the District Court concluding that: (1) the District Court properly held that Bing Kearney's IRA Account No.-1122 was pledged as security as for his loan, and therefore was not exempt under Fla. Stat. § 222.21; and (2) the Interested Parties did not make the "proportionate share" argument in their motion to dissolve the writ of garnishment or in their motion for summary judgment, and therefore the "proportionate share" issue has not been preserved for appeal by the Interested Parties.

Appellant Bing Kearney files this Petition for Panel Rehearing because the Court overlooked and failed to consider pertinent and relevant evidence in the District Court record that established that Bing Kearney's IRA was pre-approved and determined by the IRS to be exempt from taxation, and therefore exempt from garnishment by a judgment creditor.

Appellants Interested Parties file this Petition for Panel Rehearing because the Panel overlooked the Interested Parties' record in the District Court contesting Travelers' garnishment of their ownership share of the Subject Accounts and misapprehended the application of Fla. Stat. § 77.07 related to the nature and extent of the objection a party with an interest in garnished property must make to maintain their objection to the garnishment of the subject property.

In the alternative, the Interested Parties petition and move the Court to certify the question to the Florida Supreme Court on the application of Fla. Stat. § 77.07 related to the nature and extent of the objection a party with an interest in garnished property

must make to maintain their objection to the garnishment of the subject property.

ARGUMENT ON REHEARING

I. The Panel Overlooked and Failed to Consider Pertinent and Relevant Evidence in the District Court Record Which Established that Bing Kearney's IRA was Pre-Approved and Determined by the IRS to be Exempt from Taxation, and Therefore the IRA was Exempt from Garnishment by a Judgment Creditor

The Panel wrote in its Opinion that the first issue on appeal is whether Bing Kearney pledged his IRA Account No.-1122 as security collateral for his line of credit with Moose Investments. The Panel then misapprehended the summary judgment standard and wrote that in this summary judgment posture, the issue is then whether Bing Kearney adduced sufficient evidence to create a genuine issue of material fact to support his argument that the collateral pledged did not include his IRA Account No.-1122. Bing Kearney asserts the Panel improperly shifted the summary judgment burden to him, and the issue on appeal should have been whether Travelers adduced sufficient evidence to establish that there was no genuine issue of material fact related to the alleged pledge of the IRA.

In the District Court and on this appeal, Travelers has always asserted that the IRA was pledged as collateral for the security agreement, and that the rollover of the IRA was made outside of the 60-day rollover time limit. As such, Travelers has asserted that the IRA is not exempt from execution. Magistrate

Judge McCoun found in his Report and Recommendation that the IRA had been pledged and based on that pledge it lost its exempt status. Judge McCoun never found that the IRA was not a valid and exempt IRA as this Panel has determined.

The record clearly reflects none of the Parties in this case and the District Court ever questioned the issue of whether the IRA was valid and exempt from execution. Rather, Judge McCoun only found that the IRA had been pledged, and thereby the IRA lost its exempt status based upon the fact that it had been pledged. Judge McCoun never considered or found that the IRA was not valid and that it was not otherwise exempt from execution. All of the Parties (and the District Court) always acknowledged the fact that the IRA was valid and exempt from execution with the question of whether the alleged pledge of the IRA caused the IRA to lose its exempt status. As such, as to the IRA issue, both parties only briefed the pledge of the IRA issue and did not address the validity and exempt status of the IRA in their appeal briefs.

The proper issue for the Panel on appeal was therefore, was the IRA encompassed in the security agreement, and not whether the IRA was valid and exempt from execution. On the issue of the alleged pledge of the IRA, Footnote 7 of the Panel's Per Curiam Opinion states in pertinent part:

> . . . "[Bing Kearney argues that the "unless" clauses of §§ 222.21(2)(a)1 and 2 save his exemption. Sections 222.21(2)(a)1 and 2 provide that when an IRA plan has been preapproved or determined to be exempt by the Internal Revenue Service, then, if the plan

> is maintained in accordance with its governing instrument, it is exempt from creditors' claims, unless the plan has subsequently been determined not to be exempt from taxation. . . . Section 222.21(2)(a)1 applies only if the Internal Revenue Service has Pre-approved" an IRA as exempt from taxation, and there is no evidence of any such "pre-approval" of Bing Kearney's IRA. Similarly, § 222.21(2)(a)2 applies only if the Internal Revenue Service has "determined" that an IRA is exempt from taxation, and there is no evidence of any such "determination" with respect to Bing Kearney's IRA. . . . The party seeking an exemption from garnishment has the burden of proving entitlement to the exemption.]."

In summary, in response to Bing Kearney's pleaded position that the IRA is protected from garnishment pursuant to Fla. Stat. §§ 222.21(2)(a)1 and 2, the Panel wrote that the party seeking an exemption from garnishment has the burden of proving entitlement to the exemption, and that Mr. Kearney failed to present record evidence to the District Court to establish that the IRA was pre-approved by the IRS and determined to be exempt from taxation. The Panel overlooked and failed to consider the substantial record evidence before the District Court that established that the IRA was both pre-approved and determined by the IRS to be tax exempt.

IRA Account was a Traditional Tax Exempt IRA

Bing Kearney filed his Motion for Summary Judgment [Dkt. #811] asserting that his IRA funds

maintained in Account ending in-1122 were exempt from garnishment pursuant to Fla. Stat. § 222.21. *See* Appellants' Combined Appendix Tab #11. The Affidavit of Bing Kearney in Support of Motion for Summary Judgment is attached to the Motion for Summary Judgment as Exhibit A. The Affidavit of Justin Rowlson in Support of Motion for Summary Judgment as part of the record is attached to the Motion for Summary Judgment as Exhibit B. The deposition transcript of Justin Rowlson, CPA, is included in the District Court record at Dkt. #802. The deposition transcript of Cami Gibertini, corporate representative of USAmeriBank, is included in the District Court record at Dkt. #803.[3]

The record before the District Court established that on October 25, 2012, Bing Kearney renewed his IRA account with USAmeriBank, designated as account ending-0374, and the value of the funds maintained in that IRA account was $448,646.03. *See* Exhibit "D" Gibertini Deposition, Page 25; *see also* Exhibit 2 to Gibertini Deposition (Exhibit "E" hereto).[4] On January

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[3] The Affidavits of Bing Kearney and Justin Rowlson are attached to the Motion for Summary Judgment as Exhibits "A" and "B" [Dkt #'s 811-1 and 811-2]. However, the Affidavits were not separately included in the Appellants' Appendix, and the deposition transcripts of Justin Rowlson and Cami Gibertini were not included in the Appellants' Appendix. Those court filings are therefore attached hereto as Exhibits "A", "B", "C", and "D" respectively. *See* FRAP 30(a)(2) . . . "Parts of the record may be relied upon by the court or parties even though not included in the appendix."

[4] The Exhibits to the Cami Gibertini deposition are included in the court record at Dkt. #'s 806, 807, 808, 809, and 810. The deposition Exhibits are attached hereto respectively as Exhibits "E", "F", "G", "H", and "I".

2, 2015, USAmeriBank deposited Mr. Kearney's account -0374 exempt retirement funds into a new IRA account ending-1122. *See* Exhibit "D" Gibertini Deposition, Pages 39-40; *see also* Exhibits 9-10 to Gibertini Deposition (Exhibit "F" hereto). USAmeribank classified this January 2, 2015 transaction as an IRA rollover contribution. *See* Exhibit "D" Gibertini Deposition, Page 40.

On April 15, 2015, USAmeriBank issued a "Recipient Statement Form 5498" to Mr. Kearney, showing that Mr. Kearney made a valid IRA rollover contribution in 2014 in the amount of $455,119.97. This same form was also furnished to the Internal Revenue Service. *See* Exhibit 15 to Gibertini Deposition (Exhibit "G" hereto). Moreover, in USAmeriBank's Answer, USAmeriBank identified a traditional Individual Retirement Account with account number ending -1122, in addition to several other bank accounts in which Bing Kearney was believed to have an ownership interest. *See* Appellants' Combined Appendix Tab #6, Dkt. # 577.

Justin Rowlson, CPA,
Affidavit in Support of
Motion for Summary Judgment

Justin Rowlson is a Certified Public Accountant in the State of Florida employed with the accounting firm of Rowlson & Company. The accounting firm of Rowlson & Company has provided CPA services 1993. Mr. Rowlson filed his Affidavit in Support of Motion for Summary Judgment attesting as follows: *See* Exhibit "B" hereto, Dkt. #811-2:

8. In USAmeriBank's Answer to Writ of Garnishment, USAmeriBank further stated

that USAmeriBank is indebted to Bing Kearney in the amount of $457,843.81, based upon funds held by USAmeriBank in a traditional individual retirement account.

9. The IRA Account Number Ending in-1122 was originally created in 2009 under IRA account number 500374. Upon maturity of the certificate of deposit, the IRA funds were later rolled over into the IRA Account Number Ending in-1122. The funds deposited in the IRA Account Number Ending in-1122 have been in the continuous possession of USAmeriBank since October 2009.

10. The funds contained in IRA Account Number Ending in-1122 qualify as a trust created as an individual retirement account pursuant to Section 408(a) of the Internal Revenue Code.

11. The funds deposited in the IRA Account Number Ending in-1122 were deposited in accordance and compliance with the provisions of 26 U.S.C. § 408(a)(1).

12. USAmeriBank is a trustee bank, as that term is defined by 26 U.S.C. § 408(n) in accordance with 26 U.S.C. § 408(a)(2).

13. No part of the IRA Account Number Ending in-1122 has been, or will be, invested in life insurance contracts in accordance with 26 U.S.C. § 408(a)(3).

14. Mr. Kearney's interest in the IRA Account Number Ending in-1122 is nonforfeitable in accordance with 26 U.S.C. § 408(a)(4).

15. The assets of the IRA Account Number Ending in-1122 have not been, and will not be, commingled with other property except in a common trust or common investment in accordance with 26 U.S.C. § 408(a)(5).

Justin Rowlson, CPA, further prepared his Expert Report on the Exempt Status of Bing Kearney's IRA Account in opposition to Travelers' Motion for Summary Judgment on the IRA Account. Mr. Rowlson's Expert Report was filed with the District Court at Dkt #821 and #821-1, and a copy is attached hereto as Exhibit "J". Mr. Rowlson's Expert Report documents the history of the Account -1122 IRA funds and further describes the nature and exempt status of the account funds as a traditional exempt IRA account. Mr. Rowlson reported in his Expert Report that the Internal Revenue Service has received and is in possession of all of Bing Kearney's federal income tax returns. Mr. Rowlson reported that the IRS has never questioned or challenged the exempt status of Bing Kearney's USAmeriBank IRA account. To the contrary, the only one who has ever questioned or challenged the exempt status of Bing Kearney's USAmericaBank IRA account is Travelers.

The law is well settled that Individual Retirement Accounts and individual retirement annuities are both considered tax-exempt Individual Retirement Accounts pursuant to 26 U.S.C. § 408(a) and (b). As a result, the funds maintained in Individual Retirement Accounts and annuities are both exempt from garnishment by the account owner's creditors, pursuant to § 222.21(2)(a)2, Florida Statutes (2016).

Once a debtor claims that certain assets or interests in property are protected by a valid exemption, the

debtor's interest(s) in the exempt property are protected from creditors. *In re Mootosammy*, 387 B.R. 291 (Bankr. M.D. Fla. 2008). "A debtor's claim of exemption is presumptively valid, unless a party in interest objects." *Id.* Once a party in interest objects to the exemption claimed by the debtor, the objecting party "has the burden of establishing by a preponderance of the evidence that the debtor's exemptions are not properly claimed." *Id.* Bing Kearney presented substantial record evidence to the District Court to establish that his IRA was pre-approved by the IRS and determined to be exempt from taxation, and thus was entitled to exemption from garnishment. Therefore, it was error for the District Court to enter summary judgment in favor of Travelers on the issue.

II. The Panel Overlooked the Interested Parties' Record of Contesting Travelers' Garnishment of Their Ownership Share of the Subject Accounts and Misapprehended the Application of Fla. Stat. § 77.07 Related to the Nature and Extent of the Objection a Party with an Interest in Garnished Property Must Make to Maintain Their Objection to the Garnishment of the Subject Property

The Interested Parties have contended throughout this entire case that Travelers is not entitled to garnish their ownership interests in the Subject Accounts. This Panel incorrectly determined in its Opinion that the Interested Parties made their "proportionate share" argument for the first time in their Motions for Release of Funds. As such, the Panel concluded that the Interested Parties' "proportionate share" argument has not been preserved for appeal. The Panel wrote that "[I]f a party fails to raise an issue in its

motion to dissolve, it loses the opportunity to try that issue."

Throughout these proceedings Travelers has never contended that the Interested Parties did not have an ownership interest in the Subject Accounts. Rather, Travelers has always contended that Bing Kearney had an interest in the Subject Accounts. Now, Travelers has attempted to shift the burden to the Interested Parties to establish what their precise ownership interest in the Subject Account is. As addressed in the appeal briefs, Florida law presumes that the ownership of accounts held as joint tenants with the right of survivorship are held and owned proportionately. In a summary judgment posture, it was incumbent upon Travelers to come forward with evidence to rebut the presumption that the ownership interests in the accounts was owned and held by the Interested Parties as something other than proportionate, which Travelers failed to do.

Interested Parties' "Proportionate Share" Argument Has Been Preserved for Appeal

The Interested Parties have never really been active parties in Travelers' garnishment proceedings against Bing Kearney. The Interested Parties are not judgment debtors of Travelers. Travelers only holds a judgment against Bing Kearney—not the Interested Parties. Travelers' writ of garnishment only pertained to property owned by Bing Kearney, and service of process of the garnishment pleadings and documents were only served on Bing Kearney—not the Interested Parties. It was not until USAmeriBank served its Answer to the Writ of Garnishment on Bing Kearney

were the Interested Parties for the first time identified as co-owning the Subject Accounts with Bing Kearney.

The Interested Parties have contested the garnishment of their ownership portion-the "proportionate share"—of the Subject Accounts from the very start. They filed a Motion to Dissolve the Second Writ of Garnishment (Dkt. #597). They filed a Motion for Summary Judgment seeking "partial summary judgment in their favor determining that USAmeriBank account numbers ending in -3695, -0129, -0302, -0020, and -7939 are not subject to garnishment by Travelers (Dkt. #634). They filed their Objection to the Magistrate Judge's Report and Recommendation which determined that the Subject Accounts were subject to garnishment (Dkt. #718).[5] They filed their Motions (and then Renewed Motions) to Release Funds (Dkt. #'s 852-55 and 903-06). They filed their Objection to Magistrate Judge's Report and Recommendation which recommended that a final judgment of garnishment be entered (Dkt. #902). They filed their Motion for Reconsideration or Clarification of the Court's Order denying their Motions (and Renewed Motions) to Release Funds as Moot (Dkt. #913). It is an inaccurate analysis of the District Court record for the Panel to determine that the Interested Parties only made their "proportionate share" argument for the first

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[5] It is significant to note that the Magistrate Judge found, and the District Court adopted, that each Subject Account was held as a joint tenancy with rights of survivorship, and that if property is held as a joint tenancy with right of survivorship, a creditor of one of the joint tenants may attach the joint tenant's portion of the property to recover that joint tenant's individual debt. *See* Report and Recommendation (Dkt. #711) citing the Florida Supreme Court case of *Beal Bank, SSB v. Almand and Associates*, 780 So. 2d 45 (Fla. 2001).

time in their Motion for Release of Funds, and only after the District Court adopted the Magistrate Judge' Report and Recommendation, when the Interested Parties have objected to the garnishment of their proportionate share of the Subject Accounts at every step of the proceedings.

The Interested Parties' Objection to the Writ of Garnishment was Sufficient to Maintain Their Objection as Required by Fla. Stat. § 77.07(2)

The Panel wrote in its Opinion that "[t]he Interested Parties have not preserved for appeal their belated "proportionate share" argument because they did not raise this argument in accordance with Florida garnishment procedures." The Panel wrote that Fla. Stat. § 77.07(2) requires any party with an interest in a garnished property to make its specific objections to the writ of garnishment within 20 days of the writ's execution through a motion to dissolve the writ.

The Panel has applied a much more restrictive requirement for compliance with § 77.07(2) than the statute states or requires. Nowhere in the statute is there a requirement that requires "any party with an interest in a garnished property to make its specific objections to the writ of garnishment." Rather, the statute states that "[T]he defendant and any other person having an ownership interest in the property, as disclosed by the garnishee's answer, shall file and serve a motion to dissolve the garnishment within 20 days . . . stating that any allegation in plaintiffs motion for writ is untrue." Stated differently, the Panel has imposed an extremely restrictive interpretation of the statute on the Interested Parties finding that their

objection to the garnishment of the Subject Accounts was not sufficient to preserve an objection to the garnishment of only a portion of the Subject Accounts. The Interested Parties objected to the garnishment of the entirety of the Subject Accounts, but not specifically to the garnishment of their "proportionate share" of the accounts. Such an interpretation of the statute is not found in the express wording of the statute, nor is there any Florida case law that supports such a restrictive and narrow interpretation of the statute. When previously presented with a Fla. Stat. § 77.07 interpretation issue, in *Malowney v. Federal Collection Deposit*, 193 F.3d 1342 (11th Cir. 1999), this Court wrote "[a] judgment debtor may, by motion, obtain dissolution of a writ of garnishment by proving that the attached funds are exempt from garnishment under federal or state law." This Court has never before rendered such a narrow or restrictive interpretation of § 77.07 as it has done pertaining to the Interested Parties. This is particularly harmful given that the Interested Parties are innocent bystanders to Travelers' and Bing Kearney's garnishment proceedings. All they have attempted to do throughout these garnishment proceedings is to protect what is rightfully theirs—their "proportionate shares" of the Subject Accounts," which the Magistrate Judge and District Court Judge have determined that Travelers may only attach the joint tenant's portion (Bing Kearney's) of the property to recover that joint tenant's (Bing Kearney's) individual debt. To allow Travelers a windfall by permitting garnishment of both Bing Kearny's and the Interested Parties' portions of the Subject Accounts is not provide for, nor contemplate by, the statute.

III. In the Alternative, the Interested Parties Petition and Move the Court to Certify the Question to the Florida Supreme Court on the Application of Fla. Stat. § 77.07 Related to the Nature and Extent of the Objection a Party with an Interest in Garnished Property Must Make to Maintain Their Objection to the Garnishment of the Subject Property

The Interested Parties assert that the Florida Statute and case law cited in the preceding section establishes clear controlling precedent that this Court should apply. However, if this Panel is not persuaded by the Petition for Panel Rehearing, in the alternative, the Interested Party Appellants petition and move the Court to certify the following question to the Florida Supreme Court under Florida Rule of Appellate Procedure 9.150:

> Under Florida Statute § 77.07, is a non-debtor's allegation of ownership of the subject funds identified in an answer to a writ of garnishment sufficient to deny the allegations as required by the statute, or is the non-debtor required to plead every alternative basis for a claim of ownership of the subject funds?

As set out in the briefs, there are clear statements in the case law supporting the proposition that the Interested Parties' Motion to Dissolve Writ of Garnishment and subsequent Motion for Summary Judgment were more than sufficient to preserve their objection to the garnishment of their proportionate shares of the subject joint accounts and maintain their statutory presumption that, in the absence of evidence to the contrary, that the ownership of a joint account is pro

rata in proportion to the number of names on the joint accounts. Florida law does not require that a party with an interest in garnished property assert multiple alternative and perhaps conflicting theories of ownership interests in the property in order to preserve their objection to the garnishment of their proportionate share of the property.

Substantial doubt about a question of state law upon which a particular case turns should be resolved by certifying the question to the Florida Supreme Court. *Jones v. Dillard's, Inc.*, 331 F.3d 1259, 1268 (11th Cir. 2003) (citing *Moreno v. Nationwide Insur. Co.*, 105 F.3d 1358, 1360 (11th Cir. 1997) (citing *Forgione v. Dennis Pirtle Agency, Inc.*, 93 F.3d 758, 761 (11th Cir. 1996))). Resolution this way avoids the unnecessary practice of guessing the outcome under state law and offers the State Court an opportunity to explicate state law. *Id.*

Under Florida Rule of Appellate Procedure 9.150, this Court may certify the question to the Florida Supreme Court. When the determination of the question of law is determinative of this cause, and there are no clear controlling precedents in the decisions of the Florida Supreme Court, the issue is ripe for submission to the Florida Supreme Court. The Interested Party Appellants request by this petition and move this Court to certify the question to the Florida Supreme Court.

CONCLUSION

Appellant, Bing Kearney, respectfully requests that this Court vacate its November 13, 2019 Order and reverse its determination that there was not pertinent and relevant evidence to establish that Bing Kearney's

IRA was pre-approved and determined by the IRS to be exempt from taxation, and thus not exempt from garnishment by a judgment creditor.

Appellants, Interested Parties, respectfully request that this Court vacate its November 13, 2019 Order and reverse its determination that the Interested Parties did not preserve their "proportionate share" argument for appeal.

In the alternative, the Interested Parties petition and move the Court to certify the question to the Florida Supreme Court on the application of Fla. Stat. § 77.07 related to the nature and extent of the objection a party with an interest in garnished property must make to maintain their objection to the garnishment of property.

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CERTIFICATE OF COMPLIANCE

This Combined Petition for Panel Rehearing complies with the type-volume limitation of Fed. R. App. P. 40(b)(1) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains less than 3,900 words.

This Combined Petition for Panel Rehearing complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman style font.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via CM/ECF to counsel and parties of record on this 4th day of December, 2019.

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APPELLANTS' COMBINED INITIAL BRIEF COVER AND TABLES OF CONTENT (DECEMBER 21, 2018)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BING CHARLES W. KEARNEY, JR.
AND INTERESTED PARTIES, TONYA NUHFER-KEARNEY, CHARLES WESLEY KEARNEY, III, CLAYTON WHITMAN KEARNEY,
AND BRYAN G. KEARNEY

Third-Party Defendant and Interested Parties/ Appellants

v.

TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA,

Defendant/Third Party Plaintiff/Appellee

Appeal No: 18-13143
(Consolidated with Case No. 18-13145)

Trial Court No. 8:09-CV-01850-JSM-CPT

On Appeal from the United States District Court
Middle District of Florida Tampa Division

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BING CHARLES W. KEARNEY, JR.
AND INTERESTED PARTIES, TONYA NUHFER-KEARNEY, CHARLES WESLEY KEARNEY, III, CLAYTON WHITMAN KEARNEY,
AND BRYAN G. KEARNEY

Third-Party Defendant and Interested Parties/ Appellants

v.

TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA,

Defendant/Third Party Plaintiff/Appellee

Appeal No: 18-13143
(Consolidated with Case No. 18-13145)

Trial Court No. 8:09-CV-01850-JSM-CPT

On Appeal from the United States District Court
Middle District of Florida Tampa Division

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BING CHARLES W. KEARNEY, JR.
AND INTERESTED PARTIES, TONYA NUHFER-KEARNEY, CHARLES WESLEY KEARNEY, III, CLAYTON WHITMAN KEARNEY,
AND BRYAN G. KEARNEY,

Third-Party Defendant and Interested Parties/ Appellants,

v.

TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA,

Defendant/Third Party Plaintiff/Appellee.

Appeal No: 18-13143
(Consolidated with Case No. 18-13145)

Trial Court No. 8:09-CV-01850-JSM-TBM

On Appeal from the United States District Court
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