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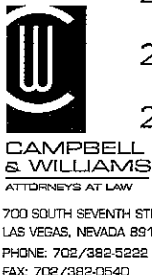
**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

KIRK and AMY HENRY,)
)
Plaintiffs,)
)
vs.)
)
FREDRICK RIZZOLO aka RICK RIZZOLO,)
)
an individual; LISA RIZZOLO, individually)
)
and as trustee of The Lisa M. Rizzolo Separate)
)
Property Trust and as successor trustee of)
)
The Rick J. Rizzolo Separate Property Trust;)
)
THE RICK AND LISA RIZZOLO FAMILY)
)
TRUST; THE RICK J. RIZZOLO SEPARATE)
)
PROPERTY TRUST; THE LISA M. RIZZOLO)
)
SEPARATE PROPERTY TRUST; THE RLR)
)
TRUST; THE LMR TRUST, and KIMTRAN)
)
RIZZOLO, an individual.)
)
)
)
Defendants.)
)
_____)

Case No. 2:08-CV-635-PMP-GWF

**PLAINTIFFS' MOTION FOR
ORDER PERMITTING
SEIZURE OF DEFENDANT
KIMTRAN RIZZOLO'S
ANNUITY ACCOUNTS**

Plaintiffs KIRK and AMY HENRY, by and through their attorneys of record, DONALD J. CAMPBELL, ESQ. and PHILIP R. ERWIN, ESQ., of the law firm CAMPBELL &



1 Rizzolo and during the time period when she was receiving substantial monthly payments
2 pursuant to the fraudulent assignment of proceeds from the Philadelphia sale.
3

4 5. Plaintiffs' counsel, with the assistance of the USMS, prepared writs of
5 garnishment and seizure to be served on the foregoing financial institutions in accordance with
6 state and federal law.¹

7 6. On June 8, 2012, the USMS served a writ of garnishment and seizure on
8 Transamerica and specifically identified Ms. Rizzolo's annuity account. In response,
9 Transamerica filed an independent action in United States District Court for the District of
10 Nevada seeking a judicial determination of whether Plaintiffs were entitled to seize the annuity
11 account pursuant to the Writ of Execution (#594). *See Transamerica Life Ins. Co. v. Henry et*
12 *al.*, Case No. 2:12-CV-01171. Specifically, Transamerica sought a declaration from the Court
13 that the Nevada exemption for annuities as codified in NRS 687B.290 did or did not apply to Ms.
14 Rizzolo's annuity account.
15

16 7. On or about June 20, 2012, the USMS served a writ of garnishment and seizure
17 on Prudential and specifically identified Ms. Rizzolo's annuity account. In response, Prudential
18 stated that "annuity contracts are generally exempt from garnishment" and that it would "await
19 instruction from the Court." *See Prudential Interrogatory Responses (#611).*
20

21 8. Metlife is located in the Southern District of Iowa and the USMS office in that
22 region will not serve the writ of garnishment and seizure without an order from the Court that the
23 accounts are, in fact, subject to seizure.
24

25
26 ¹ Ms. Rizzolo also held funds in checking accounts and a Certificate of Deposit account at
27 Citibank as well as a securities account at City National Bank. The USMS served a writ of
28 garnishment and seizure on Citibank which yielded \$211,084.89 towards Plaintiffs' collection
efforts. The USMS is in the process of serving a writ of garnishment and seizure on City
National Bank.



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9. I declare under penalty of perjury of the laws of the United States and the State of Nevada that the foregoing is true and correct.

DATED this 12th day of July, 2012.

/s/ Philip R. Erwin
PHILIP R. ERWIN

POINTS AND AUTHORITIES

I. INTRODUCTION

The instant Motion arises out of Plaintiffs Kirk and Amy Henry’s ongoing collection efforts against Defendant Kimtran Rizzolo. As the Court is well aware, Ms. Rizzolo refused to comply with the Order (#583) and Judgment (#584), which resulted in the entry of the Writ of Execution (#594). Pursuant to the Writ of Execution, Plaintiffs have endeavored to seize multiple annuities that Ms. Rizzolo created after she received fraudulently transferred funds from Defendant Rick Rizzolo.

Even though Ms. Rizzolo has not claimed any exemption or disputed Plaintiffs’ right to seize her assets, Plaintiffs’ efforts to execute on these annuities have been frustrated by the various financial institutions that created the annuities at Ms. Rizzolo’s behest. These financial institutions assert that annuities are generally exempt from execution under Nevada state law. *See* NRS 687B.290. As will be demonstrated below, however, the Nevada exemption does not apply when the party claiming the exemption obtained the allegedly exempt property through fraud or tortious conduct. Accordingly, Plaintiffs seek an order that the Nevada exemption for annuities in NRS 687B.290 does not apply in this case and, therefore, Ms. Rizzolo’s various annuities are subject to execution.

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II. ARGUMENT

Once again, Ms. Rizzolo did not object to the seizure of her assets on the grounds of any exemption. Nevertheless, Plaintiffs will address the application of NRS 687B.290 to Ms. Rizzolo’s annuities in order to clarify this issue and simplify ongoing collection efforts. The Nevada exemption provides in pertinent part:

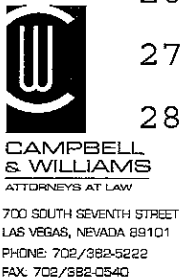
The benefits, rights, privileges and options which under any annuity contract [] are due or prospectively due the annuitant shall not be subject to execution nor shall the annuitant be compelled to exercise any such rights, powers, or options, nor shall creditors be allowed to interfere with or terminate the contract, except as to amounts paid for or as premium on any such annuity with intent to defraud...²

Id.

To begin with, common sense dictates that an individual should not be permitted to claim statutory exemptions in order to protect property that was obtained through wrongful conduct. Indeed, the Nevada Supreme Court addressed this very issue as it applied to the homestead exemption in *Maki v. Chong*, 75 P.3d 376 (Nev. 2003). In *Maki*, the judgment debtor used fraudulently obtained funds to purchase a home and subsequently claimed that the homestead exemption applied when the judgment creditor attempted to impose an equitable lien on the property. *Id.* at 378. The judgment creditor argued that the homestead exemption did not apply because the judgment debtor obtained the property through illicit means. *Id.*

The Nevada Supreme Court first acknowledged the basic proposition that “[t]here is a time-honored principle that states that he who keeps property that he knows belongs to another must restore that property.” *Id.* at 379. The Nevada Supreme Court then swiftly disabused the

² As plainly stated in the text of the statute, the Nevada exemption excludes annuities that were established with the “intent to defraud” creditors. The suspicious timing of the creation of the annuities and Ms. Rizzolo’s persistent concealment of these assets throughout discovery demonstrate that she established the various annuities to protect her ill-gotten gains from potential creditors. It is, however, unnecessary to undertake such an analysis here as Ms. Rizzolo is barred from claiming the Nevada exemption for annuities in the first place.



1 judgment debtor of the notion that the homestead exemption can be invoked to protect property
2
3 obtained through fraud as follows:

4 *Although public policy favors homestead exemptions in all but a few situations,*
5 *we cannot allow a debtor to be shielded by the homestead exemption to further a*
6 *fraud or similar tortious conduct. We therefore conclude that the homestead*
7 *exemption does not apply to transactions involving fraud or similar tortious*
8 *conduct.*

9 *Chong obtained Maki's funds by fraudulent means; therefore, the homestead*
10 *exemption does not protect her.*

11 *Id.* at 377-79 (emphasis added).

12 To be sure, numerous courts have held “that exemptions are not to be applied in such a
13 way as to make them instruments of fraud, an imposition on creditors, or a means to escape
14 honest debts.” See *In re Hill*, 163 B.R. 598, 601 (Bankr. N.D. Fla. 1994) (sustaining objection to
15 claimed exemption to an IRA that was “a repository for ill-gotten monies which cannot be
16 shielded from creditors through the application of exemption provisions.”); see also *In re*
17 *Gherman*, 101 B.R. 369 (Bankr. N.D. Fla. 1994) (refusing to apply homestead and pension
18 exemptions where the property claimed as exempt was fraudulently and unlawfully stolen by the
19 debtor); *Chiu v. Wong*, 16 F.3d 306 (8th Cir. 1994) (imposing constructive trust on homestead
20 that was purchased by debtor with funds obtained through wrongful conduct).

21
22 The same logic applies here. Ms. Rizzolo’s annuities were funded as a result of
23 fraudulent transfers designed to frustrate Plaintiffs’ recovery of the debt owed to them. The
24 subject annuities are not independent assets that were owned by Ms. Rizzolo before the
25 fraudulent transfers related to the Philadelphia sale. To the contrary, Ms. Rizzolo formed each of
26 the annuities after her husband passed away and during the time period when she was receiving
27 substantial monthly payments pursuant to the illicit assignment of proceeds from the
28



1 Philadelphia sale. It would clearly contravene Nevada state law and public policy if Ms. Rizzolo
2 was allowed to fraudulently obtain money that rightly belonged to Plaintiffs and, in turn, protect
3 it from execution by converting the funds into exempt property. Indeed, the foregoing authority
4 clearly holds that Ms. Rizzolo is barred from sheltering her ill-gotten gains under the Nevada
5 exemption for annuities.
6

7 **III. CONCLUSION**

8 Accordingly, it is respectfully requested that the Court enter an order allowing Plaintiffs
9 to seize Defendant Kimtran Rizzolo's annuity accounts in satisfaction of the Order (#583) and
10 Judgment (#584).
11

12 DATED this 12th day of July, 2012.

13 CAMPBELL & WILLIAMS

HUNTERTON & ASSOCIATES

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Attorneys for Plaintiff Amy Henry



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that service of the foregoing was served on the 12th day of July, 2012 via the Court's CM/ECF electronic filing system addressed to all parties on the e-service list.

/s/ Philip R. Erwin, Esq.
An Employee of Campbell & Williams



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