

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Southern Division

In re:) Bankr. No. 89-40349
)
WAYNE DOUGLAS TAYLOR) Chapter 7
Soc. Sec. No. 387-86-8721)
)
and) MEMORANDUM OF DECISION RE:
) MOTION TO DISCHARGE
PEGGY TAYLOR) JUDGMENT AND AVOID LIEN
a/k/a PEGGY VAN DEEST)
Soc. Sec. No. 503-72-9832)
)
Debtors.)

The matter before the Court is the MOTION FOR ORDER DIRECTING CLERK OF COURT TO DISCHARGE JUDGMENT DISCHARGED IN BANKRUPTCY AND DIRECTING REGISTER OF DEEDS TO DISCHARGE LIEN DISCHARGED IN BANKRUPTCY filed by Debtors on February 26, 1998. This is a core proceeding under 28 U.S.C. § 157(b)(2). This MEMORANDUM OF DECISION and accompanying ORDER shall constitute the Court's findings and conclusions under F.R.Bankr.P. 7052. As set forth below, the Court concludes that the judgment held by Allied Collection Services shall be discharged by the county clerk of court pursuant to S.D.C.L. § 15-16-20 but that Minnehaha County's aid lien survives bankruptcy because the debt was not scheduled and because the county's lien cannot be discharged under S.D.C.L. § 15-26-20 and 11 U.S.C. § 524(a) or avoided by Debtors under 11 U.S.C. § 522(f) or § 522(h).

I.

Wayne D. and Peggy Taylor (Debtors) filed a Chapter 7 petition on July 31, 1989. Their scheduled unsecured creditors included Allied Collection Service (Allied), which had a judgment for \$2,398.22. Minnehaha County was not listed as a secured or

unsecured creditor. A discharge of debts was entered October 31, 1989. The case was closed November 15, 1989.

On February 26, 1998, Debtors filed a MOTION FOR ORDER DIRECTING CLERK OF COURT TO DISCHARGE JUDGMENT DISCHARGED IN BANKRUPTCY AND DIRECTING REGISTER OF DEEDS TO DISCHARGE LIEN DISCHARGED IN BANKRUPTCY. Therein, they sought, on shortened notice, a discharge under S.D.C.L. § 15-26-20 of Allied's judgment and a county aid lien held by Minnehaha County. By letter to Debtors' counsel dated March 4, 1998, the Court reviewed applicable law and advised counsel that it appeared that the county's aid lien was a statutory lien that could not be discharged under either S.D.C.L. § 15-16-20 or 11 U.S.C. § 522(f). A brief in support of the MOTION was sought.

Debtors filed a brief on March 9, 1998. They stated that the county's aid lien was for public defender services incurred pre-petition by Debtor Wayne Taylor. They argued that a public defender's lien is an avoidable judicial lien, rather than a statutory lien, because a judge must set the amount of the lien under S.D.C.L. § 23A-40-12. They also argued that the lien impairs their exempt property as required by § 522(f). They cited *In re Claussen*, 118 B.R. 1009 (Bankr. D.S.D. 1990), in support of their MOTION. By a supplemental letter-brief filed March 17, 1998, Debtors argued that it would be inequitable to enforce the county's recorded lien when the underlying documentation for the lien is no longer available.

APPLICATION OF 11 U.S.C. § 524(a) AND S.D.C.L. § 15-26-20. Under South Dakota law, S.D.C.L. §§ 15-16-7 and 15-16-35, a judgment lien attaches only to non exempt real property. If the debtor owned non exempt (that is, non homestead) real property when he filed his petition in bankruptcy, the judgment creditor has a lien on that real property based on the judgment. The judgment creditor's claim will be paid from the sale proceeds when the land is sold by the bankruptcy case trustee. If the trustee abandons the land from the bankruptcy estate (rather than selling it), the judgment creditor's lien survives the debtor's bankruptcy and the judgment creditor may enforce the judgment lien later.

If the debtor did *not* have any non exempt real property when he filed his bankruptcy petition, however, there was no real property to which the judgment creditor's judgment lien could attach and become enforceable at the time of the petition. Further, after the judgment is discharged in the bankruptcy case under 11 U.S.C. § 524(a)¹, the creditor no longer has the necessary underlying judgment that can become a lien on any real property the

¹ Section 524(a)(1) of the Bankruptcy Code provides:

- (a) A discharge in a case under this title --
 (1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727, 944, 1141, 1228, or 1328 of this title, whether or not discharge of such debt is waived[.]

It is a key part of a debtor's relief because it discharges the debtor's personal liability under a judgment.

debtor may acquire after the bankruptcy.

If a judgment has been discharged in bankruptcy under § 524(a), a debtor must look to S.D.C.L. § 15-16-20 to have the judgment removed from the county clerk of court's records. The debtor must file a motion before the Bankruptcy Court to obtain an order that lists the judgments to be discharged and then serve the order on the county clerk of court. When the clerk of court receives that order, she must indicate on her records that the judgment is deemed discharged or satisfied. Thereafter, the creditor no longer can enforce the judgment or obtain a judgment lien on the debtor's non exempt real property.

Section 15-16-20 only governs the removal of judgments. If a creditor had an enforceable judgment lien on the debtor's non exempt real property on the petition date, an order obtained under § 15-26-20 has no effect on that judgment lien.

AVOIDING LIENS ON EXEMPT PROPERTY. A Chapter 7 debtor may utilize § 522(f) or § 522(h) of the Bankruptcy Code to avoid certain liens on exempt property or avoid certain transfers of exempt property. A judicial lien can be avoided on exempt property pursuant to § 522(f). It is defined as a lien "obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding." 11 U.S.C. § 101(36).

As amended in 1994, a mathematical calculation must be made under § 522(f) to determine whether the exemption is impaired. Under the formula, a judicial lien will remain in place only if

there is value in the exempt property left to support the lien after any mortgage or other lien is subtracted from the market value of the property. See generally *Farrey v. Sanderfoot*, 111 S.Ct. 1825 (1991), and *Owens v. Owens*, 111 S.Ct. 1833 (1991).

Statutory liens cannot be avoided on exempt property under § 522(f) but some may be avoided under § 522(h). A statutory lien is defined as a

lien arising solely by force of a statute on specified circumstances or conditions, . . . , but does not include security interest or judicial lien, whether or not such interest or lien is provided by or dependent on a statute and whether or not such interest or lien is made fully effective by statute[.]

11 U.S.C. § 101(53).

Under § 522(h), a debtor may utilize one of several "strong arm powers" given to the case trustee to recover exempt property if the trustee does not act. *Goebel v. United States (In re Goebel)*, 153 B.R. 593, (Bankr. M.D. Fla. 1993). Of these several "strong arm" powers, only § 545(2) of the Bankruptcy Code is applicable in this case. It provides:

The [debtor] may avoid the fixing of a statutory lien on property of the debtor to the extent that such lien . . . is not perfected or enforceable at the time of the commencement of the case against a bona fide purchaser that purchases such property, whether or not such a purchaser exists[.]

The Bankruptcy Court must refer to state law to determine whether the creditor's statutory lien on the petition date would withstand a sale of the liened property to a bona fide purchaser. See, e.g., *Drewes v. Carter (In re Woods Farmers Co-operative Elevator Co.)*, 946 F.2d 1411 (8th Cir. 1991); *Janssen v. United States (In re*

Janssen), 213 B.R. 558, 562-565 (8th Cir. B.A.P. 1997). If the lien is good against that purchaser, the debtor cannot avoid the lien. Otherwise, it may be avoided and the creditor will be returned to the rank of an unsecured creditor.

Section 545(2) is further limited by § 546(b). Section 546(b) provides that a debtor cannot avoid a lien under § 545(2) if the creditor could still perfect his interest under any "generally applicable law" that permits the creditor's later perfection to protect it from certain intervening interest holders.² *Klein v. Civale & Trovato, Inc. (In re Lionel Corp.)*, 29 F.3d 88, 92-93 (2nd Cir. 1994); *In re Microfab, Inc.*, 105 B.R. 152, 155-58 (Bankr. D. Mass. 1989).

III.

DISCHARGE OF ALLIED'S JUDGMENT.

In the case at hand, Debtors did not own any non exempt real property on their petition date to which Allied's judgment could attach to create a lien. Therefore, a judgment lien did not exist when Debtors' petition was filed and the judgment itself held by Allied was discharged in bankruptcy pursuant to § 524(a). Accordingly, Allied's judgment can be discharged by the county clerk of court pursuant to S.D.C.L. § 15-26-20.

DISCHARGE OR AVOIDANCE OF MINNEHAHA COUNTY'S LIEN

In contrast to Allied's judgment, Minnehaha County's lien

² Section 546(b) was amended in 1994 to split it into two subparts but no major substantive changes were made. See HR Rep 103-834, 103rd Cong. 2nd Sess 21 (Oct. 4, 1994).

cannot be discharged under 11 U.S.C. § 524(a) and S.D.C.L. § 15-16-20 because those statutes discharge only judgments, not liens.³ See *In re Hanson*, 164 B.R. 632, 634 (Bankr. D.S.D. 1994) (Ecker, J.) (general discussion of liens in bankruptcy); see also *Dewsnup v. Timm*, 112 S.Ct. 773 (1992) (discussion of effect of bankruptcy on liens in Chapter 7 case).

Most important, the county's lien cannot be avoided under § 522(f) as a lien impairing an exemption because it is a statutory lien, one that arises by virtue of statute, not by any legal process or proceeding. Compare 11 U.S.C. § 101(36) and (53). Debtors' argument that the county holds a judicial lien because a judge must set the amount of the lien is unpersuasive. The lien itself is created by statute, S.D.C.L. § 23A-40-11. The judge's determination of the amount pursuant to § 23A-40-12 is at most a specified condition or circumstance necessary to fulfill § 23-40-11.

Further, the county's statutory lien on Debtors' exempt property survives § 522(h) because neither the trustee or Debtors could step into the shoes of a bona fide purchaser of the property to avoid the county's lien under § 545(2). The county did not need to resort to any post-petition perfection of its interest under § 546(b) because it's lien already was enforceable against a bona

³ The Court also notes that the underlying debt to Minnehaha County was not scheduled. While the debt, though unscheduled, may have been discharged under 11 U.S.C. § 523(a)(3), an appropriate adversary proceeding has not been brought to make that determination.

fide purchaser on the petition date.

It is not material under either § 522(f) or § 522(h) that the county cannot *enforce* its statutory lien against exempt property. The lien still attached to both real and personal property. S.D.C.L. § 23A-40-11. When the property loses its exempt status, the county may then enforce its lien. S.D.C.L. §§ 23A-40-14 and 23A-40-15

Debtors' reliance on *Claussen* is misplaced for two reasons. First, in *Claussen* the county had not acquired a pre-petition aid lien because it did not pay the debtor's hospital bill until *after* the debtor's petition was filed. *Claussen*, 118 B.R. at 1012. Here the public defender's bill was paid by the county pre-petition and the aid lien arose pre-petition.

Second, the Court of Appeals' decision on which the court in *Claussen* relied for its "fresh start" theory for avoiding a county aid lien is an older Bankruptcy Act case that interpreted certain requirements for allowable claims that are no longer material under the Bankruptcy Code. *Crisp v. Connecticut (In re Crisp)*, 521 F.2d 172 (2nd Cir. 1975). The court in *Crisp* did not rely on any entitlement the debtor had to a fresh start for its rationale in avoiding a county's poor lien; it only said that its decision (in determining whether the debt was provable and dischargeable) was in "accord" with the fresh start principle of bankruptcy. *Id.* at 177.

STATUS OF LIEN ON NON BANKRUPTCY (POST-PETITION) PROPERTY

This Court does not have jurisdiction to determine whether the county's lien can attach to any post-petition property or whether

equity dictates that the county's lien should not be enforced against post-petition property because the underlying documentation for the public defender's claim is no longer available. Any property Debtors have acquired or will acquire post-petition is not bankruptcy estate property or property declared exempt during the bankruptcy case. See 28 U.S.C. § 157(b).

An order will be entered directing the clerk of court to discharge the judgment held by Allied and denying the discharge or avoidance of the Minnehaha County's aid lien.

Dated this _____ day of March 1998.

BY THE COURT:

Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:
Charles L. Nail, Jr., Clerk

By: _____
Deputy Clerk

(SEAL)

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Southern Division

In re:) Bankr. No. 89-40349
)
WAYNE DOUGLAS TAYLOR) Chapter 7
Soc. Sec. No. 387-86-8721)
)
and) ORDER DIRECTING CLERK OF
) COURT TO DISCHARGE JUDGMENT
PEGGY TAYLOR) DISCHARGED IN BANKRUPTCY AND
a/k/a PEGGY VAN DEEST) DENYING DEBTORS' MOTION AS TO
Soc. Sec. No. 503-72-9832) AVOIDANCE OF COUNTY'S AID LIEN
)
)
Debtors.)

In recognition of and compliance with the MEMORANDUM OF DECISION
RE: MOTION TO DISCHARGE JUDGMENT AND AVOID LIEN entered this day,

IT IS HEREBY ORDERED that Debtors' MOTION FOR ORDER DIRECTING CLERK
OF COURT TO DISCHARGE JUDGMENT DISCHARGED IN BANKRUPTCY AND DIRECTING REGISTER OF
DEEDS TO DISCHARGE LIEN DISCHARGED IN BANKRUPTCY filed February 26, 1998 is
GRANTED to the extent that pursuant to S.D.C.L. § 15-16-20, the
clerk of court in which the August 5, 1988 judgment of Allied
Collection Service against Peggy Van Deest, Civ. 88-1677 in the
amount of \$2,341.62 plus costs of \$56.60, was rendered, or a
transcript thereof has been filed, shall enter a certified copy of
this ORDER in the clerk's judgment record docket and that said
entry(ies) shall discharge the judgment specified from and after
the date of entry; and

IT IS FURTHER ORDERED that Debtors' MOTION FOR ORDER DIRECTING CLERK
OF COURT TO DISCHARGE JUDGMENT DISCHARGED IN BANKRUPTCY AND DIRECTING REGISTER OF
DEEDS TO DISCHARGE LIEN DISCHARGED IN BANKRUPTCY filed February 26, 1998 is
DENIED to the extent that aid liens in the amounts of \$350.40 and
\$51.60 held by Minnehaha County for public defender services
provided by the County pre-petition shall not be discharged under

S.D.C.L. § 15-16-20 or avoided under 11 U.S.C. § 522(f) or § 522(h) on property of the bankruptcy estate or on property declared in exempt in this bankruptcy case.

So ordered this _____ day of March 1998.

BY THE COURT:

Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:
Charles L. Nail, Jr., Clerk

By: _____
Deputy Clerk

(SEAL)