

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Southern Division

In re:) Bankr. No. 97-40015
) Chapter 7
DARRELL HOOKIE)
Soc. Sec. No. [REDACTED]-6059) MEMORANDUM OF DECISION RE:
) DEBTOR'S MOTION TO AVOID
Debtor.) COUNTY POOR LIEN

The matter before the Court is the Motion to Avoid County Poor Lien filed by Debtor. 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 aid lien of Brookings County shall be voided because it was filed in violation of the automatic stay.

I.

Darrell Hookie filed a Chapter 7 petition on January 7, 1997. Among his unsecured creditors was the Brookings County Auditor for \$8,211.00 for "county poor lien-Sioux Valley Hosp." A discharge order was entered April 14, 1997. The case remains open because the trustee has assets to distribute.

On January 6, 1998, Debtor filed a Motion to Avoid County Poor Lien wherein he asked that a county poor lien held by Brookings County for \$8,745.82 be avoided. No response to the Motion was received. At the Court's request, Debtor supplemented his Motion twice. In the second supplement, Debtor disclosed that after his petition was filed, Brookings County had reimbursed a hospital for pre-petition medical bills. This debt to the county, however, had been scheduled by Debtors in anticipation of the county's payment.

Through Debtor's counsel, the county indicated it did not object to the relief sought.

The matter was taken under advisement in light of the Court's recent decision in *In re Taylor*, Bankr. No. 89-40349, slip op. (March 19, 1998).

II.

APPLICATION OF 11 U.S.C. § 524(a) AND S.D.C.L. § 15-26-20.

As discussed in *Taylor*, only judgments, not liens, are discharged under 11 U.S.C. § 524(a) and S.D.C.L. § 15-16-20. Therefore, while the county's contingent claim was discharged under 11 U.S.C. § 727(b), we must look to other law to determine whether the county's aid lien survives Debtor's bankruptcy.

III.

EFFECT OF THE AUTOMATIC STAY

Sections 362(a)(4) and (5) prohibits a creditor from taking any action post-petition to "create, perfect, or enforce" a lien against bankruptcy estate property or against the debtor's property to the extent that the claim arose pre-petition. That stay went into effect on January 7, 1997 and was still in effect on February 11 and February 25, 1997 when the County obtained their statutory aid liens under S.D.C.L. § 28-14-5. Accordingly, the automatic stay was violated since the County's actions were an attempt to create and perfect a lien.


Some courts have held that an act in violation of the automatic stay is void ab initio; others say the act is voidable. See *Riley v. United States*, 118 F.3d 1220, 1222 n.1 (8th Cir.

1997); *Carpio v. Smith (In re Carpio)*, 213 B.R. 744, 748-49 (Bankr. W.D. Mo. 1997) (discussion therein); *Hutchins v. Fordyce Bank and Trust Co. (In re Hutchins)*, 211 B.R. 325, 328 (Bankr. E.D. Ark. 1997); and *Kemper Insurance Co. v. Profile Systems, Inc. (In re Profile Systems, Inc.)*, 193 B.R. 507, 511 (Bankr. D. Minn. 1996). What is certain is that 11 U.S.C. § 362(h) directs the Court to fashion an appropriate remedy when the automatic stay is violated. *Riley*, 118 F.3d at 1222; and *Sosne v. Reinert & Duree, P.C. (In re Just Brakes Corporate Systems, Inc.)*, 108 F.3d. 881, 885 (8th Cir. 1997). With that in mind, the Court concludes that the appropriate remedy is to void the aid lien and direct the county to remove it from its books. That will return the parties to their pre-petition status and insure that the fresh start provided by Debtor's discharge of the contingent debt is protected.

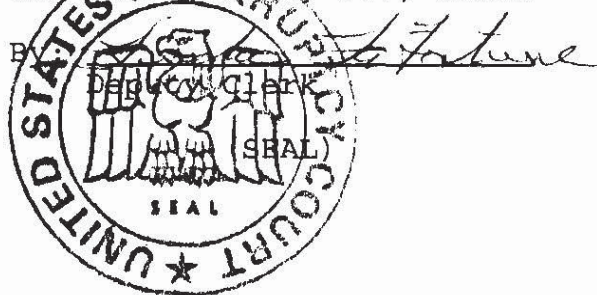
An appropriate order shall be entered.

Dated this 16 day of April, 1998.

BY THE COURT:


 Irvin N. Hoyt
 Chief Bankruptcy Judge

ATTEST:
 Charles L. Nail, Jr., Clerk



NOTICE OF ENTRY
 Under F.R. Bankr.P. 9022(a)
 Entered


APR 16 1998

Charles L. Nail, Jr., Clerk
 U.S. Bankruptcy Court
 District of South Dakota

CERTIFICATE OF SERVICE

I hereby certify that a copy of this document was mailed, hand delivered, or faxed this date to those creditors and other parties in interest identified on the attached service list.

Charles L. Nail, Jr., Clerk
 U.S. Bankruptcy Court
 District of South Dakota

By: 
 Date: 4-16-98

Case: 97-40015 Form id: 122 Ntc Date: 04/16/98 Off: 4 Page : 1
Total notices mailed: 4

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