

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF INDIANA  
SOUTH BEND DIVISION

IN THE MATTER OF	)	
STACY LENN LARD,	)	CASE NO. 05-38550 HCD
	)	CHAPTER 13
DEBTOR.	)	
	)	
	)	
STACY LENN LARD,	)	
PLAINTIFF,	)	
vs.	)	PROC. NO. 06-3050
	)	
DALIN REMODELING, INC.,	)	
DEFENDANT.	)	

Appearances:

Debra Voltz-Miller, Esq., counsel for plaintiff, 1951 East Fox, South Bend, Indiana 46613;

Glenn L. Duncan, Esq., counsel for defendant, Thorne, Grodnik LLP, 228 West High Street, Elkhart, Indiana 46516; and

Jacob S. Frost, Esq., counsel for defendant, Thorne, Grodnik LLP, 228 West High Street, Elkhart, Indiana 46516.

MEMORANDUM OF DECISION

At South Bend, Indiana, on September 28, 2006.

Before the court is the Motion to Dismiss Complaint Seeking Damages in Core Adversary Proceeding, filed on May 5, 2006, by the defendant Dalin Remodeling, Inc. The plaintiff's Amended Complaint requests actual and punitive damages, as well as attorney fees and expenses, under 11 U.S.C. § 362(a)(4).<sup>1</sup> Section (a)(4) of the automatic stay provision of the Bankruptcy Code imposes a stay on "any act to create, perfect, or enforce any lien against property of the estate" in order "to preserve the status quo as of the date of

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<sup>1</sup> The court grants the plaintiff's Amended Motion for Leave to File Amended Complaint. "A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served." Fed. R. Civ. P. 15(a), made applicable in adversary proceedings by Fed. R. Bankr. P. 7015. The Seventh Circuit liberally allows amendments, *see Pogge v. Powers (In re Smith)*, 302 B.R. 865, 867 (C.D. Ill. 2003), and in this case the defendant had not properly filed its Answer to the Complaint before the plaintiff moved to amend his Complaint.

the bankruptcy proceeding.” *In re Carlson*, 126 F.3d 915, 923 (7th Cir. 1997), *cert. denied*, 523 U.S. 1060 (1998). The defendant has asked the court to dismiss that Complaint.

### Jurisdiction

Pursuant to 28 U.S.C. § 157(a) and Northern District of Indiana Local Rule 200.1, the United States District Court for the Northern District of Indiana has referred this case to this court for hearing and determination. After reviewing the record, the court determines that the matter before it is a core proceeding within the meaning of § 157(b)(2)(G) over which the court has jurisdiction pursuant to 28 U.S.C. §§ 157(b)(1) and 1334. This entry shall serve as findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52, made applicable in this proceeding by Federal Rules of Bankruptcy Procedure 7052 and 9014. Any conclusion of law more properly classified as a factual finding shall be deemed a fact, and any finding of fact more properly classified as a legal conclusion shall be deemed a conclusion of law.

### Background

According to the Amended Complaint, the plaintiff entered into an agreement on August 24, 2005, with the defendant to perform home improvements on his residence. However, the relationship broke down; on September 9, 2005, the plaintiff asked the defendant to leave the property and to cease performance. The plaintiff filed his voluntary chapter 7 petition in bankruptcy on October 13, 2005, and gave notice to the defendant. On December 1, 2005, the defendant filed a Notice of Mechanic’s Lien on the plaintiff’s property. The plaintiff claims that the act of filing that Notice, after the defendant was notified of the plaintiff’s bankruptcy petition, is a gross violation of the automatic stay under § 362(a)(4).

The defendant’s Motion to Dismiss does not disagree with the factual underpinnings of the Amended Complaint. It states that it filed the mechanic’s lien because it was not paid for the materials and work performed on the plaintiff’s residence. It seeks dismissal of the Amended Complaint on two grounds. First, it argues that it filed the lien to perfect its interest in the plaintiff’s property. A filing of a Notice of Mechanic’s Lien is

exempted from the scope of the automatic stay, it asserts. Under § 362(b)(3), the plaintiff's petition does not operate as a stay

of any act to perfect, or to maintain or continue the perfection of, an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title or to the extent that such act is accomplished within the period provided under section 547(e)(2)(A) of this title.

11 U.S.C. § 362(b)(3). The plaintiff's second reason for requesting dismissal is that, in its Order of April 4, 2006, the court denied the debtor's motion to avoid the defendant's mechanic's lien and thereby validated the mechanic's lien.

Although the defendant did not declare in its Motion that it was seeking dismissal of the Amended Complaint under Federal Rule of Civil Procedure 12(b)(6), made applicable in adversary proceedings by Federal Rule of Bankruptcy Procedure 7012, the court views its argument to be that the Amended Complaint fails to state a claim upon which relief can be granted. "Rule 12(b)(6) authorizes a court to dismiss a claim on a dispositive issue of law." *Nietzke v. Williams*, 490 U.S. 319, 326, 109 S. Ct. 1827, 1832, 104 L.Ed.2d 338 (1989) (citing cases). "In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46; 78 S. Ct. 99, 102, 2 L.Ed.2d 80 (1957). When reviewing a motion to dismiss, a court must take the facts alleged in the complaint to be true. See *Enodis Corp. v. Employers Ins. of Wausau (In re Consolidated Indus. Corp.)*, 360 F.3d 712, 717 (7th Cir. 2004). The court therefore must consider whether the plaintiff can prove any set of facts to support his allegation.

### Discussion

The court first reviews the defendant's assertion that its mechanic's lien was exempt from the automatic stay. According to the Amended Complaint, the defendant stopped working for the plaintiff on

September 9, 2005, and filed its mechanic's lien on December 1, 2005. Under state law, however, he was required to file a timely notice of lien upon the property holder not later than 60 days after performing the job at the plaintiff's residence. *See* Indiana Code 32-28-3-3.<sup>2</sup> The defendant did not file its Notice of Mechanic's Lien within 60 days of its termination by the plaintiff. Because the Notice was untimely filed, the defendant's post-petition act of filing does not fit within the exception to the automatic stay created by § 362(b)(3). *Cf. Malloy v. St. John Medical Center (In re Woodward)*, 234 B.R. 519, 527 (Bankr. N.D. Okla. 1999) (concluding that post-petition filing of second physician's lien which did not relate back to first lien was prohibited under § 362(a)(4) and was void); *Cho v. Purdue Research Foundation*, 803 N.E.2d 1161, 1172 (Ind. App. 2004) (affirming that untimely filed mechanic's lien was invalid). The court finds that it appears beyond doubt that the plaintiff has presented in his Amended Complaint a set of facts in support of his claim which would entitle him to relief. Therefore the court will not dismiss the Amended Complaint based upon the defendant's first argument.

The court next considers the defendant's second assertion, that this court, in its Order of April 4, 2006, validated its mechanic's lien. Upon review of that Order, the court finds that it did not affirm the validity

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<sup>2</sup> Indiana Code 32-28-3-3 provides, in pertinent part:

...

(b) This subsection applies to a person that performs labor or furnishes materials or machinery described in section 1 of this chapter related to a Class 2 structure (as defined in IC 22-12-1-5) or an improvement on the same real estate auxiliary to a Class 2 structure (as defined in IC 22-12-1-5). A person who wishes to acquire a lien upon property, whether the claim is due or not, must file in duplicate a sworn statement and notice of the person's intention to hold a lien upon the property for the amount of the claim:

- (1) in the recorder's office of the county; and
- (2) not later than sixty (60) days after performing labor or furnishing materials or machinery described in section 1 of this chapter.

The statement and notice of intention to hold a lien may be verified and filed on behalf of a client by an attorney registered with the clerk of the supreme court as an attorney in good standing under the requirements of the supreme court.

Ind. Code 32-28-3-3(b). A residence qualifies as a "class 2 structure," as defined in Indiana Code 22-12-1-5(1): "A building or structure that is intended to contain or contains only one (1) dwelling unit."

of the defendant's lien. Instead, it denied the plaintiff's motion to avoid lien because the plaintiff had failed to file separately his two requests, the motion to avoid lien and motion to find a violation of § 362, as was required under N.D. Ind. L.B.R. B-9013-1. The Order went no further in its review of the lien itself. The court therefore will not dismiss the Amended Complaint based upon the defendant's second argument.

The court finds, therefore, that the defendant's reasons for dismissal do not demonstrate that the Amended Complaint fails to state a claim. It further determines that the Amended Complaint has set forth facts to support the plaintiff's allegation and that could entitle the plaintiff to relief. The court concludes that "the plaintiff could prevail under facts consistent with the complaint's allegations," *see Wilkow v. Forbes, Inc.*, 241 F.3d 552, 555 (7th Cir. 2001), and that he has presented a recognized legal claim under 11 U.S.C. § 362. Therefore the defendant's Motion to Dismiss is denied.

#### Conclusion

For the reasons stated above, the Motion to Dismiss Complaint Seeking Damages in Core Adversary Proceeding brought by defendant Dalin Remodeling, Inc. against plaintiff Stacy Lenn Lard is denied. Further proceedings with respect to the Amended Complaint will be set by separate order.

SO ORDERED.

/s/ Harry C. Dees, Jr.  
HARRY C. DEES, JR., CHIEF JUDGE  
UNITED STATES BANKRUPTCY COURT