

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF INDIANA  
FORT WAYNE DIVISION

IN THE MATTER OF: )  
 )  
WILLIAM JAMES PFISTER ) CASE NO. 04-14914  
 )  
Debtor )

**DECISION ON MOTION TO AVOID LIENS**

At Fort Wayne, Indiana, on August 26, 2005.

The debtor has filed two motions seeking to avoid purported judicial liens upon the property commonly known as 2423 Hillock Court, Fort Wayne, Indiana. This property is owned by the debtor and his non-debtor spouse as tenants by the entireties and has been claimed as exempt pursuant to § 522(b)(2)(B) of the United States Bankruptcy Code. 11 U.S.C. § 522(b)(2)(B). The motions allege that the liens in question impair the debtor's claimed exemption and may, therefore, be avoided pursuant to § 522(f) of the United States Bankruptcy Code. 11 U.S.C. § 522(f). The first motion seeks to avoid a lien allegedly held by Erie Islands Resort & Marina, while the second seeks to avoid a lien held by the Indiana Department of Revenue. On its own initiative, the court held a hearing to consider issues raised by the debtor's motions. Those issues included the question of whether the creditors actually held judicial liens upon the property.<sup>1</sup> The matter is before the court to consider

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<sup>1</sup>Other issues the court raised included whether the conditional nature of the exemption provided by § 522(b)(2)(B) could support a motion to avoid judicial liens, whether that exemption was impaired by the creditors' liens and, if so, the extent of any impairment. As to the IDR, the court was also concerned about whether the creditor had been properly served with the debtor's motion and the notice of the opportunity to object thereto. At the hearing, counsel for the IDR waived the deficiencies in service, so that issue is no longer before the court. Because of the court's answer to the question of whether the creditors hold judicial liens upon the property, it is not necessary to address the other issues it originally raised.

that issue, based upon the information and arguments presented at the hearing and the brief submitted by the IDR.<sup>2</sup>

Section 522(f) of the United States Bankruptcy Code allows a debtor to “avoid the fixing of a lien upon the debtor’s interest in property to the extent such lien impairs an exemption . . . if such lien is a judicial lien . . . .” 11 U.S.C. § 522(f)(1)(A). Consequently, before the court considers the issue of whether a debtor’s claimed exemption is impaired, the debtor must first prove that a lien has been fixed upon or attached to the debtor’s interest in property and that it is a judicial lien. In re Chinosorn, 243 B.R. 688 (Bankr. N.D. Ill. 2000). Debtor’s motions require the court to address different aspects of this threshold inquiry.

#### Erie Islands Resort & Marina

Debtor’s first motion is directed against a purported judicial lien held by Erie Islands Resort & Marina. That creditor obtained a default judgment against the debtor from a municipal court in Ottawa County Ohio, which was subsequently domesticated in Allen County, Indiana. The judgment is only against the debtor William Pfister, while the property in question is owned by the debtor and his non-debtor spouse as tenants by the entirety. The difference between the identity of the judgment debtor and the record owners of the property requires the court to consider whether the debtor has made a satisfactory demonstration that the judgment created a judicial lien against the property.

In Indiana, “all final judgments for the recovery of money . . . constitute a lien upon real

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<sup>2</sup>Although the debtor had the opportunity to respond to the IDR’s brief, it has not done so.

estate and chattels real liable to execution in the county where the judgment has been duly entered and indexed in the judgment docket . . . .” I.C. 34-55-9-2. This statute does not create a lien upon all property of the judgment debtor or even all real property of the judgment debtor. It creates a lien only as to real estate that is liable to execution. Thus, even though a judgment debtor may have some kind of an interest in real estate, unless that property is liable to execution no judicial lien will attach to it.

The property in question is owned by the debtor and his spouse as tenants by the entirety. By its very nature, property owned as tenants by the entirety is immune from seizure to satisfy the individual debts of either spouse. Mid-West Federal Sav. Bank v. Kerlin, 672 N.E.2d 82, 85 (Ind. App. 1996); Diss v. Agri Business Int’l, Inc., 670 N.E.2d 97, 99 (Ind. App. 1996); Bayes v. Isenberg, 429 N.E.2d 654, 657 (Ind. App. 1981); Myler v. Myler, 210 N.E.2d 446, 448 (Ind. App. 1965); Eilts v. Moore, 68 N.E.2d 795, 796 (Ind. App. 1946). As a result, a judgment against one spouse does not create a lien upon property held as tenants by the entirety. Kerlin, 672 N.E.2d at 86 (Judgment creditors of one spouse did not have a lien against entirety property and were not proper parties to a foreclosure action). It is only joint creditors, those who obtain a judgment against both spouses, that may have entirety property seized and sold to satisfy the debt. Matter of Hunter, 122 B.R. 349, 352-53 (Bankr. N.D. Ind. 1990); aff’d Matter of Hunter, 970 F.2d 299 (7th Cir. 1992).

At the hearing, debtor’s counsel acknowledged that only joint creditors of both spouses can reach entirety property and did not seriously contend that Erie Islands’ judgment constituted a lien against the property. Instead, he argued that should the debtor and his wife ever wish to sell the property, title companies would reference the judgment in their commitments and only by avoiding the lien will they be able to freely convey it. If this is the problem counsel seeks to overcome, the

proper remedy is not to seek the avoidance of a lien that does not exist but to educate title companies concerning Indiana law, so they will better understand judgment liens and their proper scope. If that cannot be done, there would always be the opportunity to seek a declaratory judgment in state court concerning the existence of such a purported lien.<sup>3</sup>

This court has previously observed that “there is a significant difference between avoiding a transfer and declaring that no transfer has ever occurred.” In re Myers, 262 B.R. 445, 448 (Bankr. N.D. Ind. 2001). The same is true of avoiding judicial liens. To prevail in its motion, the debtor first had to prove that Erie Islands actually held a lien against the property. Since it has failed to do so, there is nothing more to discuss. The motion will be denied.

#### Indiana Department of Revenue

The Indiana Department of Revenue holds a lien upon the property as a result of tax warrants filed with the Clerk of the Allen Circuit Court. See, I.C. 6-8.1-8-2. The debtor characterizes this lien as a judicial lien and, as such, argues that it may be avoided pursuant to § 522(f). The creditor contends that the lien is a statutory one and, since §522(f) does not authorize the avoidance of statutory liens, urges the court to deny the debtor’s motion.

The Bankruptcy Code recognizes three different types of liens: judicial liens, statutory liens

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<sup>3</sup>Bankruptcy Rule 7001 requires an adversary proceeding to determine the validity, priority or extent of a lien and, without the consent of the parties, such a determination cannot properly be made in the context of a contested matter, like the one before the court, which is initiated by a motion. In re Midway Indus. Contractors, Inc., 272 B.R. 651, 666 (Bankr. N.D. Ill. 2001); Matter of Beard, 112 B.R. 951, 955 (Bankr. N.D. Ind. 1990). See also, Chinosorn, 243 B.R. at 694 n.2. Even if the debtor had filed an adversary proceeding seeking a declaratory judgment, there would be substantial doubts about his standing to maintain such an action in this court and the court’s subject matter jurisdiction over it. See, In re Myers, 262 B.R. 445 (Bankr. N.D. Ind. 2001).

and security interests or consensual liens. A judicial lien is a “lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding.” 11 U.S.C. § 101(36). A statutory lien, on the other hand, is a “lien arising solely by force of a statute on specified circumstances or conditions . . . but does not include security interest or judicial lien . . . .” 11 U.S.C. § 101(53). Finally, although it does not concern us here, there is the security interest which is simply a “lien created by an agreement,” 11 U.S.C. §101(51), giving rise to its more common name – a consensual lien. Based upon these definitions, what distinguishes one kind of lien from another is the way in which they are created – through an agreement, some kind of legal proceedings or by operation of law.

Judicial liens have their roots in some type of judicial or administrative proceeding. Graffen v. City of Philadelphia, 984 F.2d 91, 96 (3rd Cir. 1992); In re Schick, \_\_\_ F.3d \_\_\_, 2005 WL 1869143 (3rd Cir. 2005). Statutory liens have no such procedural predicate and arise by operation of law upon the occurrence of a specified event. In re Washington, 242 F.3d 1320, 1323-24 (11th Cir. 2001). Furthermore, since judicial liens are specifically excluded from the definition of statutory liens, the two terms are mutually exclusive. Thus, the distinction is relatively simple. If the lien “arises without judicial action, it is a statutory lien, even though it is enforced through judicial proceedings; if it arises only upon judicial action, it is a judicial lien even though it is based on a statute.” In re King, 208 B.R. 376, 379 (Bankr. D. Md. 1997).

The IDR’s lien for unpaid taxes is not a judicial lien. No judicial or administrative proceedings of any kind were required before the lien came into being. Instead, all that was needed was for the department to issue a tax warrant to be filed with the clerk of the circuit court. Once the warrant was docketed, it became a judgment and created a lien upon the taxpayer’s property. I.C.

6-8.1-8-2(d), (e). Liens arising in this fashion are statutory, not judicial, liens. Graffen, 984 F.2d at 96-97; Schick, 2005 WL 1869143 \* 5.<sup>4</sup>

Debtor seems to acknowledge, at least initially, that the IDR's lien is a statutory one. Nonetheless, relying upon In re Frost, 111 B.R. 306, 310 (Bankr. C.D. Cal. 1990), counsel argues that "whenever a state statutory lien is treated under that state's law the same as a judicial lien, with the same force, effect and priority of a judicial lien, then the statutory lien may be treated as a judicial lien." This argument, and the authority upon which it is based, completely ignores the statutory definitions which must be the foundation of the court's inquiry and improperly moves the focus of that inquiry from the manner in which the lien was created to its effect or the manner in which it is enforced. In re Lionel Corp., 29 F.2d 88, 94 (2nd Cir. 1994)(liens are categorized by how they are established not by how they are preserved). Not only is Frost's interpretation wrong, but its author appears to have been aware of that fact. Although recognizing that the creditor's lien fit "within the Code's definition of statutory lien," Frost, 111 B.R. at 309, and that a "literal reading of § 522(f) did not allow the avoidance of a tax lien," id. at 310, the court concluded that denying lien avoidance would "produce . . . [an] inequitable result . . . inconsistent with the policies of the Bankruptcy Code and state exemption laws." Id. at 311. So, apparently in order to achieve what it believed was a more equitable result, the court proceeded to grant the debtor's motion. While this court recognizes that bankruptcy courts do have a broad range of equitable powers, in the Seventh Circuit they are not so unfettered. In re Chicago, Milwaukee, St. Paul & Pacific R.R., 791 F.2d 524, 528 (7th Cir. 1986)

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<sup>4</sup>As if this application of the Code's definitions were not enough, there is also §522(c)(2)(B) which states that exempt property is not liable for any pre-petition debt "except . . . a tax lien, notice of which is properly filed." It would be more than a bit absurd for the same section of the Bankruptcy Code to authorize the avoidance of tax liens on exempt property and also declare that exempt property may be held liable for those very same liens.

(a bankruptcy judge does not have “free-floating discretion to redistribute rights in accordance with his personal views of justice and fairness, however enlightened those views may be.”). See also, Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 108 S.Ct. 963, 99 L.Ed.2d 169 (1988).

Section 522(f) does not allow debtors to avoid statutory liens and that is precisely the type of lien held by the IDR. That motion will also be denied.

/s/ Robert E. Grant  
Judge, United States Bankruptcy Court