

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF INDIANA  
HAMMOND DIVISION

IN RE: )  
 )  
JERMAINE WHITE, ) CASE NO. 05-62029 JPK  
 ) Chapter 7  
Debtor. )

ORDER DETERMINING CONTESTED MATTER

The contested matter before the Court which is determined by this order arises from a Motion to Avoid Judicial Lien on Residential Real Estate filed by the debtor Jermaine White ("White"), by counsel, on July 11, 2005. By this motion, White seeks to avoid the fixing of a lien upon an interest he holds in residential real property, which lien is asserted by The Colonies of Merrillville Homeowners Association, Inc. ("The Colonies").

Pursuant to the Court's order entered on September 16, 2005, this contested matter is now before the Court for determination. The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334(b), 28 U.S.C. § 157(a), and N.D.Ind.L.R. 200.1(a)(2). This matter constitutes a "core" proceeding as defined by 28 U.S.C. § 157(b)(2)(A) and (K).

White contends that the lien asserted by The Colonies for unpaid monthly assessments imposed by The Colonies constitutes a "judicial lien" which he may avoid pursuant to 11 U.S.C. § 522(f). The Colonies asserts that its lien is not a "judicial lien", but rather is a "security interest" as defined by 11 U.S.C. § 101(51), and that as such it is not subject to avoidance under § 522(f).

11 U.S.C. § 522(f)(1), in part pertinent to this action, states:

**(f)(1)** Notwithstanding any waiver of exemptions but subject to paragraph (3), the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is—

...  
**(A)** a judicial lien,

The word "lien" is defined by 11 U.S.C. § 101(37) to be a "charge against or interest in property to secure payment of a debt or performance of an obligation". The phrase "judicial lien" is defined by 11 U.S.C. § 101(36) to be a "lien obtained by judgment, levy, sequestration, or other legal or other equitable process or proceeding".

As argued by The Colonies', its lien interest arises from a Declaration of Condominium Ownership and of Easements, Restrictions, Covenants and By-Laws, recorded on October 1, 1991 as Document No. 91-049536 in the Office of the Recorder of Lake County, Indiana. The residential real property owned by White is within the compass of this document. Paragraph 6(b) of Article VIII of the document states the following:

(b) Lien. Assessments which become due and remain unpaid shall be secured by a lien upon both the Unit and its appurtenances, said lien attaching at the time payment of the Assessment was first due. The Assessment lien shall be prior in right to all other charges whatsoever except assessments, liens and charges in favor of the \_\_\_\_\_<sup>1</sup> for taxes past due and unpaid on said unit and the amounts and liabilities secured by mortgage instruments duly \_\_\_\_\_. Assessment liens shall become perfected by the Board or its duly authorized agent filing notice of the same within 60 days from the date such assessment was due. Thereafter the Board may foreclose said lien pursuant to the laws of the State of Indiana governing mechanics and materialman's liens. In any action brought by the Board to foreclose an Assessment lien, the Owner shall be required to pay a reasonable rental for the use of his unit and the plaintiff in such foreclosure action shall be entitled to the appointment of a receiver to collect same. The Board shall have the power to purchase said unit at the foreclosure sale and to acquire, hold, lease and sell the same provided, the Board may in no way exercise as its own the voting rights belonging to said unit. Such foreclosure shall in no way preclude or prohibit a suit to recover a money judgment for unpaid Assessments.

By an "Injunction Order" signed on November 9, 2004, in the Lake County, Superior Court under Cause Number 45D10-0408-MF-0306, The Colonies obtained a judgment against White

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<sup>1</sup> The document in the Court's record from which this provision was taken was copied in such a manner that several words have obviously not been reproduced; however, the unreproduced language is not material to this decision.

in the amount of \$6,058.00 for assessments due and owing by him to The Colonies as of November 9, 2004.<sup>2</sup>

Let's first address several collateral issues which White has raised. A portion of White's brief is devoted to the argument that in order to determine issues in this contested matter, the Court must first find that there is a valid "contract" between the parties. That is not the case. White has the burden of proof to establish that his action falls within the provisions of 11 U.S.C. §522(f). Any contention that the contractual/covenant provisions upon which The Colonies premises its lien interest in White's property are invalid or inapplicable to him does not fall within the scope of an action under 11 U.S.C. § 522(f). If White wants to make an argument about the validity or applicability of the restrictive covenants, he must file an adversary proceeding pursuant to Fed.R.Bankr.P. 7001(2) and/or (9) to do so. The issue before the Court is whether The Colonies' lien interest is a "judicial lien", not whether whatever lien The Colonies may have is enforceable against White.

White argues, without citation to any authority, that the covenants under which The Colonies asserts its lien interest are in the nature of an executory contract subject to the provisions of 11 U.S.C. § 365. The United States Court of Appeals for the Seventh Circuit has determined otherwise; see, *Gouveia v. Tazbir*, 37 F.3d 295, 298-299 (7<sup>th</sup> Cir. 1994). Covenants which run with the land, such as those at issue here, have both elements of an interest in real property and of a contractual agreement. *Tazbir, supra.*, emphasizes the interest in real property aspects of restrictive covenants in the context of a covenant which restricts uses to

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<sup>2</sup> The complaint filed by The Colonies in the state court action requested relief beyond the scope of that granted by the "Injunction Order", and thus that "judgment" did not constitute a "final judgment" in that case; Indiana Rule of Trial Procedure 54(B). As a result, the entry of this order did not give rise to a judgment lien under the provisions of I.C. 34-55-9-2, which provides that only "final judgments for the recovery of money or costs in the circuit court and other courts of record of general original jurisdiction in Indiana, whether state or federal, constitute a lien upon real estate and chattels real . . ." (emphasis supplied).

which real property subject to the covenants may be dedicated. Indiana case law emphasizes the contractual nature of covenants which run with the land. In *Renfro v. McGuyer*, Ind. App., 799 N.E.2d 544, 547 (2003), *transfer denied*, 812 N.E.2d 801, the Court stated that "covenants are a form of express contract", in determining that the principles of contract construction should be applied to the construction of the language of covenants. In *Clem v. Christole, Inc.*, Ind., 582 N.E.2d 780, 782 (1991), the Indiana Supreme Court held that "[r]estrictive covenants are contract rights subject to the Indiana contract clause". Finally, in *Columbia Club, Inc. v. American Fletcher Realty Corp.*, Ind. App., 720 N.E.2d 411, 417 (1999), *transfer denied*, 735 N.E.2d 229, the Indiana Court of Appeals stated that covenants "are a species of express contract". The foregoing cases clearly establish the proposition that the lien asserted by The Colonies is a form of property interest which arises from an agreement binding upon a person or entity who obtains an ownership interest in real property subject to the terms of covenants which run with the land with respect to that property. To the extent that the covenants are contractual in nature, there is nothing "executory" about them: The covenants became fully applicable to White when he purchased his property interest, and no further performance of any promise by either White or The Colonies was necessary to cause the covenants to be binding upon White and his property interest in The Colonies development.

The lien which White seeks to avoid is that which is recited in the above-quoted provision of The Colonies' declaration of restrictive covenants. These covenants are binding upon White, and although the state court's interlocutory decision is not pertinent to this contested matter, the Lake County, Indiana Superior Court obviously deemed the covenants at issue to be fully enforceable. As stated in *Hrisomalos v. Smith*, Ind. App., 600 N.E.2d 1363, 1366 (1992):

In property law, the term "restrictive covenant" describes a contract between a grantor and grantee which restricts the grantee's use of land. Generally, the purpose behind restrictive

covenants is to maintain or enhance the value of adjacent lands by controlling the nature and use of surrounding properties. *Cunningham v. Hiles* (1979), 182 Ind.App. 511, 515, 395 N.E.2d 851, 854, *order modified on reh'g*, 402 N.E.2d 17. Although the law does not favor restrictive covenants, the contractual nature of the restrictions has led courts to enforce them in equity as long as the restrictions are unambiguous and do not violate public policy. *Id.*

To the same effect, *see, Holliday v. Crooked Creek Villages Homeowners Association, Inc.*, Ind. App. 759 N.E.2d 1088, 1092 (2001).

White contends that the lien is a "judicial lien" because the intervention of a court is necessary to enforce it. White is incorrect. As stated in 11 U.S.C. § 101(36), in order to qualify as a "judicial lien" the lien must be "obtained by judgment . . ." (emphasis supplied). The Colonies' lien is obtained by a contractual arrangement between the Association and owners of real property, in the nature of an interest in real property within the development to which the Association's restrictive covenants apply. In that context, it is a "security interest" as defined in 11 U.S.C. § 101(51), as a "lien created by an agreement". Cases decided by United States Bankruptcy Courts in other jurisdictions on issues identical to those presented in this contested matter are all in accord that a lien such as that held by The Colonies is not a "judicial lien", but rather is either a "security interest" or a "statutory lien" depending upon whether or not the applicable state law statutorily provides for and creates the lien; *In re Beckley*, 210 B.R. 391 (Bankr. M.D.Fla. 1997); *In re King*, 208 B.R. 376 (Bankr. D.Md. 1997); *In re Phillippy*, 178 B.R. 67 (Bankr. M.D.Pa. 1994); and *In re Bland*, 91 B.R. 421 (Bankr. N.D.Ohio 1988). Interestingly, I.C. 32-25-6-3 provides for a lien for unpaid assessments owed to a condominium association, and thus the lien of The Colonies may be deemed to be a "statutory lien" within the definition of 11 U.S.C. §101(53) if The Colonies' development falls within the provisions of that statute. The determination of the fine point of whether The Colonies' lien is either a "statutory lien" or a "security interest", or both, is unnecessary to this decision: in any context, the lien is not a

"judicial lien". In order to be subject to the provisions of 11 U.S.C. § 522(f), three requirements must be met, stated as follows in *In re Sanderfoot*, 899 F.2d 598, 601 (7<sup>th</sup> Cir. 1990), *reversed on other grounds*, 111 S.Ct. 1825:

[S]ection 522(f)(1), . . . allows the debtor to avoid liens if three requirements are met:

- (1) The lien is fixed on an interest of the debtor in property;
- (2) The lien impairs an exemption to which the debtor would otherwise be entitled; and
- (3) The lien is a judicial lien.** (emphasis supplied).

The action initiated by the debtor fails the foregoing test because the lien in question is not a "judicial lien".

For the reasons stated above, the Court finds that White's motion to avoid judicial lien must be denied.

IT IS ORDERED that White's Motion to Avoid Judicial Lien on Residential Real Estate is DENIED.

Dated at Hammond, Indiana on February 2, 2006.

/s/ J. Philip Klingeberger  
J. Philip Klingeberger, Judge  
United States Bankruptcy Court

Distribution:  
Debtor, Attorney for Debtor  
Trustee, US Trustee  
Attorney for Creditor