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IT IS SO ORDERED.

Dated: October 08, 2009



*Burton Perlman*  
Burton Perlman  
United States Bankruptcy Judge

**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION**

In Re:	)	Case No. 08-15814
	)	
Rocky Whicker	)	Chapter 7
	)	
	)	
Debtor	)	Judge Burton Perlman

**ORDER ON MOTION TO AVOID JUDICIAL LIEN**

This is a closed Chapter 7 case. Debtor, post-closing, has moved to avoid the judicial lien of Nicholas L. Weller (hereafter "Weller".) The motion is directed at real estate located at 1502 Ross-Hanover Road, Hamilton, Ohio. Debtor says that the lien will remain on the other real estate owned by debtor.

Weller has filed a Memorandum in Response to the motion. Weller points out that the subject property has been abandoned by the trustee and is no longer part of the bankruptcy estate.

This motion raises the question of whether this court has jurisdiction to avoid a judicial lien on real property after a case is closed and the property abandoned by the trustee.

The motion brings into play 11 U.S.C. § 522(f)(1)(A):

(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, other than a judicial lien that secures a debt of a kind that is specified in section 523(a)(5); or

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(2) (A) For the purposes of this subsection, a lien shall be considered to impair an exemption to the extent that the sum of--

- (i) the lien;
- (ii) all other liens on the property; and
- (iii) the amount of the exemption that the debtor could claim if there were no liens on the property; exceeds the value that the debtor's interest in the property would have in the absence of any liens.

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(C) This paragraph shall not apply with respect to a judgment arising out of a mortgage foreclosure.

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In his motion to avoid the judicial lien of Weller, debtor attaches a memorandum containing allegations as to facts which he says entitle him to have the lien of Weller avoided.

Weller says that because of the abandonment of the property by the trustee, and the fact that debtor has received a discharge in bankruptcy, Weller has the right to proceed in

state court to foreclose its lien against the property without interference by the Bankruptcy Court. Weller says that "such foreclosure proceedings are presently being prepared by Weller." In his memorandum in support of his response to the motion to avoid his lien, Weller says that he denies and disputes debtor's assertions of fact in the memorandum attached to his motion.

Debtor then filed a supplemental memorandum in support of his motion. The burden of that supplement memorandum is to dispute Weller's contention that abandonment of the subject property, and discharge in bankruptcy of the debtor, divests this court of jurisdiction to avoid Weller's lien. Weller responded to debtor's supplemental memorandum. In his response, Weller says that there is a judgment of foreclosure in the state court, First Financial Bank v. Rocky's 7-Day Drywall, et al. filed prior to the filing of this bankruptcy case. The significance of this judgment, says Weller, is that debtor cannot sell the subject property as he says he intends to do. In this response, Weller further points to § 522(f)(2)(C), which as stated above, provides that avoidance of a judicial lien may not be obtained with respect to a judgment arising out a mortgage foreclosure.

### **DISCUSSION**

The law on avoidance of a judicial lien post closing is by now well settled. After an extensive review of precedent, the court in In re Keller, 24 B.R. 720 (Bankr. N.D. Ohio, 1982) said:

"...this Court now concurs in the majority view and holds that, absent equitable considerations to the contrary, neither the granting of a discharge nor the administrative closing of a case should be a bar to the debtor's exercise of his lien avoidance rights."

This court has found no departure from this view through the years, and most recently

Keller was cited favorably in In re Scassa, 2009 W.L. 1586566 (Bankr. N.D. Ohio, 2009). It is immaterial that in this case there was an abandonment by the trustee. Upon closure of a bankruptcy case, property not otherwise administered at the time of the closing of the case is abandoned. 11 U.S.C. § 554(c). The conclusion in the Keller case was reached after the case was closed, so abandonment in that case had occurred prior to the decision.

The Keller decision does insert the limitation "absent equitable considerations" into consideration of lien avoidance. In a lien avoidance action, delay alone is not prejudicial until it is combined with other factors. In re Bianucci, 4 F.3d 526, 528 (7<sup>th</sup> Cir. 1993); In re Male, 362 B.R. 238, 242 (Bankr. E.D.N.C. 2007). It is the creditor's burden to prove "prejudicial delay." In re Ricks, 62 B.R. 681, 683 (Bankr. S.D. Cal. 1986). The court in Male held that an over two year delay in bringing the lien avoidance action was not prejudicial because the delay was not coupled with any other factors such as foreclosure costs. *Id.* at 242. See also Saucier v. Quantum Varde Asset Fund, LLC (In re Saucier), 353 B.R. 383, 387 (Bankr. D. Conn. 2006).

In the case before us, Weller has not sustained his burden of proof that prejudicial delay has occurred. Weller has only stated that he is preparing a state court foreclosure proceeding, but has not yet done so. In the absence of any action by Weller, the court is unable to see any prejudice to Weller by reason of a delay in filing the lien avoidance action.

As to Weller's contention that § 522(f)(2)(C), which provides that a judgment arising out of a mortgage foreclosure is not subject to that paragraph, this cannot avail him. His judgment lien does not arise out of a mortgage foreclosure, for Weller in his memorandum admits this fact, stating that "foreclosure proceedings are presently being prepared."

Thus, we have reviewed and ruled on the questions of law which have been raised on the motion to avoid lien. A question, however, remains. Debtor in his memorandum in support of his motion to avoid lien has listed a number of factual statements, not otherwise supported, and therefore cannot be considered evidence, to which Weller has responded by contesting the factual statements. It will therefore be necessary for the court to conduct an evidentiary hearing before it can apply the criteria for avoidance of a lien set forth in § 522(f)(2)(A).

An evidentiary hearing will be held by the court on 16<sup>th</sup> day of October, 2009 at 2 p.m., at the U.S. Bankruptcy Court, Suite 817, Courtroom 3, Atrium Two Building, 221 East Fourth Street, Cincinnati, Ohio.

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