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**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

| | | |
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| IN RE |) | CASE NO. 96-50589 |
| JUDITH ANN LAMER, |) | |
| Debtor, |) | ADV. NO. 97-5106 |
| |) | |
| KATHRYN A. BELFANCE, |) | CHAPTER 7 |
| TRUSTEE, |) | |
| Plaintiff, |) | JUDGE MARILYN SHEA-STONUM |
| v. | | |
| AVCO FINANCIAL SERVICES LOAN, INC., Defendant. | | ORDER DENYING MOTION OF DEFENDANT FOR SUMMARY JUDGMENT ON THE GROUNDS OF MOOTNESS |

This matter came before the Court on the motion of the defendant, Avco Financial Services Loan, Inc., for summary judgment on the Trustee's complaint to avoid preferential transfers pursuant to 11 U.S.C. §§ 547(b) and 550(a). This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(F). This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157(a) and (b)(1) and by the Standing Order of Reference entered in this District on July 16, 1984.

I. UNDISPUTED FACTS

Based upon the parties' joint statement of facts and stipulations and the record public facts in the adversary and main case file, the following is a

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summary of undisputed facts.

Prior to seeking the protection of the Bankruptcy Code, the debtor and Ronald Lamer, her husband at the time, entered into a loan agreement with Avco Financial Services Inc. ("Avco"). On October 26, 1996, Avco filed a complaint in state court against Ronald and Judith Lamer. At the time, the debtor and Ronald Lamer, her non-debtor (ex)spouse, jointly owned real property located at 2601 Myersville Road, Uniontown, Ohio. Avco obtained a default judgment against Ronald Lamer on February 6, 1996 in the amount of \$8,849.43 and filed a judgment lien on the property located at 2601 Myersville Road, Uniontown, Ohio, which was then his residence. On February 15, 1996, Avco obtained a judgment against Judith Lamer in the amount of \$8,849.43 and filed a judgment lien on her property located at the same address on February 26, 1996.

On March 19, 1996, the debtor, Judith Lamer, filed a petition for relief under Chapter 7 of the Bankruptcy Code. The debtor listed the address of her primary residence as 2226 Liberty Road, Stow, Ohio. The debtor listed the Myersville Road real property that she owned jointly with her non-debtor(ex)husband at a market value of \$90,000. The debtor also listed a mortgage, with her non-debtor (ex)husband as a co-obligor, on that real property in the amount \$79,999.73 and claimed an exemption in the amount of \$5,000.¹

¹The Court notes that the debtor claimed a homestead exemption in the property located on Myersville Rd. although her residential address appears to be 2226 Liberty Rd. However, no objection was filed to the claimed exemption, and it appears that for the purposes of this case that exemption cannot now be challenged. See *Rogers v. Laurain (In re Laurain)*, 113 F.3d 595 (6th Cir. 1997).

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The debtor did not schedule Avco as a creditor holding a judgment lien on her property, rather she listed Avco on Schedule F as the holder of an unsecured nonpriority claim and on her statement of financial affairs as having obtained judgment against her on February 15, 1996.

Kathryn A. Belfance was appointed interim trustee for this bankruptcy estate. The Trustee filed a notice of abandonment of the debtor's interest in the Myersville Road real property as burdensome and of inconsequential value to the estate. On August 27, 1996, the Court entered an abandonment order with respect to that property. Less than one month later, the Trustee filed a motion to vacate her no asset report. Her motion was granted on September 20, 1996. This case has never been closed.

Thereafter, the property was sold, pursuant to a Domestic Relations Court Order, for an amount greater than the \$90,000.00 valuation set forth in the Debtor's schedules, yielding \$22,000.00 in net proceeds after the payment of all encumbrances on the property. In satisfaction of its judgment lien on the property, Avco was paid \$10,129.60 from the proceeds of the sale.

II. Issue Presented

Plaintiff's complaint alleges that the defendant's acquisition of a judgment and recordation of a judgment lien on the Myersville Road property of the debtor within the 90 days prior to the date of the filing of the debtor's petition for relief and the subsequent satisfaction of said judgment when the debtor sold the property are preferential transfers avoidable pursuant to 11 U.S.C. § 547(b) and recoverable pursuant to 11 U.S.C. § 550. The debtor stipulated that the placing

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of the lien against her property within ninety days prior to the date of filing her petition for relief constitutes a preferential transfer avoidable by the Trustee pursuant to 11 U.S.C. § 547(b). However, the defendant, Avco, argues in its motion for summary judgment that this preference action is moot because the trustee abandoned the debtor's property located at 2601 Myersville Rd. to which the judgment lien is attached.

III. LAW

A court shall grant a party's motion for summary judgment if shown "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Bankr. R. 7056 incorporating F.R.C.P. 56(c). A material fact is one that must be decided before there can be resolution of the substantive issue that is the subject of the motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248(1986); *Bachner v. State of Illinois (In re Bachner)*, 165 B.R. 875, 878 (Bankr. N.D. Ill. 1994). The party moving for summary judgment bears the initial burden of showing the court that there is an absence of genuine dispute over any material fact. *Searcy v. City of Dayton*, 38 F.3d 282, 286 (6th Cir. 1994) (*citing Celotex Corp. V. Catrett*, 477 U.S. 317, 323 (1986)). Upon review, the Court must view all the facts and inferences in the light most favorable to the nonmoving party. *Id.*; *Boyd v. Ford Motor Co.*, 948 F.2d 283, 285 (6th Cir. 1991), *cert. denied*, 503 U.S. 939(1992).

The defendant, Avco, relies on the holding in *In re Sacy* for the proposition that the abandonment of the real property on which the judgment lien is recorded moots the trustee's preference action. 32 B.R. 506, 507(Bankr. D. Me. 1983). In that case, the creditor attached and recorded the attachment of

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the real property of the debtors in the amount of \$100,000.00 in May, 1979. In July, 1981, the creditor obtained a judgment in state court against the debtor for over two times the amount of the attachment. The debtors filed for bankruptcy in September, 1981. The interim trustee in their case abandoned the attached real property of the debtors. Then, the trustee brought an action to avoid the attachment as a preference. The Court held, "Having abandoned the real estate [by notice dated May 25, 1983], the trustee no longer has any interest in whether or not [the creditor's] attachment is a preferential transfer...the trustee's complaint shall be dismissed as moot." *Id.* At 507.

The Trustee in turn argues that the preference action is not made moot by the abandonment of the real property. The Trustee argues that the preference action and the recovery on that action are wholly separate from what the trustee abandoned. She relies on the Ninth Circuit's holding in *In re Pace*, 146 B.R. 562 (9th Cir. BAP 1992). The Ninth Circuit found that a malpractice action based on the failure to perfect a client's security interest is distinct and separate from the promissory note that should have been secured.

In the *Pace* case, the Trustee abandoned the promissory note, then sought to pursue the settlement proceeds of the malpractice claim of the debtor against his former attorney for failure to perfect his interests. The promissory note and the malpractice action were seen as two assets which were **not** so "inextricably intertwined" that the abandonment of one would operate as an abandonment of the other. *See Id.* at 564. In this case, the trustee argues, the real property and the preference action are independent enough that the abandonment of one does not function as the abandonment of the other.

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A trustee may abandon property of the estate that is burdensome or of inconsequential value to the estate. 11 U.S.C. § 554(a) & (b). According to the defendant, 11 U.S.C. § 554(a) controls this situation. Although the judgment lien at issue here was not properly scheduled by the debtor and the trustee had not explicitly administered her interests therein, Avco argues that the trustee's formal abandonment of the real property to which the judgment lien was attached resulted in an abandonment of the judgment lien and any preference action related to it despite the debtor's failure to schedule the defendant's judgment lien. Whether such a bundling of interests is the appropriate analysis should be determined in light of the categories of "property of the estate." Property of the estate is defined in 11 U.S.C. § 541 as "all the following property,...(1)...all legal or equitable interests of the debtor in property as of the commencement of the case... (3)Any interest in property that the trustee recovers under section...550...of this title." 11 U.S.C. § 541.

The parties stipulated that the debtor was a joint owner of the property located at 2601 Myersville Rd. Thus, the debtor's one-half interest in that property became property of the estate upon the filing of this case. However, when Avco filed a judgment lien against the debtor's Myersville Road real property, a transfer of part of the debtor's interest in property occurred. Thus, the debtor's one-half interest in the real property which became part of the estate pursuant to 11 U.S.C. § 541(a)(1) was diminished to the extent of the interest held by Avco by virtue of its judgment lien on that property. With respect to the real property, the property of the estate was comprised of only the debtor's one-half interest minus the value of the interest held by Avco by virtue of its

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judgment lien(the "lesser interest").

In light of the various categories of property noted in 11 U.S.C. § 541(a), this Court views the trustee's formal abandonment of the real property to be only of that lesser interest in the real property held by the debtor on the date of the commencement of the case. Abandonment of actions pursuant to the trustee's avoiding powers prior to the conclusion of a case should be explicit and knowing, not inferred, particularly when the scheduled information was not accurate and did not clearly reveal any potential avoidance action. Thus, Avco's argument that the abandonment of the real property resulted in an abandonment of the estate's interest in the judgment lien and the preference action related to it is too glib.

Avco's argument that the trustee's preference action was abandoned by virtue of the trustee's formal abandonment of real property ignores the operation of the Bankruptcy Code. An abandonment effectively returns the interest in the property at issue to the status it had prior to commencement of the case. A preference action arises upon the commencement of a case. Thus, the preference under 11 U.S.C. § 547(b) had no status prior to the commencement of the case. It is not property that would be abandoned to the debtor.

The trustee's preference action is not moot, and any recovery made by the trustee on the preference pursuant to 11 U.S.C. § 550 is property of the estate which may be administered by the trustee for the benefit of creditors.

Under 11 U.S.C. § 547(b), the trustee may avoid for the benefit of the unsecured creditors of the debtor's estate those transfers of property of the debtor which diminished or depleted the debtor's estate. 11 U.S.C. § 547(b).

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The parties stipulated that the placing of a judgment lien against the property of the debtor within ninety days prior to the commencement of this case is an avoidable preferential transfer pursuant to 11 U.S.C. § 547(b). To the extent that the transfer is avoided, the Trustee may recover the value of the property transferred pursuant to 11 U.S.C. § 550. However, the parties have not addressed the application of 11 U.S.C. § 550 to this case, and the Court does not find that current record facts are sufficient to dispose of those issues in this summary judgment motion.

IV. CONCLUSION

The debtor's motion for summary judgment on the grounds that the trustee's preference action is moot is not well taken. As a matter of law, the preference action is not moot, and the trustee may pursue it. The parties have stipulated that the placing of the lien against the debtor, Judith Lamer, within ninety days from the date of the filing of her petition constitutes a preferential transfer avoidable by the Trustee pursuant to 11 U.S.C. § 547(b). However, issues remain with respect to the calculation of the amount of the preference pursuant to 11 U.S.C. § 550.

THEREFORE, a pre-trial shall be held in this matter, as previously scheduled, on **Wednesday, December 17, 1997 at 2:00 p.m.** in Courtroom 250, U.S. Courthouse and Federal Building, 2 S. Main Street, Akron, Ohio.

IT IS SO ORDERED.

MARILYN SHEA-STONUM
Bankruptcy Judge

DATED: 12/17/97

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