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U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
AKRON

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

IN RE:) CASE NO. 03-53582
)
DAVID K. & MARY S. COOPER,) CHAPTER 13
)
DEBTOR(S)) JUDGE MARILYN SHEA-STONUM
)
) **ORDER DENYING MOTION FOR**
) **RELIEF FROM STAY**

This matter came on for hearing on February 12, 2004 on the Motion for Relief from Stay, filed by the Summit County Department of Environmental Services (“Summit County”) on January 16, 2004 (the “Motion”), the Response of the debtors, filed on January 16, 2004, and the Memorandum in Opposition to the Motion, filed by the chapter 13 trustee, Jerome L. Holub (the “Trustee”), on January 30, 2004. Participating at the hearing were Marvin D. Evans, counsel for Summit County, Robert M. Whittington, counsel for the debtors, and Keith Rucinski, counsel for the Trustee.

I. ISSUES

The issues raised by the Motion are whether sewer charges levied by a municipal corporation against the debtors and unpaid become, by self effectuation, a perfected lien upon real estate deserving priority as against other creditors without record notice or certification

of the charges and, if not, whether the relation back provisions of the Bankruptcy Code and applicable state or federal law allow a municipal corporation or county to secure a pre-petition lien by perfecting it post-petition.

II. BACKGROUND

The debtors filed their chapter 13 petition on July 11, 2003 and a Notice of chapter 13 plan was filed on July 17, 2003. On July 30, 2003 Summit County filed a proof of claim for the unsecured amount of \$1,076.96 for unpaid sewer charges. In its proof of claim Summit County proposed that it had authority to seek relief from stay and place a lien on the debtors' property stating "Statutory Lien to be Certified O.R.C. 6103.02 and 6117.02 with Balance Surviving Bankruptcy."

The chapter 13 plan proposed an 8% dividend to unsecured creditors. Summit County did not object to the plan and the Order Confirming the Plan was entered on October 28, 2003.¹

In its Motion Summit County recites, *inter alia*, the following:

Ohio Revised Code §§ 6117.02(C) and 729.49 provide that unpaid county and municipal sewer charges shall be certified and then shall constitute a lien on the real estate served by the sewer connection from the date placed on the tax duplicate. Therefore a debt for unpaid municipal sewer charges is recognized as a "statutory lien" under the 11 U.S.C.S. [sic] § 101(53). Motion at ¶ 7.

¹ It has long been the position of this Court that, because the Akron Chapter 13 Trustee tries to schedule confirmation of plans as early as possible and often prior to the bar date for claims, provisions in plans purporting to fix the treatment of a claim of a particular creditor must be accompanied by a motion served on the targeted claim holder. *See In re Sedlock*, 219 B.R. 207, 210 (N.D. Ohio 1998)(when confirmation occurs before the deadline to file proofs of claims, confirmation cannot terminate the rights of creditors).

Under the Ohio Revised Code §§ 743.04, 6117.02 and 319.40, sewer assessments are not “perfected liens” unless first certified to the County Auditor and placed on the tax list and duplicate. Absent perfection, the lien will not be treated as a secured claim. Motion at ¶ 8.

Pursuant to Ohio Revised Code §§ 319.28 and 323.11, Summit County is only permitted to perfect the lien by certifying the sewer charges once a year. Motion at ¶ 9.

Therefore the unpaid municipal sewer charge is permitted to be perfected in accordance with the relation back doctrine pursuant to the Bankruptcy Code § 546(b) which, in conjunction with § 362(b)(3), provides that a creditor may take action to perfect its lien if, under state law, the perfection of the lien would be deemed to relate back to a time before the actual perfection. Motion at ¶ 10.²

III. OHIO REVISED CODE

A. §§ 729.49, 743.04, and 5719.01

Title 7 of the Ohio Revised Code is entitled “Municipal Corporations” and within that Title Chapter 729 concerns “Assessments - Sidewalks; Sewers” and Chapter 743 concerns “Utilities - Electric; Gas; Water.” Summit County contends that this Title is applicable to it because it is one of only two counties in Ohio designated as a municipal corporation. The Trustee and the debtors contend that is it immaterial whether Summit County uses the provisions of the Ohio Revised Code that apply to counties or municipal corporations.

Title 57 of the Ohio Revised Code is entitled “Taxation” and Chapter 5719 concerns

² In its Motion Summit County also states that “This Court has previously considered this matter and with no objection having been filed, granted the Motion of the County of Summit for Relief from Automatic Stay pursuant to *In re Michael C. Davis and Julie A. Davis*, Case No. 03-54490-S, Bnkr. N.D. Ohio, E.D. Akron 2003.” Motion at 4. That motion was granted on a default basis and certainly does not have any precedential value.

“Personal Property Tax Collection.”

Section 729.49 states in pertinent part:

The legislative authority of a municipal corporation which has installed or is installing sewerage, [or] a system of sewerage. . . may, by ordinance, establish just and equitable rates or charges of rent to be paid . . . Such charges shall constitute a lien upon the property served by such connection and if not paid when due shall be collected in the same manner as other municipal corporation taxes.

Section 729.49 states that sewerage charges “shall constitute a lien upon the property served by such connection” and “shall be collected in the same manner as other municipal corporation taxes” if not paid. The “legislature has clearly provided that sewer services run not simply to the user, but to the land thus served.” *First Federal Savings and Loan Ass’n. of Galion, v. Hayes* (1987) 42 Ohio App. 3d 89, 91. The statute’s descriptive term is that the claim against the land is a “lien.” *Id.*

Summit County appears to contend that, as a municipal corporation, it need do nothing further under this statute to perfect its lien. It treats the lien as self-effectuating and thus perfected. The debtors contend that there is nothing in the Code that “permits a creditor to bootstrap the status of its claim from unsecured to secured . . . by perfecting its lien postpetition . . .” Response at ¶ 4. The Trustee and the debtors both contend that under Ohio law a sewerage lien is not self-effectuating and that whether the county is considered to be a county or a municipal corporation is of no consequence. The debtors and the Trustee assert that under Ohio statutes the county auditor must have the charges certified to him and then place them on the tax list and duplicate before Summit County can be considered to have a

perfected lien under Ohio law.

The mere determination that Summit County holds a "lien" does not resolve the question of how the lien is "perfected" so as to entitle the claim to priority as against other claimants. "It is one thing to possess a lien; it is quite another to perfect the lien." *First Federal* at 91. The provision in Ohio Rev. Code § 729.49 that if sewer charges are not paid when due, they "shall be collected in the same manner as other municipal corporations taxes," leads to a consideration of Ohio Rev. Code § 5719.01.

Ohio Rev. Code § 5719.01 states in pertinent part:

Taxes charged on any tax duplicate, except those upon real estate, shall be a lien on real property of the person charged therewith from the date of the filing of a notice of such lien as provided by law.

This section establishes that the taxes charged on any tax duplicate are a perfected lien as of the date of the filing of the notice of the lien. The Ohio legislature established a lien perfection mechanism regarding municipal water services in Ohio Rev. Code § 743.04.

This section provides, in relevant part:

... When water rents or charges are not paid when due, the director or other official or body may do either or both of the following:

(A) Certify them, together with any penalties, to the county auditor. The county auditor shall place the certified amount on the real property tax list and duplicate against the property served by the connection if he also receives from the director or other official or body additional certification that the unpaid rents or charges have arisen pursuant to a service contract made directly with an owner who occupies the property served.

The amount placed on the tax list and duplicate shall be a lien on the property served from the date placed on the list

and duplicate and shall be collected in the same manner as other taxes . . .

(B) Collect them by actions at law, in the name of the city from an owner, tenant, or other person who is liable to pay the rents and charges.

Pursuant to Ohio statute, the possession of a sewerage lien does not constitute perfection of the lien. The lien is not perfected until it is properly certified and placed on the tax list and duplicate. The Ohio Revised Code sets forth the steps Summit County, even if considered a municipal corporation, must take to certify the sewerage lien amount to the county auditor and have it placed on the tax list and duplicate. There is no provision in Ohio law to indicate that a municipality is to be treated differently from a county with regard to sewer liens.

B. §§ 6103.02 and 6117.02

On its Proof of Claim Summit County stated that it could certify its “statutory lien” on the basis of Ohio Rev. Code §§ 6103.02 and 6117.02. Chapter 6103 of the Ohio Revised Code concerns “County Water Supply Systems.” Chapter 6117 of the Ohio Revised Code concerns “Sewer Districts and County Sewers.”

Section 6103.02 reads, in pertinent part:

. . . When the source of [water] supply is owned by a municipal corporation, the . . . the schedule of rates to be charged by such municipal corporation . . . shall be ratified by the board at the time any contract is entered into for the use of water from such municipal corporation . . . When any rents or charges are not paid when due, the board may do either or both of the following:

(1) Certify them, together with any penalties, to the county auditor. The county auditor shall place the certified amount upon the real property tax list and duplicate against the

property served by the connection if he also receives from the board additional certification that the unpaid rents or charges have arisen pursuant to a service contract made directly with an owner who occupies the property served . . .

(2) Collect them by actions at law in the name of the county from an owner, tenant, or other person who is liable to pay the rents or charges.

Section 6117.02 reads in pertinent part

. . . The auditor shall record the information supplied in the sewer improvement record until the connection charges are paid in full. When any rents or charges are not paid when due, the board shall certify the same together with any penalties to the county auditor, who shall place them upon the real property tax list and duplicate against the property served by such connection. Such rents and charges shall be a lien on such property from the date the same are placed upon the real property tax list and duplicate by the auditor and shall be collected in the same manner as other taxes. . . .

These sections set forth the same provisions for perfecting sewerage liens provided in Title 7 of the Ohio Revised Code and the legal analysis is the same. There are steps the county must take to certify the lien to the county auditor and thus perfect it. These provisions make it clear that the lien is not self-effectuating.

IV. BANKRUPTCY CODE §§ 546 (b) AND 362 (b)(3)

In Ohio some liens, once perfected, relate back to a time prior to their perfection for purposes of priority, amount, and enforcement. Real estate taxes fall within this category. *See* 51 O. Jur. 2nd (1962) 529, Taxation, Section 405. In addition, mechanic's liens, upon perfection, relate back and may take priority over previously recorded liens or claims. *See* 68 O. Jur. 3d (1986) 175, Mechanic's Liens, Sec. 127.

Summit County argues that it is entitled to the benefits of §§ 362(b)(3) and 546(b) of

the Bankruptcy Code because perfection of a sewer lien falls under the relation back doctrine excepted from being a violation of the automatic stay under § 362(b)(2) and codified in § 546(b).³ The § 546(b) relation back doctrine, in conjunction with § 362(b)(3), provides that a creditor may take actions to perfect its lien if, under applicable law, the perfection of the lien would be deemed to relate back to a time before the actual perfection. *See 5 Collier on Bankruptcy* ¶ 546.03[2][a] (15th ed. 2000).

Under § 546 the “applicable law⁴ must provide that perfection, or maintenance or continuation of perfection, of an interest in property relates back in time to be superior in priority to the interest of any entity acquiring rights in the property before the date of perfection” *Id.* at [2][c][i]. Summit County does not inform this Court what provision under any state or federal law, as required by § 546(b), provides that its perfection relates back in time. Because Summit County does not make the requisite showing of what applicable law provides that perfection relates back in time, § 546 does not apply to allow it to perfect its lien post-petition.

³ In ¶¶ 9 and 10 of its Motion Summit County implies that because Ohio Rev. Code §§ 319.28 and 323.11 only permit it to perfect its lien once a year, this somehow allows them to benefit from the relation back doctrine. Neither Ohio Rev. Code § 319.28 nor § 323.11 allow for perfection relating back to the time when the County Auditor should have had the sewer charges certified to him and placed on the tax list and duplicate. Section 319.28 directs the county auditor to compile and make up a “general tax list” on or before “the first Monday in August,” correct it and certify and deliver one copy to the county treasurer on or before “the first day of October.” Section 323.11 states that the “lien of the state for taxes levied for all purposes” shall attach to all real property “on the first day of January, annually” “Case Notes and OAG” following § 319.28 refer the reader to OAG No. 66-090 reciting the steps the board of county commissioners must take to perfect a sewer lien.

⁴ “Section 546(b)(1) protects entities with an interest in property perfected under ‘any generally applicable law.’ . . . While applicable law is usually state law, federal law may also apply.” *5 Collier on Bankruptcy* ¶ 546.03[2][c].

In addition, it is clear that there is a requirement that sewer charges, as to county-owned or municipal corporation owned sewerage systems, are to be placed upon the real property tax list and duplicate by the county auditor in order to become a lien. The legislature intended to treat sewer charges differently from real estate taxes, which are self-effectuating and relate back under Ohio's taxation scheme. 51 O. Jur 2d. (1962) 529, Taxation, Sec. 405.

Further, Summit County does not tell the Court what state law would allow it to ignore the mandate of Ohio Rev. Code §§ 5719.01 and 6117.02 even if § 546 of the Code were applicable. Those statutes require sewer charges, as to county or municipal corporations sewerage systems, to be collected in the same manner as other municipal corporation taxes. Collection requires the amount of unpaid charges to be certified to the county auditor and placed upon the real property tax list and duplicate in order to become a perfected lien. The lien is only perfected from the date that the lien is certified to the county auditor and the county auditor places the amount on the real property tax list and duplicate. Ohio law is clear on the manner through which the county can perfect its liens regarding sewer charges. Sewer liens are not perfected until certified and placed on the tax list and duplicate. *First Federal* at 92.

IV. CONCLUSION

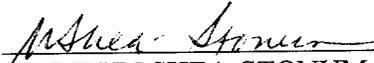
Summit County does not allege that it certified the charges to the county auditor or

that the auditor placed the amounts on the tax list and duplicate as required by Ohio law. Under Ohio law a sewerage lien is not perfected until the date of its placement on the tax list and duplicate by the county auditor. In addition, those provisions of the Bankruptcy Code and state or federal law that allow post-petition perfection to relate back to a time prior to actual perfection are not applicable in this instance.

Pursuant to Ohio law, Summit County's sewerage lien with respect to unpaid pre-petition charges is not self-effectuating, was not perfected pre-petition and cannot be perfected post-petition. Summit County has an unsecured lien as reflected in its proof of claim, and its claim in the case should be administered as a general unsecured claim.

Accordingly, the Motion for Relief from Stay is DENIED.

IT IS SO ORDERED.


MARILYN SHEA-STONUM
Bankruptcy Judge

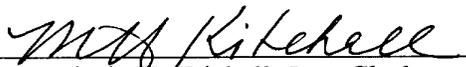
CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 5th day of March, 2004, the foregoing Order was sent via regular U.S. Mail to:

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Marjorie H. Kitchell, *Law Clerk*