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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

FILED

96 SEP -9 PM 2: 58

NORTHERN DISTRICT OF OHIO
CLEVELAND

In re:) Case No. 94-12703
)
LLOYD JERRY MENDES,) Chapter 7
)
Debtor.) Judge Pat E. Morgenstern-Clarren
)
) **MEMORANDUM OF OPINION**

This matter is before the Court on the Trustee's Objection to the Secured Claim of Jerry Wasserman. (Docket 34). For the reasons stated below, the Trustee's Objection is sustained.

JURISDICTION

This Court has jurisdiction to hear this matter under 28 U.S.C. § 1334 and General Order No. 84 entered on July 16, 1984 by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. §§ 157(b)(2)(B) and (K).

FACTS

The parties submitted this issue to the Court on Stipulations of Fact, Briefs, statements of counsel, and the case file. The relevant facts are undisputed:

Creditor Jerry Wasserman ("Wasserman") obtained a pre-bankruptcy judgment against Debtor Lloyd Mendes ("Debtor") in the Cuyahoga County Court of Common Pleas on September 20, 1990. Wasserman filed a judgment lien in that county on October 4, 1990 reflecting judgment in the amount of \$75,000 plus interest and costs. He later renewed the lien. Wasserman began efforts to collect the judgment by filing a second action against Debtor and others (the "State Lawsuit"). In the State Lawsuit, Wasserman sought to set aside an alleged fraudulent conveyance of property located on Albert Lane in Beachwood, Ohio (the "Property") or to allow his judgment

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lien to attach to the Property. Alternatively, Wasserman filed a creditor's bill to preserve the Property to his benefit.

Debtor filed this case under Chapter 7 of the Bankruptcy Code on June 27, 1994 and an Order was entered staying the State Lawsuit pursuant to 11 U.S.C. § 362. Mary Ann Rabin, the Chapter 7 Trustee (the "Trustee"), brought an Adversary Proceeding against four defendants seeking, among other things, to avoid the claimed fraudulent transfer of the Property. (Case No. 95-1543). Trustee later filed a Motion to Compromise that lawsuit, to which Wasserman objected on the ground that he held the first and best lien on the Property. (Adv. Docket 10 and 13). The Adversary Proceeding was then resolved under these Court-approved terms:

1. Defendants paid \$110,000 in settlement of the Adversary Proceeding (the "Fund");
2. The lien and rights of Wasserman, if any, transferred to the Fund and became a lien on or interest in the Fund with the same validity and priority as existed against the Property;
3. The Court is to determine the respective rights of Wasserman and the Trustee in the Property, which will determine distribution of the Fund; and
4. For purposes of resolving Wasserman's claim, it is to be assumed that a fraudulent transfer took place.

(Adv. Docket 14).

Wasserman filed a secured claim reflecting the amount of his judgment and Trustee responded by objecting to the classification of the claim as secured. Joint Stipulations of Fact, Briefs, Responses, and Replies followed. (Docket 35, 36, 37, 40, 41).

ISSUE

Does Wasserman's claim constitute a lien against the Property which is superior to the rights of Trustee?

DISCUSSION

I.

Wasserman contends that his judgment lien trumps the Trustee's interest based on the doctrine of lis pendens set forth in Ohio Revised Code § 2703.26. He argues that the existence of the judgment lien, followed by service of the Complaint and Summons in the State Lawsuit, created a lien under the lis pendens statute which prevented any third party, including Trustee, from obtaining a superior interest in the Property. As the first lien holder, Wasserman states he is entitled to the Fund in an amount up to the amount due under the judgment. He bases this argument primarily on case law from other states which interprets their state statutes.

Trustee challenges the applicability of law based on statutes from other states and argues that the filing of the State Lawsuit does not in and of itself create any lien rights in Wasserman under the Ohio statute. In the absence of a valid lien on the Property, Trustee contends that her strong-arm powers under 11 U.S.C. § 544(a) give her superior rights in the Property and that Wasserman's claim should be allowed only as an unsecured claim.

II.

The starting point for analyzing the parties' rights in the Property is the time at which Wasserman obtained his judgment against Debtor. When Wasserman won that pre-bankruptcy judgment, he became an unsecured creditor of Debtor. Wasserman's filing of the judgment lien in 1990 operated as a lien only upon real estate in which Debtor had an interest at the time the certificate of judgment was filed. *In re Oliver*, 16 Ohio Misc. 290 (D.Ct. S.D. Ohio 1968). There is no evidence that Debtor had any interest in the Property when Wasserman filed his judgment lien and so the filing of that lien did not give Wasserman any rights in the Property at that time. Wasserman's status with respect to Debtor was, therefore, that of an unsecured creditor both before and immediately after he filed the judgment lien.

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Wasserman concedes that his judgment lien standing alone does not provide him with a superior lien in the Property. Instead, as noted above, he relies on the doctrine of lis pendens to create his rights. The common law doctrine of lis pendens served to protect litigants from the transfer to third parties of real estate that was the subject of litigation. *In re Washington*, 623 F.2d 1169, 1171 (6th Cir. 1980), *cert. denied*, 449 U.S. 1101 (1981). That doctrine is now found in Ohio's statutory law:

When summons has been served or publication made, the action is pending so as to charge third persons with notice of its pendency. While pending, no interest can be acquired by third persons in the subject of the action, as against the plaintiff's title.

Ohio Rev. Code Ann. § 2703.26 (Baldwin 1993). This statute is designed to give notice to third-parties that property they are acquiring is the subject of a dispute. The statute does not create any lien rights in the one who files the notice:

The notice of lis pendens . . . does not of itself give the plaintiff rights in the property superior to those who acquire an interest in the property during the pendency of the suit. The final judgment rendered by the court ultimately determines the priority of rights in the property Lis pendens in itself does not create a lien of any kind. It merely charges the purchaser with notice of the pending action

Levin v. George Fraam & Sons, Inc., 65 Ohio App. 3d 841, 847, 585 N.E. 2d 527, 531 (1990) (citations omitted). See *In re Rodemeyer*, 99 B.R. 938 (Bankr. N.D. Iowa 1989) (interpreting a statute similar to Ohio's, the court stated that "[t]he lis pendens is a warning. Its purpose is to warn those who deal with real property while it is in litigation; they are charged with notice of the rights of the parties and take subject to the outcome of the litigation" 99 B.R. at 940).

Wasserman argues that he has a lien on the Property because he obtained a judgment, filed a judgment lien and then initiated a fraudulent conveyance action. He contends that, by operation of the lis pendens statute, a lien against the Property arose automatically and in his favor when he

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served the summons in the State Lawsuit. In reaching this conclusion, he relies primarily on *In re Bell*, 55 B.R. 246 (Bankr. M.D. Tenn. 1985). Under the Tennessee law reviewed in *Bell*, a creditor may sue to set aside a fraudulent conveyance of real property, as is also true under Ohio law. Tennessee's lis pendens statute provides that a creditor who files such a complaint has a lien against the property identified in the suit. The creditor can immediately perfect that lien as against subsequent bona fide purchasers by filing certain documentation with the recorder's office. *Bell* at 248.

Ohio's lis pendens statute is markedly different than the Tennessee statute. The Ohio statute does not have an express mechanism for creating and perfecting a lien on property. Ohio Revised Code § 2703.26 is a procedural device, rather than a substantive right, which procedure is intended to preserve the status quo until the court resolves the issues arising from the property. *Katz v. Banning*, 84 Ohio App. 3d 543, 617 N.E. 2d 729 (1992); *Levin v. George Fraam & Sons, Inc.* In Ohio, it is the final judgment rendered by the court which ultimately determines the priority of rights in the property. *Levin v. George Fraam & Sons, Inc.* The *Bell* case does not, therefore, support Wasserman's position because the statute under consideration gave creditors different rights than are available to Wasserman under Ohio's statute.

Wasserman also counts on *In re Oliver*, 16 Ohio Misc. 290 (D.Ct. S.D. Ohio 1968) in support of his argument. *Oliver*, a pre-Code bankruptcy case, addressed the issue of whether a judgment lien filed in Ohio attaches to after-acquired interests in real estate and held that it does not. That court did not specifically decide whether a judgment lien holder who files a fraudulent conveyance action thereby obtains a lien with respect to the subject property, which is the issue presented in this case. *Id.*

The Ohio lis pendens statute served only to put third parties on notice that Wasserman claimed an interest in the Property. The statute did not create any substantive rights in favor of

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Wasserman when he filed the State Lawsuit. The Chapter 7 case filing stayed the State Lawsuit, which precluded Wasserman from obtaining the judgment necessary to perfect his rights in the Property. While the parties stipulated that a fraudulent conveyance occurred, the stipulation does not equate to a judgment in Wasserman's favor in the State Lawsuit. Since Wasserman had no interest in the Property at the time the bankruptcy case was filed, it is not necessary to consider the priority of interests set forth in 11 U.S.C. § 544(a). The Fund is properly left with the Trustee for distribution to Debtor's creditors, including Wasserman, in accordance with the Bankruptcy Code.

CONCLUSION

For the reasons stated above, Trustee's Objection to the secured classification of Jerry Wasserman's claim is sustained and the claim will be allowed as unsecured. A separate judgment in accordance with this Memorandum of Opinion will be issued.

Date: 9 Sept 1996

Pat E. Morgenstern-Clarren
Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

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NOTICE OF SERVICE

I certify that this Memorandum of Opinion was served on the following individuals by regular U.S. mail, postage prepaid, on September 9, 1996:

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By: Joyce L. Gordon, Secretary
Date: 9/9/96

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NORTHERN DISTRICT OF OHIO
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In re:

LLOYD JERRY MENDES,

Debtor.

) Case No. 94-12703
)
) Chapter 7
)
) Judge Pat E. Morgenstern-Clarren
)
) **JUDGMENT**

For the reasons stated in the Memorandum of Opinion filed this date,

IT IS ORDERED that the Trustee's Objection to the Secured Claim of Jerry Wasserman
is sustained.

Date: 9 September 1996

Pat E. Morgenstern-Clarren
Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

NOTICE OF SERVICE

I certify that this Judgment was served on the following individuals by regular U.S. mail,
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