UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:	)	Case No. 02-33804
	)	
Nelly A. Dewey,	)	Chapter 7
	)	
	)	
Debtor	)	JUDGE MARY ANN WHIPPLE

MEMORANDUM OF DECISION REGARDING MOTION TO DETERMINE VALUE OR SECURED STATUS OF LIEN CLAIMANT TO AVOID THE UNSECURED PORTION OF JUDGMENT LIEN INTEREST OF CREDITOR UNDER SECTION 506(d)

This case is before the Court on Debtor's Motion to Determine the Value or Secured Status of Lien Claimant to Avoid the Unsecured Portion of Judgment Lien Interest of Creditor under Section 506(d). [Doc. # 27]. In her motion, Debtor seeks to avoid a judgment lien held by the Ohio Department of Taxation. Counsel for the State of Ohio and counsel for Debtor attended the hearing at which the Court heard argument on the motion. For the following reasons, the motion will be granted.

Background

The following facts are undisputed. The Ohio Department of Taxation has a judicial lien (LN 0200105798) as a result of an assessment filed in the Lucas County Court of Common Pleas for Debtor's unpaid personal income taxes for calendar years 1997 and 1998. Ohio Rev. Code § 5747.13(C)(clerk of court of common pleas enters judgment immediately upon filing of tax commissioner's entry making assessment final, with the judgment having "the same effect as other judgments.").

Debtor commenced this Chapter 7 case on June 7, 2002. However, Debtor owned no real property when she filed her bankruptcy petition. The Chapter 7 Trustee filed a No Asset Report in this case on July 31, 2002, and Debtor received her discharge on October 7, 2002. Debtor avers, and the State has not contested, that the underlying debt for the unpaid income taxes was discharged.

The parties agree that the judicial lien has not attached to any real property and will not

create a lien on any property Debtor acquires in the future. Debtor argues that the tax debt is unsecured under 11 U.S.C. § 506(a) since she owns no real property and, as such, she is entitled to avoid the lien under 11 U.S.C. § 506(d). The State does not, as a matter of practice or policy, take steps to release judgments and unattached liens on discharged debts in situations like this. So while the State does not contest that its lien has not attached to any real estate in this case, it is nevertheless concerned about the administrative burden and expense of having to unnecessarily release liens under such circumstances because they are void as a matter of law.

Law and Analysis

In *In re Norvell*, 198 B.R. 697, 698 (Bankr. W.D. Ky. 1996), the court aptly characterized the issue before this court, as follows:

> One of the 'great' scientific/philosophical questions of all time is 'if a tree falls in the woods, and no one is around, does it make a sound?' While this Court cannot solve the age old imponderable, it can solve the analogous bankruptcy issue of 'can a debtor have the bankruptcy court avoid a judicial lien which is void as a matter of law.' The facts of this case, while somewhat unusual, illustrate the common problem bankruptcy practitioners and real estate professionals face of what should be done when a judicial lien is filed against a debtor's real estate and that debtor files bankruptcy owning no real property.

The court will first address whether 11 U.S.C. §§ 506(d) or 522(f), upon which Debtor relies, provide a basis for relief as requested.

Section 506(d) provides, in relevant part, that "[t]o the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void. . . ." The leading case addressing lien avoidance under § 506(d) in Chapter 7 cases is *Dewsnup v. Timm*, 502 U.S. 410 (1992). In *Dewsnup*, the Supreme Court held that a Chapter 7 debtor could not "strip down" a lien that was undersecured. The Supreme Court reached its conclusion by adopting the respondents' interpretation of the language in § 506(d) to refer to whether the claim is an *"allowed"* secured claim, rather that whether the claim is allowed as a *"secured"* claim under § 506(a).[1] *Id.* at 415-17. The Supreme Court agreed with the respondents

[1] Section 506(a) provides that "[a]n allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, . . . and is an unsecured claim to the extent that the value of such creditor's interest . . .is less than the amount of such allowed claim."

that such an interpretation "gives the provision the simple

and sensible function of voiding a lien whenever a claim secured by the lien itself has not been allowed." *Id.* This interpretation is consistent with the legislative history, which focused on the allowance or disallowance of a claim:

> Subsection (d) permits liens to pass through the bankruptcy case unaffected. However, if a party in interest requests the court to determine and allow or disallow the claim secured by the lien under section 502 and the claim is not allowed, then the lien is void to the extent that the claim is not allowed.

H.R. Rep. No. 95-595, at 357 (1977).

In applying *Dewsnup*, other courts have held that a debtor in a no asset Chapter 7 case could not avoid, or "strip down" a lien on real estate pursuant to § 506(d). These courts have reasoned as follows:

> In contrast to chapter 13, where claims must be allowed or disallowed to determine what gets paid through the plan, and the would-be secured creditor whose claim is allowed only as unsecured gets paid as an unsecured creditor, the allowance of a secured claim, or determination of secured status is meaningless in a Chapter 7 where the trustee is not disposing of the putative collateral. . . .
>
> *Dewsnup* teaches that, unless and until there is a claims allowance process, there is no predicate for voiding a lien under § 506(d). Absent either a disposition of the putative collateral or valuation of the secured claim for plan confirmation in Chapter 11, 12, or 13, there is simply no basis on which to avoid a lien under § 506(d).

Laskin v. First Nat'l Bank of Keystone (In re Laskin), 222 B.R. 872, 876 (B.A.P. 9th Cir. 1998); *Webster v. Key Bank (In re Webster)*, 287 B.R. 703, 708 (Bankr. N.D. Ohio 2002)(quoting *Laskin).* As in *Laskin* and *Webster*, this case is a no asset Chapter 7 proceeding. As such, there is no claims allowance process and no predicate for voiding any lien under § 506(d).

The court also finds that § 522(f) does not provide any basis for avoidance of the State's lien. That provision permits the avoidance of judgment liens to the extent they impair exemptions to which a debtor is entitled. Lacking any interest in real estate, the Debtor has no applicable exemptions to claim and as a result the State's judgment lien cannot impair any exemption. *In re Hamilton*, 286 B.R. 291, 293 (Bankr. D.N.J. 2002).

Although §§ 506(d) and 522(f) are inapplicable under the facts of this case, the court finds that 11 U.S.C. § 524 supports a finding that the lien at issue is void, which is what Debtor really seeks. Section 524 provides, in relevant part, as follows:

> (a) A discharge in a case under this title–
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> (1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727 . . .;
>
> (2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act to collect, recover or offset any such debt as a personal liability of the debtor. . . .

In *Norvell, supra,* the court was presented with facts similar to those in this case. A judgment lien was recorded against all real property owned by the debtor; however, the debtor owned no real property at the time he filed bankruptcy. The debtor's obligation to the lien holder was discharged in the bankruptcy proceeding. Thus, the judgment that had been obtained by the lien holder was void under § 524(a)(1), as it only affected *in personam* and not any *in rem* liability. Since the obligation underlying the judgment lien was extinguished by the bankruptcy discharge and no real estate was owned by the debtor at the time the bankruptcy was filed to which the lien could attach, the court found that the judgment lien itself was void. *Id.* at 699. The court explained that a judgment lien will survive bankruptcy only as an *in rem* claim against any real estate which the debtor owned at the time his or her bankruptcy was filed and will not attach to any real estate acquired by the debtor after the filing of a Chapter 7 proceeding in which the debtor received a discharge. *Id.; see also Jarrett v. State of Ohio, Dept. of Taxation*, 293 B.R. 127, 132-33 (Bankr. N.D. Ohio 2002) (explaining that a violation of the discharge injunction in § 524 exists if a creditor attempts to renew a prepetition lien in an attempt to create a lien on property acquired by a debtor postpetition, where the underlying debt has been discharged). Furthermore, under Ohio law, the filing of a certificate of judgment does not create a lien on after-acquired land of the debtor. *Bank of Ohio v. Lawrence*, 161 Ohio St. 543, 547 (1954).

In this case, because Debtor filed bankruptcy owning no real property, there was no property to which the State's prepetition judgment lien could attach. Debtor received her discharge on October 7,

2002. As Debtor's obligation underlying the judgment lien was discharged, and the lien had not attached to any real property when the case was commenced, then the judgment lien is void as explained in *Norvell*. *See also Jarrett*, 293 B.R. at 132-133 and n.5.

The question remains what if anything should the court do about this situation. As articulated by *Norvell*, the State's lien did not attach to any real property prepetition and appears void as a matter of law. The Debtor wants to head off at the pass future issues and inconveniences, such as lending and title company problems should she seek to acquire real property someday, and the lien still appears as a matter of record in the state court. *See Hamilton*, 286 B.R. at 293. But the court is also sensitive to the State's position that it should not have to take administrative steps to release ineffective judgment liens in these situations.[2] And given that, under Ohio law, judgment liens do not attach to after-acquired property, this should not really be a title company issue, assuming it is clear as a matter of record that the tax debt was discharged.[3]

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[2] While the court recognizes appreciates the State's valid concerns as to administrative burden, a definitive document in the state court record releasing such a judgment lien might prevent the kind of problem that appears to have occurred in *Jarrett, supra,* with the State's attempted future renewal of a void lien on an ultimately unsecured tax debt that appears to have been discharged.

[3] A problem is likely to arise (and what the Debtor is probably trying to head off with the motion) when it is not clear as a matter of the bankruptcy court record that the tax debt was in fact discharged. Based on the court's determination that a judgment lien does not attach to after-acquired property, there should be no concern that the existing filing would affect newly acquired property in the future. But the record in Common Pleas Court would raise the question whether there is tax debt that was not discharged and an existing judgment subject to renewal and collection, whether it is a lien on property or not. A tax debt that has not been discharged could also result in the filing of a *new* judgment lien against future newly acquired property, which would be problematical to a title company or future lender. *See Jarrett,* 293 B.R. at 132-33. In this particular case, absent this motion and the ensuing proceedings, it would not be clear as a matter of record that Debtor's income tax obligation for 1997 and 1998 was discharged. *Id.* The fact of discharge of a tax debt is not necessarily as clear on the bankruptcy record as the discharge of other debts. *See* 11 U.S.C. § 523(a)(1). And such a determination is not within the exclusive jurisdiction of this court. *Cf*. 11 U.S.C. § 523(c). In this case, and in response to the motion, the State has not contested that the Debtor's tax

Given all of these circumstances and concerns, this court will in this case follow the lead of the court in *Norvell*. This court is likewise generally disinclined to routinely enter orders "avoiding" judgment liens on real property in individual Chapter 7 cases where there is no real property and the debt is unsecured under the principles articulated in § 506(a), on the ground that it is unnecessary. *Cf*. *Hamilton*, 286 B.R. at 293-94. But until the court articulated its views on this issue, it was certainly appropriate for the Debtor to make her request for relief. So under the particular facts of this case, the court will grant Debtor the requested relief. A separate order in accordance with this memorandum of decision will be entered.

/s/ Mary Ann Whipple

Mary Ann Whipple
United States Bankruptcy Judge

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debts for 1997 and 1998 were discharged, as she asserts. But in the future, to the extent a debtor seeks clarity as to whether a tax debt has been discharged and the principles articulated herein as to any existing judgment and lien apply, the better procedure would be to commence an adversary proceeding to determine the dischargeability of the debt, as expressly authorized "at any time" by Fed. R Bankr. P. 4007(a) and (b).