

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:) Case No.: 03-38873
)
Robert A. Dwenger,) Chapter 13
)
Debtor.)
) JUDGE MARY ANN WHIPPLE

**MEMORANDUM OF DECISION AND ORDER DENY-
ING MOTION TO DETERMINE PRIORITY OF CLAIM**

Karen Russell (“Movant”) is before the court on the Motion of Creditor Karen Russell to Determine Priority of Claim [Doc. #80] that she filed on January 20, 2005 (the “Motion”). The Motion seeks a determination that Movant holds a valid, first-priority lien on certain real property of Robert A. Dwenger (“Debtor”) located in Mercer County, Ohio (the “Property”). After reviewing the Motion, the response thereto filed by the United States of America, acting through the U.S. Department of Agriculture, Farm Service Agency (“FSA”), and the Movant’s supporting memorandum and hearing the arguments of counsel, the court will deny the Motion.

FACTUAL AND PROCEDURAL BACKGROUND

On November 9, 1993, Ted and Carol Heckman obtained a judgment against Debtor Robert A. Dwenger in the Common Pleas Court of Auglaize County, Ohio, in the amount of \$9,879.87 plus interest at a rate of 10% *per annum* from November 9, 1993. On January 4, 1994, a certificate of judgment was filed in the office of the Mercer County Clerk of Courts. The judgment creditors assigned the judgment to Movant by an instrument dated May 4, 1998, which was filed with the Mercer County Clerk of Courts on May 11, 1998.

On February 11, 1994, FSA obtained a judgment against Debtor in the United States District Court for the Northern District of Ohio, in the amount of \$156,757.58 plus interest of \$26.2237 per day from April 21, 1992. On August 12, 1996, the judgment was filed with the Mercer County Recorder.

On July 31, 1997, Movant's predecessors in interest filed a complaint to foreclose their judgment lien in the Common Pleas Court of Mercer County. On April 7, 1998, the court entered judgment validating the plaintiffs' lien, as well as liens of the Ohio Department of Taxation, FSA, and the United States Internal Revenue Service, and determining that the plaintiffs were entitled to have the Property sold and the proceeds applied to their judgment. The foreclosure judgment directed that "the Sheriff, upon confirmation of the sale, shall pay from the proceeds of the sale, upon the claims herein declared valid and ascertained, the amounts thereof in the priority as established at confirmation of sale." On April 14, 1998, the Clerk issued an Order of Sale directing the sheriff to sell the Property. On April 17, 1998, the sheriff had the Property appraised for \$150,000 but never did advertise or sell the Property. Rather, the plaintiffs voluntarily dismissed the foreclosure action on April 17, 1998.

In June 2001, the FSA commenced an action in the United States District Court for the Northern District of Ohio to foreclose its judgment lien on the Property. Movant was not named as a party. On June 4, 2003, the district court entered an order of sale, but no further action was taken because, on November 3, 2003, Debtor filed a voluntary petition for relief under Chapter 13 of the Bankruptcy Code. On November 21, 2003, Debtor filed a proposed Chapter 13 Plan, which, as amended,¹ provides for the sale of a portion of the Property with the proceeds held in escrow pending the court's determination of the validity and priority of the liens transferred to the sale proceeds. On February 25, 2004, FSA filed a proof of claim, asserting a secured claim in the amount of \$267,238.03; and, on March 10, 2004, Movant filed a proof of claim, asserting a secured claim in the amount of \$19,759.74.² On December 22, 2004, the court entered an order confirming the amended Chapter 13 Plan.

LAW AND ANALYSIS

Section 2329.02 of the Ohio Revised Code provides, in pertinent part:

Any judgment or decree rendered by any court of general jurisdiction, including district courts of the United States, within this state shall be a lien upon lands and tenements

¹ The original plan was amended on December 16, 2003, April 30, 2004, July 2, 2004, and October 1, 2004.

² There are no mortgages on or other consensual security interests in the Property.

of each judgment debtor within any county of this state from the time there is filed in the office of the clerk of the court of common pleas of such county a certificate of such judgment, setting forth the court in which the same was rendered, the title and number of the action, the names of the judgment creditors and judgment

debtors, the amount of the judgment and costs, the rate of interest, if the judgment provides for interest, and the date from which such interest accrues, the date of rendition of the judgment, and the volume and page of the journal entry thereof.

No such judgment or decree shall be a lien upon any lands, whether or not situated within the county in which such judgment is rendered, registered under sections 5309.02 to 5309.98, inclusive, and 5310.01 to 5310.21, inclusive, of the Revised Code, until a certificate under the hand and official seal of the clerk of the court in which the same is entered or of record, stating the date and purport of the judgment, giving the number of the case, the full names of the parties, plaintiff and defendant, and the volume and page of the journal or record in which it is entered, or a certified copy of such judgment, stating such facts, is filed and noted in the office of the county recorder of the county in which the land is situated, and a memorial of the same is entered upon the register of the last certificate of title to the land to be affected.

Section 2329.07 of the Ohio Revised Code provides, in pertinent part:

If neither execution on a judgment rendered in a court of record or certified to the clerk of the court of common pleas in the county in which the judgment was rendered is issued, nor a certificate of judgment for obtaining a lien upon lands and tenements is issued and filed, as provided in sections 2329.02 and 2329.04 of the Revised Code, within five years from the date of the judgment or within five years from the date of the issuance of the last execution thereon or the issuance and filing of the last such certificate, whichever is later, then, unless the judgment is in favor of the state, the judgment shall be dormant and shall not operate as a lien upon the estate of the judgment debtor.

....

If, in any county other than that in which a judgment was rendered, the judgment has become a lien by reason of the filing, in the office of the clerk of the court of common pleas of that county, of a certificate of the judgment as provided in sections 2329.02 and 2329.04 of the Revised Code, and if no execution is issued for the enforcement of the judgment within that county, or no further certificate of the judgment is filed in that county, within five years from the date of issuance of the last execution for the enforcement of the judgment within that county or the date of filing of the last certificate in that county, whichever is the later, then the judgment shall cease to operate as a lien upon lands and tenements of the judgment debtor within that county, unless the judgment is in favor of the state, in which case the judgment shall not become dormant.

One bankruptcy judge has explained the operation of these statutes as follows:

Execution and dormancy statutes are to be strictly construed. Section 2329.07 sets forth the only means in Ohio for preventing a judgment from becoming dormant.

The clear language of the statute requires the issuance of execution or a certificate of judgment before expiration of the original five-year period to prevent dormancy.

In re Gretchen, 184 B.R. 284, 285-86 (Bankr. S.D. Ohio 1995).

Movant's predecessors in interest filed a certificate of judgment with the Clerk of Courts of Mercer County, Ohio, within five years of the entry of judgment, so the judgment became a lien on all lands and tenements within Mercer County on the date the certificate was filed, January 4, 1994. Moreover, the Order of Sale issued on April 14, 1998, constitutes an "execution," since Ohio law defines the term to include "a process of a court, issued by its clerk, and directed to the sheriff of the county" "[a]gainst the property of the judgment debtor, including orders of sale." O.R.C. §§ 2327.01, 2327.02(A).³ Thus, Debtor is correct that "the Heckman lien was renewed and extended by virtue of execution and levy on that lien issued in [the] foreclosure proceeding." That renewal and extension was not, however, of unlimited duration, but was for a period of five years. *Id.* § 2329.07. Neither Movant nor her predecessors in interest filed a further certificate of judgment or obtained the issuance of a further execution by April 14, 2003, i.e., "within five years from the date of issuance of the last execution for the enforcement of the judgment within that county or the date of filing of the last certificate in that county, whichever is the later." Accordingly, on April 14, 2003, the judgment ceased to operate as a lien upon Debtor's lands and tenements within Mercer County. When this case was commenced on November 3, 2003, Movant did not hold a judgment lien on the Property.

Movant's response to this conclusion is that, if she had been named a party to FSA's foreclosure action, she would have asserted her lien in that proceeding and that would have been

³ Although the execution was not "returned" by the sheriff until the day the foreclosure action was dismissed and the return was not filed until three days thereafter, the Order of Sale was issued three days before the dismissal. Section 2329.07 requires *issuance* of the execution within five years after the filing of a certificate of judgment (or a previous execution), not that the execution be levied or the property sold within that period.

enough to continue the existence of the lien. Movant relies on *Central Hyde Park Savings & Loan Co. v. Feck*, 67 N.E.2d 44 (Ohio Ct. App. 1945), in support of her argument. That case holds that “the filing of a petition or cross-petition in an action to marshal liens prevents any loss of lien by the petitioner or cross-petitioner by reason of the fact that his judgment may otherwise become subsequently dormant.” *Id.* at 47. However, FSA did not seek to marshal liens, but only to foreclose its judgment lien, and Movant did not file a petition or cross-petition therein. The failure to name Movant as a party may have had the consequence that FSA’s foreclosure (had it taken place) would not have affected Movant’s lien, *Stewart v. Johnson*, 30 Ohio St. 24 (1876), or perhaps even that Movant would be entitled to an order vacating the foreclosure, *Galt Alloys, Inc. v. KeyBank Nat’l Ass’n*, 708 N.E.2d 701 (Ohio 1999) (citing *Cent. Trust Co. v. Jensen*, 616 N.E.2d 873 (Ohio 1993) (citing *Cent. Trust Co. v. Spencer*, 535 N.E.2d 347 (Ohio Ct. App. 1987))), but that failure does not alter the fact that the lien became dormant when Movant failed to continue the lien by obtaining the issuance of a new execution or by the simple expedient of filing a new certificate of judgment. FSA may have had an obligation to give notice to Movant before foreclosing out her interest in the Property, but it did not have an obligation to remind Movant to renew her judgment lien.

Although the Motion does not present the issue, FSA asks the court to determine that its judgment is valid and enforceable. The Federal Debt Collection Procedure Act “provides the exclusive civil procedures for the United States . . . to recover a judgment on a debt.” 28 U.S.C. § 3001(a)(1). The Act “shall preempt State law to the extent such law is inconsistent with a provision of this chapter.” *Id.* § 3003(d). Thus, 28 U.S.C. § 3201(a), not O.R.C. § 2329.02, governs the creation of the judgment lien in favor of FSA. Its provides:

A judgment in a civil action shall create a lien on all real property of a judgment debtor on filing a certified copy of the abstract of the judgment in the manner in which a notice of tax lien would be filed under paragraphs (1) and (2) of section 6323(f) of the Internal Revenue Code of 1986.

Section 6323(f), in turn, requires the filing of federal tax lien notices in the location designated by state law. 26 U.S.C. § 6323(f)(1)(A)(i). Ohio law designates that notices of federal tax liens and other liens in favor of the United States be filed “in the office of the county recorder in the county in which the property subject to the lien is situated.” O.R.C. § 317.09(A). FSA thus obtained a judgment lien

on the Property when it filed the abstract of judgment with the Mercer County Recorder on August 12, 1996.

Just as federal – not Ohio – law controls the creation of FSA’s judgment lien, 28 U.S.C. § 3201(c) – not O.R.C. § 2329.07 – governs the duration of the lien, and it provides that “a lien created under subsection (a) is effective, unless satisfied, for a period of 20 years.” 28 U.S.C. § 3201(c)(1). Accordingly, FSA’s judgment lien remains in existence under applicable federal law, even though it would have lapsed prepetition had the lien been in favor of a judgment creditor other than the United States (or the State of Ohio, in that O.R.C. § 2329.07 provides that judgment liens in favor of the state do not become dormant).

THEREFORE, for the foregoing reasons,

IT IS ORDERED that the Motion [Doc. # 80] is denied, and it is

FURTHER ORDERED that Karen Russell’s claim shall be allowed and paid as an unsecured claim in this Chapter 13 case; and it is

FURTHER ORDERED that, under the confirmed Chapter 13 Plan and the related stipulation between Debtor and FSA, the net proceeds of the sale of the Property (after the payment of the costs of sale and real property taxes) shall be disbursed to FSA, with any excess (after satisfaction of FSA’s claim)⁴ to be remitted to the Chapter 13 Trustee; and it is

FINALLY ORDERED that FSA shall cause a report of sale, showing the disbursement of the proceeds, to be filed with the court on or before 30 days after consummation of the sale.

Mary Ann Whipple
United States Bankruptcy Judge

⁴ The parties do not contemplate that there will be any excess proceeds.