
In the United States Bankruptcy Court
for the
Southern District of Georgia
Savannah Division

In the matter of:)	
)	Adversary Proceeding
LEMCO GYPSUM, INC.)	
(Chapter 7 Case <u>86-40839</u>))	Number <u>91-4158</u>
)	
<i>Debtor</i>)	
)	
)	
JAMES L. DRAKE, JR.,)	
TRUSTEE)	
)	
<i>Plaintiff</i>)	
)	
)	
v.)	
)	
HUSSEY, GAY & BELL, INC.)	
CONSULTING ENGINEERS)	
)	
<i>Defendant</i>)	

MEMORANDUM AND ORDER
ON MOTION FOR RECONSIDERATION

On June 8, 1992, this Court entered an order granting judgment lien secured status to Defendant. On June 18, 1992, the Trustee filed a Motion for Reconsideration of that order. The Trustee raises the following issues for clarification and reconsideration:

- 1) Whether the date of determination of secured status should be fixed as of the date a bankruptcy case is filed?
- 2) Whether a dormant judgment is entitled to lien status in bankruptcy?
- 3) Whether a judgment lien affects all property of a bankruptcy estate?
- 4) Whether the Defendant is entitled to distribution without having filed a proof of claim?
- 5) Whether a judgment creditor is entitled to lien creditor status in light of the Georgia Supreme Court decision in Crossroads Bank of Georgia, et al. v. Corim, Inc., 262 Ga. 364 (1992)

I shall address the fifth issue first. The Trustee cites Crossroads Bank of Georgia for the proposition that a judgment creditor does not become a lien creditor by obtaining and recording a judgment on the general execution docket. In Crossroads Bank, the Georgia Supreme Court reversed a Court of Appeals decision which held that a judgment creditor with a prior recorded lien had priority over a subsequent purchase-money secured creditor. However, Crossroads Bank is no longer good law in light of the legislature's amendment to O.C.G.A. Section 11-9-310(d). This Code Section was the basis for the court's decision in Crossroads Bank. The new statute provides as follows:

A . . . duly rendered judgment of a court having jurisdiction shall have the same priority with regard to a security interest as it would have if the . . . judgment were a conflicting security interest within the meaning of Code Section 11-9-313, which conflicting security interest was perfected by filing or which encumbrance arose at the time the tax lien or judgment was duly recorded in the place designated by statute applicable thereto.

O.C.G.A. §11-9-310(d), effective July 1, 1992. The amendment, which the Georgia Supreme Court did not apply in Crossroads Bank, gives a timely perfected purchase money security interest priority over any other security interest, and treats a judgment creditor as any other secured creditor for purposes of priority.

The amended statute places valid recorded judgment liens on an equal footing with secured lienholders. Only purchase money secured creditors are given elevated priority over prior secured creditors where such purchase money security interests are timely perfected in accordance with O.C.G.A. Section 11-9-312. In light of the foregoing, I conclude that a judgment creditor should be treated as a lien creditor where a duly recorded judgment has been filed. The Trustee's Motion for Reconsideration on this issue is overruled.

Now, addressing the first issue listed above, I conclude that the secured status of a creditor should be fixed as of the date a bankruptcy case is filed. The Trustee does not argue against this part of the ruling in my previous order.

The Trustee seeks clarification of the second issue above which is whether or not dormant but revivable judgments are entitled to secured status. I conclude that any judgments which are dormant but revivable may share in the distribution. But for the automatic stay, the dormant judgment could be revived. Inaction by the creditor in obedience to 11 U.S.C. Section 362 should not prejudice that creditor's rights.

In the case at bar, Defendant's judgment was only four years old at the time of Debtor's filing bankruptcy. The judgment became dormant during the pendency of the bankruptcy when the judgment creditor was subject to the automatic stay. As the judgment was not dormant at the time Debtor filed bankruptcy, this judgment creditor should not be prevented from sharing in the distribution because the lien became dormant after the bankruptcy was filed.

The third issue, whether a judgment lien affects all of the property of Debtor's estate, is more difficult to decide. The Trustee argues that recording the judgment perfects the judgment lien as to certain property of the debtor but not all property of the Debtor. Under Georgia law a judgment:

[S]hall bind all the property of the defendant in judgment, both real and personal, from the date of such judgment except as otherwise provided in this Code.

O.C.G.A. §9-12-80. The Trustee asserts that the recorded judgment lien does not perfect an interest in motor vehicles, stock, choses in action, or money of the debtor. *See* O.C.G.A. §§40-3-58 and 9-12-91. Owens v. Atlanta Trust and Banking Co., 122 Ga. 521, 50 S.E. 379 (1905).

According to the Trustee, the distribution in this case will come from Debtor's "choses in action" property to which the judgment did not attach. The Trustee cites O.C.G.A. Section 9-12-91, which provides that a "judgment creates no lien upon promissory

notes in the hands of the defendant." Under this Code Section, a judgment does not attach to choses in action, Anderson v. Ashford & Co., 174 Ga. 660 (1932), stock, Owens v. Atlanta Trust and Banking Co., 122 Ga. 521 (1905), or money in the hands of the Debtor. *See also* Kilgore v. Buice, 229 Ga. 445, 447 (1972) ([A] chose in action is a right to recover a debt through an action in court. Therefore, a promissory note standing alone is a chose in action, and the proper way to get at a chose in action is by garnishment); In re Burnham, 12 B.R. 286 (Bankr. N.D.Ga. 1981) (The lien of a general judgment, when execution issues thereon and it is properly recorded on the general execution docket, institutes a general lien on all of the defendant's property However, a judgment does not create a lien on a chose in action); Matter of Williamson, 78 B.R. 372 (Bankr. M.D.Ga. 1987).

In Matter of Lively, 74 B.R. 238 (S.D.Ga. 1987), binding authority, the District Court concluded that a judgment lien binds all property of the debtor, including any after-acquired property, citing O.C.G.A. Section 9-12-80. The court did not list any exceptions or limits on the scope of the judgment lien, which the Trustee now argues. The Trustee contends that Lively is consistent with his cited authorities as the judgment creditor in Lively had a valid judgment lien on Debtor's real estate and was entitled to a distribution from the proceeds of the sale of the real estate. The Trustee claims that the judgment creditor in the case at bar is not entitled to distribution as the funds to be distributed are derived from a chose in action, settlement of Debtor's claims in a lawsuit. However, these claims were not made at the March 4, 1992, hearing. At that time the Trustee asserted that there would be some distribution from the sale of machinery and equipment and possibly other items. The Trustee's arguments in March, 1992, against allowing Defendant to share

in the distribution were based on the dormancy of the judgment and the failure to file a proof of claim.

In the Trustee's Motion for Reconsideration, he asserts that the money remaining for distribution is derived from the Trustee's settlement of litigation, and that the pre-petition judgment lien would not attach to the funds, which are proceeds of a chose in action. Further, the Trustee argues that Defendant should be treated as an unsecured creditor because there is no property to which the judgment may attach and that the Defendant should have to file a claim in order to receive a *pro rata* distribution with unsecured creditors.

The dispute settled by the Trustee arises out of claims over gypsum formerly located at Debtor's place of business. Kemira, a creditor in Debtor's bankruptcy case, filed an objection to the proposed sale of the gypsum and asserted an ownership interest in the property. Debtor likewise asserted title to the gypsum. Kemira offered to compromise the dispute by paying Debtor \$100,000.00 and withdrawing all other claims against the Debtor; Debtor likewise agreed to withdraw all claims against Kemira and resolve the pending state court litigation. *See* Motion to Approve Compromise filed February 8, 1988. This Motion to Approve Compromise was approved by order of this court filed on April 7, 1988.

At the August 14, 1992, hearing on the Motion for Reconsideration, a secured creditor asserted the existence of a security agreement dated January 1, 1980, and argued that the agreement preceded the Defendant's judgment and covered all machinery, leasehold property, and gypsum to which the Defendant's judgment might attach. That party

has not intervened in this case and I will not attempt to determine in this order the rights as between that creditor and these parties.

Based on the Motion for Compromise and Order of April 7, 1988, the proceeds of the settlement do not appear to be a chose in action. While Debtor had a cause of action, it was based on a title dispute to personalty - the gypsum. As such, the money received in settlement is in the nature of personalty - the proceeds received for the gypsum and the judgment attaches to it.

The fourth issue for clarification concerns whether or not Defendant should file a claim in order to participate in the distribution of funds from Debtor's estate. In the previous order in which I found Defendant's judgment lien secured I concluded that no claim needed to be filed. In light of the above conclusions that Defendant's judgment lien is entitled to secured status, Defendant is excused by Bankruptcy Rule 3002(a) from the requirement of filing a proof of claim.

ORDER

IT IS HEREBY THE ORDER OF THIS COURT that the Motion to Reconsider is denied.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ____ day of March, 1993.