

JAN 28 2005

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:)	CASE NO. 03-76883
)	
NATIONAL SERVICE DIRECT, INC.,)	CHAPTER 11
)	
Debtor.)	JUDGE DIEHL
_____)	
)	
NATIONAL SERVICE DIRECT, INC.,)	ADVERSARY PROCEEDING
)	
Plaintiff,)	CASE NO. 04-06479
)	
v.)	
)	
HEATHER ANDERSON,)	
)	
Defendant.)	
_____)	

ORDER DENYING PLAINTIFF'S MOTION FOR JUDGMENT ON THE
PLEADINGS AND DECLARING DEFENDANT HOLDS A VALID LIEN
ON PLAINTIFF'S PERSONAL PROPERTY

This matter is before the Court on the Adversary Proceeding (the "Objection") filed by National Service Direct, Inc. (hereinafter "National" or "Plaintiff"). The Plaintiff seeks a determination as to the status and validity of Proof of Claim # 27 (the "Proof of Claim") filed by Heather Anderson (hereinafter "Anderson" or "Defendant") on May 14, 2004 through its Motion for Judgment on the Pleadings filed October 13, 2004. After considering the pleadings filed by the parties, the Court hereby denies Plaintiff's Motion for Judgment on the Pleadings because Defendant holds a valid judgment lien in the Plaintiff's personal property located in Georgia and a secured claim in this case in the amount of \$84,423.88, subject to bifurcation under 11 U.S.C. § 506.

STATEMENT OF FACTS

The Plaintiff filed its Chapter 11 case on December 4, 2003 (the “Petition Date”). On May 14, 2004, the Defendant filed its Proof of Claim asserting a secured claim in the amount of \$84,423.88. On August 24, 2004, the Plaintiff initiated this adversary proceeding against the Defendant objecting to the Defendant’s Proof of Claim and requesting the Court to determine that the Defendant only maintained an unsecured claim and therefore was not entitled to interest accruing after the Petition Date.

The Proof of Claim arises from a complaint filed by the Defendant in the United States District Court for the District of South Carolina, Charleston Division (hereinafter “District Court of South Carolina”) on October 13, 2000. (See *Heather Anderson v. Noble Systems Corp., North American Telephone Network, LLC, National Service Direct, Inc., NDSI, and William Floyd*, Civil Action Case No. 2:00-3256-18). A jury verdict was awarded in this case for the Defendant on October 3, 2001, whereby the Plaintiff was ordered to pay Defendant \$35,000.00 in compensatory damages plus post-judgment interest at a rate of 2.49%. Additionally, on January 17, 2002, the court ordered the Plaintiff to pay Defendant \$37,483.00 in attorney fees and \$7,013.14 in costs (hereinafter collectively the “South Carolina Judgments” or “Judgments”). On November 19, 2002, the District Court of South Carolina issued a Certifications of Judgment for the South Carolina Judgments. However, the Plaintiff had no real or personal property in South Carolina.

The Judgments were registered and filed with the United States District Court, District of Northern Georgia, Atlanta Division (hereinafter “District Court of Northern Georgia”) on

December 11, 2002. A Writ of Execution was executed and filed on December 17, 2002 and served upon the Plaintiff by the United States Marshals Office. After no avail, the Writ of Execution was returned to the Clerk of the District Court of Northern Georgia *nulla bona* on May 21, 2003.

The Plaintiff, as debtor in possession, filed the Objection to the Proof of Claim on grounds that the Defendant's failure to register the South Carolina Judgments on a General Execution Docket in the State of Georgia prevented the Judgments from attaching to the Plaintiff's property located in Georgia. Therefore, the Plaintiff contends that the Defendant holds only a general unsecured claim for \$83,597.43 and does not maintain a lien on the Plaintiff's property and is not entitled to any interest accruing on the Judgments after the Petition Date. On October 20, 2004 the Plaintiff moved the Court for a Judgment on the Pleadings.

CONCLUSION OF LAW

Judgment on the pleadings is appropriate when the material facts of the case are not in dispute and judgment can be rendered by looking to the substance of the pleadings and those facts judicially noticed. *Hawthorne v. Mac Adjustments, Inc.*, 140 F.3d 1367, 1370 (11th Cir. 1998) (citing *Bankers Ins. Co. v. Florida Residential Prop. and Cas. Joint Underwriting Ass'n*, 137 F.3d 1293, 1295 (11th Cir. 1998)). *See also* Fed.R.Civ.P. 12(c). Under the facts of this case, Plaintiff's motion must be denied.

To determine the status of a judgment creditor's interest in a debtor's property, the first determination is whether there is a valid judgment lien held by the party. If such a lien exists outside of bankruptcy, the next step is to ascertain whether the lien could be avoided by a debtor in possession or trustee under the Bankruptcy Code. If there is no basis for the debtor in

possession or trustee to avoid the lien, the judgment creditor holds a secured claim, subject to 11 U.S.C. §506 which determines the extent to which the claim is secured. The Court will consider each issue separately.

I. Does the Defendant Maintain a Judicial Lien Against the Plaintiff's Property in Georgia?

When a party has been granted a federal court judgment for money or property in one district, it may be registered in another district by filing a certified copy of the judgment in the new district. 28 U.S.C. §1963 (2004). Once the judgment is filed in the new district, it is given the same effect and enforcement as if the judgment was rendered through original jurisdiction in that district. *Id.* Thus, the federal judgment is not considered a foreign judgment in the new district, but instead treated and enforced as if it was originally rendered there. *Kemper Securities, Inc. v. Schultz*, 668 N.E.2d 554, 556 (10th Cir. 1995)(stating that once a judgment is registered in the new district it is not a foreign judgment in the new district but instead becomes a new judgment of that court enforceable in the same manner as any other judgment in the new district).

However, to determine whether a judicial lien exists and attaches to the judgment debtor's property in the new district after the federal judgment is registered, courts must apply the state law where the new district is located. 28 U.S.C. §1962 (2004). Specifically, 28 U.S.C. §1962 provides that a judgment rendered by a district court creates a lien on the property located in that state to the same manner and extent that a judgment from a court of general jurisdiction in that state would create. *Id.* Generally, if the law of the state where the new district is located requires that state court judgments be registered, recorded, docketed, indexed, or any other act in a particular manner or place before a judicial lien attaches, those same requirements apply to district court judgments rendered in that state. *Id.* Thus, to establish that a lien has attached to

the judgment debtor's property in the new district, the party claiming a secured interest must show that state law registration and recording requirements have been satisfied.

In this case, the Defendants registered and filed the South Carolina Judgments in the Northern District of Georgia on December 11, 2002. Since these Judgments were registered in Georgia, they maintain the same status that a judgment of original jurisdiction in Georgia would have and should be enforced in the same manner. Therefore, in order for the South Carolina Judgments to have attached to the Plaintiff's property in Georgia, which would give the Defendant a judicial lien on such property, the Defendant must have satisfied the registration and recording requirements under Georgia law.

A. *Georgia Law Governing Judicial Liens*

In Georgia, all judgments are of equal dignity and bind both real and personal property of the debtor as of the date of entry of a judgment unless the code specifically provides otherwise. O.C.G.A. § 9-12-80 (2004). The general rule is that a judgment creditor in Georgia generally acquires a lien on all the property of the defendant in judgment when it is entered. *Cohutta Mills, Inc. v. Hawthorne Indus., Inc.*, 179 Ga.App. 815 (1986). However, under section 9-12-86 of the Georgia Code, a money judgment obtained in a state or federal court will only create a lien on the title to real property if it is "recorded in the office of the clerk of the superior court of the county in which the real property is located and is entered in the indexes to the applicable records in the office of the clerk." O.C.G.A. § 9-12-86 (2004). Thus, even though a lien attaches to the personal property of the judgment debtor within the state of Georgia when the judgment is entered, the judgment must be recorded in the General Execution Docket in the county where the real property is located to attach to any real property of the debtor. *See generally In re DOTMD*,

LLC, 303 B.R. 519 (N.D. Ga. 2003); *In re Tinsley*, 421 F.Supp 1007, 1010 (M.D. Ga. 1976) *aff'd*, 554 F.2d 1064 (5th Cir. 1977)(providing that a creditor acquires a lien on the date of judgment against the debtor's personal property even though there is no entry on the General Execution Docket, but not against the debtor's real property).

In this case, the Defendant's act of registering and filing the South Carolina Judgments in the District Court of Northern Georgia created a lien on all of the Plaintiff's personal property within Georgia. However, in order for the Defendant's judgment lien to attach to the Plaintiff's real property, the Defendant would have had to take an extra step and record the judgments on the General Execution Docket in any county where the Plaintiff had title to real property. The Defendant does not dispute that she did not record the judgments on any General Execution Dockets, and therefore the Court finds that even though the Defendant holds a secured interest in the Plaintiff's personal property within the state of Georgia, she does not hold a secured interest in any real property the Plaintiff holds title to in Georgia.¹

B. In re RCF Technologies is not Persuasive to the Court

Plaintiff argues that the South Carolina Judgments must be recorded consistent with Georgia law in addition to being registered with a Georgia federal court. Further, it relies on *RCF Technologies, Inc.* to support its position that no judgment lien attaches to any property in Georgia unless the judgment is recorded in the General Execution Docket where the property is located. *RCF Technologies, Inc. v. Rubbercraft Corporation of California, Ltd. (In re RCF Technologies, Inc.)* 285 B.R. 531 (Bankr. S.D.Ga. 2001). Even though the Court is in agreement

¹According to the Plaintiff's bankruptcy schedules, the Plaintiff does not hold title to any real property. However, if the Plaintiff did hold title to real property in Georgia, the Defendant would not maintain a secured interest in such property.

with the Plaintiff in that the judgments must be recorded according to laws of Georgia in order for a lien to attach to property in Georgia, the Court respectfully disagrees with the interpretation of Georgia law as applied by the Southern District of Georgia in *RCF Technologies, Inc.* and the Plaintiff in this case.

In *RCF Technologies*, the court used section 9-12-81(b) of the Georgia Code to support the position that a judgment has to be entered upon the General Execution Docket in the county where the judgment is obtained before a lien on personal or real property is created. *Id.* at 533. However, section 9-12-81(b) provides:

As against the interest of *third parties* acting in good faith and without notice who have acquired a transfer or lien binding the property of the defendant in judgment, no money judgment obtained within the county of the defendant's residence in any court of this state or federal court in this state shall create a lien upon the property of the defendant unless the execution issuing thereon is entered upon the execution document.
O.C.G.A. § 9-12-81(b)(2004) [*emphasis added*].

This statute addresses the interest of a third party, not an original party to the judgment, and anyone one who is claiming benefit under section 9-12-81(b) has to establish that he or she is within the protected class. *In re DOTMD, LLC*, 303 B.R. at 523 (citing *Eason v. Vandiver*, 108 Ga. 109, 33 S.E. 873 (1899)). Thus, one would have to show that they are a third party who acquired the property or acquired a lien on the property at issue while acting in good faith and without notice. *Id.* The Court does not disagree that in order for a judgment creditor to prevail as against a bona fide purchaser for value, the judgment would have to be recorded in the General Execution Docket. However, in the case at hand, the Court is asked to rule on the interest of the original parties to the judicial lien and not those of a third party. Therefore, section 9-12-81(b) is not relevant here.

Even though section 9-12-81(b) does not address the issue in this case, the Georgia statute does speak to the situation where the original parties to the judicial lien are seeking a determination as to the status of the lien in section 9-12-85. This statute states that nothing under Georgia Code section 9-12-81 will affect the validity or force of any judgment or lien of any kind between the original parties. Therefore, the requirement under section 9-12-81(b) that the judgment be recorded in the Execution Docket before a lien attaches does not apply to an original judicial lien holder, or in this case, the Defendant.

In conclusion, the Defendant's act of registering the South Carolina Judgments in a Georgia federal court gave the Defendant a lien on all of the Plaintiff's personal property in Georgia. However, since the Defendant failed to take the additional steps needed to attach the Judgments to any real property that the Plaintiff held title to, she does not hold a lien against any real property owned by the Plaintiff in Georgia.

II. Can the Plaintiff Avoid the Lien as the Debtor in Possession?

Even though the Defendant has lien on the Plaintiff's personal property, there is still the issue of whether there is a basis on which the Plaintiff can avoid this lien given its position as debtor in possession. Under section 1107(a) of the Code, a debtor in possession has the same rights as the trustee and therefore may prosecute an action based upon the trustee's avoiding power under section 544 of the Code. Thus, a debtor in possession has the rights of a hypothetical judicial lien creditor as of the filing of the bankruptcy petition; a creditor with execution returned unsatisfied as of the filing of the bankruptcy petition; and a bona fide purchaser of real property who has perfected the transfer as of the filing of the bankruptcy petition. 11 U.S.C. § 544(a) (2004).

A. Plaintiff as Hypothetical Judicial Lien Creditor

Under section 544(a)(1) of the Code the debtor in possession is given the status of a hypothetical judicial lien creditor as of the petition date. 11 U.S.C. § 544(a)(1). To determine what rights a judicial lien creditor maintains courts must look to state law. 5 Colliers on Bankruptcy ¶ 544.05 (15th ed. 2004); *see also Cohutta Mills, Inc. v. Small Business Admin. (In re Cohutta Mills, Inc.)*, 108 B.R. 815 (N.D. Ga. 1989).

As addressed above, a judgment creditor in Georgia acquires a lien on the judgment debtor's personal property when the judgment is obtained. O.C.G.A. § 9-12-80 (2004). Further, the debtor in possession acquires a hypothetical judicial lien upon the commencement of the bankruptcy case. 11 U.S.C. § 544(a)(1). Thus, the Defendant's judicial lien on the Plaintiff's personal property in Georgia arose when it was registered and given the full effect of a Georgia judgment on December 11, 2002. The Plaintiff's judicial lien arose approximately a year later on December 4, 2003 when the bankruptcy petition was filed.

Looking to Georgia law, where there are two judgment creditors both claiming an interest in property, the earlier judgment entered will prevail unless the judgments were rendered during the same term of court. O.C.G.A. § 9-12-87 (2004). Therefore, the Plaintiff could not use section 544(a)(1) of the Code to avoid the Defendant's lien since it arose approximately a year before the Plaintiff's hypothetical lien was created.

Additionally, an unrecorded judgment in Georgia is not subordinate to a later judgment, so the Plaintiff cannot use section 544(a)(1) to avoid the Defendant's judgment lien on grounds it was not recorded in the General Execution Docket. *Griffith v. Posey*, 98 Ga. 475, 477, 25 S.E. 515, 515 (1896). In *Griffith* the Supreme Court of Georgia held that the older of the two

judgments against the same defendant had priority over a younger judgment, even if the older judgment was never recorded in the General Execution Docket. *Id.* Thus, the Plaintiff's status as a hypothetical judicial lien holder does not provide it with a basis to avoid the Defendant's secured claim in the Plaintiff's personal property.

B. Plaintiff as Creditor with Execution Returned Unsatisfied

Under section 544(a)(2) the debtor in possession is also given the status of a creditor with execution returned unsatisfied. 11 U.S.C. § 544(a)(2) (2004). This status does not provide the debtor in possession with a lien on any specific property of the bankruptcy estate. 5 Collier on Bankruptcy ¶ 544.06 (15th ed. 2004). It simply vests the debtor in possession with the equitable rights of a hypothetical creditor who has exhausted all of its legal remedies. *Id.* Thus, the Plaintiff in this case cannot use to 544(a)(2) to avoid the Defendant's judicial lien against its personal property.

C. Plaintiff as Perfected Bona Fide Purchaser of Real Property

Under section 544(a)(3) the debtor in possession is given the status of a bona fide purchaser of real property. 11 U.S.C. § 544(a)(3) (2004). To determine who qualifies as a bona fide purchaser and the rights of such purchaser, as with the other avoiding powers, courts must apply state law. 5 Colliers on Bankruptcy ¶ 544.08 (15th ed. 2004). However, this avoidance power is only applicable in those cases where the lien sought to be avoided is against real property, not personal property. *Id.* As previously addressed, the Defendant does not maintain a lien on any of the Plaintiff's real property. Therefore, section 544(a)(3) does not provide the Plaintiff with a method of avoiding the Defendant's secured claim in its personal property.

III. Priority of the Judicial Liens

Since the Plaintiff cannot avoid the lien under the Code as a debtor in possession, the Court has to look to Georgia law to establish the priority between the Defendant's judicial lien and the Plaintiff's hypothetical judicial lien. As previously discussed, Georgia law provides that where there are two competing judgment creditors the earlier judgment prevails unless the judgments are rendered during the same term of the court. O.C.G.A. § 9-12-87 (2004). See also *Wellington v. Lenkerd Co., Inc.*, 157 Ga. App. 755, 278 S.E.2d 458 (1981); *Fas-Pac, Inc. v. Fillingame*, 123 Ga. App. 203, 180 S.E.3d 243 (1971). Thus, the judicial lien first in time takes priority over those created after it in a different term of court. Since Defendant's lien attached on December 11, 2002 when it was registered in Georgia, which is well before the Plaintiff's hypothetical lien was created on December 4, 2003, the Defendant's lien has priority.

IV. Postpetition Interest Claim

Under section 506(b) of the Code, the holder of a secured claim can recover postpetition interest, fees, costs, and charges to the extent that the claim is oversecured. In this case, since the Defendant maintains a secured claim, she can recover any postpetition interest on her judgment up to the value of the property in which she holds a lien.

CONCLUSION

For the reasons discussed above, the Court denies the Plaintiff's Motion for Judgment on the Pleadings and finds that the Defendant holds a valid secured claim for the amount of \$84,423.88 subject to 11 U.S.C. § 506.

The Clerk's Office is directed to serve a copy of this Order upon the parties shown on the Distribution List.

IT IS SO ORDERED, the 26th day of January, 2005.



MARY GRACE DIEHL
UNITED STATES BANKRUPTCY JUDGE

DISTRIBUTION LIST:

National Service Direct, Inc.
4151 Ashford Dunwoody Road
Suite 675
Atlanta, GA 30319

Daniel A. Fliman
Lamberth, Cifelli, Stokes & Stout, PA
Suite 550
3343 Peachtree Rd.
Atlanta, GA 30326

Heather Anderson
c/o Jarrel Wigger, Esq.
8086 Rivers Ave
N. Charleston, SC 29406

Frederick N. Sager, Jr
Weinberg, Wheeler, Hudgins, Gunn & Dial
950 East Paces Ferry Road
Suite 3000
Atlanta, GA 30326

Jarrel L. Wigger
Davidson, Bennett & Wigger
8086 Rivers Avenue
N Charleston, SC 29406