

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:

CASE NO. 06-62501

Thomas Robert Spejcher and Mary Margaret
Pier,

CHAPTER 7

Debtors.

JUDGE MASSEY

S. Gregory Hays, Chapter 7 Trustee for the
estate of Thomas Robert Spejcher and Mary
Margaret Pier,

Plaintiff,

v.

ADVERSARY NO. 06-6347

Wellborn Forest Products, Inc., Covenant
Plumbing Supply of Fayette, Inc., Blu-John.com,
Inc., Georgia Department of Labor, Aqua
Koolers, LLC, and Henry County,

Defendants.

ORDER GRANTING IN PART AND DENYING IN PART
PLAINTIFF'S MOTION FOR DEFAULT JUDGMENTS

On March 6, 2006, Thomas Spejcher and Mary Pier ("Debtors") filed a joint petition for relief commencing the above referenced Chapter 7 bankruptcy case. On August 16, 2006, Plaintiff S. Gregory Hays, in his capacity as Chapter 7 Trustee of the estate of the Debtors, filed the complaint initiating this adversary proceeding, seeking to avoid under sections 362 and 547 of the Bankruptcy Code liens or potential liens allegedly held by Defendants against property of

Debtors' bankruptcy estate located in Henry County, Georgia (the "Property"). Defendants Covenant Plumbing Supply of Fayette, Inc. ("Covenant"), blu-john.com, Inc. ("blu-john.com"), and Aqua Coolers, LLC ("Aqua Coolers") have not responded to the complaint. The Clerk made an entry of default against each of these Defendants on October 6, 2006. Plaintiff now moves for default judgments. For the reasons stated below, Plaintiff's motion is granted as to Covenant and Aqua Coolers and denied as to blu-john.com.

The certificate of service indicates service of the summons and complaint in accordance with Fed. R. Bankr. P. 7004(b)(3). The Trustee effectuated service by first class mail, postage prepaid, addressed to the registered agent for each of the three defendants. Accordingly, this Court has personal jurisdiction over Covenant, blu-john.com, and Aqua Coolers. Additionally, this Court has subject matter jurisdiction over these core proceedings pursuant to 28 U.S.C. §§ 1334(b), 157(a), and 157(b)(2)(F) and (O).

Entry of default judgment is governed by Fed. R. Civ. P. 55(b), made applicable in adversary proceedings by Fed. R. Bankr. P. 7055. The court's decision to enter default judgment is discretionary. *See Hamm v. DeKalb County*, 774 F.2d 1567, 1576 (11th Cir. 1985). "A party is not entitled to a default judgment as a matter of right, even where the defendant is technically in default." *Ganther v. Ingle*, 75 F.3d 207, 212 (5th Cir. 1996). Additionally, "[a] defendant's default does not in itself warrant the court in entering default judgment. There must be a sufficient basis in the pleadings for the judgment entered." *Nishimatsu Constr. Co. v. Houston Nat. Bank*, 515 F.2d 1200, 1206 (5th Cir. 1975). The defaulting defendant "admits the plaintiff's well-pleaded allegations of fact," *id.*, but "is not held to admit facts that are not well-pleaded or

to admit conclusions of law.” *Id.* Thus, the Court must look to the complaint to determine if it contains well-plead allegations of fact that entitle Plaintiff to the relief demanded.

Counts II and III of the complaint seek to avoid liens allegedly held by Covenant and blujohn.com against the Property as preferential under section 547(b) of the Bankruptcy Code.

Section 547(b) provides in pertinent part that:

the trustee may avoid any transfer of an interest of the debtor in property–

- (1) to or for the benefit of a creditor;
- (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
- (3) made while the debtor was insolvent;
- (4) made–
 - (A) on or within 90 days before the date of the filing of the petition; or
 - (B) between 90 days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and
- (5) that enables such creditor to receive more than such creditor would receive if–
 - (A) the case were a case under chapter 7 of this title;
 - (B) the transfer had not been made; and
 - (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

11 U.S.C. § 547(b).

As to Covenant, Plaintiff’s allegations provide a sufficient basis for the Court to find a voidable preference under section 547(b). He alleges that Covenant recorded a writ of fieri facias on January 26, 2006 in the office of the Clerk of the Superior Court of Henry County, Georgia, which was less than 90 days before Debtors filed their Chapter 7 petition. Indeed, the Fi Fa, attached to the complaint as an exhibit, shows that the Covenant obtained its judgment on January 11, 2006, a date also within the 90-day preference period.

These facts satisfy the elements of a voidable preference of section 547(b). As defined in section 101(54) of the Bankruptcy Code, the term “transfer” expressly includes “the creation of a lien.” Under Georgia law, a judgment lien attaches to real property only when “the judgment,

decree, order, or writ of fieri facias 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.” *See* Ga. Code Ann. § 9-12-86(b). Thus, the transfer of an interest in the Henry County property to Covenant occurred no sooner than January 26, 2006. The underlying judgment constitutes an antecedent debt. *See* § 11 U.S.C. § 101(5) and (12) (defining “debt” and “claim”). Although Plaintiff does not expressly allege that Debtors were insolvent when the transfer occurred, their insolvency is presumed since the transfer took place within the 90-day statutory window. *See* 11 U.S.C. § 547(e) (“For the purposes of this section, the debtor is presumed to have been insolvent on and during the 90-days immediately preceding the date of the filing of the petition.”). Each of the other elements of section 547(b) is expressly alleged. Accordingly, the judicial lien held by Covenant is avoidable under section 547(b) and default judgment is proper against this defendant.

As to blu-john.com, however, the complaint fails to state a claim for relief under section 547. The complaint alleges that blu-john.com recorded a materialmen’s and mechanics’ claim of lien within the 90-day preference period. Materialmen’s and mechanics’ liens are statutory liens under Georgia law. *See* Ga. Code Ann. § 44-14-361. A trustee’s ability to avoid the fixing of a statutory lien is limited. *See* 11 U.S.C. §§ 545 and 547(c)(6). Pursuant to section 547(c)(6), transfers that constitute “the fixing of a statutory lien that is not avoidable under section 545” are not avoidable under section 547. Thus, in order for a trustee to avoid a transfer constituting the fixing of a statutory lien under section 547, the lien must fall within the provisions of section 545. Section 545 provides that:

[t]he trustee may avoid the fixing of a statutory lien on property of the debtor to the extent that such lien—

- (1) first becomes effective against the debtor–
 - (A) when a case under this title concerning debtor is commenced;
 - (B) when an insolvency proceeding other than under this title concerning the debtor is commenced;
 - (C) when a custodian is appointed or authorized to take or takes possession;
 - (D) when the debtor becomes insolvent;
 - (E) when the debtor’s financial condition fails to meet a specified standard; or
 - (F) at the time of an execution against property of the debtor levied at the instance of an entity other than the holder of such statutory lien;
- (2) is not perfected or enforceable at the time of the commencement of the case against a bona fide purchaser that purchases such property at the time of the commencement of the case, whether or not such a purchaser exists, except in any case in which a purchaser is a purchaser described in section 6323 of the Internal Revenue Code of 1986, or in any other similar provision of State or local law;
- (3) is for rent; or
- (4) is a lien of distress for rent.

11 U.S.C. § 545.

In this case, Plaintiff has not alleged that blu-john.com’s statutory lien falls within any of these provisions. Moreover, the facts alleged in the complaint suggest that blu-john.com’s lien may fall outside the purview of section 545. Notwithstanding the fact that the creditor bears the burden of establishing an affirmative defense to an otherwise avoidable preference under section 547(g) of the Bankruptcy Code, Plaintiff relieved blue-john.com of its burden here. By alleging that blue-john.com’s lien is a mechanics’ lien, Plaintiff established the lien’s nonavoidability under section 547(c)(6). Under the plain language of section 547(c), “the trustee *may not avoid* under this section a transfer– ... (6) that is the fixing of a statutory lien that is not avoidable under section 545 of this title.” 11 U.S.C. § 547(c) (emphasis added). Accordingly, Plaintiff may not avoid blue-john.com’s statutory lien under section 547. Thus, the complaint fails to state a claim for relief as to blu-john.com, making default judgment improper against this Defendant.

As to Aqua Coolers, the complaint states a claim for relief under section 362 of the Bankruptcy Code. Plaintiff alleges that Aqua Coolers recorded a writ of fieri facias in

connection with a prepetition judgment on April 10, 2006, 35 days *after* Debtors filed their petition. Immediately upon the filing of a bankruptcy petition, a stay is automatically created barring, among other acts, “any act to create, perfect, or enforce any lien against property of the estate.” 11 U.S.C. § 362(a)(4). Aqua Koolers did not obtain relief from the automatic stay and therefore violated the stay by recording its Fi Fa after the petition date, whether or not it was aware that Debtors filed bankruptcy at the time it recorded the Fi Fa. In the Eleventh Circuit, “[a]ctions taken in violation of the automatic stay are void and without effect.” *Borg-Warner Acceptance Corp. v. Hall*, 685 F.2d 1306, 1308 (11th Cir. 1982). Thus, any lien on the Henry County property belonging to this estate arising from recordation of Aqua Koolers’ Fi Fa on April 10, 2006 is void and of no effect.

Accordingly, it is

ORDERED that Plaintiff ’s motion for default judgment is GRANTED as to Covenant and Aqua Koolers and DENIED as to bluejohn.com.

Dated: October 30, 2006.


JAMES E. MASSEY
U.S. BANKRUPTCY JUDGE