

**United States Bankruptcy Court
Western District of Wisconsin**

Cite as: [Unpublished]

**Randi L. Osberg, Trustee, Plaintiff, v.
Lyman Lumber of Wisconsin, Inc., Defendant)**
(In re Wiley B. Syverson and Carmen L. Syverson, Debtors)
Bankruptcy Case No. 91-00606-7, Adv. Case. No. A92-1066-7

United States Bankruptcy Court
W.D. Wisconsin, Eau Claire Division

September 4, 1992

Randi L. Osberg, Chapter 7 Trustee.
Joseph R. Mirr, for the defendant.

Thomas S. Utschig, United States Bankruptcy Judge.

**MEMORANDUM OPINION, FINDINGS OF FACT,
AND CONCLUSIONS OF LAW**

This matter comes before the Court on an adversary proceeding filed by the chapter 7 trustee, Randi L. Osberg. The defendant is Lyman Lumber of Wisconsin, Inc. (Lyman) and it is represented by Joseph R. Mirr. The debtors are Wiley B. and Carmen L. Syverson. The relevant facts are as follows. Lyman obtained a judgment against Wiley and Carmen Syverson on December 19, 1990, in Chippewa County Circuit Court. This was docketed in Williams County, North Dakota on February 4, 1991. The debtors owned a one-half interest in a parcel of real estate in Williams County as of that date. Several weeks later, on February 25, 1991, the debtors filed a petition under chapter 7 of the Bankruptcy Code.

On August 9, 1991, the Court entered an order which provided that Lyman's lien on the North Dakota real estate was avoided to the extent of the debtors' allowed exemption in the property. The debtors claimed \$7,800 as exempt under 11 U.S.C. § 522(d)(5). The Court's order, entered pursuant to stipulation between the parties, avoided Lyman's lien to that extent. Lyman alleges that the trustee, by consenting to the entry of that order, thereby waived his right to claim that its lien was a preference. The trustee denies this allegation.

The North Dakota real estate was sold pursuant to an order of this Court on February 14, 1992. The proceeds from the sale were escrowed by the trustee. Lyman originally had filed a proof of claim as an unsecured creditor in the amount of \$18,835.60, representing the amount of its claim without interest against the debtors. Lyman later amended its proof of claim on April 13, 1992. In its amended claim, Lyman asserted it had a secured claim in the amount of \$18,835.60. The trustee asserts that Lyman is an unsecured creditor. He bases this assertion on his belief

that the creation of Lyman's lien on the North Dakota real estate on February 4, 1992, constitutes a preference pursuant to 11 U.S.C. § 547(b). As such, the trustee argues, the lien is voidable and therefore unsecured.

This matter therefore presents two issues for the Court's determination:

1) Whether the docketing of a judgment in North Dakota constitutes a "transfer" of property for purposes of 11 U.S.C. § 547(b) -- the preference provision of the Bankruptcy Code.

2) Whether the trustee waived his right to challenge Lyman's lien based upon a prior stipulation which resulted in a court order avoiding Lyman's lien to the extent it impaired the debtors' exemptions.

Addressing the preference issue, § 547(b) provides:

(b) Except as provided in subsection (c) of this section, 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 ninety 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.

See 11 U.S.C. § 547(b) (West 1992).

The defendant raises numerous arguments in support of its assertion that it was not the recipient of a preferential transfer. Both the defendant and the plaintiff do agree that, under North Dakota law, the docketing of a judgment is the relevant act which turns a judgment into a lien for ten years on any real property in the applicable county. Nevertheless, the defendant asserts that it did not receive anything through the docketing process; nothing was "transferred" to it for purposes of § 547(b). Lyman then appeals to logic through the use of several hypothetical fact scenarios to support its position. It next cites several cases for the proposition that a judgment creditor receives no estate or property interest through the docketing of its judgment - the creditor is merely given a remedy under the law. See Hinson v. Lexington State

Bank (*In re Hinson*), 20 B.R. 753 (Bankr. D. S.C. 1982); *Lattimore v. Walt's Tree Service (In re Lattimore)*, 12 B.R. 111 (Bankr. W.D. N.Y. 1981). Finally, Lyman argues that it would not necessarily receive more through the docketing of its lien than it would in a chapter 7 liquidation -- one of the requirements of § 547(b). It bases this assertion on its speculation that it might never execute on the property to force its sale.

The Court has considered the defendant's arguments as well as the trustee's response. The Court finds the defendant's position to be without merit and holds that, under the facts presented here, the docketing of the judgment in North Dakota does constitute a "transfer" for purposes of § 547(b).

A leading authority on bankruptcy has considered this exact issue in the context of defining "transfer" for purposes of § 547(b). It states that "[a]ny judicial proceeding that creates or fixes a lien upon the debtor's property will constitute a preference [provided the other elements of § 547(b) are met]." *See 4 Collier on Bankruptcy*, ¶ 547.03[1][A] at 547-19 (15th ed. 1992). It then goes on to note that the state law of the jurisdiction at issue needs to be examined to determine what "act" -- entry or docketing of the judgment, or issuance of execution -- actually creates the lien. In making this point the treatise states: "[m]ore commonly the judgment becomes a lien against real property when properly entered in a judgment docket or otherwise enrolled. Therefore, the date of entry or enrollment of the judgment is the focal point for the determination of whether the judgment is a preferential transfer." *See id.* at 547-20 - 547-21. As noted, the parties have agreed that under North Dakota law it is the docketing of a judgment which creates a lien. Lyman's judgment was docketed in Williams County, North Dakota, on February 4, 1991. That date is within 90 days of the debtors' petition date -- February 25, 1991.

Several other courts have considered this issue, moreover, and have likewise held that the docketing of a judgment constitutes a "transfer" for purposes of § 547(b). These cases applied state laws similar to the North Dakota law involved here -- laws which provide that the lien is created upon docketing. *See, e.g., In re Zimpel*, 106 B.R. 451, 452 (Bankr. E.D. Va. 1989); *In re Pouncey*, 59 B.R. 615, 617 (Bankr. M.D. Ala. 1986); *Wilmington Nursery Co., Inc. v. Burkert*, 36 B.R. 813, 816 (Bankr. E.D. N.C. 1984); *Campbell v. Council of Co-owners of Villas on the Fazio Horizontal Property Regime I (In re Bates)*, 35 B.R. 5, 6 (Bankr. D. S.C. 1983); *Jordan v. Borda (In re Jordan)*, 5 B.R. 59, 61 (Bankr. D. N.J. 1980).

Nor do the two cases cited by the defendant mandate a different result. Neither involved a preference action; thus the specific question at issue here was not addressed in either of them. The defendant has therefore cited no authority to support the proposition that the creation of a judicial lien does not constitute a "transfer" for purposes of § 547(b).

The result the Court reaches, furthermore, is consistent with the broad definition of "transfer" contained in 11 U.S.C. § 101(54). Under that provision, a "transfer" includes "[e]very mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property, or with an interest in property, including retention of title as a security interest and foreclosure of the debtor's equity of redemption." *See* 11 U.S.C. § 101(54) (West 1992).

Finally, the trustee correctly notes that once Lyman's judgment was docketed, no bona fide purchaser could acquire the property and avoid the effect of the judgment lien. The lien was thereby "perfected" for purposes of the Bankruptcy Code. *See* 11 U.S.C. § 547(e)(1) (West 1992).

On this basis, then, the Court finds that a "transfer" for purposes of § 547(b) did indeed occur on February 4, 1991 -- within 90 days of the debtors' filing date. The Court further finds that the other elements of § 547(b) have been met here. The aforementioned "transfer" was made for the benefit of Lyman on account of an antecedent debt. It was made within 90 days of the filing and was therefore made while the debtor was insolvent. See 11 U.S.C. § 547(f) (West 1992). Finally, the docketing enabled Lyman to receive more than it would have in a chapter 7 liquidation. As noted by the trustee in his reply brief, docketing its judgment gave Lyman a superior status as against other unsecured creditors as to the debtors' property in Williams County, North Dakota. If the "transfer" had not been made, Lyman would have shared equally in any distribution to all unsecured creditors.

Turning to the second issue, Lyman asserts that the trustee waived his right to challenge its lien when he signed the stipulation on August 6, 1991. The stipulation was between the debtors, Lyman and the trustee and provided that Lyman's lien was avoided only to the extent of the debtors' allowed exemption under 11 U.S.C. § 522. The Court approved this stipulation on August 9, 1991. Lyman cites the Wisconsin law of waiver and argues that it applies in this case.

The Court finds this argument of the defendant to be likewise without merit. The trustee correctly asserts that he did not raise the preference issue at the time of the debtors' motion to avoid Lyman's lien nor was he obligated to do so. The trustee also points out that he objected to the original draft of the stipulation because it specifically provided for payment of Lyman's lien. This language was therefore deleted in the revised order and stipulation. Finally, the trustee notes the practical utility of waiting until property is actually sold before addressing issues such as the one before the Court here. The trustee listed but a few of the many contingencies which can occur and render the sale of property impossible or unprofitable. Given these factors, the Court declines to hold that the trustee implicitly waived his right to challenge Lyman's claim by signing the aforementioned stipulation.

The Court therefore finds that the defendant's docketing of its judgment in North Dakota on February 4, 1991, constituted a "transfer" pursuant to § 547(b). The Court further finds that the other elements of a preference are also present here. Accordingly, the trustee may avoid the lien of Lyman and it will share in any ultimate distribution to unsecured creditors pursuant to the provisions of chapter 7 of the Bankruptcy Code.

This decision shall constitute findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052 and Rule 52 of the Federal Rules of Civil Procedure.