UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

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U.S. DISTRICT COURT
W.D.N.Y. - ROCHESTER

In re: Mark Scarpino,

Debtor.

96-CV-6281T

DECISION and ORDER

INTRODUCTION

Marine Midland Bank ("Marine Midland") appeals the May 24, 1996 Decision and Order of the Honorable John C. Ninfo, III, granting the debtor's Motion to Avoid Lien Pursuant to 11 U.S.C. § 522(f)(1). For the reasons set forth below, Judge Ninfo's decision is affirmed.

BACKGROUND

On December 11, 1990, Marine Midland was granted a judgment lien against Mark Scarpino ("Scarpino") in the amount of $16,378.56. The lien arose from Scarpino's failure to make payments on a loan acquired from Marine Midland. On October 27, 1995, Scarpino filed for bankruptcy pursuant to Chapter 7 of the Bankruptcy Code. He listed ownership of a residence at 226 Hinkleyville Road, Spencerport, New York, which he had purchased on December 29, 1994, subject to a mortgage in favor of Fleet Mortgage Group with an outstanding balance of approximately $86,061.60. On bankruptcy schedule C, he claimed a $10,000 homestead exemption pursuant to § 5206(a) of the New York State Civil Practice Law and Rules and on Schedule F he listed Marine Midland's lien as an unsecured non-priority claim.

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On January 4, 1996, Scarpino filed a motion to avoid lien, arguing that pursuant to § 522(f)(1) of the Bankruptcy Code, Marine Midland's lien should not attach to his interest in the Hinkleyville Road property. Scarpino's principal argument is that Marine Midland's lien impairs his ability to claim a homestead exemption on the property.

DISCUSSION

Section 522(f)(1) of the Bankruptcy Code provides, in pertinent part, that:

> Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is --
>
> (1) a judicial lien[.]

In Farrey v. Sanderfoot, 500 U.S. 291, 111 S. Ct. 1825 (1991), the Supreme Court held that a debtor may avoid a lien under § 522(f)(1) only if the lien attached to the debtor's property after the property was acquired. As the Court stated, "the critical inquiry remains whether the debtor ever possessed the interest to which the lien fixed, before it fixed" and that question is one of state law. Id. at 1830-31.

Judge Ninfo found that Marine Midland's judgment lien did not "fix" to the Hinckleyville property until after the property was acquired and, therefore, under § 522(f)(1) the lien was avoidable. He concluded, that under New York law, judgment liens such as Marine Midland's attach to property interests after

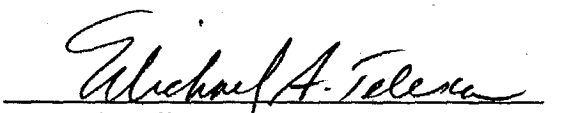
the property interest is acquired. In addressing the order in which pre-acquired liens attached to each other after the acquisition of a property interest by a debtor, the New York State Court of Appeals in Hulbert v. Hulbert, 216 N.Y. 430 (1916), stated:

> Pursuant to the settled rule . . . the three judgments referred to became liens on the after-acquired property of the judgment debtor at the time of its acquisition by the debtor. The liens of these three judgments, therefore, attached simultaneously to the interest of Hulbert upon his acquiring title to that interest on the death of his father.

Marine Midland misinterprets this language as holding that the judgment liens attached to the after-acquired property interest simultaneously with its creation. However, Hulbert addressed the issue of lien priority, not the question of precisely when the liens attached to the after-acquired property interest. Conceptually, there could be no attachment of the pre-existing lien until the property was first transferred to the debtor. Other New York cases support the conclusion that judgment liens attach to property interests only after acquisition of the property interest, and not simultaneously with the creation of the property interest. See, e.g., In re Hazard's Estate, 25 N.Y.S. 928, 930-31 (Sup. Ct. 1st Dept. 1893), aff'd, 141 N.Y. 586 (1894). Accordingly, Judge Ninfo's application of § 522(f)(1) was appropriate under the Supreme Court's decision in Farrey and his decision is affirmed for the reasons set forth above.

WHEREFORE, Judge Ninfo's May 24, 1996 Decision and Order granting the debtor's Motion to Avoid Lien Pursuant to 11 U.S.C. § 522(f)(1) is granted.

ALL OF THE ABOVE IS SO ORDERED.



MICHAEL A. TELESCA
United States District Judge

Dated: Rochester, New York
August 13, 1996