UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK
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In re

DARLENE M. WEBBER Case No. 93-13294 B

Debtor
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DARLENE M. WEBBER
Plaintiff

-vs-

CITIBANK (NYS) N.A.,
STEPHEN STRATTON, D.D.S.,
CHASE LINCOLN FIRST BANK,
FCC NATIONAL BANK, SUCCESSOR TO
FIRST NATIONAL BANK OF CHICAGO,
GENERAL ELECTRIC CREDIT CORP.,
CITIBANK (SD) N.A.,

Defendants
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MEMORANDUM AND ORDER

The question here in this Chapter 7 case is the extent to which the grant of a second mortgage to the first mortgagee affects the Debtor's § 522(f)(1) privilege to void intervening judgment liens. The second mortgage extended the mortgage term by 10 years (though this is not clear), raised the mortgage payments, and raised the total face amount of the mortgage.

As suggested in *Shultis v. Woodstock*, 594 N.Y.S.2d 890 (3rd Dept. 1993), merely extending the time to pay a first mortgage typically does not prejudice a junior lienor. (This is particularly true here where all pertinent events have occurred

well within the original 20-year term of the original mortgage.) What might prejudice the junior lienor are modifications that increase "the total amount of indebtedness placed prior to the subordinate lien." But in measuring that prejudice, one must focus upon expectations.

In the *Shultis* case, the junior mortgagee had consented to a previous modification by which the senior encumbrance was to be fixed at $345,972.64 plus interest at 11%. The subsequent modification, to which the junior lien did not consent, had the effect of increasing the senior lien by approximately $7200. To that extent the junior lien was granted priority over the senior lien, in the distribution of any proceeds after foreclosure.

Here, even if Citibank had done a title search before extending credit to the debtor, it would have had no right to expect a lien of less than $26,000 - the initial amount of the first mortgage - though it might have hoped for a lower balance. Forbearance, tax arrears and other causes, might result in no reduction of senior mortgage debt. But the modification raised the mortgage lien to $27,328.97 as of February 2, 1993, and (purportedly) $27,300.00 as of the date of the § 522(f) motion.

Were this a foreclosure proceeding, the Court might grant the first mortgagee a first lien to the extent of $26,000, Citibank a lien as to the next $1328.97,[1] then a lien to the first mortgagee

[1]More correctly, it is a "pool" of intervening judgment lienors to whom the $1328.97 "fund" would be awarded; Citibank is

as to its last $1300, then the balance of the Citibank judgment lien.[2]

That is the priority sequence which must not be upset by 11 U.S.C. § 522(f)(1) --the state law sequence of lien priorities -- when non-avoidable liens follow judgment liens.[3]

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seniormost among those claims.

[2]To the extent that the *Shultis* court cites *Empire Trust Co. v. Park-Lexington Corp.*, 276 N.Y.S. 586 (App. Div. 1st Dept. 1934) for the proposition that "courts have indicated an inclination," in some circumstances, to elevate the entire junior lien rather than to elevate only such portion thereof as was "prejudiced" by the modification, this Court disagrees. The Empire Trust case demonstrates no such inclination. The modification in that case violated provisions of the senior indenture (a lease) that expressly commanded that approval of the junior lienor (a leasehold mortgagee) be obtained as to the modifications in question. The Court found that a trial was necessary to determine whether the modification "was calculated to destroy the value of the [junior lien] and eventually extinguish all interest therein." In the case at Bar there is no suggestion that the modification violated any terms of the prior mortgage or lacked good faith in any regard. That it impaired Citibank to the extent of approximately $1300 was an indirect consequence of the modification, not the intendment of the modification. It should also be noted that if a modification that is prejudicial in part were to result in a priority for Citibank's entire judgment ($2702.00 plus costs and interest), rather than for only $1328.97 thereof, and if (consequently) the Debtor could not set aside the balance of the Citibank judgment lien, she would also lose the § 522(f)(1) privilege as to another $9000 of judgment liens taken by five other creditors subsequent to Citibank (NYS) N.A. and before the modification. It does not seem appropriate or logical to this Court that the Debtor's voluntary grant of an added $1328.97 lien after suffering the judgments should cost the Debtor the privilege of setting aside even one dollar of the intervening judgment liens.

[3]For example, see *In re Diliberto*, 150 B.R. 7 (Bankr. W.D.N.Y. 1993) where Judge Ninfo summarized the holdings of this District under § 522(f)(1).

By voluntarily transferring an added $1328.97 of her otherwise exempt equity after suffering the entry of judgments, the Debtor foreclosed herself from asserting that that amount was impaired by the judgment lien, rather than by the mortgage lien. The judgment will be preserved to that extent and to that extent the creditor must be paid as a secured creditor.[4]

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[4]That a grant of a $1328.97 lien might have a $2600-plus consequence is not intuitively obvious, and requires further brief elaboration. This consequence is well-known in sports, business, or other pursuit, as the "swing." The debtor here loses both the added lien she gave up, and the right to assert that lien against the judgment lienor. It works as follows. In order to establish the § 522(f)(1) privilege of avoiding judgment liens, the Debtor must establish that any equity to which the judgment has attached is "exempt" equity. Here the total debt to the mortgagee is asserted to be $27,300 and the property value is asserted to be $33,900. If the property value happened to be $37,300 (for the sake of argument) rather than $33,900, any § 522(f)(1) motion would seek to assert the existence of the $1300 lien to work an avoidance of an equal amount of judgment lien. (Subtracting the full $27,300 from the $37,300 value leaves the $10,000 maximum available homestead exemption.) If only $26,000 were voluntarily encumbered, there would be $1300 equity <u>over</u> exemption to support the judgment lien.

The voluntary grant of the added $1328.97 cost the debtor the right to assert that amount of encumbrance in bankruptcy, to achieve lien avoidance.

The Debtor lost not only what she gave up to the mortgagee, but also what she might have successfully asserted against the judgment lienor.

Such result should not turn on the happenstance that she paid the lien down by $28.97, nor on the happenstance that the value of her home is sufficiently less than $37,300 to assure that all of her "equity" is exempt.

(Similarly, no Judge of this Court had denied any Debtor's § 522(f)(1) lien avoidance motion when the value happens

The Citibank judgment shall be avoided only to the extent it exceeds $1328.97, and then only subject to 11 U.S.C. § 349. The subsequent judgment liens will be set aside subject also to 11 U.S.C. § 349. The Debtor's counsel shall submit a suitable order, on notice to Citibank's counsel.

SO ORDERED.

Dated: Buffalo, New York
January , 1994

/s/Michael J. Kaplan

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U.S.B.J.

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to be less than the mortgage liens, even though at that moment in time the debtor has no equity in the property to be "impaired.")