

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK

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In re:

Case No.: 1-03-12341 -dem

MICHELE H. HJORLEIFSSON
a/k/a MIKE HJORLEIFSSON and
DAWN HJORLEIFSSON,

Chapter 7

Debtors.
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DECISION AND ORDER

APPEARANCES:

John Riso, Esq.
Attorney for the Debtors
Borrell & Riso, L.L.P.
1500 Hylan Boulevard
Staten Island, New York 10305

Stuart L. Sanders, Esq.
Attorney for Alternative Data Technology, Inc.
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19 West 34th Street, Suite 905
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DENNIS E. MILTON
United States Bankruptcy Judge

In this chapter 7 proceeding, the debtors Michele and Dawn Hjorleifsson (the “debtors”) seek an Order avoiding six judgment liens filed against their residential real property located at 20215 79th Avenue, Spanaway, Washington (the “Property”) and thereafter granting the debtors permission to sell the property (the “Application”). As set forth more fully below, the Application is denied. Since a discharge voids a judgment only to the extent that such judgment is a determination of the personal liability of the debtor, and a judicial lien attached to property is a liability in rem, a judicial lien remains enforceable after a debtor’s discharge. The

judicial liens in this case are not avoidable pursuant to Section 522(f)(1) of the Bankruptcy Code (the “Code”), which allows a debtor to avoid a judicial lien “to the extent that such lien impairs an exemption to which the debtor would have been entitled[,]” 11 U.S.C. § 522(f)(1), because the debtors are not entitled to claim the homestead exemption on the Property.

JURISDICTION

This Court has subject matter jurisdiction over this controversy pursuant to 28 U.S.C. §§1334(b) and 157(b)(2) and the Eastern District of New York standing Order of reference dated August 28, 1986. This decision constitutes the Court’s findings of facts and conclusions of law to the extent Fed. R. Bank. P. 7052 requires.

FACTUAL BACKGROUND

In 2002 four creditors obtained six judgment liens on the Property from the Washington State Pierce County Superior Court. The judgment liens total \$796,372.78 in principal. On March 1, 2002, Horace Nelson obtained liens in the amounts of \$28,165.90 and \$26,000.00. On March 8, 2002, Lee Wise obtained a lien in the amount of \$22,140.96. On April 5, 2002, Global Funding LLC obtained a lien in the amount of \$88,646.54. On October 16, 2002, Alternative Data Technology, Inc. (“Alternative Data”), obtained a lien in the amount of \$600,447.52. On December 6, 2002, Horace Nelson obtained a lien in the amount of \$30,971.86 (collectively the six liens will be referred to as the “liens”). In addition, Professional Foreclosure Corporation of Washington as Trustee on behalf of Washington Mutual Bank holds a first mortgage on the Property in the amount of \$190,989.84.

On February 26, 2003 (the ‘Petition Date’), the debtors filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code. On June 17, 2003, the Court issued an Order discharging the debtors. More than two years later, on August 18, 2005, counsel for the debtors

filed the Application which sought to avoid the liens. In the Memorandum of Law in support of the Application, the debtors advanced two arguments. The debtors claimed the Court had the authority to reopen the debtors' case in order to consider an application to avoid judicial liens on the Property. Debtors' Memorandum Of Law In Support Of Motion To Avoid Liens And Sell Property (October 6, 2005) at 4. The debtors also claimed that the liens impaired their \$20,000 homestead exemption and were subject to avoidance pursuant to Code Section 522. Id. at 5-6.

On September 2, 2005, counsel for Alternative Data filed an Objection to the Application and on October 4, 2005, counsel for Alternative Data filed a Memorandum of Law in support of the Objection. Counsel for Alternative Data first argued that the debtors' discharge had rendered all the other judicial liens void, that those liens could not be included in the calculation for lien avoidance under Section 522 and that the Alternative Data judgment lien could not be avoided. They contended that even if the discharge voided the liens, its judgment lien was not voided since Alternative Data had filed an adversary proceeding regarding the dischargeability of its lien prior to issuance of the discharge. Objection at 4; Memorandum of Law at 2-3. Next, they claimed that its lien was not subject to avoidance under Code Section 522 because the debtors were not entitled to a homestead exemption with respect to the Property. Objection at 3 - 4.

After conducting hearings on September 7, 2005, October 6, 2005 and November 17, 2005, the Court took the matter under advisement and reserved decision.

ANALYSIS

Since A Judicial Lien On Real Property Remains Enforceable After A Discharge, The Liens Are Enforceable. The Liens May Be Avoided Under Code Section 522 But The Debtors Are Not Eligible To Claim A Homestead Exemption For The Property In Washington.

Counsel for the debtors has argued that the Court has the authority to issue an Order reopening the debtors' case and thereafter to determine an application to avoid the judicial liens on the Property¹. Debtors' Memorandum of Law at 4. In opposition, counsel for Alternative Data has argued that the debtors' discharge rendered all the judicial liens against the debtors other than its own void. Alternative Data Memorandum of Law at 2-3. Counsel for both parties have confused the extent of the discharge. A discharge voids only those judgments to the extent that such judgments are a determination of the "personal liability of the debtor." Wrenn v. Am. Cast Iron Pipe Co. (In re Wrenn), 40 F.3d 1162,1164 (11th Cir.1994); United States v. Alfano, 34 F. Supp.2d 827, 838 (E.D.N.Y.1999); 11 U.S.C. §524(a)(2). Since a judicial lien attached to property is a liability in rem, it remains enforceable after discharge. Id. See also, 4 Collier on Bankruptcy ¶524.02 [1] (Lawrence P. King ed., 15th ed. 2005); Dewsnup v. Timm, 502 U.S. 410, 418, 112 S. C. 773, 778, 116 L Ed.2d 903 (1992). Accordingly, all of the liens remain enforceable against the debtors.

Although they remain enforceable, the liens may be avoided pursuant to Section 522 of the Code. Section 522 allows a debtor to avoid a judicial lien "to the extent that such lien impairs an exemption to which the debtor would have been entitled." 11 U.S.C. 522(f)(1). A

¹ There is no need for a Court Order to reopen the case. Although the Court has issued an Order of Discharge, the case has remained open pending resolution of the adversary proceeding which Alternative Data commenced against the debtors.

debtor can avoid a particular judicial lien if, in order to satisfy it, he would have to use assets he is otherwise entitled to set aside from the bankruptcy estate as exemptions. Here, the debtors claimed that the liens impaired their \$20,000 homestead exemption and were subject to avoidance pursuant to Section 522.²

Even if the Court were to assume that the liens impaired the New York State homestead exemption, the homestead exemption for the Property is not available to the Debtors. The statute fixing the New York State homestead exemption states that the exemption applies to property “owned and occupied as a principal residence.” New York Civil Practice Law and Rules §5206(a). On their chapter 7 petition, the debtors listed their residence as 794 Sheldon Avenue, Staten Island, New York. In addition, Michele Hjorleifsson testified that in October 2001 he moved from Spanaway, Washington to New York and that in December 2002 his wife moved from Washington to New York. Transcript of Deposition of Michele Hjorleifsson (December 20, 2004) at 8-9. Michele Hjorleifsson also testified that the Property was rented to a school principal starting in February or March 2004. *Id.* at 10. Since the Property was not property “owned and occupied as [the debtors]’ principal residence” on the Petition Date, the debtors are not eligible to claim the homestead exemption for the Property and may not seek avoidance of the liens under Code Section 522 on the grounds that they impair their homestead exemption.

² Pursuant to Code Section 522(b)(1), New York State has “opted out” of the federal exemption scheme. *In Re Flatt*, 160 B.R. 497, 499 (N.D.N.Y. 1993)(citations omitted). When the debtors filed their chapter 7 petition, the New York State homestead exemption was \$10,000.00; joint debtors could aggregate the exemption up to \$20,000.00 in the equity of the homestead property. New York Civil Practice Law and Rules § 5206(a).

CONCLUSION

The application is denied in all respects. Since a discharge voids a judgment only to the extent that such judgment is a determination of the personal liability of the debtor and a judicial lien attached to property is a liability in rem, the liens remains enforceable after a debtor's discharge. In addition, although a debtor can avoid a particular judicial lien if, in order to satisfy it, he would have to use assets he is otherwise entitled to set aside from the bankruptcy estate as exemptions, the debtors in this case may not claim the homestead exemption for the Property because it was not owned and occupied as their principal residence when they filed their chapter 7 petition.

IT IS SO ORDERED.

Dated: Brooklyn, New York
February 15, 2006

s/Dennis E. Milton
DENNIS E. MILTON
United States Bankruptcy Judge

