

MAR 30 2007

NOT FOR PUBLICATION

**HAROLD S. MARENUS, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT**

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT**

In re:)	BAP No. NC-06-1254-BSKu
)	
MORLEY P. THOMPSON, SR.,)	Bk. No. 04-11142
)	
Debtor.)	Adv. No. 05-01075
_____)	
)	
ANDREA A. WIRUM,)	
Chapter 7 Trustee,)	
)	
Appellant,)	
)	
v.)	MEMORANDUM¹
)	
GREAT AMERICAN LIFE)	
INSURANCE CO., INC.,)	
)	
Appellee.)	
_____)	

Argued and Submitted on February 23, 2007
at San Francisco, California

Filed - March 30, 2007

Appeal from the United States Bankruptcy Court
for the Northern District of California

Honorable Alan Jaroslovsky, Bankruptcy Judge, Presiding

Before: BRANDT, SMITH and KURTZ,² Bankruptcy Judges.

¹ This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

² Hon. Frank L. Kurtz, United States Bankruptcy Judge for the Eastern District of Washington, sitting by designation.

1 Pre-petition, appellee Great American Life Insurance Company
2 ("GALIC") acquired a lien under Ohio law in debtor Morley P. Thompson's
3 right to withdraw annual payments as beneficiary of his deceased wife's
4 testamentary trust. Thompson filed a chapter 11³ petition, then filed an
5 adversary proceeding to determine the validity, priority, and extent of
6 GALIC's lien, and/or to avoid the lien. After conversion, the chapter
7 trustee substituted in as plaintiff, and moved for summary judgment.
8 GALIC cross-moved. Relying on the Ohio Court of Appeals' interpretation
9 of the trust provisions, the bankruptcy court ruled that GALIC's lien was
10 superior to the estate's interest, and dismissed the complaint.

11 We AFFIRM.

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I. FACTS

14 In November 2002 GALIC obtained a \$5.5 million judgment against
15 Thompson and the Patricia Smith Thompson Trust ("Trust") in the Hamilton
16 County, Ohio, Court of Common Pleas. Thereafter GALIC filed an action
17 in the same court against Thompson and the Trust seeking a creditor's
18 bill under Ohio Rev. Code § 2333.01.⁴ A creditor's bill enables a

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20 ³ Absent contrary indication, all "Code," chapter and section
21 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 prior to
22 its amendment by the Bankruptcy Abuse Prevention and Consumer
Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23, as the case from
which this appeal arises was filed before its effective date
(generally 17 October 2005).

23 All "Rule" references are to the Federal Rules of Bankruptcy
24 Procedure, and all "FRCP" references are to the Federal Rules of Civil
Procedure.

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⁴ Ohio Rev. Code § 2333.01 provides:

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27 When a judgment debtor does not have sufficient
28 personal or real property subject to levy on execution to
satisfy the judgment, any equitable interest which he has in
real estate as mortgagor, mortgagee, or otherwise, or any
interest he has in a banking, turnpike, bridge, or other
(continued...)

1 creditor to execute upon a debtor's equitable interests in satisfaction
2 of a judgment when there is insufficient real or personal property to
3 execute upon. In re Wiener, 276 B.R. 810, 812-13 (Bankr. N.D. Ohio
4 2001).

5 The Trust is an Ohio testamentary trust established by Thompson's
6 deceased wife which grants Thompson a right to annual withdrawals:

7 In any taxable year of the trust for federal income tax
8 purposes, my spouse shall have the right to withdraw from
9 principal, property not exceeding five thousand dollars
10 (\$5,000.00) in the aggregate, valued as of the date of the
11 receipt of the related instrument of withdrawal, and, if my
12 spouse shall be living on the last day of the year, to
13 withdraw property having a value on that day equal to an
14 amount, if any, by which five percent (5%) of the then market
15 value of the principal . . . exceeds the value of the property
16 previously withdrawn by my spouse for such year.

13 Trust, pages 5-6. It further provides that distributions of such
14 withdrawals, if requested, are to "be made within 30 days after the close
15 of the year," and that "[t]he right of withdrawal . . . shall not be
16 cumulative." Id. at 6.

17 In the creditor's bill proceeding, GALIC sought to attach and
18 execute on Thompson's right to withdraw. The state court entered a
19 creditor's bill judgment on 5 November 2003. The Trust appealed the
20 judgment to the Ohio Court of Appeals.

21 Thereafter, on 6 May 2004, Thompson filed for chapter 11 relief.
22 A stipulated order for relief from stay was entered 14 April 2005 to
23 allow the Ohio appeal to proceed; the judgment was affirmed 27 January
24

25 ⁴(...continued)

26 joint-stock company, or in a money contract, claim, or chose
27 in action, due or to become due to him, or in a judgment or
28 order, or money, goods, or effects which he has in the
possession of any person or body politic or corporate, shall
be subject to the payment of the judgment by action.

1 2006. Great American Life Insur. Co. v. Thompson Trust, 2006 WL 199751
2 (Ohio App. 1 Dist. Jan. 27, 2006) appeal not allowed, 109 Ohio St. 1496,
3 2006 - Ohio - 2762, 848 N.E. 2nd 858 (Jun. 7, 2006). The Ohio Court of
4 Appeals held that the assets subject to Thompson's demand were not
5 protected by the Trust's spendthrift provisions, id. at *2, and that
6 under Ohio law the creditor's bill had given GALIC a lien in the
7 distributions that was senior to any unsecured interest of the Trust
8 (Thompson was indebted to the Trust). Id. at *3. The court
9 characterized Thompson's power to withdraw money from the trust as the
10 equivalent of "money in the bank." Id. at *2. Thompson has continued
11 to exercise his right to withdraw from the trust during the pendency of
12 the bankruptcy.

13 Prior to the court of appeals' ruling, Thompson filed an adversary
14 proceeding to determine the nature and extent of GALIC's and the Trust's
15 interests in Thompson's right to withdraw. See Amended Complaint dated
16 29 July 2005. The complaint also sought avoidance of GALIC's lien under
17 § 544 as a secret lien, a preference, and a post-petition transfer. The
18 bankruptcy case was converted to chapter 7 on 8 February 2006, and the
19 chapter 7 trustee, Andrea A. Wirum, was substituted into the action as
20 plaintiff.

21 On 11 May 2006 the trustee moved for summary judgment determining
22 that GALIC's creditor's bill lien does not attach to any post-petition
23 withdrawals from the Trust, and declaring that the trustee may avoid
24 GALIC's lien under Ohio state law and § 544 as an unperfected, secret
25 lien. GALIC cross-moved for summary judgment dismissing the complaint.

26 The bankruptcy court granted GALIC's motion and denied the
27 trustee's, entering a written memorandum on 12 June 2006 and an order and
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1 judgment dismissing the adversary proceeding on 11 July 2006.⁵ The
2 trustee timely appealed.

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II. JURISDICTION

5 The bankruptcy court had jurisdiction via 28 U.S.C. § 1334 and
6 § 157(b)(1) and (b)(2)(A), (F), (K), and (O), and we do under 28 U.S.C.
7 § 158(c).

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III. ISSUE

10 Whether the bankruptcy court erred in granting GALIC's motion for
11 summary judgment and denying the trustee's.

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IV. STANDARD OF REVIEW

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⁵ The record reflects no explicit determination as to the remaining claims under §§ 547 and 549. The trustee has apparently abandoned them.

1 V. DISCUSSION

2 **A. Nature of GALIC's and the estate's interest in property**

3 This appeal turns on the nature of the property interest encumbered
4 by the creditor's bill lien, and the timing of attachment. "For a lien
5 to exist, both the property and the obligation must exist at the same
6 time." In re Baker, 217 B.R. 609, 613 (Bankr. N.D. Cal. 1998). If the
7 property interest is the right to withdraw funds, that right existed pre-
8 petition, and it would have come into the estate encumbered by the
9 creditor's bill lien. If, as the trustee contends, the property interest
10 is the withdrawn funds, which were withdrawn (came into existence) post-
11 petition, they are unencumbered by GALIC's lien. See In re Fuller, 134
12 B.R. 945, 947 (9th Cir. BAP 1992) (automatic stay prevents pre-petition
13 liens from attaching to property acquired post-petition).

14 Bankruptcy courts look to state law to determine legal or equitable
15 interests in property as of the petition date. In re Pettit, 217 F.3d
16 1072, 1078 (9th Cir. 2002) (citing Butner v. U.S., 440 U.S. 48, 54-55
17 (1979)). "State law controls the validity and effect of liens in the
18 bankruptcy context." In re Southern California Plastics, Inc., 165 F.3d
19 1243, 1247 (9th Cir. 1999) (citations omitted).

20 Under Ohio law, the filing of a complaint for a creditor's bill
21 automatically creates a lien on all the judgment debtor's equitable
22 assets. In re Weiner, 276 B.R. 810, 814 (Bankr. N.D. Ohio 2001); see
23 also Gaib v. Gaib, 14 Ohio App. 3d 97, 99, 470 N.E. 2d 189, 191 (1983).
24 In Weiner, a creditor filed a complaint in state court for a creditor's
25 bill seeking to attach insurance renewal commissions that were owed to
26 Weiner. Weiner's bankruptcy petition stayed adjudication of the
27 complaint. The trustee challenged the creditor's claim of a lien on the
28 commissions, predicated on an alleged procedural error in the complaint

1 (failure to allege that defendant lacked sufficient real or personal
2 property subject to levy to satisfy the judgment). The bankruptcy court
3 overruled the trustee's objection. Despite the omitted allegation and
4 the fact that the complaint had not been adjudicated, the bankruptcy
5 court held that the creditor held a valid lien against the debtor's
6 insurance renewal commissions. Id.

7 In other contexts, federal courts have held that a right to future
8 payments is a property right that is attachable. The "important
9 consideration is the breadth of control" that the recipient could have
10 over the property. Drye v. U.S., 528 U.S. 49, 61 (1999). For example,
11 federal tax liens have been held to attach to rights to receive pension
12 payments, In re Connor, 27 F.3d 365, 366 (9th Cir. 1994); distributions
13 from a spendthrift trust, In re Orr, 180 F.3d 656, 664 (5th Cir. 1999);
14 disability benefits, In re Stinnett, 321 B.R. 477, 484-85 (S.D. Ind.
15 2005), amended in part on rehearing, 2005 WL 928528, aff'd in part,
16 denied in part, 465 F.3d 309 (7th Cir. 2006); and social security
17 benefits, In re Anderson, 250 B.R. 707, 710-11 (Bankr. D. Mont. 2000).
18 On the other hand, a pre-petition wage garnishment arising out of a
19 judgment lien did not attach to post-petition earnings because those
20 earnings did not exist on the petition date. Baker, 217 B.R. at 610
21 (citing Local Loan Co. v. Hunt, 292 U.S. 234 (1934)).

22 In invalidating the Trust's spendthrift provision with respect to
23 the year-end distributions, the Ohio Court of Appeals characterized
24 Thompson's right to withdraw as follows:

25 Here, Thompson's power to withdraw \$5000 and five percent
26 of the trust corpus at the end of each year was unconditional.
27 He merely needed to be alive at the end of each year. Because
28 Thompson essentially had an "unfettered ability to possess and
own" trust assets, the assets subject to Thompson's demand
were not protected by the spendthrift provision and sheltered

1 from creditors. Here, the power to withdraw money from the
2 trust was akin "to having money in the bank."

3 Great American Life Ins. Co., 2006 WL 199751 at *2 (footnotes omitted).

4 Under Ohio law, then, the right to withdraw was a choate interest
5 to which the creditor's bill lien attached pre-petition. This conclusion
6 is consistent with both Weiner and the creditor's bill statute, which
7 provides for attachment of equitable interests only.

8 The trustee argues that Thompson's right to withdraw did not mature
9 until it was exercised. She contends the year-end withdrawals are not
10 unqualified because they are subject to two conditions: (1) debtor must
11 be alive on 31 December of the applicable year; and (2) the election to
12 withdraw must be made by 30 January of the subsequent year. The
13 trustee's articulation of the latter condition is not entirely accurate:
14 the trust instrument does not require election by 30 January, but
15 requires the trustee of the trust to complete distribution of the year-
16 end withdrawal no more than 30 days after the "close of the year." On
17 the other hand, the trust does provide that the right to withdraw is not
18 cumulative, implying that if a request is not made for a particular year,
19 the opportunity to do so will be lost. But these considerations do not
20 change the outcome. The choice of whether to make the withdrawal is
21 exclusively in Thompson's hands, thus, his property right was mature on
22 the petition date.

23 The trustee takes issue with the bankruptcy court's reliance on the
24 Ohio court's holding as a definitive statement of Ohio law. However, the
25 trustee has pointed out no contrary Ohio law.

26 In her reply brief, the trustee contends that GALIC is judicially
27 estopped from relying on the Ohio Court of Appeals' decision because it
28 previously represented to the bankruptcy court that lifting the stay to

1 allow the state court appeal to proceed would not prejudice the estate.
2 It is not self-evident how the estate is prejudiced by a creditor
3 obtaining what is essentially a declaration of its rights under state
4 law. Nor did the trustee explicitly address the judicial estoppel
5 argument in her opening brief; she has therefore waived it. In re Sedona
6 Inst., 220 B.R. 74, 76 (9th Cir. BAP 1998), aff'd, 21 Fed. Appx. 723 (9th
7 Cir. 2001). In any event, judicial estoppel does not apply. Judicial
8 estoppel is an equitable doctrine that precludes a party from asserting
9 one position, and then seeking an advantage by taking an inconsistent
10 position in a subsequent matter. Hamilton v. State Farm Fire & Cas. Co.,
11 270 F.3d 778, 782-83 (9th Cir. 2001). In the Ninth Circuit, application
12 of the doctrine is limited to situations where the court relied on the
13 earlier position. Id. at 783. Nothing in the record indicates that such
14 is the case here, nor does the trustee so argue.

15 The bankruptcy court did not err in ruling that GALIC's lien
16 attached pre-petition.

17 **B. Avoidability under Section 544**

18 Section 544 provides:

19 (a) The trustee shall have, as of the commencement of the
20 case, and without regard to any knowledge of the trustee or of
21 any creditor, the rights and powers of, or may avoid any
transfer of property of the debtor or any obligation incurred
by the debtor that is voidable by--

22 (1) a creditor that extends credit to the debtor at
23 the time of the commencement of the case, and that
24 obtains, at such time and with respect to such
25 credit, a judicial lien on all property on which a
creditor on a simple contract could have obtained
such a judicial lien, whether or not such a creditor
exists[.]

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27 This provision confers "strong-arm" powers on the trustee to avoid, among
28 others, unperfected and secret pre-petition liens. In re Commercial

1 Money Center, Inc., 350 B.R. 465, 474 (9th Cir. BAP 2006); In re Tleel,
2 79 B.R. 883, 887 (9th Cir. BAP 1987), aff'd, 876 F.2d 769 (9th Cir.
3 1989). The bankruptcy court properly rejected the trustee's arguments
4 that GALIC's lien was both unperfected and secret. Under Ohio law, the
5 lien arose upon filing of the creditor's bill complaint; the bankruptcy
6 court concluded that the lien was perfected upon entry of judgment in the
7 creditor's bill action and was thus not avoidable under § 544. See In
8 re Wind Power Systems, Inc., 841 F.2d 288, 292-93 (9th Cir. 1988)
9 (applying similar California law). Nor was it secret: GALIC's action
10 and judgment were matters of public record.

11 The trustee argued in the bankruptcy court that the lien was never
12 perfected because GALIC took no action beyond filing the creditor's bill
13 action and obtaining a judgment. But as GALIC pointed out, Ohio law
14 provides no mechanism for perfecting a creditor's bill lien. In similar
15 circumstances, the Ninth Circuit Court of Appeals has held in two cases,
16 applying California law, that certain liens were not subject to avoidance
17 by the trustee. See In re Hilde, 120 F.3d 950 (9th Cir. 1997)
18 (ORAP-order to appear-lien); In re Loretto Winery Ltd., 898 F.2d 715 (9th
19 Cir. 1990) (producer's lien). Although it is not clear that the lien was
20 "perfected" upon entry of the creditor's bill judgment (or that
21 perfection is required under Ohio law), the cited cases support the
22 conclusion that the lien is not avoidable under § 544(a). The bankruptcy
23 court did not err.

24

25

VI. CONCLUSION

26 The trustee has not shown that the bankruptcy court erred in ruling
27 that GALIC's lien attached pre-petition, or that the lien was not
28 avoidable under § 544. Accordingly, we AFFIRM.