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UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No.	CC-14-1569-KiTaKu
)		
RICHARD JAMES SWINTEK,)	Adv. No.	8:13-01106-TA
)		
Debtor.)	Bk. No.	8:10-22458-TA
)		
_____)		
)		
KAREN M. GOOD,)		
)		
Appellant,)		
)		
v.)		
)		
CHARLES W. DAFF, Chapter 7)		
Trustee,)		
)		
Appellee.)		
_____)		

O P I N I O N

Argued and Submitted on November 19, 2015,
at Pasadena, California

Filed - December 18, 2015

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

Honorable Theodor C. Albert, Bankruptcy Judge, Presiding

Appearances: Roya Rohani argued for appellant Karen M. Good;
Arjun Sivakumar of Brown Rudnick LLP argued for
appellee Charles W. Daff, Chapter 7 Trustee.

Before: KIRSCHER, TAYLOR and KURTZ, Bankruptcy Judges.

1 KIRSCHER, Bankruptcy Judge:
2

3 Appellant and judgment creditor Karen Good appeals an order
4 wherein the bankruptcy court determined that § 108(c)¹ did not
5 toll or extend the one-year expiration period for Good's lien
6 under CAL. CODE CIV. P. ("CCP") § 708.110(d). This precise question
7 of law is a matter of first impression before the Panel. We hold
8 that § 108(c) tolled the one-year expiration period imposed under
9 CCP § 708.110. Therefore, we VACATE AND REMAND.

10 **I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

11 **A. Prepetition events**

12 In 2001, two law firms obtained money judgments totaling
13 approximately \$300,000 against Richard J. Swintek, a former
14 certified public accountant, for unpaid legal fees. In 2009, Good
15 acquired the money judgments by assignment. She renewed the
16 judgments in 2010 and began collection efforts.

17 On June 30, 2010, the state court issued an Application and
18 Order for Appearance and Examination ("ORAP") to Swintek pursuant
19 to CCP § 708.110. Good claims she personally served Swintek with
20 the ORAP on that same date. Swintek was ordered to appear for
21 examination on August 19, 2010.

22 In July 2010, Good instructed the Orange County Sheriff to
23 levy upon several deposit accounts and certificates of deposit
24 held in the name of Swintek and/or his wife. The sheriff took
25 custody of approximately \$67,000.

26 _____
27 ¹ Unless specified otherwise, all chapter, code and rule
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

1 Swintek failed to appear for the ordered examination,
2 resulting in the state court continuing it until October 14 and
3 issuing a bench warrant for his arrest. Good claims she served
4 Swintek with the new notice.

5 **B. Postpetition events**

6 Swintek filed a chapter 7 bankruptcy case on September 2,
7 2010. He identified Good as a secured creditor with an execution
8 lien valued at \$2,900, and he identified her as an unsecured
9 creditor holding a claim for \$310,000 for "attorney's fees."
10 Notably, Good is Swintek's only creditor. Trustee Charles W. Daff
11 was appointed to Swintek's case.

12 Trustee eventually acquired the \$67,000 in levied funds.
13 Good claimed all rights to them in her filed proof of claim.
14 Thereafter, upon Swintek's motion under § 522(f), the bankruptcy
15 court avoided Good's execution lien to the extent it impaired
16 Swintek's allowed exemption of \$21,725. Trustee was to hold the
17 balance of the levied funds, \$45,274.79 plus any accrued interest.

18 **1. Good's first adversary complaint**

19 In 2013, Good filed an adversary complaint against Trustee
20 seeking a determination on the priority of her lien and
21 declaratory relief. Good alleged that upon serving Swintek with
22 the ORAP, she obtained a lien (the "ORAP Lien") on all of his
23 personal property assets for one year under CCP § 708.110. Good
24 alleged that all funds held by Trustee were subject to her ORAP
25 Lien, yet he was refusing to distribute them to her.

26 In his motion to dismiss, Trustee argued that Good's ORAP
27 Lien, issued on June 30, 2010, expired one year after the date of
28 the order; thus, any lien created by service of the ORAP expired

1 on June 30, 2011. Trustee contended the one-year durational
2 period in CCP § 708.110(d) was not extended or tolled by § 108(c),
3 citing In re Gbadebo, 431 B.R. 222, 226 n.4 (Bankr. N.D. Cal.
4 2010).

5 Rejecting the "dictum" in Gbadebo that § 108(c) did not apply
6 to ORAP liens and relying on Kipperman v. Proulx (In re Burns),
7 291 B.R. 846, 849 n.4 (9th Cir. BAP 2003), the bankruptcy court
8 ruled that § 108(c) applied to Good's ORAP Lien. Therefore,
9 because Good had stated a claim for declaratory relief, Trustee's
10 motion to dismiss was denied.

11 **2. Good's amended adversary complaint and the motions for**
12 **summary judgment**

13 Good filed an amended complaint against Trustee and the
14 parties filed multiple motions for summary judgment. Good
15 contended her ORAP Lien constituted an "enforcement" lien under
16 California law and remained stayed by § 362 until the levied funds
17 were no longer property of the estate. Because she was not
18 allowed to continue with her enforcement efforts once Swintek
19 filed bankruptcy, Good argued that § 108(c) tolled the one-year
20 enforcement period of her ORAP Lien, citing Miner Corp. v. Hunters
21 Run Ltd. P'ship (In re Hunters Run Ltd. P'ship), 875 F.2d 1425
22 (9th Cir. 1989), In re Burns, 291 B.R. at 849, and S. Cal. Bank v.
23 Zimmerman (In re Hilde), 120 F.3d 950 (9th Cir. 1997).

24 Trustee contended that Good's ORAP Lien expired by its own
25 terms on June 30, 2011, before her adversary complaint was filed,
26 and that § 108(c) did not toll the one-year period. Trustee
27 argued that § 108(c) did not apply to an ORAP lien because it is
28 created by service and does not involve a "commencement" or a

1 "continuation" of a civil action, as § 108(c) requires. In
2 support of his position, Trustee noted a recent case, Wolfe v.
3 Palladino (In re Harris), Adv. No. 8:13-01125 (Bankr. C.D. Cal.
4 Apr. 29, 2014), wherein the same bankruptcy court determined that
5 an ORAP lien is not a "commencement" or "continuation" of a civil
6 action, but rather is an "anomalous lien" arising after judgment
7 has been entered and an ORAP properly served; thus, § 108(c) did
8 not toll an ORAP lien's one-year expiration period.

9 In ruling for Trustee, the bankruptcy court acknowledged that
10 no appellate court within the Ninth Circuit has addressed the
11 issue of whether § 108(c) tolls the one-year expiration period of
12 an ORAP lien. A split in persuasive authority also exists among
13 bankruptcy courts. Ultimately, the bankruptcy court decided to
14 adopt its prior ruling in Harris: § 108(c) does not toll the one-
15 year expiration period of an ORAP lien. Accordingly, because Good
16 had not renewed her ORAP Lien prior to the expiration date in June
17 2011, it had expired. Therefore, she had no claim against the
18 levied funds; summary judgment for Trustee was appropriate.

19 Good timely appealed.

20 **II. JURISDICTION**

21 The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334
22 and 157(a)(2)(K). We have jurisdiction under 28 U.S.C. § 158.

23 **III. ISSUE**

24 Did the bankruptcy court err in determining that § 108(c) did
25 not toll the one-year expiration period for an ORAP lien under CCP
26 § 708.110(d)?

27 **IV. STANDARD OF REVIEW**

28 We review the bankruptcy court's legal conclusions, including

1 its interpretation of the Code, de novo. Sachan v. Huh (In re
2 Huh), 506 B.R. 257, 262 (9th Cir. BAP 2014)(en banc). Likewise,
3 we review the bankruptcy court's order granting summary judgment
4 de novo. Centre Ins. Co. v. SNTL Corp. (In re SNTL Corp.), 380
5 B.R. 204, 211 (9th Cir. BAP 2007).

6 V. DISCUSSION

7 Trustee disputes and Good contends she held a valid ORAP lien
8 against Swintek at the time he filed his bankruptcy case. This
9 contention may involve a factual matter the bankruptcy court will
10 have to determine on remand. If valid, then it is undisputed the
11 one-year expiration period under CCP § 708.110(d) had not yet run
12 when Swintek filed his bankruptcy case, just two months after Good
13 allegedly served him with the ORAP. Therefore, the question
14 before us is whether § 108(c) tolled the running of the one-year
15 durational period. We conclude it did.

16 A. CCP § 708.110 and 708.120

17 In 1982, California enacted a comprehensive Enforcement of
18 Judgments Law governing the enforcement of all civil judgments in
19 California. CCP § 680.010-709.030. It reflects the legislative
20 intent to allow judgment creditors a "'speedy and inexpensive
21 means . . . to obtain priority over other creditors" In
22 re Hilde, 120 F.3d at 954 (citation omitted)(emphasis in
23 original); In re Burns, 291 B.R. at 850.

24 Under CCP § 708.110, a judgment creditor may apply to the
25 court for an order requiring the judgment debtor to appear for an
26 examination "to aid [the creditor's] enforcement of the money
27 judgment." CCP § 708.110(a). Service of the ORAP on the judgment
28 debtor creates an enforceable lien on the debtor's personal

1 property. CCP § 708.110(d).²

2 An ORAP lien exists from the date the order to appear is
3 served and is effective for one year unless extended or sooner
4 terminated by the court. CCP § 708.110(d). In other words, an
5 ORAP lien will expire by its own terms if it is not renewed before
6 the expiration of one year. Service of the ORAP is all that is
7 required to create and establish the priority of the ORAP lien.
8 In re Hilde, 120 F.3d at 953; In re Burns, 291 B.R. at 850. An
9 ORAP lien is allowed to be a "secret" or "hidden" lien; it is not
10 recorded or published. "'Other creditors are able to discover the
11 lien only if they know about the creditor's judgment and review
12 the court file.'" Morgan Creek Prods. v. Franchise Pictures LLC
13 (In re Franchise Pictures LLC), 389 B.R. 131, 141 (Bankr. C.D.
14 Cal. 2008) (quoting Hon. Alan M. Ahart, Cal. Prac. Guide:
15 Enforcing Judgments & Debts § 6:1306 (The Rutter Group 2007)).
16 See In re Hilde, 120 F.3d at 956 (public policy issues trustee has
17 with an ORAP lien being a "secret" lien is something for the
18 California Legislature to solve).

19 **B. Section 108(c)**

20 Section 108(c) provides that "if applicable nonbankruptcy law
21 . . . fixes a period for commencing or continuing a civil action
22 in a court other than a bankruptcy court on a claim against the

23 ² Specifically, CCP § 708.110(d) provides:

24
25 The judgment creditor shall personally serve a copy of the
26 order on the judgment debtor not less than 10 days before the
27 date set for the examination. Service shall be made in the
28 manner specified in Section 415.10. Service of the order
creates a lien on the personal property of the judgment
debtor for a period of one year from the date of the order
unless extended or sooner terminated by the court.

1 debtor, . . . and such period has not expired before the date of
2 the filing of the petition, then such period does not expire until
3 . . . 30 days after notice of the termination or expiration of the
4 stay under section 362" The "applicable nonbankruptcy
5 law" at issue here is CCP § 708.110(d).

6 **C. The bankruptcy court erred in determining that the one-year
7 expiration period for an ORAP lien is not tolled by § 108(c).**

8 **1. Preliminary matters**

9 Before we begin our analysis, we make two preliminary
10 observations. We conclude that CCP § 708.110(d) is a statute of
11 duration as opposed to a statute of limitations. See Spirtos v.
12 Moreno (In re Spirtos), 221 F.3d 1079, 1080 (9th Cir. 2000)(ten-
13 year expiration period for renewing a judgment lien under CCP
14 § 683.110 is a statute of duration); In re Hunter's Run Ltd.
15 P'ship, 875 F.2d at 1426 (eight-month enforcement period in
16 Washington state mechanic's lien statute is a statute of
17 duration); see also Commission Comments to CCP § 708.110 which
18 states: "Subdivision (d) of Section 708.110 is amended to
19 prescribe a one-year **duration** for the lien created under this
20 section." (Emphasis added). Nonetheless, whether something is a
21 statute of limitations or a durational period matters not;
22 § 108(c) applies to either. In re Hunter's Run Ltd. P'ship, 875
23 F.2d at 1427; United States v. Valley Nat'l Bank (In re Decker),
24 199 B.R. 684, 688 (9th Cir. BAP 1996).

25 Second, the appeal is not moot based on Swintek's discharge.
26 Even though Swintek received a discharge in October 2012, which
27 effectively terminated the automatic stay as to him, the stay is
28 still in effect here because funds remain in the bankruptcy

1 estate, which Trustee has not abandoned. § 362(a)(3), (c)(1); In
2 re Spirtos, 221 F.3d at 1081 (so long as assets remain in the
3 estate the stay as to property of the estate remains in effect).

4 **2. The bankruptcy court cases addressing this issue are**
5 **split; the Ninth Circuit and BAP cases cited by the**
6 **parties do not resolve it.**

7 Two California bankruptcy courts have addressed the precise
8 issue before us, but unfortunately neither court provided an
9 extensive analysis. They also reached different conclusions. In
10 Franchise Pictures LLC, the creditor obtained an ORAP lien in
11 March 2004; the debtor filed its bankruptcy case in August 2004,
12 before the lien had expired. 389 B.R. at 137. The debtor argued
13 that the creditor's ORAP lien had expired in March 2005, while the
14 bankruptcy case was pending, and was therefore invalid. Id. at
15 140. The issue involved whether the one-year duration of the ORAP
16 lien was tolled or extended under § 108(c) in order to avoid the
17 March 2005 expiration. Id. In determining that § 108(c) tolled
18 the one-year period and that the ORAP lien was still in force, the
19 bankruptcy court noted:

20 This section generally applies "to time periods within
21 which a creditor must bring an action to enforce a lien
22 before the lien expires. It also applies to the time
23 period to renew a judgment to maintain its
24 enforceability." Collier on Bankr., ¶ 108.04[2] (Alan N.
25 Resnick & Henry J. Sommer, eds.-in-chief, 15th ed. rev.
26 2007)(footnotes omitted).³

27 Id.

28 The bankruptcy court in Gbadebo provided far less analysis on
the issue. There, a creditor had objected to the debtor's chapter
11 plan which classified the creditor's claim as unsecured. 431

³ The bankruptcy court also cited to In re Burns, supra,
which we discuss below.

1 B.R. at 225. The creditor argued he held a secured claim against
2 the debtor's personal property by virtue of an ORAP lien obtained
3 prior to the bankruptcy filing. Id. The bankruptcy court held
4 that the creditor's objection may have had merit when it was first
5 asserted, but the one-year ORAP lien had since expired. Id. at
6 226. To support its decision, the Gbadebo court stated in a
7 footnote: "The Court does not read 11 U.S.C. § 108 as extending
8 this period." Id. at 226 n.4.

9 Good argues that Burns and Hilde, while not addressing the
10 precise issue before us, have implicitly and necessarily held that
11 an ORAP lien is tolled by § 108(c). In Burns, the issue before
12 the Panel was whether service of an ORAP on the debtor only was
13 sufficient to create an ORAP lien in qui tam settlement monies
14 being held by the United States. 291 B.R. at 848-53. Tolling
15 under § 108(c) was not at issue on appeal, nor was it examined.
16 The only mention of tolling was in a footnote, where the Panel
17 stated: "The [bankruptcy] court also ruled that the one-year
18 duration of the ORAP Lien had been tolled by Burns' bankruptcy
19 filing, which occurred nine months after service of the ORAP."
20 Id. at 849 n.3. The Franchise Pictures LLC court relied upon the
21 Panel's statement in this footnote for its decision as well. 389
22 B.R. at 141. While one could view this as an "implicit" ruling by
23 the Panel that the tolling provision of § 108(c) applies to an
24 ORAP lien, we do not wish to speculate. We believe the Panel's
25 statement there was merely informational.

26 In Hilde, the issue was whether or not an ORAP lien requires
27 perfection. The Ninth Circuit, in reversing the Panel's decision,
28 held that it does not. 120 F.3d at 953-54. In the Panel's

1 reversed decision, the issue of tolling under § 108(c) was briefly
2 discussed in a footnote, which stated: "If the ORAP lien was
3 perfected, then its duration time would have been tolled by
4 § 108(c)" Zimmerman v. S. Cal. Bank (In re Hilde), 189
5 B.R. 776, 779 n.3 (9th Cir. BAP 1995), rev'd, 120 F.3d 950 (9th
6 Cir. 1997). However, the Panel conceded the lien's termination
7 was not at issue and it declined to raise the issue sua sponte.
8 Id. This footnote, which was not addressed by the Ninth Circuit,
9 appears to be only dicta. Moreover, the Ninth Circuit did not
10 discuss the issue of tolling, focusing entirely on the question of
11 perfection.

12 **3. Spirtos controls this issue.**

13 We conclude that Spirtos, a 2000 Ninth Circuit decision not
14 raised by the parties, resolves the issue before us. There, the
15 wife of the deceased debtor argued that the creditor's judgment
16 lien was void under the California statute of duration in CCP
17 § 683.020, which provides that a judgment lien becomes
18 unenforceable after ten years. 221 F.3d at 1080. The creditor
19 obtained the judgment in 1983, the debtor's bankruptcy case was
20 filed in 1987 and he received a discharge in 1996. Id. Thus, the
21 ten-year period to renew the judgment expired in 1993, after the
22 debtor filed for bankruptcy, but before he received his discharge.
23 Because the creditor failed to renew her judgment under CCP
24 § 683.110, the wife contended the claim should be disallowed. Id.

25 After reviewing the statutory language of § 108(c), the Ninth
26 Circuit held that the ten-year period during which the creditor
27 had to renew her judgment lien had not expired:

28 On its face, section 108(c) appears to cover our

1 situation. The California statute of duration is a
2 nonbankruptcy law that applies to the Moreno judgment.
3 The statute fixes a ten-year period during which Moreno
4 had to keep the judgment from expiring by filing for
renewal. Under section 108(c), then, the limitations
period does not expire until 30 days after the end of the
automatic stay.

5 Id. at 1080-81. See also Morton v. Nat'l Bank of N.Y.C. (In re
6 Morton), 866 F.2d 561, 566 (2d. Cir. 1989)(holding same regarding
7 ten-year duration period to renew judgment liens in New York).

8 The Sirtos court also rejected the wife's argument that the
9 creditor could not avail herself of § 108(c) unless she was barred
10 by the automatic stay from renewing her judgment. 221 F.3d at
11 1081. "It is the creditor's inability to enforce the judgment for
12 a portion of the ten-year period that keeps the period of duration
13 open under section 108(c)." Id.

14 Although Sirtos did not specifically address an ORAP lien
15 under CCP § 708.110, we believe its holding controls by analogy.
16 We too are faced with a state statute of duration that fixes a
17 certain time period during which a creditor's ORAP lien is
18 effective but after which it will expire if not renewed by the
19 court. Similar to a judgment lien, an ORAP lien is an "other
20 lien[] created by [the] enforcement process," which attaches to
21 the judgment debtor's personal property. See CCP Art. 5 of Part
22 2, Title 9 Enforcement of Judgments, Div. 2, Ch. 2; CCP § 697.910.
23 Whether Good was unable to renew her ORAP Lien because of the
24 automatic stay is of no consequence. In re Sirtos, 221 F.3d at
25 1081. The fact remains that she was prohibited from enforcing the
26 ORAP Lien attaching Swintek's nonexempt personal property which
27 became, and remains, property of the estate. See id.;
28 § 362(a)(4).

1 In reaching its decision, the bankruptcy court focused on the
2 phrase in § 108(c) "commencing or continuing a civil action."
3 Relying on a California Bankruptcy Journal article, the bankruptcy
4 court reasoned that an ORAP lien is neither a "commencement" nor a
5 "continuation" of a civil action, but rather is an "anomalous
6 lien" arising after a judgment has been entered and an ORAP
7 properly served. In the aforementioned article, the authors
8 opined:

9 [T]o find that 11 U.S.C. § 108(c) tolls the time a
10 judgment creditor has to renew an ORAP lien seems to
11 require that a mere request to "extend" (as expressly
12 stated in CCP § 708.110) the life of an ORAP lien be
13 deemed the equivalent to the "commencement" or
"continuation" of a civil action, an analogy which some
may find conceptually hard to swallow, particularly when
one considers that it is the **service** of the ORAP is what
creates the initial lien.

14 32 Cal. Bankr. J. 473, 476 (2013)(emphasis in original). Not
15 surprisingly, Trustee focuses on the same phrase in § 108(c) to
16 argue that it does not apply to an ORAP lien. We disagree.

17 The Spirtos court did not analyze whether renewing a judgment
18 lien under CCP § 683.110 was a "commencement" or a "continuation"
19 of a civil action; it merely opined that § 108(c) applied. The
20 words "commencing" or "continuing" are not defined in the Code.
21 Arguably, the Ninth Circuit must have considered such lien
22 renewals a "continuation" of a civil action. We see nothing
23 different here. Good held money judgments that were obtained
24 through civil actions in the California state court. She then
25 took the steps necessary to obtain the ORAP from that same court,
26 which gave her the right to examine Swintek about his assets
27 available to satisfy the judgments. She then, as she alleges,
28 properly served Swintek with the ORAP thereby creating the ORAP

1 Lien on his nonexempt personal property.

2 Trustee contends that because only service is needed to
3 create an ORAP lien, it is not a "commencement" or a
4 "continuation" of a civil action. Trustee overlooks the fact that
5 while an ORAP lien is created by proper service, obtaining an ORAP
6 itself is not just some random, unconnected act.

7 An ORAP is a means by which a judgment creditor can examine
8 the judgment debtor to discover property and apply it toward the
9 satisfaction of the original money judgment. Imperial Bank v. Pim
10 Elec., Inc., 33 Cal. App. 4th 540, 546-47 (1995). A judgment
11 debtor's examination is a "supplemental proceeding attendant to
12 the [original] case." United States v. Feldman, 324 F. Supp.2d
13 1112, 1117 (C.D. Cal. 2004). Even though the initial civil action
14 may be complete, an application for an ORAP is generally filed in
15 the same court where the original money judgment was entered. CCP
16 § 708.160(a). The order is docketed in the same civil action. We
17 fail to see how an ORAP and the attendant lien to enforce the
18 money judgment is not a "continuation" of the initial civil
19 action. See In re Lobherr, 282 B.R. 912, 916 (Bankr. C.D. Cal.
20 2002)(renewal of a judgment, which is a judicially noticed process
21 and not merely a procedural act, constitutes a "continuation" of a
22 proceeding as contemplated by § 362(a)(1) and violated the
23 automatic stay).

24 Moreover, although proper service is all that is necessary to
25 obtain an ORAP lien initially, court intervention is required to
26 extend it. A party generally files a noticed motion in the
27 initial civil action requesting the extension, which the judge
28 considers and grants or denies. See Bank of Montreal v. SK Foods,

