

In the United States Bankruptcy Court

for the Northern District of Iowa

Western Division

KEITH E. BIGGINS and
DONNA M. BIGGINS

Debtor(s).

Bankruptcy No. X92-01065S

Chapter 7

Contested No. 6104&6106

ORDER RE: MOTIONS TO AVOID LIENS and OBJECTION TO EXEMPTIONS

The matters before the court are two motions by Debtors to avoid the liens of Chris Miller Construction, Inc. (Contested #6106) and Kent Wenck, f/d/b/a Love Tire, Inc. (Contested #6104), and the objection of Kent Wenck to a claim of exemption. Hearing was held in Sioux City on August 25, 1992. The court now issues the following findings of fact and conclusions of law as required by Fed. R.Bankr. P. 7052. This is a core proceeding under 11 U.S.C. § 157(b) (2) (B) and (K).

Motion to Avoid Lien of Chris Miller Construction

In April and May 1991, Chris Miller Construction, Inc. (MILLER CONSTRUCTION) furnished materials and performed work under a contract with Debtors to make improvements on their home. The total amount owing for the work was more than \$11,000.00. Debtors disputed the number of hours Miller Construction charged on the project. Debtors made no payments on the amount owed Miller Construction. Miller Construction recorded a mechanic's lien on May 24, 1991 (Exhibit A). Debtors, on August 21, 1991, signed a confession of judgment for \$11,071.41 (Exhibit B). Miller Construction garnished Mr. Biggins' wages in December, 1991 and January, 1992. Debtors filed a Chapter 7 bankruptcy petition on June 2, 1992.

On June 29, 1992, Debtors filed a "Motion to Avoid Statutory Lien" pursuant to 11 U.S.C. § 522(f) to avoid the mechanic's lien of Miller Construction, which allegedly impairs Debtors' exemption in their homestead. Miller Construction resisted the motion, stating that a statutory lien may not be avoided under § 522(f). Debtors, in a reply brief and at the hearing, argued that the confession of judgment supplanted the mechanic's lien, thus making it an avoidable judicial lien.

The judgment became a lien on debtors' real property in the county where the judgment was entered. Iowa Code § 624.23-24. It is a "judicial lien" since it is a lien obtained by judgment. 11 U.S.C. § 101(36). The issue in this matter is whether a judgment taken after filing and recording a mechanic's lien has any effect on the mechanic's lien, a statutory lien that may not be avoided by a debtor under § 522 (f) .

The court has identified two theories under which Debtors might assert that the judgment lien has superseded the mechanic's lien. First, they may be arguing that by taking judgment against the Debtors, Miller Construction has waived its rights under the mechanic's lien. Second, Debtors may be alleging that Miller Construction has elected the remedy of executing on the judgment and is now estopped from relying on the mechanic's lien. Because of the nature of mechanics' liens and their treatment in the law, neither of these theories is effective to defeat Miller Construction's lien.

The general rule is that "a lien claimant may bring a personal action against the owner for the amount of the debt for which a lien is claimed as a cumulative remedy without waiving the right to the lien." Roseliep v. Herro, 239 N.W. 413,

415 (Wis. 1931), citing Southern Surety Co. v. York Tire Service, 227 N.W. 606 (Iowa 1929) (other citations omitted); *see also*, Annotation, "What Amounts to Waiver of Right to Mechanic's Lien", 65 A.L.R. 282, 313-15 (1930). The statutory rights of a mechanic's lienholder are in addition to the common law rights arising from the underlying contract. Meagher v. Quale, 77 N.W.2d 878, 880-81 (N.D. 1956); 53 Am. Jur.2d Mechanics' Liens, § 340 at 864-65; 57 C.J.S. Mechanics' Liens § 266 at 874-75. The pursuit of personal judgment against the owner and the foreclosure of the mechanic's lien are distinct actions. F. M. Sibley Lumber Co. v. Murphy, 220 N.W. 746, 747 (Mich. 1928) (in personam and in rem proceedings). They are not identical actions and each affords different types of relief. Meagher v. Quale, 77 N.W.2d 880, 882; Kenko, Inc. v. Lowry Hill Construction Co., 392 N.W.2d 18, 21 (Minn. 1986).

In Southern Surety, building contractors initially sued a tenant for an amount owed for improvements made on the property under a contract with the tenant. The contractors obtained judgment, but execution did not satisfy the judgment, and the tenant was in bankruptcy. Although the court ultimately found that the contractors did not have a contract with the owner, the court did conclude that the contractors did not waive their rights under the mechanic's lien by obtaining the previous judgment and executing on other property. Southern Surety, 227 N.W. 606, 607 (Iowa 1929).

Other courts also allow both personal judgment and foreclosure of a mechanic's lien as cumulative and concurrent remedies, even in simultaneous suits against the same defendant. In Meagher v. Quale, the owner sued the contractor, Meagher, for negligence in constructing an apartment building. Meagher counterclaimed for the amount due under the contract. While that action was still pending, Meagher brought a second action to foreclose the mechanic's lien. The court concluded that Meagher's statutory rights to enforce the mechanic's lien were cumulative and in addition to his common law rights under the contract; Meagher would still be entitled to bring suit to foreclose the lien even if the first suit had proceeded to judgment in his favor. "Neither is the lien waived or merged upon the obtaining of a judgment at law upon the debt. Until the lienor has realized upon said judgment or parted with the ownership thereof, it does not act to destroy his lien." Meagher v. Quale, 77 N.W.2d at 881, citing Erickson v. Russ, 129 N.W. 1025, 1026 (N.D. 1911).

In F. M. Sibley Lumber Co. v. Murphy, 220 N.W. 746 (Mich. 1928), a lumber company had supplied materials for building a house. The company brought an action to foreclose its mechanic's lien and named the owner and general contractor as defendants. The general contractor assigned its rights to the lumber company, which then also sued the owner in an action on the contract and began garnishment proceedings. The court noted many cases which applied the general rule that a mechanic's lien is a cumulative remedy the lien holder may pursue in addition to its ordinary contract remedies. Even though enforcement of the mechanic's lien would have been sufficient to satisfy the lumber company's entire claim, the court upheld its right to pursue the common law action and garnishment proceedings. The mechanic's lienholder may pursue all available remedies simultaneously until it obtains satisfaction for the debt. Roseliep v. Herro, 239 N.W. 413, 416 (Wis. 1931); and *see* Sibley Lumber, 220 N.W. at 747 (citation omitted).

A few courts follow the opposite rule and hold that failure to assert a lien in the suit for personal judgment is waiver of the lien. *See*, Roseliep v. Herro, 239 N.W. at 415 (citing other jurisdictions). A recent Kansas case held that failure to pursue both remedies in the same action is a violation of the rule against splitting causes of action, and the lien is waived. Home State Bank v. P. B. Hoidale Co., 718 P.2d 292 (Kan. 1986). In Hoidale, the contractor filed a mechanic's lien, then brought suit against the owner for the amount owing without seeking to foreclose the lien. The next month, the bank recorded three mortgages it had taken approximately a year earlier. The bank then brought an action to foreclose its mortgages. The court refused to allow foreclosure of the mechanic's lien as a counterclaim in the bank's action. The contractor had obtained judgment in its contract action before the bank's suit came to trial. The court held that the contractor lost its right to foreclose by not joining it with the action for personal judgment against the owner.

The Kansas approach is a minority view which is not followed in Iowa. *See* Southern Surety Co. v. York Tire Service, 227 N.W. 606 (Iowa 1929). The court in Hoidale cited no cases involving mechanics' liens, and relied heavily on a case applying a questionable interpretation of the cumulative remedies provision of § 9-501 of the Uniform Commercial Code (Iowa Code § 554.9501). Hoidale, 718 P.2d at 294-95, citing In re Wilson, 390 F.Supp. 1121 (D. Kan. 1975) (creditor who sued on note without foreclosing on collateral was treated as unsecured creditor in bankruptcy). This view of "cumulative" remedies, that all remedies not pursued simultaneously are lost, has since been rejected by the Kansas federal court and the Tenth Circuit. Bank of Oklahoma v. Fidelity State Bank & Trust Co., 623 F.Supp. 479, 484 (D. Kan. 1985). Further, Iowa's mechanic's lien law requires that no action be joined with an equity proceeding to foreclose the lien. Iowa Code § 527.26 (1992). The plaintiff may choose to pursue one remedy or the other or may file separate

petitions. Sweetser v. Harwick, 25 N.W. 744 (Iowa 1885).

Parties may waive a lien either expressly or by their actions; however, the facts must show an intention to waive a right before waiver will be implied. Roseliep v. Herro, 239 N.W. at 415. As the cases demonstrating the general rule of cumulative remedies show, taking a judgment and executing upon the judgment in themselves do not constitute a waiver. There is no evidence in our case that Miller Construction intended to waive its lien.

Neither is the confession of judgment an election of a remedy inconsistent with foreclosure of the lien so as to estop Miller Construction from asserting the right to foreclose. In Stroh Corp.v. K & S Development Corp., 247 N.W.2d 750 (Iowa 1976), Stroh, a construction subcontractor who did not receive payment, filed a mechanic's lien against the property. Stroh also brought an action against the general contractor; however, the judgment obtained in that proceeding was not collectible. Stroh then brought an action against the property owner to enforce the mechanic's lien. The court examined the doctrine of election of remedies and concluded that the prior judgment did not preclude an action to foreclose the mechanic's lien.

The doctrine of election of remedies applies where (1) two or more remedies exist, (2) the remedies are inconsistent, and (3) a party chooses one of the remedies. *Id.*, 247 N.W.2d at 753. Remedies are inconsistent when the facts underlying them are contradictory or their legal theories are repugnant to each other. Bolinger v. Kiburz, 270 N.W.2d 603, 606 (Iowa 1978). For example, the vendor under a contract for sale of real estate may not forfeit the contract and then sue for damages or specific performance, remedies that are based on affirmation of the contract. Abodeely v. Cavras, 221 N.W.2d 494, 498 (Iowa 1974). The doctrine is similar to application of the law of estoppel, but is to be construed narrowly so as not to trap a plaintiff for a mere mistake. Stroh, 247 N.W.2d at 753.

In our case, Miller Construction had a choice of remedies and chose first to obtain judgment on the amount owed on the contract. However, as in Stroh, the remaining element of the election doctrine, inconsistency of remedies, is not met. Foreclosing a mechanic's lien is not inconsistent with obtaining judgment. Enforcement of a mechanic's lien is cumulative and consistent with the other remedies which may be available to enforce the underlying contract. *Id.* (citations omitted).

The court notes that Debtors also argued in their motion and reply brief that under Iowa Code § 572.28, Miller Construction's lien is void. The issue was not addressed at the hearing. Section 572.28 is in the nature of a statute of limitations, and requires a contractor to bring suit to enforce a lien within 30 days of demand by the owner. Woodruff & Son v. Rhoton, 101 N.W.2d 720, 722 (Iowa 1960). The demand must give the contractor notice of the action necessary or the claim advanced. *Id.* Debtors allege that by signing the confession of judgment and not paying, they have made demand to foreclose the lien. The court concludes that this argument is without merit. Debtors' actions were not sufficient to constitute a demand for the purposes of Iowa Code § 572.28.

Therefore, Debtors' signing the confession of judgment had no effect on Miller Construction's mechanic's lien. The mechanic's lien is a statutory lien that is not avoidable by the debtors under § 522(f). Debtors' motion to avoid the lien of Miller Construction will be denied.

Motion to Avoid Lien of Kent Wenck and Objection to Exemptions

In April of 1992, Kent Wenck, f/d/b/a Love Tire, Inc., (WENCK) obtained judgment against Debtor Keith Biggins; in May, Wenck levied against four vehicles titled in Mr. Biggins' name. On June 26, 1992, Debtors filed an amended schedule of exempt property, listing three motor vehicles: a 1983 Thunderbird, a 1977 Pontiac and a 1955 Chevy pickup truck. The fourth vehicle, a 1975 Chevy pickup truck, had been sold for salvage. Debtors then moved the court for an order avoiding the judicial liens on all four vehicles under 11 U.S.C. § 522(f) (1) and, alternatively, as preferential transfers. Wenck resisted the motion to avoid liens and objected to the exemption of the 1955 Chevy truck.

Wenck first argues that § 522(f) (1) is not applicable because his levy did not create a "judicial lien." He argues that, under Iowa Administrative Code § 761-400.11(321), the sheriff's levy is a "security interest."

The Bankruptcy Code provides that a "judicial lien" is a charge against or interest in property to secure payment of a

debt "obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding." 11 U.S.C. § 101(36), (37). The Code defines a "security interest" as a "lien created by an agreement." 11 U.S.C. § 101(51). Therefore, under the Bankruptcy Code definitions, it is inconsistent to say that a levy is a security interest. The Administrative Code section cited by Wenck is meant to implement Iowa Code § 321.50, which in turn is intended to supplement the Uniform Commercial Code. Iowa Code § 321.50(5). However, for the purpose of lien avoidance under § 522(f), the definitions provided in the Bankruptcy Code will control. , "[F]ederal law determines the availability of a lien avoidance." Matter of Thompson, 750 F.2d 628, 630 (8th Cir. 1984).

Moreover, application of federal law is necessary to effect the purpose of the lien avoidance statute. The objective of § 522(f) is to protect the debtor's fresh start by permitting avoidance of certain liens on exempt property. H.R.Rep. No. 595, 95th Cong., 1st Sess. 362 (1977). However, lien avoidance is limited so as to maintain a balance between the rights of debtors and creditors. Thompson, 750 F.2d at 631. The limits on lien avoidance are provided by § 522(f) and the definitions in § 101. Section 522(f) (2) limits lien avoidance to non-possessory, non-purchase money security interests in certain types of property. Section 522(f) (1) is limited to avoidance of "judicial liens," which are defined in § 101(36) as various types of non-consensual liens.

The liens against the motor vehicles are "judicial liens" for the purpose of § 522(f) because they were acquired by levy. 11 U.S.C. § 101(36). Section 522(f) allows Debtors to avoid judicial liens which impair exemptions to which they would otherwise be entitled. Under certain circumstances, the debtors also may avoid transfers in order to preserve exemptions. See 11 U.S.C. § 522(g), (h). Therefore, Debtors' motion to avoid liens will be sustained only as to property properly declared exempt. Exemptions must be selected from property of the estate. 11 U.S.C. § 522(b).

There is no dispute regarding the truck sold for salvage. Debtors claim no interest in the 1975 Chevy truck. Wenck is not seeking to preserve his lien in that vehicle. There is also no serious dispute regarding the 1977 Pontiac and the 1983 Thunderbird. Debtors have properly claimed the two vehicles under Iowa Code § 627.6(9) (b), which allows each debtor one car as exempt property. The liens will be avoided as to these two vehicles.

The primary dispute in this case concerns the 1955 Chevy truck. Debtors state in their motion to avoid the lien that the property is "exempt due to ownership by another party." Debtors argue that, although title to the truck is in the name of Keith Biggins, the truck was a gift to their son and that he is the owner of the vehicle. In order to claim the 1955 Chevy truck exempt, Debtors must have an interest in the truck and must have an exemption recognized under Iowa exemption law. If the Debtors have no interest in the truck, they cannot claim it as exempt in their bankruptcy petition.

Ownership of motor vehicles in Iowa is established by certificate of title. Iowa Code § 321.45(2). The exceptions to this rule, enumerated in the statute, are not applicable here. Keith Biggins and his son may have agreed that the son has an interest in the truck. However, the court cannot recognize any such interest without the son's name on the title. Iowa Code § 321.45(2) (d). Legal title to the truck is in Keith Biggins. Moreover, he has retained that interest for his own benefit in obtaining more favorable insurance rates on the vehicle. His interest is property of the estate. Since Debtors have declared two other vehicles exempt, they cannot also claim the 1955 Chevy truck as exempt. Therefore, the judicial lien of Kent Wenck against the truck does not impair an exemption to which Debtors would otherwise be entitled. Debtors' motion to avoid this lien will be denied.

ORDER

IT IS ORDERED that Debtors' Motion to Avoid the Statutory Lien of Chris Miller Construction, Inc. is denied.

IT IS FURTHER ORDERED that Debtors' Motion to Avoid the Judicial Lien of Kent Wenck against the 1975 Chevy pickup truck and 1955 Chevy pickup truck is denied.

IT IS FURTHER ORDERED that Debtors' Motion to Avoid the Judicial Lien of Kent Wenck against the 1983 Ford Thunderbird and 1977 Pontiac is granted.

IT IS FURTHER ORDERED that Kent Wenck's objection to Exemption in the 1955 Chevy truck is sustained.

Judgment shall enter accordingly.

So ORDERED ON THIS 29th DAY OF SEPTEMBER, 1992.

William L. Edmonds
Bankruptcy Judge