

In the United States Bankruptcy Court

for the Northern District of Iowa

SUNBELT LODGING
ASSOCIATES INC.

Debtor(s).

Bankruptcy No. 92-13275

Chapter 11

JOHN J. CARELLA Trustee

Plaintiff(s)

Adversary No. 94-91049

vs.

TREASURER VILLAGE OF MENANDS;
RECEIVER OF TAXES AND
ASSESSMENTS TOWN OF COLONIE;
DIRECTOR OF FINANCES
COUNTY OF ALBANY; ONBANK &
TRUST CO.; and MENANDS UNION
FREE SCHOOL DISTRICT

Defendant(s)

MEMORANDUM DECISION

The plaintiff, a chapter 11 trustee, seeks declaratory and other relief. John J. Carella (TRUSTEE) seeks a determination that certain governmental units held no valid liens against real property sold by the trustee; that they hold no valid liens against the proceeds of sale; and that the buyer acquired the property from the trustee free and clear of the units' tax claims. To the extent that valid liens attached to the proceeds of sale, trustee seeks judgment against the mortgage holder based on an indemnity agreement.

The parties have stipulated to the material facts (docket no. 21A). They ask that the matter be determined as a motion for summary judgment. Oral argument was held September 26, 1994. Jonathan D. Deily, Esq. appeared for plaintiff John J. Carella; Peter J. Molinaro, Esq. appeared for the Treasurer of the Village of Menands and the Menands Union Free School District; William A. Nowak, Esq. appeared for the Receiver of Taxes and Assessments, Town of Colonie; and Gregory A. Rutnik, Esq. appeared for the Director of Finances, Albany County. No one appeared for Onbank & Trust Co. It has not responded to the complaint; it is in default.

I.

The facts are as follows, taken verbatim from the stipulation. Within the stipulation there are references to annexed exhibits (exhibits A through O). These are admitted into evidence.

A. GENERAL MATTERS

1. On July 31, 1992, the Debtor, Sunbelt Lodging Associates, Inc. (hereinafter "Debtor" or "Sunbelt") commenced a voluntary petition under Chapter 11 of Title 11, United States Code, in the U.S. Bankruptcy Court, Northern District of New York ("the Bankruptcy Court"). A copy of the Notice of Commencement of Case is annexed hereto as Exhibit "A".
2. At and prior to the commencement of the above-referenced bankruptcy case, Sunbelt was the owner, in fee, of a

- certain tract or parcel of land and the improvements thereon, located at 575 Broadway in the Village of Menands, County of Albany, State of New York, hereinafter referred to as the Property.
3. The Property is identified by Tax Map Number 44.19-1-8.20.
 4. From the commencement of the bankruptcy case and until the appointment of the Trustee, the Debtor continued in possession of the Property and operated thereon a business, a hotel/motel formerly known as the Ramada Inn (Menands).
 5. On March 1, 1993, the Bankruptcy Court, entered an order appointing John J. Carella as Trustee of the Debtor pursuant to 11 U.S.C. Section 1104, a true copy of which Order is annexed hereto as Exhibit "B".
 6. Between March 1, 1993 and February 4, 1994, the Trustee was in possession of the Property.
 7. On August 16, 1993, the Bankruptcy Court entered an Order Authorizing Sale of Property of the Estate, a true copy of which is annexed hereto as Exhibit "C".
 8. On February 3, 1994, the Bankruptcy Court entered an Order Amending Order Authorizing Sale of Property of the Estate, a true copy of which is annexed hereto as Exhibit "D".
 9. On February 4, 1994, the Trustee, pursuant to a Contract of Sale (a true copy of which is annexed hereto as Exhibit "E") conveyed the Property to Vesta Community Housing Development Board, Inc. ("Vesta") by delivery of a deed dated December 17, 1993, a true copy of which deed is annexed hereto as Exhibit "E".
 10. The Trustee disbursed the proceeds of the sale of the Property in accordance with a Closing Statement, a true copy of which is annexed hereto as Exhibit "G".

B. VILLAGE OF MENANDS

11. The Village of Menands is an incorporated Village of the State of New York.
12. The Village of Menands has the power and authority, among other things, to sue and be sued; to assess and levy real property taxes on real property located within its territorial jurisdiction; and to levy and assess water and sewer charges ("water rents") for service to property within its jurisdiction.
13. The Clerk/Treasurer, Village of Menands, is the official authorized to collect real property taxes and water rents assessed and levied by the Village of Menands.
14. The Property lies within the jurisdiction of the Village of Menands with respect to real property taxes and water rents.
15. The Village of Menands claims a lien upon the Property for the following unpaid real property taxes:
 - a. 1993-1994 Property Tax, for fiscal year June 1, 1993 to May 31, 1994, in the sum of \$10,718.50, due on or before July 1, 1993 plus interest and penalties thereafter, pursuant to Invoice Number 178, as reflected on Exhibit "H" annexed hereto.
16. The aforementioned real property tax claim of the Village of Menands had a tax status date of January 1, 1993 pursuant to Real Property Tax Law, Section 1400.
17. The Village of Menands further claims a lien upon the Property for the following unpaid water rents and sewer charges:
 - a. Water Rents for service to the Property for the period November 1, 1991 through April 30, 1992 in the sum of \$5,400.89, due on or before July 31, 1992, plus interest and penalties thereafter, pursuant to Invoice Number 188, annexed hereto as Exhibit "I". These charges represent water consumed and sewer use prior to the filing of the petition on July 31, 1992.
 - b. Water Rents for service to the Property for the period May 1, 1992 through October 31, 1992 in the sum of \$7,218.26, due on or before January 31, 1993, plus interest and penalties thereafter, pursuant to Invoice Number 1188, as reflected in Exhibit "J" annexed hereto. Some of these charges are for water consumed and sewer use prior to the filing of the petition on July 31, 1992.
 - c. Water Rents for service to the Property for the period November 1, 1992 through February 28, 1993 in the sum of \$4,825.23, due on or before July 31, 1993, plus interest and penalties thereafter, as reflected, in part, on Invoice Number 189 annexed hereto as Exhibit "K", the Trustee having heretofore paid a portion of the service period covering March 1, 1993 through April 30, 1993.
18. The Trustee is holding in escrow the sum of \$10,500.00 from the proceeds of sale of the Property subject to the adjudication of the claim for water rents described in subparagraphs (a) and (b) of the preceding paragraph 17.
19. As of July 31, 1994, the Village of Menands asserts a lien on the Property in the following amounts:
 - a. Real Property Tax

Original Amount of Tax \$10,718.50

Penalty	\$ 0.00
Interest	\$ 1,822.10
Total	\$12,540.60

b. Water Rents

i. Service 11/1/91 - 4/30/92

Original Amount	\$ 5,400.00
Penalty	\$ 0.00
Interest	\$ 1,350.01
Total	\$ 6,750.01

ii. Service 5/1/92 - 10/31/92

Original Amount	\$ 7,218.26
Penalty	\$ 0.00
Interest	\$ 1,371.42
Total	\$ 8,589.68

iii. Service 11/1/92 - 2/28/93

Original Amount	\$ 4,825.23
Penalty	\$ 0.00
Interest	\$ 627.25
Total	\$ 5,452.48

C. MENANDS UNION FREE SCHOOL DISTRICT

20. The Menands Union Free School District ("Menands School District") is an established school district of the State of New York.
21. The Menands School District has, among other things, the power and authority to sue and be sued; and to assess and levy school taxes on real property within its territorial jurisdiction. The Town of Colonie initially collects these taxes for the Menands School District.
22. The Property lies within the territorial jurisdiction of the Menands School District with respect to school taxes.
23. The Menands School District claimed or claims a lien upon the Property for the following unpaid school taxes:
 - a. 1993-1994 Menands School Tax for fiscal year July 1, 1993 to June 30, 1994, in the sum of \$32,650.46, payable without penalty on or before September 30, 1993, plus interest and penalties thereafter, pursuant to Bill No. 300164, a copy of which is annexed hereto as Exhibit "L".
24. The aforementioned school tax had a tax status date of March 1, 1993 pursuant to Real Property Tax Law, Sections 1302, subsection 3 and 302.
25. On November 1, 1993, the aforementioned unpaid school taxes due Menands School District were transferred to the County of Albany, Director of Finance and were relieved with the Town and County taxes due and payable January 31, 1994.
26. From and after November 1, 1993, the claim of a lien on the Property with respect to the aforementioned unpaid school taxes is asserted by the County of Albany.

D. TOWN OF COLONIE

27. The Town of Colonie is an established Town of the State of New York.
28. The Town of Colonie has the power and authority, among other things, to sue and be sued; and to collect certain real property and school taxes, as more particularly described hereinafter.
29. The Receiver of Taxes and Assessments, Town of Colonie, is the official authorized to collect said real property and school taxes.

30. By Warrant dated December 31, 1993, a copy of which is annexed hereto as Exhibit "M", the Receiver of Taxes and Assessments, Town of Colonie was directed and authorized to collect certain town taxes, county taxes, relieved school taxes and other taxes.
31. Included in said Warrant were the following taxes assessed and levied, or relieved, against the Property by the County of Albany:

a.		
	County Tax (Albany County), 1994	\$12,498.92
		b.
	Town Tax (Town of Colonie), 1994	\$ 9,133.49
		c.
	School Relevy (Menands School District) (originally payable 9/30/93)	\$34,935.99
		d.
	Surcharge	\$ 1.00
	Total	\$56,569.40

- e. The foregoing taxes were due and payable to the Receiver of Taxes and Assessments, Town of Colonie, by January 31, 1994 without penalty, and with penalty thereafter, until April 1, 1994, as reflected in Exhibit "N" annexed hereto.
- f. On or about April 8, 1994, the Receiver of Taxes, upon the expiration of the Warrant on April 1, 1994, returned to the County of Albany, the amounts collected pursuant thereto and an account of all taxes remaining unpaid and included in said Warrant.
- g. The aforementioned taxes on the Property were included in the return to the County of Albany, as reflected in Exhibit "O" annexed hereto.
- h. The claim of a lien on the Property with respect to the unpaid county tax and town tax, is and has always been asserted by the County of Albany, not by the Town of Colonie.
- i. The claim of a lien on the Property with respect to the unpaid school taxes is and has always been asserted either by the Menands School District or by the County of Albany, but not by the Town of Colonie.

E. COUNTY OF ALBANY

- j. The County of Albany is an established political subdivision of the State of New York.
- k. The County of Albany has the power and authority to sue and be sued; to assess and levy real property taxes on real property located within its territorial jurisdiction; and to acquire or assert a lien with respect to unpaid real property, school, and other taxes within its territorial jurisdiction.
- l. The Director of Finance, County of Albany, is the official authorized to collect said taxes.
- m. The Property lies within the territorial jurisdiction of the County of Albany.
- n. On or about November 1, 1993, the County of Albany acquired from the Menands School District the right to collect and to assert a lien with respect to the unpaid school taxes due on the Property for 1993-1994, reflected on Exhibit "L", plus accrued and accruing penalties and interest.
- o. On December 31, 1993, the County of Albany issued the Warrant to the Town of Colonie (Exhibit "M"), with respect to the town, county, and relieved school taxes described in paragraph 31 hereinabove.
- p. On or shortly after April 1, 1994, the Town of Colonie returned to the County of Albany the taxes described in paragraph 32 and in Exhibits "N" and "O".
- q. The County of Albany asserts a lien against the Property for the following taxes:
- | | | |
|----|---|-------------|
| a. | School Relevy (Menands School District) | |
| | Original Amount | \$32,650.46 |
| | Penalties through 1/31/94 | 2,285.53 |
| | Total | \$34,935.99 |
| b. | Town Tax (Town of Colonie) | |
| | Original Amount, due 1/31/94 | \$ 9,133.49 |
| c. | County Tax (County of Albany) | |
| | Original Amount, due 1/31/94 | \$12,498.92 |
| d. | | |

Surcharge Due 1/31/94	\$ 1.00
Total as of 1/31/94	\$56,569.40
e. Combined Town, County, School Relevy, Surcharge	
Original Amount Due 1/31/94	\$56,569.40
Penalty 2/1/94 to 7/31/94	\$ 2,828.47
Interest 2/1/94 to 7/31/94	\$ 3,563.88
Other charges 2/1/94 to 7/31/94	\$.50
Total Due (7/31/94)	\$62,962.25

II.

REAL ESTATE TAXES

The Town of Colonie contends that it is not a real party-in-interest in this proceeding as it has no claim against the debtor, the transferred real estate or its proceeds for the tax periods in question. The Town's collection rights and obligations as to its taxes and as to County and School District taxes have been transferred to the County of Albany. No party, including the plaintiff, objects to the dismissal of the complaint against the Town.

The tax claim for the Village of Menands relates to the fiscal year June 1, 1993, to May 31, 1994. The disputed taxes for the Menands Union Free School District relate to the fiscal year July 1, 1993, to June 30, 1994. The real estate taxes for the Town of Colonie and the County of Albany are for 1994. It is undisputed that for all tax years in question the tax status dates under New York law arose postpetition. The tax status date is the commencement of the taxing process; it is on that date that the taxing authority determines the exposure of the property to taxes and assesses the value of the property for taxing purposes. See Lincoln Savings Bank, FSB v. Suffolk County Treasurer (In re Parr Meadows Racing Association, Inc.), 880 F.2d 1540, 1546 (2nd Cir. 1989), *cert. denied* by Suffolk County Treasurer v. Barr, 493 U.S. 1058, 110 S.Ct. 869 (1990).

It is the tax status date which gives rise to a taxing authority's interest in the real estate of the debtor located within the authority's jurisdiction. Parr Meadows, 880 F.2d at 1546-47. For the tax years at issue, the taxing authorities had no interest in the debtor's real estate prior to the filing of the chapter 11 case on July 31, 1992. The tax claims are postpetition claims. Although the taxing authorities may assess the value of the property for the purpose of determining a postpetition claim against the estate (see 11 U.S.C. § 362(a)(6)), such assessment may not give rise to, or create, an interest in the estate's realty. The creation of such an interest and its perfection are stayed by 11 U.S.C. § 362(a)(4). The court takes judicial notice that none of the governmental defendants has obtained relief from the stay. Thus, for the tax periods at issue, none of the taxing authorities has obtained an interest in the estate's realty or a lien against it.

The chapter 11 trustee obtained a court order permitting sale of the property. Paragraph 3 of the court's August 1993 order stated:

The sale of the real property herein authorized and directed shall be free of any and all liens and encumbrances existing on the real property as of the time of conveyances, all such liens and encumbrances to attach to the proceeds of sale in the same order of priority as they occupied with respect to the real property.

(Stipulation of Facts, Exhibit C, Order Authorizing Sale of Property of the Estate, August 16, 1993.) At the time of the sale, the taxing authorities had no interests in the property, including liens; therefore, no interests of theirs attached to the proceeds of sale.

The outcome of this dispute is controlled by the Second Circuit's decision in Parr Meadows, 880 F.2d 1540. The exception to the stay enacted by Congress as part of the Bankruptcy Reform Act of 1994 to permit the creation or perfection of real estate tax liens for taxes coming due after the filing of the petition does not apply to this case. Bankruptcy Reform Act of 1994, P.L. No. 103-394, 108 Stat. 4106 (Oct. 22, 1994), § § 401 and 702(b). Defendants argue that 11 U.S.C. § § 362(b)(3) and 546(b) permit post-filing perfection of the government liens. This is directly

contrary to the holding of Parr Meadows. Defendants have urged the court not to apply that holding because it was incorrectly decided. I decline to ignore controlling precedent.

Although Parr Meadows did not consider § 959 and 960 of Title 28 of the United States Code, nothing in those statutes requires a different result in this proceeding. Section 959(a) permits trustees to be sued without leave of court "with respect to any of their acts or transgressions in carrying on business connected with . . . property" of the estate. Subsection (b) of § 959 requires trustees to "manage and operate the property in [their] possession . . . according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof." These are operational provisions. I do not construe them to displace the stay provisions of 11 U.S.C § 362 which protect property of the estate. Section 960 of Title 28 makes trustees in bankruptcy subject to state and local taxes. But nothing in it subjects estate property to the creation or perfection of a tax lien absent relief from the automatic stay, or exception from it.

Albany County argues that as there is no personal liability for real property taxes, they are unenforceable if not collected from the sales proceeds of estate realty. According to the County, the effect of this lack of personal liability is to "discharge" any taxes not paid out of sale proceeds. Also, the County contends that even if such taxes are unsecured or administrative claims against the estate, they are effectively discharged if the estate cannot pay them. The County says that either result is contrary to the spirit or the letter of 11 U.S.C. § 523(a)(1) relating to the dischargeability of real estate taxes.

The County's assertion that property owners are not personally liable for real estate taxes is contrary to New York Real Property Tax Law § 926(1), which indicates that owners who are residents of the city or town where the real estate is assessed, if the owners are correctly listed on the tax rolls, are personally liable for such taxes. There is insufficient evidence in this case to determine if debtor is personally liable. Assuming it is personally liable, the County's argument is not supported by the Bankruptcy Code. Section 727(b) provides that a discharge discharges the debtor from "debt." Section 523(a) lists the "debts" which are excepted from a discharge. If, as the County argues, there is no personal liability for real estate taxes, then the debtor owes no debt to the taxing authorities, and the exception for taxes described in § 523(a)(1)(A) is not relevant.

If the corporate debtor is personally obligated for the property taxes, then such debts would not be discharged in a chapter 7 case, nor would any others. 11 U.S.C. § 727(a)(1). But the inability of the creditor to collect a nondischargeable debt does not legally violate provisions of the Code on discharge. That a creditor may never recover on an undischarged claim is not grounds for permitting payment of the debt out of property against which the creditor has no lien.

Two notice issues have been raised. Counsel for the Menands Union Free School District, in oral argument, contended for the first time that the School District did not get notice of the trustee's proposed sale of the property. The trustee's counsel responded that he could not say that the School District got notice of the sale, but that even if it did not, it still was not prejudiced. Section 363(f) of the Code permits the trustee to sell property of the estate free and clear of interests if such interests are in bona fide dispute. Based on the holding of the Parr Meadows case, the district's lien was and is the subject of a bona fide dispute. The School District has had the opportunity in this proceeding to establish its lien against the proceeds of sale. School District's counsel has not informed the court on what ground it might have prevented the sale. In any event, failure to serve the School District with notice of the proposed sale might have resulted in the buyer taking subject to the School District's interest in the property. At the time of the sale, it had none.

Albany County says the notice of the motion to sell was defective in that it told parties that the sale would be "free and clear of all liens and claims by warranty deed, with lien covenant." (County's Reply Memorandum, point 1, quoting sale notice.) The County contends that implicit in such a statement is a common understanding that all liens would be satisfied upon transfer. Had it known that its "lien" would be abrogated, it would have objected to the sale. Because the automatic stay prevented the County's lien from attaching to the property, this argument is without merit.

The trustee asks the court to determine that the buyer of the property obtained title to it free and clear of the taxing authorities' claims for taxes for the fiscal years in question. The trustee is concerned that the defendants may argue that upon sale, the tax liens attached because the stay terminated when the real estate was no longer property of the estate.

Such a result would defeat the purpose of 11 U.S.C. § 363(f) which permits sales of estate property free and clear of interests. Those creditors holding valid interests, including liens, may be adequately protected by having their interests attach to the proceeds of sale. 11 U.S.C. § 363(e). If the defendants in this case had valid liens against the property prior to sale, they would have been limited to their interests in the proceeds of sale, and the buyer would have obtained the property free and clear of their interests. Application of the Parr Meadows decision leads to the conclusion that at sale, the taxing authorities had no interest in the property to secure the taxes in question. To conclude that after the sale, liens attach in favor of the taxing authorities to secure tax claims arising prior to sale, would place the buyer of the property in a worse position than it would have been in had the taxing authorities held valid interests at the time of sale. Such a result would undercut the ability of the trustee to make sales free and clear of interests under § 363. The defendants have not argued to the contrary. I conclude that Vesta Community Housing Development Board, Inc. acquired title to the debtor's property from the trustee free and clear of any claim of lien by any of the defendants for payment of the property taxes for the years in question, and that tax liens for such periods may not attach to the real estate upon its transfer to the purchaser.

WATER AND SEWER RENTS

The Village of Menands claims a lien against the proceeds of sale for unpaid water rents and sewer charges. Some of the charges were for water and sewer services provided prepetition for which the bill was payable on or before July 31, 1992, the date of bankruptcy. A second bill was for water and sewer services provided between May 1 and October 31, 1992, for which the bill was payable on or before January 31, 1993. A third bill was for services provided entirely after bankruptcy and for which the bill was payable on or before July 31, 1993.

The trustee contends that none of the water charges became a prepetition lien against the motel property. As authority for this proposition, he cites New York Village Law, § 11-1118, which in part states:

The board of water commissioners shall establish a scale of rents for use of water, to be called "water rents," and to be paid at such times and in such manner as the board may prescribe. . . . Such rents, together with the amount of any penalty prescribed by the board and due for non-payment of such rents within a time prescribed by the board, shall be a lien on the real property upon which or in connection with which the water is used, and such a lien is prior and superior to every other lien or claim, except the lien of an existing tax.

The trustee argues that this statute should be construed to provide that water rents become a lien against real property only as they become delinquent. He points out that at the time of the filing of the debtor's case, none of the water or sewer rents at issue was delinquent. He says that the automatic stay prevented the attachment of any lien for water or sewer rents, which became delinquent after the bankruptcy filing, citing 11 U.S.C. § 362(a)(4).

The Village responds that the water and sewer rents became a lien against the debtor's motel property as water was used. Even if that were not so, the Village argues that it obtained at least an interest in the debtor's property as water was used, so that even if the liens were not perfected until after the rents became delinquent, perfection would not be stayed. For the latter proposition, the Village would have the court apply 11 U.S.C. § § 362(b)(3) and 546(b) and the rationale of Parr Meadows, 880 F.2d 1540 (2nd Cir. 1989).

As to the dates on which the Village might have obtained a lien or perfection of a lien, there are several possibilities, including: the date of the first usage of water in a usage period; each time water is used; the last date of use in the usage period; the date the meter is read; the date the usage is converted to a charge; the date the bill for the charge is issued; the date the bill is sent; the date the bill is last due without penalty; and the date the bill becomes delinquent.

The foregoing relate to the practical business events involved in the supply and use of water. Other possibilities are provided by § 11-1118: the date the board of water commissioners certifies unpaid rents to the village clerk, and the date on which the clerk presents the certification to the Village Board of Trustees.

In arguing when the water rents become a lien, the trustee and the Village dispute the meaning of the following portion of the statute: "Such rents, together with the amount of any penalty prescribed by the board and due for nonpayment of such rents within a time prescribed by the board, shall be a lien on the real property upon which or in connection with

which the water is used. . . ." N.Y. Village Law § 11-1118. The Village maintains that the statute is clear that rents are due when water is used, and the lien arises at that time. The trustee argues for a construction of this language which depends on the sentence's first parenthetical phrase being part of the subject of the sentence. If this reading is correct, then one might conclude that only delinquent water rents attach as a lien against the property. I do not accept that this is the only or most reasonable reading. "Such rents" is the subject of the sentence. "Such rents . . . shall be a lien. . . ." The parenthetical phrase need not detract from the status of water rents as a lien. It provides merely that any penalty for delinquent rents is also a lien. The phrase "due for non-payment" describes the term "penalty." It does not modify "such rents" so as to mean that only rents past due shall be a lien. In short, one need not read the statute to mean that rents are not a lien until they become delinquent.

This court's task is to determine and give effect to the intent of the legislature in adopting the statute. Home Office Reference Laboratory, Inc. v. Axelrod, 127 Misc.2d 444, 445, 485 N.Y.S.2d 178, 180 (N.Y. Sup.Ct. 1984). The date on which the lien for water rents arises is not expressly stated. It may be that it was not a particular concern of the legislature. The intent of the statute is clear. Charges for water supplied to a property shall be a lien against the property superior to all other claimants, regardless of when the claims might arise. Claims subject to the lien for water rents would include the claim of a purchaser. The effect of the statute is that there can be no good faith purchaser who can claim priority over the lien. Thus, the legal nicety of exactly when the lien arises need not have concerned the legislature. Whenever it arises, no claimant can defeat it.

The reason for such a system is apparent. Water is a necessity to individuals and to commerce. Municipalities, such as here, often supply the need. The United States Supreme Court has described well the need for the service and for its payment:

A city without water would be a desolate place and if plaintiff's property was in such situation it would partake of the desolation. And as a supply of water is necessary it is only an ordinary and legal exertion of government to provide means for its compulsory compensation.

Dunbar v. City of New York, 251 U.S. 516, 518, 40 S.Ct. 250, 251. (1920).

If under New York law no one (other than the sovereign) can assert a claim to realty which has priority over the lien for water rents, the date the rents became a lien is not critical under state law. And that the water might have been supplied after the creation of the competing claim does not violate due process of law. See Provident Institution for Savings in Jersey City v. Mayor and Aldermen of Jersey City, 113 U.S. 506, 511, 5 S.Ct. 612, 613 (1885).

The significance of creation or perfection arises because of 11 U.S.C. § 362(a)(4) which stays any act to create, perfect or enforce a lien against property of the estate. The trustee contends that this section stayed the water rents from becoming a lien. The trustee has pointed to no act necessary to create or perfect the lien. The trustee argues that in the absence of the stay, the lien would have become a lien against the property when the water rents became delinquent. For such attachment to be stayed, the act creating or perfecting the lien would have to be the reading of the meter, the computation of the charges or the sending of the bill. I do not find that these are acts necessary to the creation of perfection of a lien for water rents. They are in a sense ministerial acts necessary for calculation of the debt, but the debt has already been incurred. At best, they are acts to collect or recover a claim. This is even a doubtful proposition. A internal Village determination of the amount owed is an unlikely violation of the stay. Sending the bill for prepetition water rents, as a collection effort, would be stayed by § 362(a)(6), but I do not find it is an act to create or perfect the Village's lien against the property.

Instead, I conclude water rents became a lien against the property as the water is used. Such a construction promotes the spirit and intent of the legislature, which would have the lien arise at the earliest possible time to preserve the priority which it intended. It would follow that anyone acquiring an interest in the property after the water is used takes the interest subject to the lien.

That is so in this case. The lien for prepetition water rents arose at the time of use. Such a lien would not be avoidable under 11 U.S.C. § 545(2) because under state law, it is enforceable against a bona fide purchaser. The Village's lien for prepetition rents attached to the proceeds of sale and must be paid from them.

The trustee must also pay postpetition water rents from the proceeds of sale. As the court concludes that there is no act necessary to create or perfect the lien, the lien exists also for the postpetition use of water by the debtor-in-possession or the trustee. Collection for postpetition use is not stayed. (See 11 U.S.C. § 362(a)(6) which stays collection of prepetition debts.) Nonetheless, the lien arises by statute at the time of postpetition use.

Sewer rents shall be treated in the same fashion. Section 452 of N.Y. General Municipal Law provides for such rents and states that they "shall constitute a lien upon the real property served by the sewer system or such part or parts thereof for which sewer rents shall have been established and imposed. The lien shall be prior and superior to every other lien or claim except the lien of an existing tax, assessment or other lawful charge imposed by or for the state or political subdivision or district thereof." N.Y. Gen. Mun. Law § 452(3).

The charges for sewer rents are for the same periods as the water rents and are charged in the same invoices. The court will infer from the invoices that the charges are based on water use, a charging system permissible under New York law. N.Y. Gen. Mun. Law § 451.

The court concludes that the Village's lien for sewer rents arose at the time of use of the system. The proceeds of sale are subject to the lien for rents incurred before and after the filing of bankruptcy.

For the period November 1, 1991 through April 30, 1992, the water and sewer charges are \$5,400.89. The court calculates the interest on such charges as \$108.02 for August 1992, and \$1,566.29 for the 29 months from September 1, 1992 to January 1, 1995. The total lien for the period covered by invoice number 188 is \$7,075.20.

For the period May 1, 1992 through October 31, 1992, the water and sewer charges are \$7,218.26. The court calculates the interest on these charges as \$144.37 for the month of February 1993, and \$1,660.14 for the 23 months from March 1, 1993 through January 1995. The total lien for the period covered by invoice number 1188 is \$9,022.77.

For the period November 1, 1992 through February 28, 1993, the water and sewer charges unpaid by the trustee are \$4,825.23. The interest for August 1993 is \$96.50. The interest for the period September 1, 1993 through January 1995 is \$820.25. The total lien for the period covered by invoice number 189 is \$5,741.98.

The Village's total lien against the proceeds for water and sewer charges is \$21,839.95. However, it is entitled to additional interest on the water and sewer rents, as provided by Village rate schedules, until the rents are fully paid. The trustee, pursuant to prior order of the court, possesses \$10,500.00 for the partial satisfaction of the lien. The trustee shall have judgment against Onbank & Trust Co. on his contract claim for indemnity. Bank shall be ordered to indemnify the trustee for any sum in excess of \$10,500.00 which is necessary to satisfy the Village's lien for water and sewer rents up to the amount paid to Onbank & Trust Co. by the trustee.

In accordance with this decision,

IT IS ORDERED that the complaint of John J. Carella, trustee, against Town of Colonie is DISMISSED.

IT IS DETERMINED THAT:

No lien of the Village of Menands for payment of real property taxes for the 1993-94 tax year affixed to the real property hereafter described on Exhibit A of this Order or to the proceeds of the sale of such property by trustee John J. Carella.

The property described in Exhibit A was subject to the Village of Menands' lien for water and sewer rents for the period November 1, 1991 to and including February 28, 1993, and such lien attached to the proceeds of the property's sale to Vesta Community Housing Development Board, Inc.

The sale of such real property by the trustee was free and clear of the interests of the Village for such real property taxes and water and sewer rents and purchaser Vesta Community Housing Development Board, Inc. acquired the property free and clear of the Village's claims for 1993-94 property taxes and for the water and sewer rents for the period of November 1, 1991 to and including February 28, 1993. A lien in favor of the Village for the 1993-94 property tax does

not and may not attach to the property upon its transfer to the purchaser.

The amount of the lien of the Village of Menands for such period as of the date of judgment is \$21,839.95.

IT IS DETERMINED THAT:

No lien of the Menands Union Free School District for payment of 1993-94 school taxes affixed to the real property hereafter described in Exhibit A or to the proceeds of the sale of such property by trustee John J. Carella.

The sale of such real property by the trustee was free and clear of the interests of the Menands Union Free School District for such school taxes, and purchaser Vesta Community Housing Development Board, Inc. acquired the property free and clear of the School District's claims for such taxes. A lien in favor of the School District for the 1993-94 school taxes does not and may not attach to the property upon its transfer to the purchaser.

IT IS DETERMINED THAT:

No lien of the County of Albany for payments of the following real estate taxes attached to the real property hereafter described in Exhibit A or to the proceeds of sale of the property by trustee John J. Carella: (1) 1993-94 school district taxes for the Menands Union Free School District; (2) 1994 real property taxes for the town of Colonie; and (3) 1994 real property taxes for the County of Albany.

The sale of such real property by the trustee was free and clear of the interests of the County of Albany for such taxes, and purchaser Vesta Community Housing Development Board, Inc. acquired the property free and clear of such interest. A lien in favor of the County of Albany for such taxes does not attach to the property upon its transfer to the purchaser.

IT IS ORDERED that the lien of the Village of Menands for the unpaid water and sewer rents shall be paid from the \$10,500.00 held in escrow by the trustee and from the remaining proceeds of sale. The Village's lien rights shall include penalties or interest accruing from the date of this judgment pursuant to the water and sewer rate schedules prescribed for the Village of Menands.

IT IS FURTHER ORDERED that Onbank & Trust Co. shall indemnify John J. Carella, trustee, for any sum in excess of \$10,500.00 which is necessary to satisfy the lien of the Village of Menands for water and sewer rents for the period of November 1, 1991 to and including February 28, 1993, up to the amount of the money paid to Onbank & Trust Co. from the proceeds of the sale of the property.

Judgment shall enter accordingly.

SO ORDERED ON THIS 17th DAY OF JANUARY, 1995.

William L. Edmonds
Chief Bankruptcy Judge

Sitting by Designation