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U.S. Bankruptcy Appellate Panel
of the Tenth Circuit
February 8, 2002
Barbara A. Schermerhorn
Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE PAULA JOANN LOWTHER, Debtor.	BAP No. WO-01-081
PAULA JOANN LOWTHER, Appellant, v. NEAL LOWTHER, Appellee.	Bankr. No. 00-10566 Chapter 7 ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court
for the Western District of Oklahoma

Before McFEELEY, Chief Judge, PUSATERI, and CLARK, Bankruptcy Judges.

CLARK, Bankruptcy Judge.

Neither of the parties requested oral argument, and after examining the briefs and appellate record, the Court has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. Bankr. P. 8012; 10th Cir. BAP L.R. 8012-1(a). The case is therefore ordered submitted without oral argument.

Paula Joann Lowther, the Chapter 7 debtor ("Debtor"), appeals a Memorandum Opinion and Order of the United States Bankruptcy Court for the

* This order and judgment has no precedential value and may not be cited, except for the purposes of establishing the doctrines of law of the case, res judicata, or collateral estoppel. 10th Cir. BAP L.R. 8010-2.

Western District of Oklahoma denying her "Amended Application for Issuance of Citation for Indirect Contempt for Violation of Debtor's Discharge." For the reasons set forth below, we AFFIRM.

I. Background

The Debtor was married to Neal Lowther ("Lowther"), and the couple owned a home. In 1997, Lowther filed a divorce petition, and a Decree of Divorce was later entered by the state court, awarding the Debtor the couple's marital home. The Debtor's interest in the home was subject to her obtaining refinancing of the home by no later than February 1, 2000 to pay Lowther the sum of $11,360. If she could not pay Lowther by that date, the state court ordered the house to be sold to satisfy the debt. The state court also ordered the Debtor to pay Lowther's attorney's fees incurred in conjunction with the couple's custody dispute.

In January 2000, the Debtor filed a Chapter 7 petition. At that time, she had not paid Lowther the amount owed for the home, or the court-ordered attorney's fees.

The Debtor listed her home as an asset in her bankruptcy schedules, stating that it was worth $66,000, and that BancOklahoma Mortgage Corporation had a claim secured by the home in the amount of $48,000. She claimed the home as exempt in the amount of $25,000, and that claimed exemption was not challenged. Lowther was not scheduled as a secured creditor. Rather, the Debtor scheduled him in her bankruptcy case as an unsecured creditor for the home-related debt and the attorney's fee-debt.

A reaffirmation agreement between the Debtor and BancOklahoma Mortgage Corporation was filed with the bankruptcy court. The Chapter 7 trustee did not liquidate the home, and the Debtor, having reaffirmed her mortgage debt, remained in possession of the home.

Lowther did not file a proof of claim in the Debtor's case. Neither Lowther nor the Debtor ever commenced an action to determine the dischargeability of the home-related debt under 11 U.S.C. § 523(a)(5) or (a)(15).[1] Neither the Debtor nor the Chapter 7 trustee ever sought to avoid Lowther's interest in the home.

The Debtor was granted a discharge in May 2000. Lowther later filed in the state court a Motion for Sale of Residence ("Sale Motion"), requesting an order "for the sale of the real property set forth in the Decree for the reason that the [Debtor] has not refinanced said property and paid [Lowther] his money." Sale Motion, *in* Appendix at 174. The Debtor responded to the Sale Motion, claiming that Lowther's claim had been discharged, and that the Motion was a violation of her discharge. The Debtor also filed in the bankruptcy court an "Application for Issuance of Citation for Indirect Contempt for Violation of Debtor's Discharge and Debtor's Application to Assess Sanctions for Violation of the Debtor's Discharge" ("Contempt Application"), asserting that the Sale Motion was filed in violation of her discharge.

Prior to the bankruptcy court's ruling on the Debtor's Contempt Application, the state court entered an order granting the Sale Motion ("Payment Order"), holding that the judicial lien on the home that it created in the Decree of Divorce was not dischargeable. Payment Order, *in* Appendix at 271. The Payment Order concludes: "The [Debtor] is granted until May 1, 2001 to pay the

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[1] Except as otherwise stated, all future statutory references are to title 11 of the United States Code.

Lowther timely filed an adversary proceeding against the Debtor, seeking a determination that debt for court-awarded attorney's fees and costs was nondischargeable under § 523(a)(5). At trial on Lowther's complaint, the bankruptcy court stated that it would not make any determinations as to the priority of Lowther's lien on the home or its dischargeability, stating that no formal request to except that debt from discharge had been made. It issued an order excepting the attorney's fee-debt from discharge, but this Court reversed. Lowther v. Lowther (In re Lowther), 266 B.R. 753 (10th Cir. BAP 2001). Lowther has appealed this Court's judgment to the Tenth Circuit, and that appeal is pending.

$11,360.00. In the event the $11,360.00 is not paid by that date, the realty shall be immediately listed for sale." Payment Order, *in* Appendix at 271.

After the state court issued the Payment Order, the Debtor amended the Contempt Application that she had filed in the bankruptcy court ("Amended Contempt Application"). In the Amended Contempt Application, the Debtor argued that not only was the Sale Motion filed in violation of her discharge, but that the state court's Payment Order was entered in violation of her discharge. Lowther responded to the Debtor's Amended Contempt Application.

At approximately the same time that she filed her Amended Contempt Application in the bankruptcy court, the Debtor also requested the state court to reconsider its Payment Order and for a stay of that Order. From the bench, the state court ruled that it would wait to see how the bankruptcy court decided the Amended Contempt Application prior to issuing any further orders. The effect of the state court's statements was to stay its Payment Order.

The bankruptcy court then issued a Memorandum Opinion and Order ("Order"), denying the Debtor's Amended Contempt Application. It held that the discharge injunction in § 524(a)(2) had not been violated because that section enjoins the collection of a "debt as a personal liability of the debtor," not a secured creditor's enforcement of an unavoided lien. Since Lowther's lien against the home was "not in serious doubt," his Sale Motion, seeking to enforce that lien, was not a violation of § 524(a)(2). Order, *in* Appendix at 315. The court noted that Lowther's unavoided lien was enforceable against the exempt home under § 522(c)(2), and that the lien was not avoidable by the Debtor under § 522(f), as interpreted in Farrey v. Sanderfoot, 500 U.S. 291 (1991). Finally, it rejected the Debtor's argument that the lien was void under § 502(d) due to Lowther's failure to file a proof of claim. The court concluded:

> The action initiated by [Lowther] in state court was merely an effort to enforce the lien which had been granted to him by the decree of divorce. It was the only method which was authorized by the decree for the enforcement of his lien. Clearly, [Lowther's] motion to sell the residence was not an attempt to enforce the personal liability of [the Debtor]; rather, its purpose was to cause [Lowther's] lien to be satisfied from the proceeds of the sale of the residence.
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> Therefore, the action undertaken by [Lowther] in state court is not a violation of the discharge injunction of § 524(a)(2).

Order, *in* Appendix at 318.

The Debtor timely appealed the bankruptcy court's final Order, and all parties have consented to this Court's appellate jurisdiction. *See* 28 U.S.C. §§ 158(a)(1) & (c)(1); Fed. R. Bankr. P. 8001(a) & 8002(a); 10th Cir. BAP L.R. 8001-1.

II. Discussion

The Debtor claims that the bankruptcy court erred in denying her Amended Contempt Application and refusing to find that Lowther had acted in violation of the discharge injunction. The bankruptcy court's findings of fact are not contested by the Debtor, as she only takes issue with its conclusions of law. Thus, we review this matter *de novo,* giving no deference to the bankruptcy court's Order. *See* Gledhill v. State Bank (In re Gledhill), 164 F.3d 1338, 1340 (10th Cir. 1999). In so doing, we conclude that the bankruptcy court did not err.

The Debtor received a discharge under § 727, which states:

> Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all *debts* that arose before the date of the order for relief under this chapter . . . whether or not a proof of claim based on any such debt . . . is filed . . . and whether or not a claim based on any such debt . . . is allowed . . . .

11 U.S.C. § 727(b) (emphasis added). Under the plain language of § 727(b), only prepetition "debts" are discharged in bankruptcy. A "debt" is defined by the Bankruptcy Code as a "liability on a claim," id. at § 101(12), and a "claim" is defined as "a right to payment[.]" Id. at § 101(5)(A). Liens, which are a "charge

against or interest in property to secure payment of a debt or performance of an obligation[,]" id. at § 101(37), are distinct from "debts," and under the express terms of § 727(b) are not subject to discharge. Based on these provisions, which recognize a lienholder's constitutionally-protected property rights, it is well-established that, unless a lien has been avoided, it survives bankruptcy, even if the debtor claims the property securing the lien exempt and the debtor's underlying personal liability to the lienholder, or the "debt," has been discharged under § 727. Id. at § 522(c)(2) (exempt property subject to liens that have not been avoided); Johnson v. Home State Bank, 501 U.S. 78 (1991) (creditor's right to foreclose on a lien survives bankruptcy notwithstanding the discharge of personal liability); Farrey, 500 U.S. at 297 ("Ordinarily, liens and other secured interests survive bankruptcy."). Lowther's lien, therefore, was unaffected by the Debtor's Chapter 7 discharge.

Not only was Lowther's lien unaffected by the Debtor's discharge under § 727, but Lowther's actions against the Debtor to enforce his lien on the home were not a violation of the injunction set forth in § 524(a)(2). That section states:

> (a) A discharge in a case under this title–
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> . . . .
>
> (2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any [discharged] debt as a personal liability of the debtor, whether or not discharge of such debt is waived . . . .

11 U.S.C. § 524(a)(2). By its express terms, this section enjoins only acts to collect a discharged "debt as a personal liability of the debtor . . . ." Id. It in no way pertains to liens, or to a secured creditor's *in rem* action against a debtor to collect from the property securing its lien. Chandler Bank v. Ray, 804 F.2d 577 (10th Cir. 1986) (per curiam) (*in rem* actions are not affected by discharge injunction, even if creditor did not participate in bankruptcy case); *see generally* Walker v. Wilde (In re Walker), 927 F.2d 1138, 1141-42 (10th Cir. 1991)

(discussing § 524(a)(2)).

The combined effect of a discharge under § 727 and the injunction set forth in § 524(a)(2) is to bar actions against a debtor *in personam* for liability on a discharged debt secured by a lien, but to leave actions against the debtor to collect from the property securing the lien *in rem* unaffected. Johnson, 501 U.S. at 84; Chandler, 804 F.2d at 579; *see generally* Landsing Diversified Prop.-II v. First Nat'l Bank & Trust Co. (In re Western Real Estate Fund, Inc.), 922 F.2d 592, 600 (10th Cir. 1990) (per curiam) ("'What is important to keep in mind is that a discharge in bankruptcy does not extinguish the debt itself but merely releases the debtor from personal liability . . . .'") (quoting *In re Lembke*, 93 B.R. 701, 702 (Bankr. D. N.D. 1988)), *modified in part on other grounds by* Abel v. West, 932 F.2d 898 (10th Cir. 1991). As stated in Johnson:

> The Court of Appeals thus erred in concluding that the discharge of petitioner's *personal liability* on his promissory notes constituted the complete termination of the Bank's *claim* against petitioner. Rather, a bankruptcy discharge extinguishes only one mode of enforcing a claim–namely, an action against the debtor *in personam*–while leaving intact another–namely, an action against the debtor *in rem*.

501 U.S. at 84 (emphasis in original).

Lowther's Sale Motion sought an order of the state court requiring the Debtor to sell the home securing his lien to satisfy his claim. By merely seeking to enforce his lien against the home, Lowther did not, as the bankruptcy court correctly held, violate § 524(a)(2) and, therefore, the bankruptcy court is affirmed.

The Debtor argues that Lowther does not have a lien on the home and, therefore, the Sale Motion was not an *in rem* action, but rather one to collect his discharged debt from the Debtor personally in violation of § 524(a)(2). She makes five arguments to support her contention of no lien, all of which are without merit.

First, the Debtor claims that Lowther's lien should not be given effect inasmuch as it is unperfected under Oklahoma law. This argument fails because a lien exists despite any alleged failure of perfection. In particular, in Oklahoma, a divorce court may *create* an equitable lien by declaration, specifically stating in a divorce decree that a lien exists in real property to satisfy a property division debt in the event that the debtor-spouse fails to pay a sum certain by some future date. Okla. Stat. Ann. tit. 43, § 134(A); First Community Bank v. Hodges, 907 P.2d 1047 (Okla. 1995).[2] Such an equitable lien is "analogous to a real estate mortgage lien which secures a specific parcel of real property for the payment of a sum of money, due on a certain date." Id. at 1052 (footnote omitted). The *perfection* of such a lien occurs when the judgment creditor files the divorce decree that created it in the county where the property is located. Id. at 1053. Perfection of a lien does not have any bearing on the existence of the lien, but rather serves to notify third parties that a lien on property exists. Such notice is necessary to secure the lienholder's priority over other creditors with

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[2] Okla. Stat. Ann. tit. 43, § 134(A) states that:

> An order for the payment of money pursuant to a divorce decree, whether designated as support or designated as pertaining to a division of property shall not be a lien against the real property of the person ordered to make such payments unless the court order *specifically provides* for a lien on the real property.

Recognizing this statute, the Oklahoma Supreme Court in Hodges stated that: "No lien is created in a divorce decree unless the court specifically creates one." 907 P.2d at 1052.

If a lien is not specifically created in a divorce decree under § 134(A), a former spouse owed money under a divorce decree may, once the money is due and owing under the terms of a divorce decree, obtain a lien against the debtor-spouse's property by filing a "Statement of Judgment" in "the office of the county clerk . . . ." Okla. Stat. Ann. tit. 12, § 706(B); *see* id. at § 706(A) (this section applies to judgments that award the payment of money, and under subsection (B), a lien is created by the filing of a Statement of Judgment); *see also* Hodges, 907 P.2d at 1047, 1051-52 (a creditor-spouse need not file a Statement of Judgment as required under § 706, the general money judgment statute, if the divorce decree creates a lien under § 134(A)).

subsequently-created interests in the same property. As acknowledged in Hodges, "[t]he purpose of statutes which govern the filing of liens and their perfection is to protect third parties who act in good faith and without notice." Id.; *see generally* Parker v. Elkins Welding & Const., Inc. (In re Elkins Welding & Const., Inc.), 258 B.R. 216, 220 (10th Cir. BAP 2001) (recognizing that attachment and perfection under the Uniform Commercial Code are "distinct concepts," and that perfection relates to third-party notice issues).

The Debtor did not contest that the Decree of Divorce *created* a lien before the bankruptcy court, and she has admitted in her pleadings before us that a lien exists, stating Lowther was "granted a money judgment of $11,360.00, which was secured by a lien, which attached . . . ." Appellant's Brief at 9. Rather, the Debtor maintains that Lowther's lien against the home is not *perfected*. Even assuming that this is true, Lowther's failure to perfect his lien does not invalidate the state court's creation of the lien. Since the Debtor admits that a lien against the home exists and that lien was not avoided, Lowther may enforce the lien against the home without violating § 524(a)(2).[3]

Second, the Debtor argues that Lowther's lien should be disregarded and he should be treated as an unsecured creditor, because he did not object to her scheduling him as an unsecured creditor and he did not file a proof of claim in her case asserting a secured claim. The fact that Lowther did not participate in the Debtor's case, however, does not strip him of his uncontested, unavoided lien. The Chapter 7 Debtor's schedules, and her characterization of claims therein, do not govern the allowance of claims or the validity of liens. *See* 11 U.S.C. § 502

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[3] The Debtor argues that although there has never been a judgment entered avoiding Lowther's lien under § 544, the bankruptcy court should have considered the fact that the lien is allegedly avoidable under that section. We do not agree. The bankruptcy court correctly ruled that until a judgment avoiding the lien was entered, it was required to recognize Lowther's interest in the home. Indeed, avoidance of a lien under § 544 requires the filing of an adversary proceeding within the time limits imposed under § 546(a). *See* Fed. R. Bankr. P. 7001(2).

(allowance of claim in bankruptcy is governed based on proofs of claim filed under § 501); Fed. R. Bankr. P. 3003 (schedules constitute prima facie evidence of the validity and amount of certain claims only in cases filed under Chapters 9 and 11); id. at 7001(2) (contest related to the existence of a lien must be made by adversary proceeding). Furthermore, it is well-established that secured creditors are not required to file a proof of claim against a debtor, and that liens will not be void under § 506(d) due solely to the fact that a proof of claim has not been filed. 11 U.S.C. § 506(d)(2); Fed. R. Bankr. P. 3002(a) (only unsecured creditors and equity security holders are required file a proof of claim or interest for the claim or interest to be allowed) & Advisory Committee Note ("A secured claim need not be filed . . . ."); *see* In re Babbin, 160 B.R. 848, 849 (D. Colo. 1993) (recognizing no need to file proof of claim). The consequence of a secured creditor's failure to file a proof of claim is to bar it from participating in a distribution of estate assets on any unsecured portion of its claim. Lowther's failure to participate in the Debtor's Chapter 7 case, therefore, in no way affected the validity and effectiveness of his lien outside of the case.

Third, the Debtor maintains that statements made by Lowther's attorney at a hearing before the bankruptcy court on the dischargeability of the attorney-fee-debt voided any interest that Lowther has in the home. Specifically, the Debtor contends that Lowther's attorney stated that Lowther did not have a debt in relation to the home. Having read the transcript of the hearing referred to by the Debtor, however, we do not agree with the Debtor's characterization of the events of the hearing. Lowther's attorney did state that he did not think there was a "debt" for dischargeability purposes, but he never stipulated that Lowther's "lien" was in anyway ineffective or invalid. As discussed above, a "debt" and a "lien" are two separate concepts that the Debtor has failed to distinguish. Any statement that Lowther did not have a "debt" for purposes of determining dischargeability,

therefore, cannot be read to render Lowther's lien invalid.

Related to her third argument is the Debtor's fourth argument, contending that Lowther's attorney's statements related to the existence of a "debt" resulted in the discharge of Lowther's debt and, thus, Lowther cannot claim an interest in the home. Based on the law discussed above, this argument is without merit. We agree that the Debtor's house-related "debt" to Lowther was discharged under § 727 inasmuch as no action to except it from discharge was or has been commenced under § 523(a). But, the discharge of the "debt" does not invalidate Lowther's "lien." Rather, the discharge simply relieves the Debtor of personal liability on the debt to Lowther. Lowther may look to the property to satisfy the house-related debt created under the Decree of Divorce.

Fifth, and finally, the Debtor argues that Lowther's lien is ineffective because Lowther failed to object to her claimed exemption in the home and the exemption is necessary for the Debtor's well-being. However, the fact that Lowther did not object to the Debtor's claimed exemption does not strip him of his lien. As the bankruptcy court correctly stated, the exempt home is not liable for prepetition debts, except a debt secured by a lien that has not been avoided or that is not void under § 506(d). 11 U.S.C. § 522(c)(2). Here, the exempt home is liable for Lowther's claim because Lowther's lien has not been avoided and, for the reasons stated by the bankruptcy court, is not void under § 506(d). Indeed, no action to void or avoid Lowther's lien under § 522(f) or under any other provision has been commenced.[4]

Although the bankruptcy court correctly held that Lowther did not violate

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[4] The bankruptcy court, apparently recognizing that the Debtor had standing to file a motion to avoid Lowther's lien under § 522(f) and that such an action would not be time-barred, stated in a footnote that Lowther's judicial lien was not avoidable thereunder in light of Farrey, 500 U.S. at 292. On appeal, the Debtor states that Farrey is not applicable. Since a § 522(f) motion was not before the bankruptcy court, we need not address this issue.

the discharge injunction in § 542(a)(2), we note that the relief afforded by the state court in the Payment Order was a violation of § 524(a)(2), because it ordered the Debtor to personally pay Lowther the discharged home-related debt by a certain date, with the alternative relief being for the Debtor to sell the house to pay Lowther's claim. Such relief, however, was not requested by Lowther, who is the party to this appeal and, thus, he should not be held responsible for it. Furthermore, according to the record on appeal, the Payment Order, and thus the order therein requiring the Debtor to pay Lowther, has been stayed by the state court pending proceedings related to the Debtor's Amended Contempt Application. Thus, this Order and Judgment should provide the state court with guidance on any future order issued in conjunction with Lowther's Sale Motion or the Debtor's motion for reconsideration.

III. Conclusion

Accordingly, for the reasons stated above, the Order of the bankruptcy court is AFFIRMED.