

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA**

In re,

Sarah April Prater,

Debtors.

Sarah April Prater,

Plaintiff,

v.

Cooper, Coffas, Moore, and Gray, P.A. for
Textron Financial,

Defendant.

C/A No. 05-13666-jw

Chapter 13

Adv. Pro. No. 06-80063-jw

JUDGMENT

FILED

clock & min. M

MAY 17 2006

ENTERED

MAY 18 2006

K. E. P.

United States Bankruptcy Court
Columbia, South Carolina (11)

Based upon the Findings of Fact and Conclusions of Law made in the attached Order of the Court, Defendant has a lien against Plaintiff's property in Anderson County, which will terminate upon the foreclosure of such property. Plaintiff may treat Defendant as an unsecured creditor in her plan and Defendant's judgment will not create a lien on Plaintiff's other property if Plaintiff receives a discharge. Having fully addressed the allegations and relief sought in the Complaint and the issues raised by the Motion to Dismiss, the Court enters judgment according to the Order and closes this adversary proceeding without prejudice.


UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
May 17, 2006

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA**

In re, Sarah April Prater, <div style="text-align: right;">Debtors.</div>	
Sarah April Prater, <div style="text-align: right;">Plaintiff,</div>	
v. Cooper, Coffas, Moore, and Gray, P.A. for Textron Financial, <div style="text-align: right;">Defendant.</div>	

C/A No. 05-13666-jw

Chapter 13

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ORDER

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United States Bankruptcy Court
Columbia, South Carolina (11)

This matter comes before the Court upon a Complaint filed by Sarah April Prater (“Plaintiff”) against Cooper, Coffas, Moore, and Gray, P.A. for Textron Financial (“Defendant”) and Defendant’s Motion to Dismiss pursuant to Fed. R. Civ. P. 12. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(K). This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 157 and 1334. Venue of this proceeding appropriately exists in this district. 28 U.S.C. § 1409(a). Pursuant to Fed. R. Civ. P. 52, made applicable to this proceeding by Fed. R. Bankr. P. 7052, the Court makes the following Findings of Fact and Conclusions of Law.¹

FINDINGS OF FACT

1. Plaintiff filed a voluntary petition under Chapter 13 on October 14, 2005.

¹ To the extent any of the following Findings of Fact constitute Conclusions of Law, they are adopted as such, and to the extent any Conclusions of Law constitute Findings of Fact, they are also adopted as such.

2. Prior to the petition date, Defendant obtained a judgment against Plaintiff and recorded the judgment in Anderson County, South Carolina.

3. The recorded judgment created a lien against Plaintiff's real property in Anderson County, South Carolina.

4. Prior to the petition, Defendant did not levy against Plaintiff's personal property and thus did not acquire a lien against Plaintiff's personal property. Defendant also did not file the judgment in other counties so the judgment did not create a lien on real property owned by Plaintiff in other counties.

5. Plaintiff's confirmed plan provides that Plaintiff will surrender all of her interest in real property in Anderson County, South Carolina. Plaintiff's confirmed plan provides that Plaintiff will avoid Defendant's judicial lien by an adversary proceeding.

6. Plaintiff brought this adversary to seek declaratory relief that Defendant's judgment does not create a lien against Plaintiff's presently owned or after acquired property, except the lien against Plaintiff's real property in Anderson County, South Carolina. Plaintiff also seeks a declaration that Defendant's lien is unsecured and dischargeable and for a judgment indicating that the judgment is void and of no effect once Debtor receives a discharge.

7. Defendant moved to dismiss Plaintiff's Complaint as not being ripe for adjudication.

CONCLUSIONS OF LAW

The Complaint raises three issues to the Court. First, Plaintiff seeks a declaration that Defendant's claim is unsecured because Plaintiff surrendered her interest in the real property in Anderson County in her confirmed plan. The effect of property surrendered pursuant to § 1325(a)(5)(C) is to relinquish Plaintiff's interest in the property to the creditors holding a lien

on that property. See 8 COLLIER ON BANKRUPTCY at 1325.06[4], at pp. 1325-48 - 1325-49 (Lawrence P. King et al. eds., 15th ed. Revised 2005) (noting that § 1325(a)(5)(C) allows the debtor to surrender the property securing the claim to the holder of the claim at or before confirmation). The Court is not aware of any statutory support that a judicial lien becomes unsecured once Plaintiff surrenders encumbered property in her chapter 13 plan. Therefore, it appears that Defendant is secured by its lien on this property in Anderson County, South Carolina until such time as the lien is extinguished under state or federal law. Nevertheless, through the foreclosure process, Defendant's claim shall be paid or shall become unsecured upon the sale of the property. Therefore, Plaintiff may properly treat any deficiency claim that Defendant has against her estate as unsecured as she has done in her confirmed plan. Id.

As the second issue, Plaintiff's Complaint also seeks a declaration that Defendant's claim is dischargeable. In examining this issue the Court notes that the deadline for filing an objection to Plaintiff receiving a discharge has not elapsed. Plaintiff's debt to Defendant may be dischargeable under § 1328 or Plaintiff may receive a hardship discharge or a discharge under chapter 7, if she subsequently converts this case. Of course, this case could be dismissed prior to discharge. Each of these scenarios may effect whether Defendant's claim is discharged. There is not enough information in Plaintiff's Complaint or the record for the Court to determine as a matter of law at this time whether Defendant's claim is dischargeable. To date, neither Defendant nor any other party in interest has asserted that Plaintiff should not receive a discharge of Plaintiff's debt to Defendant and so it appears that Defendant's claim may be dischargeable. Nevertheless, the Court believes that Defendant's Motion to Dismiss should be granted as to Plaintiff's request for a present declaration, as a matter of law, that Defendant's claim is

dischargeable because the time period to object to discharge has not lapsed and because future events could effect whether Defendant's claim will be discharged.

Finally, Plaintiff seeks a declaration that the underlying judgment should be declared void and of no effect as to Plaintiff's presently owned and after acquired property. Since Plaintiff has not received a discharge in this case, it is premature to address the issue of whether Defendant's judgment is void. See In re Pratt, C/A No. 96-73679-W, slip op. at 4 (Bankr. D.S.C. Aug. 13, 1996) (declining to require a judgment creditor to satisfy an avoided judgment lien where debtor had not yet received a discharge). Therefore, the Court grants Defendant's Motion to Dismiss because Plaintiff is not yet entitled to a declaration that Defendant's judgment is void and should be vacated. See id. However, the Court observes that the relief Plaintiff seeks will likely be provided to her, without further proceeding, as a matter of law upon discharge. See In re McPeak, C/A No. 99-02052-B, Adv. No. 99-80097-B, slip op. at 4 (Bankr. D.S.C. Oct. 27, 1999) (holding that pre-petition judgments will not constitute a lien subsequent to discharge on a debtor's after acquired property). If Plaintiff receives a discharge of Defendant's claim, then the Defendant cannot use its judgment to create a lien against Plaintiff's presently owned or after acquired property nor may Defendant seek to otherwise enforce its judgment against property not encumbered by the judgment prior to the petition date. Plaintiff's Complaint appears premised on a concern that Defendant may seek to create a lien on property not currently encumbered by Defendant's judgment. Though the debtor's bar may bring these types of adversary actions for precautionary reasons, the Court believes that Plaintiff's action in this case is not necessary or, at least, premature.

As a matter of federal law, liens are determined on the date a debtor files his bankruptcy petition. See McPeak, slip op. at 4. Assuming state law would allow a creditor to create a lien

post-petition or post-discharge for a pre-petition debt, such a law would be invalid because federal law pre-empts in the area of bankruptcy, which alters the rights of judgment creditors. U.S. CONST. art. I, § 8, cl. 4. Federal law plainly provides that, while a debtor is in bankruptcy, a judgment creditor cannot enforce a judgment against the debtor or against property of the estate nor may a judgment creditor engage in any act to create a lien against property of the estate. See 11 U.S.C. § 362(a)(2) and (4). Further, Title 11 provides that once a discharge is issued, the discharge “voids any judgment ... to the extent that such judgment is a determination of personal liability” and the discharge also “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 such debt as personal liability of the debtor....” See 11 U.S.C. § 524(a)(1) and (2), see also, Pratt, slip op. at 3, Ducker v. Standard Supply Co., Inc., 280 S.C. 157, 311 S.E.2d 728 (S.C. 1984) (holding that a discharge order does not invalidate a pre-petition judicial lien not avoided in bankruptcy but rather the debtor is relieved of personal liability). These two provisions of § 524 provide Plaintiff with sufficient assurance that Defendant, although the holder of a judgment, cannot create a lien against Plaintiff’s presently owned or after acquired property not encumbered by the judgment prior to the petition, if Plaintiff receives a discharge. Furthermore, Defendant’s pre-petition judgment would not have an effect after discharge on Plaintiff or any property that the judgment did not encumber pre-petition. See Pratt, slip op. at 5 (noting that a debtor can nullify any effect of pre-petition judgment, avoided in bankruptcy, by filing a copy of the discharge order with the appropriate county office). In this case, the pre-petition lien only attached to a parcel of real property in Anderson County and that lien will be paid or extinguished once the encumbered property is foreclosed upon.² Once that lien is extinguished,

² The Court presumes that the foreclosure complaint addresses Defendant’s lien and that the proceeding will be

the judgment cannot create a lien on Plaintiff's other property while Plaintiff is in bankruptcy or after Plaintiff receives a discharge.

Based upon the foregoing, the Court finds that Defendant has a lien against Plaintiff's property in Anderson County, which will either be paid or terminate upon the foreclosure of such property. Plaintiff may treat Defendant as an unsecured creditor in her plan and Defendant's judgment will not create a lien on Plaintiff's other property if Plaintiff receives a discharge. This Order sufficiently addresses the allegations and relief sought in the Complaint and the issues raised by the Motion to Dismiss, the Court therefore enters judgment accordingly and closes this adversary proceeding without prejudice.

AND IT IS SO ORDERED.


UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
May 17, 2006

conducted according to state law.