

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF RHODE ISLAND

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In re: :

DONALD J. WILDING : BK No. 01-14170
Debtor Chapter 7

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ORDER DENYING MOTION TO AVOID JUDICIAL LIEN

APPEARANCES:

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BEFORE ARTHUR N. VOTOLATO, United States Bankruptcy Judge

Heard on the Debtor's motion to avoid CitiFinancial Consumer Services, Inc.'s ("CitiFinancial") judicial lien on his home in Warwick, Rhode Island ("the property"). The debt underlying the lien in question was paid in full sometime prior to the filing of the instant motion, and the lien was released and discharged at about the same time.¹ At issue, I think, is whether CitiFinancial's 2001 judicial lien may now be avoided under 11 U.S.C. § 522(f), and the payment ordered disgorged, all nunc pro tunc.

BACKGROUND

In November 2001, Donald Wilding filed a garden-variety Chapter 7 no asset bankruptcy case in which the Debtor received his discharge, and the case closed in mid February 2002. About two years later, in December 2004, the Debtor filed a motion to reopen his case for the purpose of avoiding a 2001 judicial lien held by CitiFinancial. The case was reopened, and at the hearing on his motion to avoid lien, the Debtor alleged that the market value of the property was \$60,000 and was subject to a mortgage in favor of North American Mortgage Corp. in the amount of \$58,000, plus CitiFinancial's judicial lien in the approximate amount of \$10,000. During the administration of his Chapter 7 case the Debtor claimed

¹ The details of the history of this matter furnished by the parties leave much to be desired.

and was allowed an exemption in the property, under 11 U.S.C. § 522(d)(1), in the amount of \$2,000. It is undisputed that prior to the filing of the present motion to avoid its judicial lien, CitiFinancial had been paid in full and had formally released and discharged the obligation which was the basis for the lien. The Debtor now urges that this Court's decision in *In re Mailhot*, 301 B.R. 774 (Bankr. D.R.I. 2003), be extended to cover cases like this, that the lien should be avoided, nunc pro tunc, and that the creditor should disgorge the funds it received when the judgment was paid. CitiFinancial responds that, as there is no debt upon which to support it, there is no lien to avoid, so the relief sought by the Debtor must be denied.

DISCUSSION

For several reasons *Mailhot* has no application here, i.e., in *Mailhot* the debtor sought to avoid a judicial lien on real estate which she no longer owned. 301 B.R. at 776. When *Mailhot* was selling her home, but prior to disbursing the sale proceeds, the closing attorney became aware of the lien and held funds in escrow pending a ruling on its validity. *Id.* The ruling in *Mailhot* was that the Debtor need not have an interest in her home at the time she moved to avoid the judicial lien, *id.* at 776-777, and that if

the debtor owned the property at the time of the *fixing* of the judicial lien, the lien may be avoided under Section 522(f). *Id.*

The issue we address today is clearly different from that in *Mailhot*. Here, when CitiFinancial's claim was voluntarily paid in full by the Debtor,² CitiFinancial formally released its lien, long before the filing of the instant motion. A lien is defined as "a legal right or interest that a creditor has in another's property, lasting usually until a debt or duty that it secures is satisfied." Blacks Law Dictionary 933 (7th ed. 1999). A judicial lien is a "lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding." 11 U.S.C. § 101(36). Here, since CitiFinancial has been paid in full, and the lien securing its debt formally discharged, neither the debt nor the lien existed at the time the instant motion was filed. In addition, there are no facts here indicating that Section 105 or nunc pro tunc consideration by the Court would be appropriate. Quite simply, there are no rights or justiciable property interests before the Court, and it is clearly too late to raise any.

Determined to leave no stone unturned, the Debtor also argues that this scenario fits within the scope of *Culver LLC v. Chiu* (*In*

² Probably as part of a refinancing transaction, although the record is not clear as to this.

re Chiu), 304 F.3d 905 (9th Cir. 2002). Unfortunately for the Debtor, however, *Chiu* is very similar to *Mailhot*, where the debtors, who no longer owned the property, sought to avoid a judicial lien that had never been acted upon, which was an encumbrance of record, and which was securing a debt which was still outstanding. There is a second important dissimilarity in *Chiu* as well - at the closing the escrow agent withheld sufficient funds to pay the lien creditor (a la *Mailhot*), but after the bankruptcy court ruled in the debtors' favor on the lien avoidance issue, the order avoiding the lien was recorded in the land evidence records and the escrowed funds were released to the Debtors. *Id.* at 907. On appeal by the lienholder, the debtors argued that the matter was moot because there was no stay pending appeal and they had received the escrowed funds. *Id.* But the appellate court disagreed, noting that the buyers were not bona fide purchasers, since they had knowledge of and took the property subject to the judicial lien creditor's interest. *Id.* So *Chiu* is not applicable or helpful here either, where this Debtor voluntarily paid CitiFinancial long before requesting a judicial determination as to the validity of the lien.

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For the foregoing reasons, the Debtor's Motion to Avoid CitiFinancial's *alleged* (but non-existent) judicial lien is DENIED, as is his request for the disgorgement of funds.

Enter judgment consistent with this Order.

Dated at Providence, Rhode Island, this 7th day of July, 2005.



Arthur N. Votolato
U.S. Bankruptcy Judge

Entered on docket: 7/7/2005