

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

IN RE:) In Proceedings
) Under Chapter 7
ERNEST L. HALE and)
ERMEL E. HALE,) No. BK 89-50630
)
Debtor(s).)

MEMORANDUM AND ORDER

On October 26, 1989, Ernest and Ermel Hale (debtors) filed for relief under chapter 7 of the Bankruptcy Code. The City of Granite City, Illinois (City) was scheduled as an unsecured creditor without priority based upon a debt for unpaid sewage treatment billing.

On December 5, 1989, the debtors filed a motion to avoid lien alleging that the City had filed a lien against the debtors' residence for the unpaid bills. The debtors alleged the lien impaired their homestead exemption and was voidable pursuant to 11 U.S.C. §522.¹ The City responded that its lien was statutory, and not subject to avoidance under section 522. Thereafter, debtors' counsel argued that the City's lien was invalid as a statutory lien because the notice of lien allegedly contained an incorrect legal description of the property it purported to encumber. However,

¹Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is -

(1) a judicial lien; or

(2) a nonpossessory, nonpurchase-money security interest...

debtors' response provided no documentation to dispute the accuracy of the legal description contained in the Notice of Lien. Thus, on February 9, 1990, debtors' counsel was ordered to file with the Court a certified copy of the deed to the property in question. Debtors' counsel neither timely complied with said order nor requested an extension of time to comply. Over a week after the certified copy was due, and after this order had been written but prior to its execution, debtors' counsel filed a document with an attached cover sheet labeled "Compliance with Order for Production of Deed." The document submitted was old, in poor condition, and most importantly not certified.

The Court ordered production of a certified copy of the deed for a specific reason, that being Federal Rule of Evidence 902. Under Rule 902 certified copies of public records are self authenticating and may be accepted as evidence. The document submitted by debtors' counsel does not comply with Rule 902 and thus is inadmissible as evidence. Therefore, the Court will consider the merits of debtors' motion without the aid of any supporting documentation.

Debtors' original motion to avoid lien argued the lien was subject to avoidance pursuant to 11 U.S.C. §522. However section 522(f) only provides for avoidance of a judicial lien, or a nonpossessory, nonpurchase-money security interest. 11 U.S.C. §522(f)(1), (2). The City's lien is a statutory lien which arises pursuant to Ill.Rev.Stat. ch. 24, para. 11-141-7 (Supp. 1989).² Since the City's lien is a

²Such charges or rates are liens upon the real estate upon or for which sewerage service is supplied whenever the charges or rates become delinquent as provided by the ordinance of the municipality fixing a delinquency date. However, the municipality has no

statutory lien it is not subject to avoidance pursuant to section 522(f). In re Whitford, 101 B.R. 559 (Bankr. S.D. Ill. 1989).

Debtors subsequently filed an amended motion to avoid lien. The amended motion alleged the City's lien was "invalid" as a statutory lien on the basis that the Notice of Lien contained an incorrect legal description. The statute which creates the City's lien provides that the unpaid charges are liens upon the real estate whenever the charges become delinquent. Ill.Rev.Stat. ch. 24, para. 11-141-7 (Supp. 1989). Thus, all that must occur prior to the fixing of a lien is mere delinquency in payment. Therefore, at the moment the charges became delinquent, the City had a valid lien against the debtors' residence.

Conceivably, debtors' amended motion could be construed as arguing that the lien was not properly perfected under state law.³ However, whether the City acquired a lien, and whether the City subsequently

preference over the rights of any purchaser, mortgagee, judgment creditor, or other lien holder arising prior to the filing of the notice of such a lien in the office of the recorder of the county in which such real estate is located, or in the office of the registrar of titles of such county if the property affected is registered under "An Act concerning land titles", approved May 1, 1897, as amended. This notice shall consist of a sworn statement setting out (1) a description of such real estate sufficient for the identification thereof, (2) the amount of money due for such sewerage service, and (3) the date when such amount became delinquent. The municipality has the power to foreclose this lien in the same manner and with the same effect as in the foreclosure of mortgages on real estate. Ill.Rev.Stat., ch. 24, para. 11-141-7 (Supp. 1989)(emphasis added).

³In order to perfect a lien for unpaid sewerage service the municipality must file a Notice of Lien in the Office of the Recorder of the county in which the real estate is recorded. The Notice of Lien must consist of a sworn statement setting out (1) a description of such real estate sufficient for the identification thereof, (2) the amount of money due for such sewerage service, and (3) the date when such amount became delinquent.

perfected that lien are two different arguments. The debtors have provided no evidence on the issue of perfection and thus the Court will not entertain the argument.

IT IS ORDERED the debtors' Motion to Avoid Lien is DENIED.

/s/ Kenneth J. Meyers
U.S. BANKRUPTCY JUDGE

ENTERED: March 8, 1990