

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

IN RE:)	In Proceedings
)	Under Chapter 7
DOROTHY L. SMITH,)	
)	No. BK 87-40255
Debtor.)	
DOROTHY L. SMITH,)	
)	
Petitioner,)	
)	
v.)	ADVERSARY NO.
)	87-0141
KEITH SLAUGHTER FORD,)	
)	
Respondent.)	

O R D E R

This matter is before the Court on debtor's motion to vacate order and allow amendment.

The order debtor wishes to have vacated is this Court's denial of debtor's motion for turnover. In that motion, debtor asked for turnover of the funds in her two bank accounts which had been garnished by respondent prior to the filing of the bankruptcy petition to satisfy a state court default judgment. On October 15, 1987, the Court denied the motion for turnover because a garnishment is a judicial lien and debtor failed to take any steps to avoid the lien.

In her current motion, debtor asks the Court to vacate its order dismissing the motion for turnover and to allow her to amend the motion to include a request to avoid the judicial lien. Debtor notes that the original motion for turnover was timely filed in that it was filed prior to her August 4, 1987 discharge. She

claims that respondent will not suffer any prejudice if she is allowed to amend her motion.

In response, respondent argues that once the case is closed debtor must show excusable neglect in order to amend a motion and that debtor has failed to show excusable neglect. In the same response he also argues that he would be substantially prejudiced as the garnished monies were distributed after the Court's October 15, 1987 order. However, at the hearing respondent stated that the monies have not been distributed and are still being held in the two banks.

An action to avoid the fixing of a lien under §522(f) may be brought even after the debtor has been granted a discharge. In re Kalli, 34 B.R. 191, 192 (Bankr. D. Vt. 1983). See also, In re McDonald, 34 B.R. 842, 844 (Bankr. D. S.C. 1983) ("If the lien-holder has not been prejudiced by the delay resulting from the debtor's failure to file a lien avoidance action, the debtor's lien avoidance proceeding should be entertained.").

In the present case, debtor originally commenced this action prior to the discharge date. Although this action was not initially brought as a lien avoidance proceeding, respondent was put on notice, prior to debtor's discharge, that debtor considered the garnished funds to be at issue. Furthermore, respondent has failed to demonstrate that he has been prejudiced by debtor's delay in filing a lien avoidance action. However, this Court sees no necessity to vacate its prior order. Rather, debtors are granted leave to file a separate adversary complaint seeking avoidance of the judicial lien.

At oral argument, respondent argued that, even if debtor were allowed to amend, he would still be entitled to \$600.00 of the garnished funds pursuant to §547. Apparently, respondent is referring to §547(c)(7) which prevents a trustee from avoiding a preferential transfer of less than \$600.00.

"Section 547(c)(7) only operates when the transaction in question is shown to be a preference." In re Johnson, 53 B.R. 919, 924 (Bankr. N.D. Ill. 1985) adhered to, 57 B.R. 635 (Bankr. N.D. Ill. 1986). The debtor does not need to prove the elements of a preference in order to be able to avoid a lien under §522(f). Id. Accordingly, §547(c)(7) is not applicable in this case.

Finally, in reviewing debtor's pleadings, it is apparent that debtor has confused the garnishment proceeding in this case with a wage deduction order which is a different type of proceeding under Illinois law. See, Id. at 922 n. 6. Debtor should keep the differences between these types of proceedings in mind as she attempts to show that she meets the four requirements for avoiding a lien under §522(f). See, Id. at 922.

IT IS ORDERED that debtor is granted leave to file an adversary complaint to avoid the judicial lien.

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

ENTERED: January 4, 1988