

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

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|--------------------------------|-----------------------|
| IN RE: | In Proceedings |
| | Under Chapter 11 |
| TRI-CITY REDI MIX, INC. | Case No. 99-40991 |
| Debtor(s). | |
| TRI-CITY REDI MIX, INC. | |
| Plaintiff(s), | Adversary No. 00-4006 |
| V. | |
| ENERGY TRANSPORT SYSTEMS, INC. | |
| Defendant(s). | |

OPINION

This matter is before the Court on the debtor's complaint to avoid judicial lien. The facts are undisputed. On May 10, 1999, Energy Transport Systems, Inc. ("Energy Transport") obtained a judgment against the debtor. A memorandum of judgment was executed on May 17, 1999. On May 19, 1999, after phoning the Franklin County Recorder of Deed's Office to ascertain the proper recording fees, counsel for Energy Transport mailed the memorandum of judgment to the recorder's office for filing along with the recording fee that the office indicated as sufficient. On May 20, 1999, the debtor filed its Chapter 13 bankruptcy petition.

The Franklin County Recorder of Deeds, upon receipt of the memorandum of judgment, returned it to Energy Transport unrecorded. Recording was denied for failure to provide the

proper amount of recording fees, and for failure to use proper form, in that there was not enough blank space on the top of the document for placement of the recording stamp. The deficiencies were corrected, and Energy Transport again mailed the memorandum of judgment to the Recorder of Deed's Office on May 27, 1999. This time, the recorder's office accepted the memorandum of judgment for filing. The filing took place on June 2, 1999.

Debtor maintains that the lien asserted by Energy Transport is void because the memorandum of judgment was recorded subsequent to debtor's bankruptcy filing in violation of the automatic stay. Section 362(a) (5) of the Bankruptcy Code provides that the filing of the bankruptcy petition stays

"any act to create, perfect or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case. . . ."

11 U.S.C. § 362(a)(5)

Under Illinois law, it is the actual filing of a judgment by the county recorder, rather than the mailing of the memorandum of judgment to the recorder's office, that creates a judgment lien. 735 ILCS 5/12-101 (Supp. 1998); In re Moler, 152 B.R. 561 (Bank. S.D. Ill. 1993). In this case, debtor's bankruptcy filing occurred prior to the time that Energy Transport's judgment was placed of record to become a lien on debtor's real estate. Accordingly, the automatic stay was in

effect at the time of the filing of the memorandum, precluding the creation of the judgment lien in this case.

Energy Transport acknowledges that its memorandum of judgment was placed of record following debtor's bankruptcy filing. However, Energy Transport asks the Court to impose an equitable lien because the memorandum of judgment was in the possession of the recorder's office prior to the filing of the bankruptcy case, along with the recording fee that the office indicated as sufficient when Energy Transport's attorney inquired as to the amount of such fee. The Court rejects this argument for two reasons.

First, no facts have been alleged to show that the recorder's office had the memorandum of judgment in its possession at any time prior to the filing of the bankruptcy case. To the contrary, the facts illustrate that the memorandum of judgment was first mailed to the recorder's office on May 19, 1999. Consequently, the recorder's office would have received the memorandum of judgment, at the earliest, on May 20, 1999, the date of the bankruptcy filing. Second, Energy Transport cannot rely on the recording office's error in relaying the amount of the recording fee as a basis for imposing an equitable lien when, even if the correct fee amount had been communicated by the recorder's office and delivered along with the

memorandum, recording would still have been denied, in that the memorandum was submitted for filing in an improper form.¹

Accordingly, the Court finds that Energy Transport's lien, having been obtained in violation of the automatic stay, is void.²

SEE WRITTEN ORDER.

ENTERED: APRIL 18, 2000

/s/ Kenneth J. Meyers
United States Bankruptcy Court

¹The Court makes no determination as to whether this creditor would be entitled to an equitable lien if the only grounds for refusing to record had been the insufficient recording fee.

²Although a court may, under extraordinary circumstances, annul the automatic stay retroactively, thereby giving effect to an action taken in violation of the stay and rendering it "voidable" rather than simply void, see 11 U.S.C. § 362(d), 2 Collier on Bankruptcy, ¶ 362.11[1] at 362-115 (15th ed. Rev. 1999), no such circumstances exist in this case.