

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF FLORIDA  
FORT LAUDERDALE DIVISION

In re: :  
 : Case No. 06-10619-JKO  
YVES A. MARINEAU and :  
NICOLE M. MARINEAU, :  
 : Chapter 13  
Debtors. :  
\_\_\_\_\_ :

**ORDER DENYING DEBTORS' MOTION TO RELEASE  
GARNISHED FUNDS AND GRANTING STAY RELIEF**

This case came on for hearing on May 8, 2006, on the Debtors' motion [CP 9] to release garnished funds and the motion [CP 23] by Dodge Enterprises, Inc., as assignee of Chase Manhattan Bank USA, N.A. (the "Creditor") seeking relief from the automatic stay so that it could complete its state court garnishment of the same funds.

**Findings of fact**

The Debtors filed their chapter 13 petition on February 24, 2006. Prior to the petition date, the Creditor had obtained a state court judgment against Debtor Nicole Marineau in the original

amount of \$4,538.28. In an effort to collect on that judgment, Creditor served a writ of garnishment on Bank of America (“BofA”) on February 10, 2006, two weeks prior to the petition date. After subtracting BofA’s fees, the balance in the Debtors’ bank account maintained there was \$826.16. Following the filing of their petition, the Debtors made demand on Creditor for the release of the garnishment on the grounds that the continuation of the garnishment proceedings constituted a violation of the automatic stay and on the grounds that by securing the previously unsecured judgment debt, the garnishment constituted a transfer of property which could be avoided as a preference under 11 U.S.C. § 547. When the Creditor refused to release the garnishment, the Debtors filed their motion seeking an order compelling the release of the garnishment and seeking an order compelling the turnover of the garnished funds. By cross-motion, the Creditor seeks relief from the automatic stay to complete its garnishment.

### **Issues**

Is the Creditor’s refusal to release the garnished funds a violation of the automatic stay? Is the securing of the Creditor’s judgment an avoidable transfer? Conversely, should the automatic stay be released so that the Creditor can complete its state court garnishment?

### **Conclusions of law**

The Court has jurisdiction over these motions pursuant to 28 U.S.C. § 1334. In accordance with 28 U.S.C. § 157(b)(3), the Court determines that this is a core proceeding under 28 U.S.C. § 157(b)(A), (B), and (O).

Prior to the enactment of amendments to the Florida garnishment statute, § 77.06 *Fla. Stat.* effective July 1, 2000, the service of a writ of garnishment did not create a lien under Florida law. Rather, a garnishment lien arose only upon entry of a final judgment in favor of the garnishor.

*Continental National Bank of Miami v. Tavormina (In re Masvidal)*, 10 F.3d 761, 763 (11<sup>th</sup> Cir. 1993). The amendment to § 77.06 *Fla. Stat.* was expressly adopted by the Florida legislature to alter the result the Eleventh Circuit reached in *Masvidal*. See *Senate Staff Analysis and Economic Impact Statement for Bill SB 2016* (April 3, 1998, rev. April 22, 1998) at 6-7.

Under current § 77.06 *Fla. Stat.*, the service of a writ of garnishment creates a lien on garnished funds. That lien dates from the time of service of the writ. *In re Lastra*, 2005 Bankr. LEXIS 1619 (Bankr. S.D. Fla. 2005); *In re Giles*, 271 B.R. 903 (Bankr. M.D. Fla. 2002). Accordingly, it is clear that the Creditor here holds a lien on the garnished funds held by BofA.

The question thus becomes whether, as argued by the Debtors here, the lien so created is avoidable under 11 U.S.C. § 547 as a preferential transfer.<sup>1</sup> The lien here is created by statute, and the status of statutory liens is governed by 11 U.S.C. § 545. Although certain types<sup>2</sup> of statutory liens are avoidable, Florida garnishment liens are not avoidable under § 545. Moreover, § 546(b) makes clear that the rights of a trustee<sup>3</sup> under § 545 are subject to the provisions of non-bankruptcy law which permits the maintenance or continuation of perfection of an interest in property by an entity (such as the Creditor here) who acquires its interest in such property prior to the petition date.

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<sup>1</sup>Of course, if the lien were avoidable under § 547 as the Debtors suggest, that relief would necessarily have to be sought by adversary proceeding pursuant to Rule 7001, and not by motion.

<sup>2</sup>Statutory liens which become effective upon insolvency or the filing of a bankruptcy petition, liens not enforceable as of the petition date against a bona fide purchaser, and liens for rent or distress for rent may be avoided by a trustee under § 545.

<sup>3</sup>There is a split of authority as to whether a chapter 13 debtor has standing to avoid liens or whether that power is reserved to the chapter 13 trustee. Because the garnishment lien involved here is not avoidable by a trustee, the Court does not need to rule on the issue of the Debtors' standing.

Accordingly, the continuation of the Creditor's garnishment lien takes priority over the trustee's avoiding powers.

For these reasons, the garnishment lien held by the Creditor is a perfected statutory lien created under Florida law which a party with the powers of a trustee in bankruptcy cannot avoid. Accordingly, the Debtors' motion seeking release of the garnishment lien and turnover of the garnished funds must be denied. The Creditor's refusal to release the garnishment lien is expressly senior to the trustee's avoiding powers under § 546(b) and does not constitute a violation of the automatic stay imposed by § 362.

The question then becomes whether the Creditor is entitled to stay relief. As the holder of a perfected lien in \$826.16, the Creditor is entitled to adequate protection of its lien interest under § 361. There is no practical way to provide adequate protection in this context. The Creditor holds a perfected lien; it will be given stay relief so that it can complete its garnishment proceedings in state court. Accordingly, it is ORDERED:

1. The Debtors' motion to compel release of garnishment and motion for return of funds [CP 9] is hereby DENIED.

2. The Creditor's motion seeking relief from the automatic stay [CP 23] is hereby GRANTED. The Creditor has complete relief from the automatic stay imposed by 11 U.S.C. § 362 and may complete its state court garnishment action.

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Copies Furnished To:

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