

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND
(Baltimore Division)

In re: RESTIVO AUTO BODY, INC. Debtor	Case No.: 11-18718 RAG Chapter 11
SUSQUEHANNA BANK Plaintiff	
vs.	
RESTIVO AUTO BODY, INC., et al. Defendant	Adv. Case No.: 11-00734 RAG

**MEMORANDUM OF LAW IN SUPPORT OF SUSQUEHANNA BANK'S MOTION
FOR SUMMARY JUDGMENT**

The Plaintiff, Susquehanna Bank, through its attorney, Thomas C. Valkenet, offers this memorandum in support of its Motion for Summary Judgment and says:

I. Summary of the Case.

Susquehanna Bank and the Internal Revenue Service both hold liens on real property owned by the Debtor. Both entities claim first priority liens on the improved lot at 5296 Enterprise Street, Eldersburg, Maryland, and unimproved Lot 39, Enterprise Street, Eldersburg, Maryland (collectively the "Properties"). Susquehanna Bank's first lien position arises from the late recording of IRS liens after the bank's refinance transaction was settled and disbursed. Well settled authority grants Susquehanna Bank the first lien position where the government's late recording gave no notice to the refinancing lender as of the date the loan was made.

II. Discussion.

A. Material facts that are not credibly disputed.

1. On January 4, 2005, Susquehanna and Restivo executed loan documents for a \$1,000,000.00 loan (“Loan”). The Loan is evidenced by a note (“Note”). Exhibit A (Affidavit of Denise Aherne-Venzke at ¶ 3).
2. Also on January 4, 2005, Restivo Auto Body, Inc. executed and delivered to Susquehanna an indemnity deed of trust (“IDOT”) securing the Note to the Properties. Exhibit A (Affidavit of Denise Aherne-Venzke at ¶ 4).
3. As of January 4, 2005, there were no federal tax liens recorded against the Properties in the docket for the Carroll County Circuit Court.
4. The IDOT created a lien in favor of Susquehanna on two properties owned by the Debtor. Lot 17 is improved by the building housing the Debtor’s automotive repair business. Lot 39 is the adjacent unimproved parcel.
5. The IDOT was recorded among the Land Records of Carroll County, Maryland in Liber 4316, folio 529 on February 11, 2005. Exhibit A (Affidavit of Denise Aherne-Venzke at ¶ 4).
6. Restivo Auto Body, Inc. incurred tax liability to the IRS for the year 2003 in the amount of \$74,283.62 and for the year 2004 in the amount of \$73,109.22. Exhibit B (Federal Tax Lien Document).
7. The Federal Tax Lien Document bears the IRS affirmation that it “was prepared and executed at BALTIMORE, MD on this, the 04th day of January, 2005.” Exhibit B. The Federal Tax Lien Document also recites the recording date as January 10, 2005. Exhibit B.

8. The Federal Tax Lien Document also states that the lien was recorded on January 10, 2005. Exhibit B.

9. Pursuant to this Court's Order in the main case (Document #32), Lot 39 has been sold. The proceeds of the sale are now held in escrow, pending the outcome of this Adversary Proceeding.

B. The law of summary judgment.

The guiding principles for summary judgment are well known. Summary judgment is proper where there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). In this case the dates for each material event are known to all parties, and are evident from the loan documents, land records and lien notices exchanged in discovery. Application of the federal statute to these material facts guides a disposition in favor of the Plaintiff.

C. The priorities between a lender's security interest and a federal tax lien.

The security interest of Susquehanna Bank and the government's tax liens are competing for priority. Both statutory and case law affords protection to Susquehanna Bank's lien where the tax lien was not recorded in a timely manner. Susquehanna Bank's IDOT falls within a category of security interests that preserve their priority over a tax lien where the disbursement and effective date of the instrument predates the properly recorded and indexed notice of lien.

Federal tax liens are creatures of 26 U.S.C. § 6321 *et seq.*¹ If a taxpayer fails to pay a tax obligation, the government is entitled to impose a lien on the taxpayer's real and personal property. It was once the law that a federal tax lien took priority from the time a demand was made by the government for payment. The mere act of making lawful demand was enough to grant the IRS priority over virtually all other general liens perfected after the demand for payment of the delinquent tax. It was not a defense to the government's claim to lien priority that the competing lien holder had no notice of the government's claim. *United States v. City of New Britain*, 347 U.S. 81, 84-88 (1954). The federal tax lien, even if not recorded, won primacy over all others.

This harsh and absolute rule has been ameliorated by Congress. The Internal Revenue Code was revised in 1966 to extend special protection to certain classes of creditors whose interests are perfected before they have notice of outstanding federal tax liens. *Air Power, Inc. v. United States*, 741 F.2d 53, 54-55 (4th Cir. 1984); *See, United States Statutes At Large, PL 89-719, November 2, 1966, 80 Stat. 1125.*

Susquehanna Bank is within the class of secured creditors benefitted by this change in the tax code. It is 26 U.S.C. § 6323(a), attached in its entirety as Exhibit C, that describes the creditor classes that are no longer automatically primed by a federal tax liability:

(a) Purchasers, holders of security interests, mechanic's lienors, and judgment lien creditors.--The lien imposed by section 6321 shall not be valid as against any purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor until notice thereof which meets the requirements of subsection (f) has been filed by the Secretary.

¹ 26 U.S.C. § 6321- "If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person."

Subsection (f) of 26 U.S.C. § 6323 requires a recorded notice of lien in order to burden the taxpayer's real property. *See* Exhibit D. Specifically, subsection (f)(1) and (f)(4) in relevant parts provide:

(1) Place for filing.--The notice referred to in subsection (a) shall be filed--

(A) Under State laws.--

(i) Real property.--In the case of real property, in one office within the State (or the county, or other governmental subdivision), as designated by the laws of such State, in which the property subject to the lien is situated;

* * * *

(4) Indexing required with respect to certain real property.--In the case of real property, if--

(A) under the laws of the State in which the real property is located, a deed is not valid as against a purchaser of the property who (at the time of purchase) does not have actual notice or knowledge of the existence of such deed unless the fact of filing of such deed has been entered and recorded in a public index at the place of filing in such a manner that a reasonable inspection of the index will reveal the existence of the deed, and

(B) there is maintained (at the applicable office under paragraph (1)) an adequate system for the public indexing of Federal tax liens, then the notice of lien referred to in subsection (a) shall not be treated as meeting the filing requirements under paragraph (1) unless the fact of filing is entered and recorded in the index referred to in subparagraph (B) in such a manner that a reasonable inspection of the index will reveal the existence of the lien.

Three Maryland code provisions tell the government where to file the notice of lien, the effective date of the lien, and proscribe that a tax lien is not valid against a holder of a security interest until the notice has been filed. To establish a lien, “[A] tax collector may file a notice of tax lien with the clerk of the circuit court for the county where the property that is subject to the lien is located.” Md. Code Ann., Tax-Gen. § 13-807. It is the date of filing that provides priority. Md. Code Ann., Tax-Gen. § 13-808. Like the United State Congress, the Maryland legislature directs that “a tax lien is not valid against any purchaser, holder of a security interest, mechanic's lienor, or judgment

lien creditor until notice of the tax lien has been filed under § 13-807.” Md. Code Ann., Tax-Gen. § 13-809(b)(1).

Maryland is a state where a deed is valid as against a purchaser of property when it is recorded. *See* Md. Code Ann., Real Prop. § 3-201. The federal statute, *supra*, at subsection (f)(4)(B) declares that “actual notice or knowledge” of a federal tax lien is not given until the notice is recorded in the public index.

The IRS did file the Federal Tax Lien in the Carroll County lien records. It was recorded on January 10, 2005. Thus, actual notice or knowledge is dated, at the earliest, from January 10, 2005. This is six days after Susquehanna Bank established its security interest.

D. Susquehanna Bank was the holder of a security interest in the Property prior to receiving notice of the Federal Tax Lien and is in a superior lien position.

1. Susquehanna Bank has a security interest in the Property.

The United States Court of Appeals for the Fourth Circuit instructs that “[i]f an asserted claim is a ‘security interest’ within the meaning of the Tax Code, it takes priority if it is created before the government properly files its tax liens.” *United States v. 3809 Crain Ltd. P’ship*, 884 F.2d 138, 142 (4th Cir. 1989). Susquehanna Bank is in a superior lien position because its security interest was created before the government properly recorded the Federal Tax Lien Document.

The appellate court’s reasoning merely tracks the express language of the statutes. A “security interest” is defined in 26 U.S.C. § 6323(h)(1) as follows:

The term “security interest” means any interest in property acquired by contract for the purpose of securing payment or performance of an obligation or indemnifying against loss or liability. A security interest exists at any time (A) if, at such time, the property is in existence and the interest has become protected under local law against a subsequent judgment lien arising out of an unsecured obligation, and (B) to the extent that, at such time, the holder has parted with money or money's worth.

Susquehanna Bank received a security interest in the Properties when Restivo Auto Body, Inc. executed the IDOT. Exhibit A at ¶ 4. The IDOT secures the payment of the Loan to the Properties. It is a two step analysis to determine when that security interest “exists” in a manner that grants priority over the Federal Tax Lien. Subsection (A) looks to whether Maryland law grants Susquehanna Bank priority over an ordinary judgment lien arising out of an unsecured obligation. Subsection (B) examines whether Susquehanna Bank parted with value. Each element will be discussed, in turn.

Subsection (A) directs the Court to Maryland’s recording statutes to determine when the IDOT became protected against subsequent judgment liens. Maryland grants a recorded instrument priority from its “effective date,” as follows:

The effective date of a deed is the date of delivery, and the date of delivery is presumed to be the date of the last acknowledgment, if any, or the date stated on the deed, whichever is later. Every deed, when recorded, takes effect from its effective date as against the grantor, his personal representatives, every purchaser with notice of the deed, and every creditor of the grantor with or without notice.

Md. Code Ann., Real Prop. § 3-201. The Susquehanna Bank instrument was dated and acknowledged on January 4, 2005. This is its “effective date.” This is the date which establishes Susquehanna’s lien priority against a subsequent judgment lien arising out of an unsecured obligation.

Subsection (B) next asks whether Susquehanna Bank paid “money or money’s worth” for the Properties. The relevant Treasury Department Regulation defines “money or money’s worth” as:

(3) Money or money's worth. For purposes of this paragraph, the term money or money's worth includes money, a security (as defined in paragraph (d) of this section), tangible or intangible property, services, and other consideration reducible to a money value. Money or money's worth also includes any consideration which otherwise would constitute money or money's worth under the preceding sentence which was parted with before the security interest would otherwise exist if, under local law, past consideration is sufficient to support an agreement giving rise to a security interest, and provided

that the grant of the security interest is not a fraudulent transfer under local law or 28 U.S.C. § 3304(a)(2). A firm commitment to part with money, a security, tangible or intangible property, services, or other consideration reducible to a money value does not, in itself, constitute a consideration in money or money's worth. A relinquishing or promised relinquishment of dower, curtesy, or of a statutory estate created in lieu of dower or curtesy, or of other marital rights is not a consideration in money or money's worth. Nor is love and affection, promise of marriage, or any other consideration not reducible to a money value a consideration in money or money's worth.

26 C.F.R. § 301.6323(h)-1(a)(3). Susquehanna Bank advanced \$1,000,000.00 to the Debtor in exchange for a written and recorded security interest in the Properties.

Once Susquehanna Bank recorded the IDOT, its lien was perfected as of January 4, 2005. By operation of Maryland law, Susquehanna Bank had lien priority against a subsequent judgment lien arising out of an unsecured obligation from this date.

2. Susquehanna Bank's security interest arose prior to record notice of the Federal Tax Lien.

There is no fact or allegation that Susquehanna Bank ever had actual notice of its borrower's tax liabilities prior to making the loan. This case involves only record notice through Maryland's recording indices. The date that the Federal Tax Lien was noticed through the recording indices was January 10, 2005. By that time, Susquehanna Bank already held a perfected security interest in the Properties.

3. It has been done before.

This fact pattern is not new to this Court. In *WC Homes, LLC v. United States*, CIV.A DKC 2009-1239, 2010 WL 1141204 (D. Md. Mar. 22, 2010) reconsideration denied, CIV.A. DKC 2009-1239, 2010 WL 3221845 (D. Md. Aug. 13, 2010), Judge Chasanow came to the same conclusion now urged by the Plaintiff, based upon an almost identical fact pattern. Exhibit D (Copy of *WC Homes, LLC v. United States*).

In *WC Homes, LLC*, the property owner executed a promissory note to the bank secured by a deed of trust for the property. The deed of trust was not recorded immediately. Between the time that the deed of trust was executed and recorded, notices of two federal liens were recorded. The tax liens arose from obligations predating the deed of trust.

After the bank recorded its deed of trust, the owners of the property defaulted on the underlying note. *Id.* A foreclosure sale was held and the bank purchased the property. The deed was conveyed to the bank and recorded. The bank then conveyed the deed to the WC Homes, LLC. As the new owner of the property, WC Homes, LLC filed suit seeking a determination, among other things, that the tax liens were junior to the bank's foreclosed deed of trust. WC Homes alleged that the tax liens were extinguished by the foreclosure sale.

Judge Chasanow granted a motion for summary judgment in favor of WC Homes, LLC and against the United States. Judge Chasanow held that the tax lien was not valid against the bank. The bank had priority over the federal tax lien precisely because of the government's late recording.

Judge Chasanow's analysis instructs this case. Susquehanna Bank did not have notice of the Federal Tax Lien. It was recorded after delivery of the IDOT. Like in *WC Homes, LLC*, the Federal Tax Lien Document was recorded after the delivery date of the deed of trust. For this simple reason, the Federal Tax Lien is subordinate to the lien of Susquehanna Bank.

III. Conclusion

For the foregoing reasons, application of the law to the undisputed material facts require judgment in favor of Susquehanna Bank.

/s/
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Certificate of Service

I HEREBY CERTIFY that on, February 22, 2012, a copy of the foregoing paper was filed electronically on the Court's PACER system, and was thus served via the Court's transmission facilities, to:

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/s/
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