

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE**

In re:

Bk. No. 03-13284-MWV
Chapter 7

Kirk Dennis Dubois,
Debtor

Kirk Dennis Dubois,
Movant

v.

R. Brian Snow, Esq.,
Respondent

Michael S. Askenaizer, Esq.
Nashua, New Hampshire
Attorney for Debtor/Movant

Nancy H. Michels, Esq.
Londonderry, New Hampshire
Attorney for Respondent

MEMORANDUM OPINION

I. INTRODUCTION

Kirk Dubois (the “Debtor”) filed a motion to avoid a lien (Doc. No. 6) claimed by Attorney R. Brian Snow (the “Creditor”) pursuant to 11 U.S.C. § 522(f)(2). The Creditor objected and the Court held a hearing on January 21, 2004. After hearing the arguments of the parties, the Court took the matter under advisement.

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the “Standing Order of Referral of Title 11 Proceedings to the United States

Bankruptcy Court for the District of New Hampshire,” dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

II. FACTS

The parties are in agreement on all material factual issues. They disagree on the application of the Bankruptcy Code to those facts. On September 12, 2000, the Debtor and the Creditor entered into a written agreement for the Creditor to provide the Debtor with legal services in connection with a domestic case commenced by the Debtor’s then spouse, Doris J. Dubois (the “Spouse”). On October 12, 2000, the Spouse commenced a divorce proceeding against the Debtor. The Creditor subsequently filed an appearance and various pleadings on behalf of the Debtor in the divorce proceeding.

As part of the final divorce decree, the Spouse was ordered to pay approximately \$51,000 to the Debtor on account of his equity interest in their former marital residence. The Creditor claimed an attorney’s lien on those proceeds for the unpaid balance of his fees in the amount of \$5,200. New Hampshire law, NH RSA 311:13, provides:

From the commencement of an action . . . or appearance in any proceeding before any state or federal department, board, or commission, the attorney who appears for a client in such proceeding shall have a lien for reasonable fees and expenses upon the client’s cause of action, upon the judgment decree or other order in the client’s favor entered or made in such proceeding, and upon the proceeds derived therefrom. . . . Upon the request of the client or the attorney, the court in which the proceeding is pending . . . may determine and enforce the lien

The Spouse made payment of the equity in the former marital residence to the Debtor, but the Creditor’s bill for legal services remained unpaid. The Creditor then filed with the superior court a pleading titled “Notice and Assertion of Attorney’s Lien Per RSA 311:13” in the divorce proceeding on May 30, 2003. On August 26, 2003, the superior court entered an order determining

that the Creditor had an attorney's lien under NH RSA 311:13 in the amount of \$3,200 against the Debtor's 401k account, which was awarded to him under the divorce decree, and requiring payments to be made forthwith. The Debtor filed a petition under Chapter 7 of the Bankruptcy Code on September 25, 2003 (the "Petition Date"). The parties do not dispute that \$3,200 represents a "reasonable fee" within the meaning of NH RSA 311:13 or that the Debtor owed that amount to the Creditor on the Petition Date.

The parties agree that the Creditor held a lien on the Debtor's 401k account on the Petition Date. The Debtor's schedules list the 401k account as property of the estate with a value of \$21,000 and claim an exemption for the entire amount pursuant to section 522(b)(2) of the Bankruptcy Code and NH RSA 511:2(XIX).¹ The first meeting of creditors under section 341(a) of the Bankruptcy Code was held on November 25, 2003, and no objection to the Debtor's claim of exemptions was filed on or before the deadline of December 26, 2003. See Fed. R. Bankr. P. 4003(b); Taylor v. Freeland & Kronz, 503 U.S. 638 (1992). Therefore, the Creditor's lien impairs the Debtor's exemption in his 401k account which was scheduled as property of the estate and properly exempted from the bankruptcy estate.

III. DISCUSSION

The Debtor contends that the Creditor's lien is a "judicial lien" within the meaning of section 101(36) of the Bankruptcy Code while the Creditor contends that his lien is a "statutory

¹ Neither party has raised the question of whether the Debtor's 401k account is property of the estate under section 541 of the Bankruptcy Code. See Patterson v. Shumate, 504 U.S.753 (1992), holding that certain ERISA benefits are not property of the estate. If the 401k account in this case were not property of the estate, then it would not be subject to a claim for exemption and, accordingly, the lien would not be avoidable under section 522(f) of the Bankruptcy Code. However, that issue has not been raised and is not before the Court.

lien” as defined in section 101(53) of the Bankruptcy Code. The parties agree that if the Creditor’s lien is a “statutory lien” under the Bankruptcy Code, the Debtor may not avoid it under the provisions of section 522(f) of the Bankruptcy Code, but if it is a “judicial lien,” then it may be avoided under the provisions of section 522(f).

“In general, the Bankruptcy Code divides the concept of lien into three types of liens: judicial liens, security interests, and statutory liens. These ‘three categories are mutually exclusive and are exhaustive except for certain common law liens.’ ” In re Ramsey, 89 B.R. 680, 681 (Bankr. S.D. Ohio 1988) (citing H.R. Rep. No. 595, 95th Cong., 1st Sess. 312 (1977)). A security interest is a consensual lien and is not applicable in this case. A “judicial lien” is a lien “obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding.” 11 U.S.C. § 101(36). A “statutory lien” is a lien “arising solely by force of a statute on specified circumstances or conditions, . . . but does not include [a] security interest or judicial lien.” 11 U.S.C. § 101(53) (emphasis added).

The Debtor contends that the Creditor’s lien is a judicial lien for two reasons. First, the lien can only arise after the commencement of a judicial action or administrative proceeding and, therefore, does not fit the definition of a “statutory lien” because it does not arise “solely by force of a statute.” Second, the Debtor contends that even if the lien in this case were not a statutory lien, the rights which the Creditor is seeking to enforce arise from an order of the superior court and, therefore, constitute the enforcement of a court order which, under the Bankruptcy Code, can only be a judicial lien.

The Debtor’s first argument must fail because the attorney’s lien under NH RSA 311:13 satisfies each and every element in the definition of a statutory lien under the Bankruptcy Code. The lien arises solely under the statute based upon the occurrence of specified conditions or

circumstances, namely the filing of an appearance for a client in a judicial proceeding. Thus the lien at issue was not “obtained” through any judicial proceeding, court order or agreement with the Debtor. Rather, it arose solely because of the provisions of NH RSA 311:13 upon the Creditor’s filing of an appearance for his client, the Debtor, in the divorce proceeding instituted by the Spouse. The fact that one of the conditions specified in the statute is the commencement of judicial proceedings is not dispositive. No action by a court is necessary to create the lien. Because the Creditor’s lien under NH RSA 311:13 arose solely under an applicable state statute and was not obtained through legal proceedings, it is a statutory lien under the Bankruptcy Code.

The Debtor’s second argument rests on the proposition that if the holder of a statutory lien takes any prepetition action to perfect, enforce or determine the nature or extent of a statutory lien, the lien transforms itself into a judicial lien. The Court rejects the Debtor’s position that any resort to the courts to perfect or enforce a statutory lien results in a metaphysical transformation of the lien. “In metaphysics there is a difference between being and becoming.” Town of Colchester v. Hinesburg Sand & Gravel, Inc. (In re APC Constr.), 112 B.R. 89, 125 (Bankr. D. Vt. 1990). NH RSA 311:13 expressly provides that the superior court may, upon request of either the client or the attorney, determine and enforce the lien created under the statute. However, the statute does not authorize the superior court to create the lien itself.² In this case, the superior court’s order only confirmed the existence of the statutory lien and determined the amount and payment terms for the lien. Those actions were in furtherance of the enforcement of an existing lien, not the creation

² The Court notes that if the superior court issued a writ of trustee process or a writ of attachment in order to secure a judgment in a contract action between an attorney and a client over an unpaid fee, such action would be inherently judicial and would create a judicial lien. However, the lien in this case arose solely under NH RSA 311:13.

of the lien. Accordingly, the superior court's order of August 26, 2003 did not convert the Creditor's statutory lien into a judicial lien.

IV. CONCLUSION

For the reasons set forth in this opinion, the Creditor's lien under NH RSA 311:13 is a statutory lien which may not be avoided under section 522(f) of the Bankruptcy Code. The Court shall enter a separate order denying the Debtor's motion to avoid the lien (Doc. No. 6). This opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052.

ENTERED at Manchester, New Hampshire.

Date: February 11, 2004

/s/ J. Michael Deasy
J. Michael Deasy
Bankruptcy Judge