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signed 5-23-00

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

In Re:

**JANICE KING, f/k/a JANICE L. NELSON,
f/k/a JANICE L. BAKER,**

DEBTOR.

**CASE NO. 99-41229-7
CHAPTER 7**

GARY A. NELSON,

PLAINTIFF,

v.

ADV. NO. 99-7078

**JANICE KING, f/k/a JANICE L. NELSON,
f/k/a JANICE L. BAKER,
DARCY WILLIAMSON in her capacity as
Chapter 7 Trustee,
COMMERCE BANK, N.A., and
ADVANTA NATIONAL BANK,**

DEFENDANTS.

**ORDER GRANTING COMMERCE BANK'S MOTION FOR
SUMMARY JUDGMENT, AND RULING ON PLAINTIFF'S
MOTION FOR PARTIAL SUMMARY JUDGMENT**

This proceeding is before the Court on the motion of plaintiff Gary A. Nelson ("the Plaintiff") for partial summary judgment and defendant Commerce Bank's ("Commerce") cross-motion for summary judgment. No response has been filed by defendant-debtor Janice King ("the Debtor") or defendant Advanta National Bank ("Advanta"). The Plaintiff's complaint does not appear to seek any relief against the chapter 7 trustee and she does not appear to have asserted any interest in this

proceeding. The Plaintiff appears by counsel Jonathan C. Brzon of Murray, Tillotson, Nelson & Wiley, Chartered. Commerce appears by counsel Thomas J. Fritzlen, Jr., of Martin, Leigh, & Laws, P.C. The Court has reviewed the relevant pleadings and is now ready to rule.

FACTS

The following facts are not disputed. The Plaintiff and the Debtor were divorced in 1997. On June 19, 1997, the state divorce court entered an order dividing the couples' assets and liabilities. The following aspects of the division are relevant here. The Debtor was awarded certain business property "free and clear of any right, title or interest" of the Plaintiff. The Debtor was also awarded the marital home, and required to pay any debt or mortgage owed on it. The Plaintiff was awarded a judgment for \$24,293, one-half of the couples' equity in the home, and given a lien on the home for that amount. The judgment would not be due and owing, however, until August 14, 2011, unless one of the following events occurred earlier: (1) the Debtor's death; (2) a sale or refinancing of the marital home; or (3) the Debtor's failure to use the home as her primary residence. Furthermore, interest on the judgment would not begin to accrue until the judgment became due, and then would accrue at the judgment rate in effect at that time.

The Plaintiff appealed the divorce court's decision dividing the marital property. On appeal, he did not contend that the business property was improperly awarded to the Plaintiff, or seek any relief concerning it. Among other things, however, he did argue that he was entitled, pursuant to K.S.A. 16-204(d), to interest on the judgment awarded to him for part of the equity in the marital home. The Kansas Court of Appeals affirmed under Supreme Court Rule 7.042(d) and (e), 1998 Kan. Ct. R. Ann. 47. This means the court determined there was no reversible error, and "(d) the opinion or

findings of fact and conclusions of law of the trial court adequately explain the decision,” and “(e) the trial court did not abuse its discretion.”

In September 1997, the Debtor gave Commerce a mortgage on the business property that had been awarded to her. The mortgage was properly recorded the same day.

In October 1998, the Debtor obtained a loan from defendant Advanta, secured by a mortgage on the marital home, that paid off a second mortgage that existed when she and the Plaintiff bought the home. A year later, the state divorce court entered an agreed order determining that this loan was a refinancing that caused the Plaintiff’s judgment to become due and owing.

Before filing for bankruptcy, the Debtor defaulted on the first mortgage on the home, and the mortgage holder sued to foreclose. In October 1999, the mortgage holder obtained stay relief to allow that suit to proceed and to allow all necessary parties to participate in the foreclosure. Advanta defaulted in the suit. A judgment was entered in January 2000 that determined, among other things, that both the first mortgage and the lien given to the Plaintiff in the divorce case were superior to Advanta’s lien. In the argument portion of his brief responding to Commerce’s motion for summary judgment, the Plaintiff asserts that the home has now been sold at a sheriff’s sale, but the proceeds “covered” only the first mortgage and past due property taxes. His judgment, he argues, remains unsatisfied.

In the divorce, the Debtor was ordered to pay a portion of uninsured medical expenses incurred for care of the couple’s children. When the Plaintiff filed his complaint in this adversary proceeding, the Debtor owed him about \$1,5000 for such expenses, but the debt has since been reduced to \$339.89. The Plaintiff asks for summary judgment declaring that this debt is

nondischargeable under 11 U.S.C.A. §523(a)(5) as a debt for the support of the children. As indicated, the Debtor has not responded to this claim.

DISCUSSION

Federal Rule of Civil Procedure 56, governing grants of summary judgment, is made applicable to bankruptcy proceedings by Federal Rule of Bankruptcy Procedure 7056. Rule 56 provides that this Court must grant summary judgment “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” In considering a motion for summary judgment, the Court must examine all the evidence in the light most favorable to the party against whom summary judgment is sought. Summary judgment is inappropriate if an inference can be deduced from the facts which would allow the nonmovant to prevail. The court must consider factual inferences tending to show triable issues in the light most favorable to the existence of those issues. Where different ultimate inferences may properly be drawn, summary judgment should be denied. *United States v. O’Block*, 788 F.2d 1433, 1435 (10th Cir. 1986).

The Plaintiff claims to have an interest superior to Commerce’s mortgage on the business property, arguing the June 19, 1997, property division order gave him an immediate general judgment lien on all real property, including the business property, that the Debtor owned in the county where the property division order was entered. His argument is somewhat unclear, because he suggests in the first sentence of his argument that his notice of appeal of the divorce court’s order gave third parties notice of his interest in the subject matter of the suit under K.S.A. 60-2201 so they could not acquire a superior interest, but spends the rest of his brief arguing the theory that the order itself gave him a

judgment lien against the business property under K.S.A. 60-2202. Since he did not question in his appeal the divorce court's award of the business property to the Debtor free and clear of any claim he might have, the Court does not understand how the appeal alone could have given anyone notice of his possible interest in that property. Whatever may have been the point of his reference to K.S.A. 60-2201, the Court rejects any assertion that the Plaintiff's appeal had any impact on the priority of Commerce's lien on the business property.

The Plaintiff has not indicated which portion of K.S.A. 1999 Supp. 60-2202 he is relying on, but the Court believes it must be the part of subdivision (a) that reads: "Any judgment rendered in this state . . . by a district court of this state in an action commenced under chapter 60 of the Kansas Statutes Annotated shall be a lien on the real estate of the judgment debtor within the county in which judgment is rendered. . . . [T]he lien shall be effective from the time at which the petition stating the claim against the judgment debtor was filed but not to exceed four months prior to the entry of the judgment."¹ The Plaintiff contends this statute automatically gave him a lien on the business property despite the divorce court's attempt to award it to the Debtor free and clear of any interest he might otherwise have had.

The Plaintiff made a similar argument to the Kansas Court of Appeals in his appeal of the divorce court's order, asserting that his lien on the marital home had to draw interest under K.S.A. 1999 Supp. 16-204(d) despite the divorce court's attempt to allow interest to accrue only at a later

¹The Kansas Legislature amended K.S.A. 60-2202 effective July 3, 1997, by adding new subdivisions (d) and (e). Subdivisions (a), (b), and (c) were not changed. The new provisions would not apply in the circumstances now before the Court, so the amendment could have no impact on this case.

date or the occurrence of a later event. K.S.A. 1999 Supp. 16-204(d) provides: “Any judgment rendered by a court of this state on or after July 1, 1986, shall bear interest on and after the day on which the judgment is rendered at the rate provided by subsection (e).” By summarily affirming the divorce court’s decision, the Kansas Court of Appeals rejected the Plaintiff’s argument that the divorce court did not have the authority to delay the application of 16-204(d) to the judgment lien it awarded on the marital home. The appellate court would have reversed this portion of the divorce court’s order if it had agreed with the Plaintiff that K.S.A. 1999 Supp. 16-204(d) required interest to start to accrue immediately on the judgment for one-half of the equity in the marital home. *See, e.g., In re Marriage of Cline*, 17 Kan. App. 2d 230, 232-34 (1992) (divorce court order for spousal maintenance was void to extent duration of obligation could exceed maximum specified in K.S.A. 1991 Supp. 60-1610(b)(2); failure to comply with statute was reversible error).

Besides delaying the accrual of interest under 16-204(d), the divorce court also indicated an intent to delay the application of 60-2202(a) to the judgment it gave the Plaintiff for one-half of the marital equity, both by awarding the business property free and clear of any interest of the Plaintiff and by making the judgment not due and owing until a future date or a future event. When reasonably read, the divorce court’s decision makes clear the court had no intent to create a present lien for the Plaintiff on the business property. That property was awarded to the Debtor “free and clear of any right, title or interest” of the Plaintiff. At the same time, the marital home was awarded to the Debtor subject to a judgment and lien in favor of the Plaintiff, but the judgment would not be “due and owing” until a future date or future event. It is unreasonable to believe the judge could have intended for the latter award to override the express terms of the former. Since the divorce court had the authority to delay the

application of 16-204(d), this Court sees no reason why it could not also delay the application of 60-2202(a). The Court is convinced the Plaintiff's argument that 60-2202(a) had to apply immediately to the judgment awarded to him would also have been rejected had he presented it to the Kansas Court of Appeals.

The marital equity judgment the divorce court created in this case appears to have been intended to operate much as alimony and child support obligations operate under Kansas case law interpreting 60-2202(a). *See Haynes v. Haynes*, 168 Kan. 219, 222-24 (1949); *Brieger v. Brieger*, 197 Kan. 756, 759-60 (1966). When a divorce court does not impose any specific lien on real property to secure payment of an alimony or child support obligation, a judgment lien under 60-2202(a) does not arise until a periodic payment on the obligation comes due but is not paid. If the party obliged to make the payment has transferred real property before the payment comes due, the transfer is not affected by the party's subsequent failure to make the payment. The Plaintiff was awarded a lien against the marital home to secure payment of the marital equity judgment the debtor was ordered to pay him, but the judgment was not due until a later date or event. When the Debtor granted Commerce a mortgage on the business property, the specified date had not arrived and none of the specified events had occurred. Therefore, the marital equity judgment was not due and owing when the Debtor granted the mortgage, and 60-2202(a) had not yet given the Plaintiff a lien on the business property.

The Court believes the Plaintiff's judgment lien theory must also be rejected because it would unduly restrict the alienation of property. *See Rajala v. Kelly (In re Kelly)*, 169 B.R. 721, 725 (Bankr. D. Kan. 1994). In this case, the theory would prevent the Debtor from transferring any real

property she owned in the county free of the Plaintiff's potential judgment lien even before any of the specified events occurred or August 14, 2011, arrived, despite the fact that the judgment she owed him was not yet due and owing.

The Plaintiff also asked the Court to grant a \$339.89 nondischargeable judgment for the Debtor's obligation to pay pre-petition unreimbursed or uninsured medical expenses for their children. Section 523(a)(5) of the Bankruptcy Code excepts from discharge a debt for the support of a child, in connection with a divorce decree. The divorce decree required the parties to divide their children's medical expenses. The Debtor did not object to the Plaintiff's claim for this expense. The Court concludes that the Plaintiff is entitled to a \$339.89 nondischargeable judgment against the Debtor.

Finally, the Plaintiff asked the court for an order holding that his interest in the marital home is superior to that of defendant Advanta. As indicated earlier, the state court has already entered a journal entry of foreclosure that declared the Plaintiff's interest in the property was second in priority and Advanta's interest was third. This Court sees no reason to enter an order reiterating the state court's order. Furthermore, if the Plaintiff is correct that the sale proceeds were insufficient to pay more than past-due property taxes and the first mortgage, the question of the relative priority of the Plaintiff's and Advanta's liens on the home is moot.

The Court concludes that Commerce Bank is entitled to a summary judgment declaring that its mortgage on the business property is prior to any claim of the Plaintiff. The Plaintiff's request for summary judgment on that issue is denied. The Court also concludes that the Plaintiff is entitled to a \$339.89 judgment for the nondischargeable debt attributable to the Debtor's share of the unreimbursed

or uninsured medical expenses of the parties' minor children. Finally, the Court concludes it need not enter any order regarding the relative priority of the Plaintiff's and Advanta's liens on the marital home.

IT IS SO ORDERED.

Dated at Topeka, Kansas, this _____ day of May, 2000.

JAMES A. PUSATERI
CHIEF BANKRUPTCY JUDGE