

**UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHERN DIVISION**

In the Matter of:	}	
GEORGE H. JOHNSON, III	}	CASE NO. 98-81356-JAC-7
SSN: XXX-XX-6282	}	
GLORIA J. JOHNSON	}	
SSN: XXX-XX-7359,	}	CHAPTER 7
Debtor(s).	}	

MEMORANDUM OPINION

This case comes before the Court on debtors' motion to reopen the above styled case to pursue discharge violations and for other relief against creditors. For the reasons set forth below, the Court finds that the motion is due to be denied.

On July 14, 1998, the debtors received their Chapter 7 discharge in the above styled case. Following their discharge, debtors argue Redstone Federal Credit Union ("Redstone") revived a pre-petition judgment and assigned collection of the judgment lien to Heath Emerson and Danny Adcock ("Emerson" and "Adcock") in violation of the discharge injunction.

The pertinent facts in this matter are undisputed. Prepetition, on July 18, 1996, debtors acquired real property located in Limestone County, Alabama. On June 9, 1997, Redstone recovered a judgment against the debtors in the Circuit Court of Limestone County, Alabama in the sum of \$27,715.08, plus court costs. On or about June 26, 1997 Redstone recorded the certificate of judgment in the Probate Court of Limestone County.

On April 6, 1998, debtors filed a Chapter 7 petition in this Court. On Schedule A of their petition, the debtors listed a mobile home and approximately one acre of land which they valued at \$20,350. On Schedule F, debtors listed Redstone as a general unsecured creditor in the amount of \$29,435. The debtors did not file a motion to avoid Redstone's judgment lien during the pendency

of the bankruptcy proceeding. On July 14, 1998, this Court entered the debtors' Chapter 7 discharge which discharged their personal debt to Redstone. The discharge order reads in part as follows:

Collection of Discharged Debts Prohibited

The discharge prohibits any attempt to collect from the debtors a debt that has been discharged. For example, a creditor is not permitted to contact a debtor by mail, phone, or otherwise, to file or continue a lawsuit, to attach wages or other property, or to take any other action to collect a discharged debt from the debtors. A creditor who violates this order can be required to pay damages and attorney's fees to the debtor.

However, a creditor may have the right to enforce a valid lien, such as a mortgage or security interest, against the debtors' property after the bankruptcy, if that lien was not avoided or eliminated in the bankruptcy case. Also, a debtor may voluntarily pay any debt that has been discharged. [emphasis added]

It is undisputed that the debtors did not file a motion to avoid Redstone's judgment lien in their 1998 bankruptcy case. On July 21, 1998, the Court closed the debtors' case.

On January 31, 2005, the debtors filed a second Chapter 7 bankruptcy petition, case no. 05-80409-JAC-7. Debtors did not list Redstone as a creditor in their 2005 petition and did not file a motion to avoid Redstone's lien during the case. Debtors received a Chapter 7 discharge on June 1, 2005.

On May 6, 2007, Redstone filed a Motion for Revival of Judgment in the Circuit Court of Limestone County. On May 9, 2007, the Circuit Court granted the revival. On June 7, 2007, Redstone recorded the certificate of judgment, as revived.

On July 25, 2013, Redstone transferred and assigned the judgment and lien to Emerson and Adcock. On July 29, 2013, Emerson and Adcock filed an application for writ of execution against the same real property listed in the debtors' 1998 bankruptcy petition.

On August 29, 2013, the debtors filed a third Chapter 7 petition, case no. 13-82668-JAC-7, to prevent execution on the judgment. After the debtors filed a suggestion of bankruptcy in the Circuit Court, Emerson and Adcock filed a motion to lift stay in the 2013 bankruptcy case to proceed with the Circuit Court action. The motion to lift stay referenced and included a copy of Redstone's 1997 judgment, Redstone's motion to revive the 1997 judgment lien, the 2007 recorded certificate of judgment, as revived, and the document transferring same from Redstone to Emerson and Adcock.

On October 3, 2013, the debtors filed a motion to avoid the judgment held by Emerson and Adcock. On November 5, 2013, this Court heard arguments on the motion to lift stay and entered an order lifting the stay in favor of Emerson and Adcock. The order provides that the Court "abstains from consideration of the claims and disputes by and between the parties pursuant to 28 U.S.C. § 1334 and lifts the stay for the parties to proceed with their remedies against each other in state court." The order continued the 2013 motion to avoid judicial lien generally pending the outcome of the state court action.

On December 18, 2013, the Circuit Court entered an order finding that the value of the subject property exceeded the value of the debtors' homestead exemption and ordered the Sheriff to set off the debtors' homestead exemption. On January 15, 2014, counsel for debtors filed a motion in the Circuit Court to set aside execution of the judgment, arguing that their 1998 bankruptcy discharged the judgment lien, and that the revival of judgment was void. While this motion was pending, the Circuit Court ordered the execution sale to proceed on March 3, 2014 conditioned upon further order on debtors' pending motion to set aside execution. Emerson and Adcock purchased the property at the execution sale by credit bid.

On April 2, 2014, Emerson and Adcock filed a response in the Circuit Court to debtors' motion to set aside execution. Emerson and Adcock argued that the debtors' 1998 bankruptcy discharge extinguished Redstone's *in personam* claims against debtors, but same had no effect on Redstone's *in rem* claim against the debtors' property. On May 20, 2014, the Circuit Court entered an order denying debtors' motion to set aside execution of judgment and confirmed the Sheriff's sale of the real property.

On September 8, 2014, debtors filed the motion that is now before this Court to reopen their 1998 bankruptcy to pursue discharge violations against Redstone, Emerson, and Adcock, and to pursue an avoidance action in the 1998 bankruptcy proceeding sixteen years after the Court closed the case. Debtors admit that Redstone's judgment lien was not avoided during their 1998 bankruptcy case, but assert that they are not barred from seeking avoidance of same despite the years of delay because the delay was not their fault and because Redstone and the assignees will not suffer any prejudice.

A majority of courts have rejected per se rules that either consistently allow reopening or those that never allow reopening for the purpose of pursuing a lien avoidance action.¹ Each case must, instead, be examined on a case by case basis to determine whether the doctrine of laches will bar a motion to reopen. In *Matter of Caicedo*, 159 B.R. 104, 106 (Bankr. D. Conn. 1993), the bankruptcy court denied a motion by the debtor to reopen her Chapter 7 case eight years after it was closed and stated that “[w]hile neither the Code nor the Rules prescribe a time period, the legislative history of Section 350(b) states that the equitable doctrine of laches may bar a party’s attempt to reopen a case.” In *In re Tarkington*, 301 B.R. 502 (Bankr. E.D. Tenn. 2003), the bankruptcy court

¹ *In re Harvey*, 245 B.R. 834 (W.D. Ky. 1999).

denied debtors' motion to reopen case to avoid judicial lien where the case had been closed for seventeen months. The court denied the motion finding that the debtors' delay, when coupled with the prejudice to the creditor of having to present evidence of value of residence more than seventeen months earlier and additional attorney fees creditor would incur in defending the action warranted denial of debtors' motion based on laches. The Seventh Circuit in *In re Bianucci*, 4 F.3d 526 (7th Cir. 1993) explained that although the passage of time in itself does not constitute prejudice, delay may be prejudicial when it is combined with other factors. In *Bianucci*, the Seventh Circuit refused to reopen a bankruptcy case where the debtors "delayed bringing their motions for an inordinate length of time, including a five-month period during which they had actual knowledge that [the] judgment lien had never affirmatively been avoided. That factor, combined with [creditor's] expenses to revive its judgment . . . provide[d] ample reason for the bankruptcy court to decline to reopen the case."²

Although this Court has not adopted an absolute time period for determining when the doctrine of laches applies, the Court finds that the lapse of sixteen years in this case is sufficient to bar the motion to reopen. The debtors were aware of Redstone's judicial lien during the pendency of the 1998 case, yet they waited more than sixteen years after the Court closed the 1998 case to file this motion to reopen. Debtors also failed to address the lien during the 2005 bankruptcy. The Court finds that the debtors' motion to reopen is barred by laches given debtors' knowledge of the lien during the 1998 bankruptcy, combined with the inexcusable sixteen year delay in filing this motion, and the prejudice to the creditors in the form of expenses incurred by Redstone to revive the

² *In re Bianucci*, 4 F.3d 526, 529 (7th Cir. 1993).

lien, as well as attorney's fees and expenses incurred by Emerson and Adcock after they purchased the revived lien.

The debtors' 1998 discharge of their personal debt to Redstone did not discharge or satisfy the judgment lien. As explained by the bankruptcy court in *Jarrett v. State of Ohio, Dept. of Taxation (In re Jarrett)*, 293 B.R. 127 (Bankr. N.D. Ohio 2002), it is well established that the act of renewing a lien does not conflict with the discharge injunction in the case of prepetition property.

The court wrote:

The basis for this is clear: Such a creditor is not, in contravention to the discharge injunction of § 524, attempting to enforce its claim as a "personal liability" against the debtor, but is instead merely seeking to preserve its *in rem* interest.

On the other hand, when a creditor seeks to renew a prepetition lien so as to bring within the lien's scope property acquired by a debtor postpetition (a.k.a. after acquired property), courts uniformly find that a violation of the discharge injunction of §524 has occurred.³

Despite the cases cited by debtors regarding floating liens, Redstone's 1997 judgment lien clearly attached to prepetition property and the lien was never avoided. Thus, the 2007 lien renewal did not violate the discharge injunction. Redstone's judgment lien attached *in rem* to the subject property pursuant to Alabama law. "Every judgment, a certificate of which has been filed as provided in Section 6-9-210, shall be a lien in the county where filed on all property of the defendant which is subject to levy and sale under execution. . . ."⁴ In this case, the 1997 judgment lien attached to the debtors' property *in rem* when Redstone recorded its certificate of judgment in Limestone County where the subject property is located. Therefore, the judgment lien was not as the debtors

³ *Jarrett v. State of Ohio, Dept. of Taxation (In re Jarrett)*, 293 B.R. 127, 132 (Bankr. N.D. Ohio 2002).

⁴ ALA. CODE § 6-9-211.

assert a floating lien. Thus, the cases cited by debtors regarding floating liens and after acquired property are inapplicable.

Finally, the Court finds that the debtors are estopped from pursuing discharge violations against the parties in this proceeding. On November 5, 2013, the Court lifted the stay in the debtors' pending 2013 bankruptcy proceeding and abstained to allow the same parties to proceed in the Circuit Court with their rights and remedies against each other. The debtors did not appeal the order and same is now final. The same arguments regarding the validity of Redstone's judgment lien following the debtors' 1998 bankruptcy discharge and the 2007 lien renewal were presented in the Circuit Court. On May 20, 2104, the Circuit Court entered an order denying debtors' motion to set aside execution of judgment and confirmed the Sheriff's sale of the subject property. That order is currently on appeal and will be finally determined in state court.

A separate order will be entered consistent with this opinion denying debtors' motion to reopen.

Done and Entered this day November 10, 2014

/s/ Jack Caddell
Jack Caddell
U.S. Bankruptcy Judge