U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

IN RE:	§	
	§	
CHARLOTTE WYNNE,	§	
	§	
Debtor.	§	CASE NO. 04-45372-DML-7

MEMORANDUM OPINION

Before the court is Charlotte Wynne's ("Debtor") Amended Objection to Claim and Request for Determination Under 11 U.S.C. § 506(d) (the "Objection"), by which Debtor challenges the secured claim (the "Claim") filed on behalf of the estate of W. M. Franks, Jr. ("Franks").[1] Franks responded to the Objection, which was considered at a hearing on November 15, 2004.

The parties have provided authorities to the court. This memorandum opinion constitutes the court's findings and conclusions. FED. R. BANKR. P. 7052 and 9014. This matter falls within the court's core jurisdiction. 28 U.S.C. §§ 1334(a) and 157(b)(2).

I. BACKGROUND

The court does not have facts sufficient to describe the relationship between Franks and Debtor that led to the filing of the Claim and the present dispute. It appears, however, in 1997 and 1998 Franks paid taxes due on Debtor's homestead (the "Property"). Apparently, Franks understood the Property was to be deeded to him.

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[1] The Claim was originally filed in Franks' name. The original version was withdrawn and replaced by a Claim filed in the name of Shannon Ann Low, as Administratrix of Franks' estate. Both versions are based on the same facts and need not be distinguished for purposes of this memorandum opinion. The court will hereafter refer to the claimant as Franks for convenience.

When Debtor did not deed the Property to Franks, Franks initiated suit against Debtor in state court in 1999 (the "State Suit"). In the State Suit Franks sought judgment that title to the Property belonged in him. In connection with the State Suit, Frank filed a Notice of Lis Pendens against the Property (the "Lis Pendens").

In 2000, Franks amended his petition in the State Suit seeking, as alternative relief, (1) a money judgment for funds advanced to Debtor by Franks plus the taxes paid; and (2) subrogation to and foreclosure on the lien rights of the taxing authority (the "Tax Lien") paid by him. On March 28, 2003, an Agreed Judgment was entered in the State Suit by which Franks was awarded $12,000 plus attorney's fees. The Agreed Judgment also imposed a lien on the Property. Though Franks asserts (Franks' Trial Brief, p. 4) that the "Agreed Judgment enforced Franks' tax lien," there is no mention in the Agreed Judgment of the Tax Lien, nor does the Agreed Judgment provide for Franks' subrogation to the Tax Lien or for the preservation of the Tax Lien.

Debtor filed for relief under chapter 7 of the Bankruptcy Code[2] on May 28, 2004. Debtor claimed the Property as exempt, and no objections to the claimed exemption were raised.

II. ISSUE

The issue presented in this case is whether, by reason of the Lis Pendens, the Tax Lien, or the Agreed Judgment, Franks retains lien rights against the Property notwithstanding Debtor's invocation of Code section 522(f)(1)(A).

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[2] 11 U.S.C. §§ 101-1330 (2004) (hereafter the "Code").

III. DISCUSSION

Section 522(f)(1)(A) states in pertinent part:

> (f)(1) . . . [T]he debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is–
>
> (A) a judicial lien, other than a judicial lien that secures a debt–
>
> (i) to a spouse, former spouse, or child of the debtor . . . .

Code § 522(f)(1)(A).

Because the debt to Franks is not owed to a spouse or child of Debtor, and because the property has been exempted, the sole question the court must deal with is whether Franks' lien rights exist by reason of a judicial lien. "Judicial lien" is defined in the Code as a "lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding." Code § 101(36). With regard to the Agreed Judgment the court holds that a lien arising from recordation of a judgment is a judicial lien. *See Henderson v. Belknap (In re Henderson)*, 18 F.3d 1305, 1307-08 (5th Cir. 1994); *Cullen Ctr. Bank & Trust v. Hensley (In re Criswell)*, No. 96-20021, 1997 U.S. App. LEXIS 12784, at *3 (5th Cir. Jan. 9, 1997); *In re Inman*, 131 B.R. 789, 793 (Bankr. N.D. Tex. 1991).

As to the Lis Pendens, even if it also does not fit within the definition of judicial lien,[3] it defies logic that a lis pendens would give greater rights to a creditor under the Code than would a judgment entered in the suit which is the basis for the lis pendens. Moreover, as discussed below, the doctrine of merger results in incorporation of the Lis Pendens in the subsequent judgment.

As to the Tax Lien, assuming that under the Code Franks would be subrogated to the taxing authority's lien rights,[4] the court concludes that those rights were subsumed into the Agreed Judgment. Under the doctrine of merger, whatever rights Franks had by reason of payment of taxes on the Property became merged into the Agreed Judgment. *See Farm Credit Bank of Tex. v. Gayle (In re Gayle)*, 189 B.R. 914, 919 (Bankr. S.D. Tex. 1995); *Ford v. City State Bank of Palacios*, 44 S.W.3d 121, 131 (Tex. App.–Corpus Christi 2001, no pet.); *In re Allsup*, 92 S.W.2d 323, 326 (Tex. App.–Texarkana 1996, no writ); RESTATEMENT OF THE LAW, SECOND, JUDGMENTS, § 18 (1982). While this general rule is subject to exception, *see In re Gayle*, 189 B.R. at 919-20, the court has found no case (and Franks has cited none) in which a

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[3] The court believes a lis pendens falls within the definition of judicial lien in that it is a result of a "legal or equitable process or proceeding." *See* Code § 101(36). *See also FDIC v. Walker*, 815 F. Supp. 987, 990 (N.D. Tex. 1993) (agreeing that "a lis pendens is the functional equivalent of an involuntary lien as it acts as a cloud on title"); *Thornburg v. Lynch (In re Thornburg)*, 277 B.R. 719, 729 (Bankr. E.D. Tex. 2002) (concluding that "lis pendens is a part of a judicial proceeding" and that "[t]he effect of filing a Notice of Lis Pendens in the State of Texas is the 'functional equivalent of an involuntary lien as it acts as a cloud on title under Texas law'"); *Blandino v. Bradshaw (In re Bradshaw)*, 315 B.R. 875, 889 (Bankr. D. Nev. 2004) ("A lis pendens is closely allied to a judicial lien."); *Hoffman v. Schaeneman (In re Schaeneman)*, No. H-77-991, 1980 Bankr. LEXIS 4507, at *14 (Bankr. D. Conn. Sept. 9, 1980) (considering issue of whether lis pendens is a judicial lien under provisions of the Bankruptcy Act and finding that "[t]o claim that a lis pendens is not a lien under § 67a [of the Bankruptcy Act] is to ignore the purpose of the avoidance of such liens.").

[4] Provisions such as Code section 507(d) (providing that persons paying, *inter alia*, tax claims against a debtor are not subrogated to the taxing authority's priority) suggest that Congress intended to be sparing in granting subrogees special status.

party claiming subrogation to an unrecorded statutory lien was allowed to enforce that lien after entry of a judgment for the underlying debt.

Moreover, in the case at bar, Franks sought in the State Suit to enforce the Tax Lien, yet the Agreed Judgment did not make any provision regarding the Tax Lien. On the other hand, the Agreed Judgment clearly included disposition of Franks' claim for paid taxes. Given the terms of the Agreed Judgment and Franks' particular pleading in the State Suit respecting the Tax Lien, the court holds that, at least on the facts of this case, the Tax Lien was merged into the Agreed Judgment.

IV. CONCLUSION

As Franks' lien is dependent upon the Agreed Judgment and as the lien created by recording of the Agreed Judgment is clearly a judicial lien, Franks' lien is voidable pursuant to section 522(f)(1)(A) of the Code. Counsel for Debtor is directed to prepare and submit a final judgment avoiding Franks' lien and otherwise consistent with this memorandum opinion.

Signed this 20th day of December 2004.

DENNIS MICHAEL LYNN
UNITED STATES BANKRUPTCY JUDGE