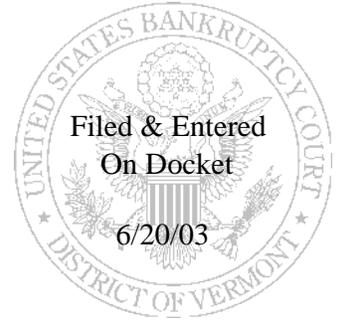


UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT



In re:

**Thomas P. Kilduff and
Kimberly A. Kilduff,
Debtors.**

**Chapter 13
Case # 03-10368**

Appearances: Carolyn Adams, Esq.
Wells River, VT
For the Debtor

Jennifer Emens-Butler, Esq.
Bethel, VT
For the Creditor

ORDER
DENYING DEBTORS' MOTION TO AVOID MECHANIC'S LIEN
AND DETERMINING PLAN TREATMENT OF MECHANIC'S LIEN CLAIM

On April 25, 2003, the Debtors Thomas P. Kilduff and Kimberly A. Kilduff (hereinafter, the "Debtors") filed a Motion to Avoid Judicial Lien (doc. #14) (hereinafter, the "Motion"), seeking, pursuant to 11 U.S.C. § 522(f)(1)(A), to avoid the lien of Nathan Pero. In response, Creditor Pero (hereafter, the "Creditor") filed an Objection to Debtors Motion to Avoid Lien (hereinafter, the "Objection") (doc. #21), arguing his lien was not avoidable because it was a statutory lien, not a judicial lien.

On June 12, 2003, the Court held a hearing on Debtors' Motion and Creditor's Objection. The Creditor argued that he originally held a \$14,400 mechanic's lien which he perfected by, first, obtaining a judgment in the amount of \$6,952 plus interest (12% from July 30, 1998) and, then, recording said judgment in the Town of West Fairlee Land Records, both as required by 9 V.S.A. §§ 1921–1928. At the hearing the Court held that under Vermont law the Creditor's mechanic's lien was a statutory lien, not a judicial lien. See In re APC Construction, Inc., 132 B.R. 690, 694 (D. Vt. 1991) (holding that although the holder of a mechanic's lien must resort to judicial proceedings to perfect his lien by judgment order, the lien itself retains its original status as a statutory lien; therefore, the lien could not be avoided, although perfected post-petition, because the judgment order would relate back to the date of the original statutory contractor's lien); see also In re The Rainbow Trust, 216 B.R. 77 (B.A.P. 2d Cir. (Vt.) 1997) (holding perfected mechanic's lien is statutory lien); cf., Archer v. Warner, 123 S. Ct. 1462, 2003 US LEXIS 2493, at *12 (Mar. 31, 2003) ("the mere fact that a conscientious creditor has previously reduced his claim to judgment should not bar further inquiry into the true nature of the debt."). Therefore, the Court denied the Debtors' Motion to avoid lien.

On June 13, 2003, the Court held a confirmation hearing on the Debtors' Chapter 13 Plan (doc. #5) (hereinafter, the "Plan"). The Plan proposed to pay the Creditor approximately \$680 as a secured claim, but did not provide for any payment on the unsecured portion of the Creditor's claim; the Plan did not provide for the Creditor to retain any lien. The Creditor objected to this treatment alleging that he is entitled to both a dividend on the unsecured portion of his claim and retention of his lien. See Creditor's Objection to Chapter 13 Plan (doc. #9). At the June 13th hearing, the Debtors were directed to amend their Plan to provide for a dividend on the unsecured portion of the Creditor's claim so as to comply with the requirements of the Bankruptcy Code regarding Creditor's claim; the Debtors were also directed to re-notice the amended plan to all creditors since each unsecured creditor would receive a smaller dividend than originally noticed under the original Plan once Creditor Pero's unsecured portion of his claim was added to the pool of unsecured claims. The confirmation hearing was adjourned until July 24, 2003 to give Debtors' counsel sufficient time to amend and re-notice the amended plan. The Court did not rule on the question of lien retention at that time. This Order addresses the proper treatment of the Creditor's mechanic's lien in chapter 13.

Pursuant to 11 U.S.C. § 506, the Creditor's Claim is secured to the extent of equity in the real property to which the lien attaches (approximately \$680) and unsecured as to the balance (approximately \$6400).¹ Since the statutory lien is not a "security interest," it is not protected from modification by § 1322(b)(2). Hence, the Court finds that the Creditor's claim can be "crammed down"² like an undersecured car loan, and, specifically, that the Debtors can strip off the unsecured portion, modifying the Creditor's rights, and, upon successful completion of the chapter 13 plan, discharge the lien through the plan.³ Cf., Pond v. Farm Specialist Realty et al., (In re Pond), 252 F.3d 122 (2d Cir. 2001).

IT IS THEREFORE ORDERED that:

1. the Creditor's Objection to confirmation of Debtors' Plan is sustained in part and overruled in part;
2. in order to have their Plan confirmed, the Debtors must file an amended plan which pays Creditor Pero the secured portion of his Claim in full, as well as pays Creditor Pero the same dividend as all other

¹Pursuant to 11 U.S.C. § 506(a), the allowed amount of a secured claim is limited to the value of the collateral securing that claim; and, pursuant to 11 U.S.C. § 1325(a)(5)(B), a chapter 13 plan shall be confirmed if the plan pays the holder of a secured claim at least the amount of the allowed secured claim.

²When a plan pays a secured creditor an amount equal to the value of the collateral securing the debt, rather than the full amount of the outstanding balance, this is colloquially known as a "cram down" of the creditor's debt.

³The Court notes that if the claim involved were entitled to priority, a debtor may have to pay it in full, even after stripping the lien, to confirm a plan. However, since there has been no evidence presented in this case that Creditor's lien is a priority unsecured claim, the Court need not decide that issue here.

- unsecured creditors on the remaining unsecured portion of his Claim; and
3. the Creditor's lien shall be discharged upon completion of the Debtors' Plan.

SO ORDERED.

June 20, 2003
Rutland, Vermont



Colleen A. Brown
United States Bankruptcy Judge