

(Cite as: 1989 WL 360853 (Bankr.D.Vt.))

In re Howard M. PRUSSAK, d/b/a High Meadow Farms Market, Debtor.

No. 88-00007.

United States Bankruptcy Court.

D. Vermont.

July 19, 1989.

J.I. Meyers, White River Junction, Vt., for Howard M. Prussack (debtor).

W.M. McCarthy, Brattleboro, Vt., for R.E. Avant(Avant).

FRANCIS G. CONRAD, Bankruptcy Judge.

***1** The matter [FN1] before us presents the issue of whether a State Court Clerk's certification of a stipulated Order, dated the same day it was signed by the Superior Court Judge and Assistant Judges, is sufficient to satisfy a State statute which requires that recording of a judgment lien "shall consist of filing a copy of the judgment with (the) date it became final, certified by the Clerk of the Court issuing the judgment." (parentheticals supplied). We hold the certification satisfies the statute.

This contested matter is before us on Debtor's objection to the secured priority claim of Avant on the grounds, inter alia, that it is not accompanied by satisfactory evidence showing Avant's judgment lien has been perfected. Specifically, Debtor objects to Avant's claim because:

... at no place on said judgment does there appear any statement of the date when the judgment became final, certified by the clerk of the court issuing the judgment. The only certification is that it is a true copy, and not the date it became final.

Debtor's Memorandum of Law in Support of Objection to Claim of Roy Eric Avant--Preliminary Statement, p. 2 (emphasis in original).

12 Vt.Stat.Ann. § 2901 provides for the creation of a judgment lien as follows:

A final judgment issued in a civil action shall constitute a lien on any real property of a

judgment debtor if recorded as provided in this chapter.

How a judgment lien is recorded is found in 12 Vt.Stat.Ann. § 2904. It provides:

A judgment creditor may record a judgment lien at any time within eight years from the date the judgment becomes final in the town clerk's office of any town where real property of the debtor is located. Recording shall consist of filing a copy of the judgment with (the) date when it became final, certified by the clerk of the court issuing the judgment. The certification shall be recorded by the town clerk in the land records.

(parentheticals supplied).

One argument that Debtor raised orally at the hearing on the objection to Avant's claim, but not articulated well in its brief, pertained to the finality of the stipulated judgment Order.

The stipulated judgment Order was signed by the Court, certified by the State Clerk of Court, and recorded by the Town Clerk, all on November 3, 1987. The Clerk did not indicate the date the Order became final.

Debtor argued at the hearing, relying on V.R.Civ.P. 62(a), that the judgment Order could not have been recorded in the Town Clerk's Office because execution could not issue on it until thirty (30) days after entry. V.R.Civ.P. 62(a) provides:

(a) Automatic Stay, Exceptions--Injunctions, Receiverships, and Divorce Orders. Except as stated herein, no execution shall issue upon a judgment nor shall proceeding be taken for its enforcement until the expiration of 30 days after entry....

Avant's Memorandum of Law counters Debtor's Memorandum with the following:

The entry of judgment is a ministerial act pursuant to provisions of V.R.C.P. 58. A judgment is effective when entered as provided in V.R.C.P. 79(a). Rule 79(a) provides that upon entry by the Clerk, the Order is effective and final.... Vermont law does not preclude any judgment from being final or require a thirty day waiting period.

*2 Creditor Avant's Memorandum of Law, p. 1.

Debtor's execution argument is without merit. Recording a judgment lien and executing on it are two separate and distinct procedures, albeit execution without recordation may be legally impossible when real property is involved.

Avant also raises that the filed lien was a stipulated Order and "therefore was not really appealable [t]] say that the order was 'nothing' until thirty days after filing would be a

grave injustice and lead to fraud to all judgment debtors." Avant's Memorandum of Law, p. 2.

After we received the first memoranda of law and started to draft this Memorandum Decision, we realized that the issue about what constitutes a Clerk's certification was not adequately addressed by the parties. In our view, the Clerk's certification constituted the key to resolve this matter. At a later status conference in the main case, we asked the parties to re-brief the issue of what constitutes a Clerk's certification. Avant did not submit an additional memorandum and the Debtor's later submitted memorandum contained information that the Court was already aware of. Suffice it to say there is very little case law from other jurisdictions on what constitutes a Clerk's certification. It is non-existent in Vermont. The certification issue requires that we construe a Vermont statute on which there is no case law.

We approach the issue with trepidation. The issue appears never to have been raised in the State of Vermont, and yet the certification of orders and judgments is a common occurrence in any Clerk's Office. If there was in effect a procedure to certify issues to the Vermont Supreme Court, the issue in this matter would have been certified. But no certification procedure is in effect. Therefore, we must interpret Vermont law.

The task of resolving a statutory dispute begins where all inquiries begin-- with the language itself. *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685, 105 S.Ct 2297, 2301, 85 L.Ed.2d 692 (1985). It is also where the inquiry ends in this matter because there is no legislative history available to us. Compare, *Caminetti v. United States*, 242 U.S. 470, 485, 37 S.Ct 192, 194, 61 L.Ed. 442 (1917) (The sole function of a Court is to enforce a statute according to its terms.).

As a general rule, a statute should be read according to its literal terms, *United States v. Locke*, 471 U.S. ----, ----, 105 S.Ct 1785, 1792, 85 L.Ed.2d 64, 75 (1985), unless this renders the statute ineffective or leads to absurd or irrational consequences.

The primary vehicle for interpreting the meaning of a Vermont statute is the "plain meaning rule." This rule was described recently in *Cavanaugh v. Abbott Laboratories*, 145 Vt. 516, 529, 496 A.2d 154 (1985). The Cavanaugh Court, citing *Heisse v. State*, 143 Vt. 87, 89, 460 A.2d 444, 445 (1983), said:

The most elementary rule of statutory construction is that the plain meaning controls. If confusion or ambiguity does not appear, then the statute is not construed, but rather is enforced in accordance with its express terms.

***3** *Cavanaugh*, supra, 145 Vt. at 529.

A judgment or order is recorded under V.R.A.P. 4 when such judgment is entered on the criminal or civil docket. *Glaback v. Sardelle*, 132 Vt. 490, 493, 321 A.2d 1 (1974). "Judgment"

as used in (the) rules includes a decree and any order from which an appeal lies. V.R.Civ.P. 54. The Vermont Rules of Civil Procedure do not undertake to determine what is an appealable order, this being a matter left to case law. *Woodward v. Porter Hospital, Inc.*, 125 Vt. 264, 214 A.2d 67 (1965). See, Reporter's Notes to V.R.Civ.P. 64. If the rule provides that case law is to determine what is an appealable order, how can a Clerk determine what is a final order and certify to it? Our rhetorical question answers the issue raised in this case. A Clerk of Court in Vermont cannot determine what is an appealable final order, nor should they be required to do so.

A Clerk of Court's duty is primarily ministerial in nature. Perhaps we can say this another way. There is a distinction between a judgment itself and the "filing" or the "entry" of the judgment. A judgment is the final determination of an action. It is an act of the Court. *Ex parte Morgan*, 114 U.S. 174, 175, 5 S.Ct 825, 29 L.Ed. 135, (1885). Judges make judgments. Clerks "file" or "enter" them in the Court records. "Filing" is the delivery of the judgment to the Clerk for entry and preservation. *The Washington*, 16 F.2d 206, 208 (2d Cir.1926). The ministerial notation comes from the requirements of V.R.Civ.P. 58 which require that a Clerk of Court "forthwith prepare, sign and enter the judgment without awaiting any direction by the Court." The determination of when an order is final is discretionary in nature, although there are no legal bright lines which assist the discretion. Certification is a ministerial act.

Certification has been defined as: "a documentary declaration ... regarding ... facts ... from the public authority ... a writing so signed and authenticated as to be legal evidence (a) writing by which testimony is given that a fact has or has not taken place." *People ex rel. Smith v. Foster*, 27 Misc. Rep. 576, 58 N.Y.S. 574, 579 (Sup.Ct 1899).

What is the purpose of the Clerk's certificate under Vermont Statutes Annotated? The statute does not explicitly tell us, but rather, the nature of a certificate does. A certificate should substantially apprise a person to whom it is delivered of the facts sought to be brought to their notice, and upon which the person is to act. If a judgment or lien is to be recorded by a Town Clerk, the Town Clerk must be apprised of the prima facie validity of the judgment or order so it may be recorded. Without such a procedure an unscrupulous person could file bogus orders and judgments in the land records. The certification procedure protects both the debtor and the creditor.

The true value of a Clerk of Court's certification is that it attests to the prima facie validity of a Court order or judgement and allows it to be recorded in the land records as a lien. It says nothing about the substantive intent or nature of the order or judgment, only that this document is what a Court ordered or adjudged. A certification by a Clerk of Court merely attests that the order or judgment is exactly what it is--an order or judgment.

***4** Debtor's argument that the Clerk should certify when the judgment became final at first blush appears to have some merit. But closer scrutiny reveals its weakness in at least two

areas. The first being the ministerial function of a Clerk, and the second being an improper or misapplication of the grammatical modifiers in 12 Vt.Stat.Ann. § 2904.

Vermont case law indicates the finality of a judgment should be determined by case law. Subject to the provisions of V.R.Civ.P. 54(b), a judgment is effective upon entry by the Clerk, provided it is entered as directed in Rule 79(a). It is from the entry date that an appeal lies, not the date the Court signed the order, unless of course, the parties stipulated otherwise. The entry on the Clerk's docket is a ministerial act, done without any direction by the Court. V. R.Civ.P. 58. One of its purposes then is to provide a date from which an appeal lies. The entry provides the date, but Vermont Rules Civil Procedure leaves it to others to determine its efficiency.

12 Vt.Stat.Ann. § 2904 is not a paragon of good grammar. As enacted, it reads in pertinent part:

Recording shall consist of filing a copy of the judgment with (the) date when it became final, certified by the clerk of the court issuing the judgment.

(parentheticals supplied). Debtor's interpretation of this statute would require us to hold that the clause "certified by the clerk of court issuing the judgment" modifies only the word "final." This is an incorrect grammatical interpretation. The clause "certified by the clerk of the court issuing the judgment" modifies the entire preceding clause. Thus, the judgment, not the certificate, should contain the date when it becomes final. Although we observe that there could be some ambiguity about when an order or judgment was entered on the docket in a situation where the date entered by the Court is different from the date of the Clerk's certification, [FN2] this is not the situation here. The Court signed the Order on November 3, 1987 and the Clerk of Court certified to its authenticity in a certification dated November 3, 1987. Based upon the foregoing, we conclude that Avant's judgment was properly recorded as a judgment lien under Vermont law.

Our conclusion on the lien issue, however, does not end this matter entirely. The lien was filed within the ninety (90) day preference period of 11 USC § 547. A judicial lien filed within the ninety (90) day preference period and otherwise satisfying § 547 is considered a preference and is avoidable. Avant argues that this issue, raised by the Debtor in its later memorandum, was filed beyond the fifteen (15) days allowed by the Court for filing memoranda and, therefore, is waived. We cannot subscribe totally to Avant's view.

A preference action is initiated by the start of an adversary proceeding. It is a discrete cause of action under the Bankruptcy Code. 11 USC § 547. When it is combined with an objection to claim contested matter, the adversary proceeding and the objection to claim may be heard together. Rules of Practice and Procedure in Bankruptcy Rule 3007. And although no preference action has been filed by Debtor, there is no doubt in our mind that Debtor has

presented a prima facie case under § 547 to avoid the lien as a preference. Avant, however, has not been fairly apprised of the § 547 issue. Accordingly, we do not entertain the § 547 cause of the actual time of entry. action because no adversary proceeding is pending at this time. We leave it to Debtor to decide if a preference action should be filed.

***5** One further comment from us. This is an assets case. it appears that there will be a 90-95% dividend to unsecured creditors. Assuming arguendo our interpretation of Vermont law is incorrect, and assuming an adversary proceeding is filed and Avant's lien is determined to be a preference, and Avant is determined to be unsecured, Avant could lose five to ten cents on the dollar. Or vice versa, Avant prevails, there would be a slight reduction in the "grocery basket" distributed to unsecured creditors. We suggest to the Debtor and Avant that before one pursues a preference action or the other an appeal, they discuss a Solomon-like settlement and save their clients the expense of more legal fees.

An appropriate Order will be entered.

FN1. We have jurisdiction to hear this matter under 28 USC § 1334(b) and the general reference to this Court under the District Court rules. This is a core matter under 28 USC § 157(b)(2)(K). This Memorandum of Decision constitutes findings of fact and conclusions of law under F.R.Civ.P. 52 as made applicable by Rules of Practice and Procedure in Bankruptcy Rule 7052.

FN2. We do not presume to tell the Vermont Clerks how to perform their duties. To avoid the situation posed, however, and assuming the entry date on the docket is different from the Court's signature date, a simple statement on the order or judgment when the item was entered on to the docket would avoid any doubt about the actual time of entry.

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