IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

CARY PAUL SHAHID
Appellant,

v. Case No.: 3:16cv406-RV/CJK

BANCORPSOUTH BANK,
a Mississippi banking corporation,
Appellee.
_____/

ORDER

On August 21, 2015, Cary Paul Shahid filed a petition for bankruptcy under Chapter 11 of the Bankruptcy Code. Thereafter, BancorpSouth Bank (BCS) brought a complaint commencing an adversary proceeding seeking a declaration that it had a valid and perfected judgment lien on an asset—specifically, 500 shares of common stock in Ocean Club of Walton County, Inc., a Florida corporation that Shahid was president of—which was not avoidable as a preference pursuant to Section 547 of the Bankruptcy Code. The parties filed cross motions for summary judgment. On August 3, 2016, the Bankruptcy Court (Judge Henry A. Callaway) issued a lengthy oral ruling granting summary judgment for BCS, and denying summary judgment for Shahid. Shahid now appeals that ruling and judgment.

I. Standard of Review

District courts function as appellate courts in reviewing decisions reached by bankruptcy courts. *See, e.g., In re Graupner*, 537 F.3d 1295, 1299 (11th Cir. 2008) ("In a bankruptcy case, the district court functions as an appellate court . . . .") (Vinson, J.). A bankruptcy court deciding a summary judgment motion, just like a district court, must determine whether there are any genuine issues of material fact. *See, e.g., Carey*

Lumber Co. v. Bell, 615 F.2d 370, 378 (5th Cir. 1980). And also, just like a district court, a bankruptcy court may only grant summary judgment if there is no genuine issue of material fact. *See, e.g., In re Optical Technologies, Inc.*, 246 F.3d 1332, 1334 (11th Cir. 2001). An appellate court—whether a court of appeals or a district court reviewing a bankruptcy court—will review a bankruptcy court's grant of summary judgment *de novo*. *Id.*

II. Background

The following factual background is taken from the Bankruptcy Court's oral ruling. Except where noted, this factual background is not in dispute.

In September and October 2011, BCS obtained two final judgments totaling over $1.8 million against Cary Paul Shahid in Florida state court. Shortly thereafter, on October 3, 2011, and November 2, 2011, respectively, BCS filed judgment lien certificates with the Florida Secretary of State. The certificates complied in form and substance to Section 55.202(2)(a), Florida Statutes, and they appear in the public database on the Secretary of State's website as required by Section 55.203(4).

At all times pertinent, Shahid has owned 500 shares of common stock in Ocean Club. The stock is evidenced by a stock certificate and is a certificated security under Florida law. In 2013, Shahid, in his capacity as the president of Ocean Club, executed a stock pledge agreement on behalf of Ocean Club as "grantor" purportedly granting to Whitney Bank a security interest in the stock. Ocean Club also executed a mortgage on its real estate in favor of Whitney Bank, and it granted Whitney Bank a security interest in its furniture, fixtures, and equipment. Shahid delivered the certificate for the stock to Whitney Bank. However, even though he owned the stock personally, Shahid did not execute the security agreement individually—only in his capacity as the president of Ocean Club. Shahid did not endorse the stock certificate in favor of

Whitney Bank, and the stock was never registered in the name of Whitney Bank on Ocean Club's books. BCS, Shahid, and Whitney Bank agree that Whitney Bank never obtained a perfected security interest in the stock.

Although the parties did not stipulate to the actual physical location of the stock certificate, Shahid was at all times relevant a resident of Florida and has not contended that it was located anywhere other than Florida. Thus, the Bankruptcy Court assumed (as will I) that the Ocean Club stock certificate was located in Florida from October 2011 forward.

In supplemental proceedings in Florida state court, BCS moved to implead Whitney Bank. By order dated December 23, 2014, the Walton County Circuit Court ordered the impleader of Whitney Bank, and required the issuance of a summons to, and service of the summons on, Whitney Bank, along with the motion to implead and order. The order and summons were served on Whitney Bank on December 24, 2014. However, the order and summons did not require Whitney Bank to surrender the stock to anyone.

On May 8, 2015, BCS caused an amended writ of execution to be issued to the Sheriffs of the State of Florida to execute on Shahid's assets. Having determined that its security interest in the stock was invalid, on May 29, 2015, Whitney Bank delivered Shahid's Ocean Club stock to the Sheriff of Escambia County, Florida, pursuant to the amended writ of execution. Eighty-four days later, on August 21, 2015, Shahid filed a petition for relief under Chapter 11 of the Bankruptcy Code.

III. Discussion

A bankruptcy trustee or Chapter 11 debtor may avoid certain transfers pursuant to Bankruptcy Code Section 547, which states, in relevant part:

> (b) Except as provided in subsections (c) and (i) of this section, the trustee may avoid any transfer of an interest of the debtor in property—

> (1) to or for the benefit of a creditor;
> (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
> (3) made while the debtor was insolvent;
> (4) made—
>
> > (A) on or within 90 days before the date of the filing of the petition; or
> > (B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and
>
> (5) that enables such creditor to receive more than such creditor would receive if—
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> > (A) the case were a case under chapter 7 of this title;
> > (B) the transfer had not been made; and
> > (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

Bankruptcy Code Section 547(e)(2) provides that, for purposes of Section 547, and except as provided in paragraph (3) of subsection (e), a transfer is made—

> (A) at the time such transfer takes effect between the transferor and the transferee, if such transfer is perfected at, or within 30 days after, such time, except as provided in subsection (c)(3)(B);
> (B) at the time such transfer is perfected, if such transfer is perfected after such 30 days; or
> (C) immediately before the date of the filing of the petition, if such transfer is not perfected at the later of—

> (i) the commencement of the case; or
>
> (ii) 30 days after such transfer takes effect between the transferor and the transferee.

Bankruptcy Code Section 547(e)(1)(B) provides that, for the purpose of Section 547, a transfer of property other than real property is perfected "when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee." To determine "when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee," the court looks to state law. *Butner v. United States*, 440 U.S. 48, 55 (1978) (property rights of a bankruptcy estate are generally determined by state law).

Shahid does not dispute that BCS obtained a valid and perfected judgment lien on the stock. The issue presented to the Bankruptcy Court (and to this court on appeal) is *when* BCS obtained its valid and perfected lien. BCS argues that it obtained its valid and perfected lien on Shahid's stock when it registered its judgment lien certificates with the Secretary of State of Florida in late 2011 and that the registration created a transfer outside the 90-day preference period set forth by Section 547(b)(4)(A), which was not subject to avoidance. Shahid, meanwhile, argues that the bank obtained a lien only when Whitney Bank delivered the stock to the Escambia County Sheriff on May 29, 2015, which was within the 90-day preference window. Thus, the question to be resolved is whether a creditor's filed judgment lien certificate creates a lien that attaches to a debtor's stock certificate, or whether actual seizure of the stock certificate is required.

I agree with the Bankruptcy Court that actual seizure of the stock certificate was not required here. The Judgment Recordation Act was enacted October 1, 2001, and as Professor Jeffrey Davis (who served as reporter for the Florida Bar Committee that

spearheaded the law and participated in the six-year drafting and enactment process) has noted, the statute changed the law in Florida in various ways. *See* Jeffrey Davis, *Fixing Florida's Execution Lien Law Part Two: Florida's New Judgment Lien on Personal Property*, 54 Fla. L. Rev. 119 (2002). In that statute, the Florida legislature created two alternative and independent means to create a lien on personal property: by recordation and by execution. As for the former, Section 55.202 provides that:

> (2) A judgment lien may be acquired on a judgment debtor's interest in all personal property in this state subject to execution under s.56.061, other than fixtures, money, negotiable instruments, and mortgages.
>
> > (a) A judgment lien is acquired by filing a judgment lien certificate in accordance with s. 55.203 with the Department of State…

As for the latter, Section 55.205(1) provides that:

> A judgment creditor *who has not acquired a judgment lien as provided in s. 55.202* or whose lien has lapsed may nevertheless proceed against the judgment debtor's property through any appropriate judicial process. Such judgment creditor proceeding by writ of execution acquires a lien as of the time of levy and only on the property levied upon. Except as provided in s. 55.208, such judgment creditor takes subject to the claims and interest of priority judgment creditors. (emphasis added)

With the Judgment Recordation Act, Florida created a new method of creating judgment liens on personal property. Instead of having to rely upon the delivery and execution to the sheriff in each county where the judgment defendant had personal property (as it was prior to 2001), creditors holding a judgment could file a judgment lien certificate with the Secretary of State and obtain a lien on many types of personal

property across the state.[1]

Section 56.061 sets out the type of personal property subject to execution, and it provides that "Lands and tenements, goods and chattels, equities of redemption in real and personal property, and *stock in corporations*, shall be subject to levy and sale under execution." Pursuant to Section 55.202(2)(c), the effective date of a judgment lien created under Section 55.202(2)(a) is the date and time of filing of the judgment lien certificate. Section 55.202(3) provides that, "Except as otherwise provided in § 55.208, the priority of a judgment lien acquired in accordance with this section or § 55.204(3) is established at the date and time the judgment lien certificate is filed." Thus, according to Section 55.202, once a judgment creditor has filed a judgment lien certificate in accordance with the Florida statute—and it is undisputed that was done here—the priority of the lien is fixed, and another judgment creditor who later files a judgment lien certificate cannot acquire a judgment lien that is higher priority than his. The transfer created by the filing of the judgment creditor's judgment lien certificate is, therefore, made for the purposes of Section 547(e)(2) at the time and date of filing.[2]

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[1] While describing the effect of the 2001 Judgment Recordation Act, Professor Davis notes the judgment lien created under the statute as separate and distinct from a lien created by execution and perfected by levy. *Davis, supra,* at 141. Professor Davis explains that Section 55.202 provides Florida judgment creditors with an advantage over judgment creditors who must perfect liens under the approach adopted by the majority of states. He notes that under the majority approach, a lien on personal property is only acquired by levy. *See id.* at 140. A levy on a significant asset often pushes a debtor into bankruptcy within the 90 day preference period. On the other hand, while the filing of a judgment lien certificate under Section 55.202 creates a judgment lien on the debtor's personal property, the filing of the certificate alone is not likely to cause the debtor to immediately file for bankruptcy. Professor Davis notes that, if a prudent creditor waits 91 days to levy on his lien created under Section 55.202, and that levy causes the debtor to file for bankruptcy, the creditor's lien will not be subject to a preference attack. *Id.* at 141.

[2] BCS has persuasively stated in its brief on appeal:

In this case, BCS filed its judgment lien certificates in accordance with Section 55.202 on October 3, 2011, and November 2, 2011, respectively. The priority of its lien was established at that time, and no hypothetical judgment creditor could acquire a judicial lien that was superior to BCS's lien. Thus, the transfers were made for the purposes of Section 547 outside of the 90-day preference period and are not avoidable under that section.

Shahid argues, however, that BCS could not (and did not) establish a valid and perfected lien on the Ocean Club stock by filing the judgment lien certificates under Section 55.202 because the *only* way to obtain a valid and perfected judgment lien on a certificated security is set forth in Section 678.1121, which is a statute specifically applicable to certificated stock and is part of the Uniform Commercial Code. Section 678.1121 states in pertinent part (emphasis added):

> (1) The interest of a debtor in a certificated security may be reached by a creditor *only* by actual seizure of the security certificate by the officer making the attachment or levy, except as otherwise provided in subsection (4). However, a certificated security for which the certificate has been surrendered to the issuer may be reached by a creditor by legal process upon the issuer.

> [T]he court's purpose in construing a statute is to give effect to the legislature's intent; when that intent can be ascertained from the words used, given their ordinary meaning, the court should not look behind the plain language. *State v. Burris*, 875 So.2d 408, 410 (Fla. 2004). According to the clear, unambiguous terms of the Judgment Recordation Act, it applies to corporate stock.
>
> Section 55.202(2) provides that a lien may be acquired under the Act on a judgment debtor's personal property that is subject to execution under § 56.061. Section 56.061, in turn, explicitly includes "corporate stock" as personal property and excludes "fixtures, money, negotiable instruments, and mortgages" as property subject to execution. The language of these sections evidences the legislature's intent to allow judgment creditors to create and perfect a lien on stock by filing judgment lien certificates under the Act.

A bankruptcy court sitting in Florida has held that Section 678.1121 is indeed the sole method for a creditor to reach a debtor's interest in a certificated security. *In re Cohen,* 2009 WL 3675400 (Bankr. S.D. Fla. 2009). Judge Callaway disagreed with *Cohen,* concluding that Florida law—which controls resolution of this issue—follows the *in pari materia* rule of statutory construction, pursuant to which two statutes that relate to the same subject should be construed together to harmonize both statutes and give effect to the legislature's intent. *See, e.g., Maggio v. Florida Dep't of Labor and Employment Security,* 899 So.2d 1074, 1078 (Fla. 2005). Judge Callaway endeavored to apply that rule of statutory construction when he stated as follows:

> Florida Statute Section 678.1121 is the exclusive means of creating an execution lien on certificated stock and requires seizure of the certificate to create an execution lien. However, construing Section 678.1121 and the newer statutes found at Sections 55.201 through 209 together so as to harmonize them and give effect to the legislature's intent, the Court finds that the newer recordation lien of Florida Stature Section 55.202 is a separate, different lien which does not require seizure of the stock certificate for perfection. As discussed earlier, Florida Statutes Sections 55.202(2) two, 56.061, and 55.205(4) specifically make the recordation lien applicable to stock in corporations, including certificated securities. And as also discussed earlier, the judgment execution lien and the judgment recordation lien are separate, independent means of creating a judgment lien on personal property; a judgment creditor can use utilize one or the other or both. Seizure is one of the final steps in the execution and levy process. A creditor who accomplishes seizure of a stock certificate has necessarily perfected a judgment execution lien on the stock certificate. However, the seizure requirement does not relate to the recordation lien, which does not require execution at all as provided by Section 55.205(1). To superimpose the seizure requirement on the recordation lien

> would render the recordation lien a nullity and eliminate its sphere of operation with regard to stock certificates because it would require judgment creditors to go through the execution and levy process, thus creating execution lien, in order to create a judgment lien on stock certificates.

I agree with this analysis and conclusion. I also agree with BCS's argument in its brief that:

> Section §678.1121 does not, as Shahid submits, preclude the creation of a judgment lien on stock through recordation under the Judgment Recordation Act. Shahid's reading of §678.1121 and emphasis on the words "can be reached by a creditor *only* [by] actual seizure" glosses over the meaning of the words "reached by" and assumes that "to reach" means "to perfect a lien on." However, Official Comment 1 to that section suggests seizure is only required to constitute a proper levy.[3] Shahid erroneously equates lien creation with execution, ignoring the effect of the Judgment Recordation Act.

IV. Conclusion

For the reasons stated above, the ruling and judgment by the Bankruptcy Court on August 3, 2016, are hereby AFFIRMED.

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3 Official Comment 1 states:

> In dealing with certificated securities the instrument itself is the vital thing, and therefore a valid levy cannot be made unless all possibility of the certificate's wrongfully finding its way into a transferee's hands has been removed. *This can be accomplished only when the certificate is in the possession of a public officer, the issuer, or an independent third party.* A debtor who has been enjoined can still transfer the security in contempt of court. *Therefore, although injunctive relief is provided in subsection (e) so that creditors may use this method to gain control of the certificated security, the security certificate itself must be reached to constitute a proper levy whenever the debtor has possession.* [emphasis added]

DONE and ORDERED this 29th day of September 2017.

/s/ Roger Vinson
ROGER VINSON
Senior United States District Judge