

MEMORANDUM OPINION

This matter comes before the Court on cross-motions for summary judgment filed by the Bibb County Tax Commissioner ("Commissioner") and the Chapter 7 Trustee ("Trustee") regarding whether Commissioner has a secured claim for certain pre-petition ad valorem taxes assessed against property that Trustee has abandoned. After considering the pleadings, evidence and applicable authorities, the Court enters the following findings of fact and conclusions of law in conformance with Federal Rule of Bankruptcy Procedure 7052.

Findings of Fact

Prior to the petition, Commissioner assessed ad valorem taxes in the amount of \$825.57 against four boats owned by Tonnie and Carla Jones ("Debtors"). The ad valorem taxes were due and unpaid at the time of Debtors' petition. On May 14, 1999, Commissioner filed Fi. Fa.'s in the Superior Court of Bibb County for execution upon all of Debtors' property. Debtors filed for relief on August 20, 1999.

Trustee abandoned the boats against which Commissioner assessed the ad valorem taxes in question because they were encumbered by a consensual lien in excess of their value. Debtors had certain real property, however, that Trustee has

liquidated for an amount sufficient to pay Commissioner in addition to senior security interests on such real property. Commissioner argues that he holds a secured claim entitling him to payment from the proceeds of Trustee's real estate sale. Trustee argues that the Bankruptcy Code's provisions regarding allowance of ad valorem tax claims prevent Commissioner from receiving such payment.

Conclusions of Law

Georgia law provides a lien on all of a taxpayer's property interests in favor of the taxing authority when taxes become due and unpaid. O.C.G.A. § 48-2-56(a) (2000).¹ A lien on all of a taxpayer's property arises when a particular item of property is valued for ad valorem tax purposes, and the lien continues until such taxes are paid. O.C.G.A. § 42-8-56(d)(1).² Ad valorem tax liens are senior to all other security interests in the particular item of

¹O.C.G.A. § 48-2-56(a) provides
Except as otherwise provided in this Code section, liens for all taxes due the state or any county or municipality in the state shall arise as of the time the taxes become due and unpaid and all tax liens shall cover all property in which the taxpayer has any interest from the date the lien arises until such taxes are paid.

²O.C.G.A. § 48-2-56(d)(1) provides
Liens for any ad valorem taxes shall cover the property of taxpayers liable to tax from the time fixed by law for valuation of the property in each year until such taxes are paid

property taxed, and junior to security interests in all of the taxpayer's other property. O.C.G.A. § 42-8-56(d)(2).³ The taxing authority may perfect its lien by filing a Fi. Fa. See Thompson v. Adams, 157 Ga. 42, 42, 120 S.E. 529, 530 (1923); State v. Atlanta Provision Co., 90 Ga. App. 147, 150, 82 S.E.2d 145, 147 (1954); Matter of Fulton Air Service, Inc., 37 B.R. 358, 360-61 (Bankr. N.D. Ga. 1984).⁴

Commissioner's lien is a "statutory lien" as that term is defined under the Bankruptcy Code because it arose "solely by force of a statute on specified circumstances[,]" namely the specified circumstance, pursuant to O.C.G.A. § 48-8-56(a), of a tax due and unpaid. See 11 U.S.C. § 101(53). A Chapter 7 trustee may avoid statutory liens defined by certain criteria related to a debtor's financial distress pursuant to 11 U.S.C. § 545(1)(A)-(F), or statutory liens that were not perfected or enforceable against a bona fide purchaser who might have purchased the encumbered property at

³O.C.G.A. § 48-2-56(d)(2) provides
The lien for any ad valorem tax shall not be superior to the title and operation of a security deed when the tax represents an assessment upon property of the taxpayer other than property specifically covered by the title and operation of the security deed.

⁴In these cases, the courts did not state that filing a writ of fieri facias is the specific means of perfecting a tax lien. The cases hold that while filing a Fi. Fa. is not prerequisite to a tax lien's attachment to a delinquent taxpayer's property, failure to file a Fi. Fa. would leave the tax lien subject to the rights of a subsequent bona fide purchaser without notice.

the time of commencement of the case pursuant to 11 U.S.C. § 545(2).⁵ In this case, Trustee may not avoid Commissioner's lien under Subsection 545(1) because its criteria do not match the circumstance specified in O.C.G.A. § 48-8-56(a) for the attachment of a tax lien in Georgia. Furthermore, Trustee may not avoid Commissioner's lien under Subsection 545(2) because Commissioner's lien was perfected and enforceable against a bona fide purchaser more than ninety days prior to the commencement of the case.

Trustee does not argue, however, that he can use his avoidance powers to prevent payment of Commissioner's lien from the proceeds of Debtors' real property. Rather, Trustee argues that Commissioner has no "secured" claim under Section 506(a) because any "claim" that he might have for ad valorem taxes must be disallowed pursuant to Section 502(b)(3).

Section 502(b)(3) provides for the disallowance of a claim "if such claim is for a tax assessed against property of the estate, [to the extent that] such claim exceeds the value of the interest of the estate in such property." 11 U.S.C. § 502(b)(3). Trustee argues that because he abandoned the boats against which the tax was assessed, the estate's interest in them is of no value. Any tax assessed against

⁵There are other provisions for avoiding statutory liens that are inapplicable to the present case. See 11 U.S.C. §§ 545(3) and 545(4).

the boats exceeds the value of the estate's interest in the boats by the full amount of the tax, thus Trustee argues that any claim for taxes assessed against the boats should be disallowed pursuant to Section 502(b)(3).

Trustee is correct to the extent that Commissioner's claim may be allowed as an unsecured claim. However, Trustee's argument fails to distinguish between a disallowed claim, and a debt that, though disallowed as an unsecured claim in proceedings under the Bankruptcy Code, nevertheless remains a secured debt attached to the property by a lien.

Accordingly, Trustee's motion for summary judgment will be denied to the extent that it asks the Court to hold that Commissioner is not entitled to a secured claim against the proceeds of Trustee's real estate sale.

In his brief in support of his motion, Trustee argues in the alternative that if Commissioner is entitled to a secured claim against the proceeds of the real estate sale, then this is properly a case for application of the marshaling doctrine. Trustee may be correct in this assertion. Marshaling requires two creditors and two assets, with only one of the assets common to both creditors. Commissioner and Trustee, with the status of a lien creditor pursuant to 11 U.S.C. § 544, are two creditors; the boats and the real property are assets; and the Commissioner has the right to resort to both the boats and the real estate sale proceeds

while Trustee may resort only to the real estate sale proceeds. See 5 KING, COLLIER ON BANKRUPTCY ¶ 544.07[1], p. 544-13 to 544-14.

However, though Trustee states this premise is an undisputed fact, Trustee has not shown, and Commissioner has not stipulated, that Commissioner's right to full satisfaction of his claim would not be impaired if he were required to resort to his lien on the boats. Accordingly, the question regarding marshaling cannot be resolved by Trustee's motion for summary judgment.

Conclusion

Trustee's motion for summary judgment will be denied. Commissioner's motion for summary judgment will be granted to the extent he asks the Court to hold that he has a security interest in the proceeds of Trustee's sale of real estate. To the extent that he asks to be paid from the proceeds of Trustee's real estate sale, however, Commissioner's motion will be denied pending determination as to whether the doctrine of marshaling appears in this case.

An order in accordance with this opinion will be entered on this date.

Dated this 17th day of July, 2000.

James D. Walker, Jr.
United States Bankruptcy Judge

CERTIFICATE OF SERVICE

I, Cheryl L. Spilman, certify that the attached and foregoing have been served on the following:

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This 20th day of July, 2000.

Cheryl L. Spilman
Deputy Clerk
United States Bankruptcy Court

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