

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

In re:

CHARLES WILLIAM DU FRESNE,
Debtor.

ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT,
AND DENYING MOTION OF DEFENDANT
COUNTY OF RAMSEY FOR
SUMMARY JUDGMENT

CHARLES WILLIAM DU FRESNE,

BKY 3-92-2691

Plaintiff,

ADV 3-93-68

v.

COUNTY OF RAMSEY; UNITED STATES
OF AMERICA; and DEPARTMENT OF
REVENUE, STATE OF MINNESOTA,

Defendants.

At St. Paul, Minnesota, this 25th day of March, 1994.

This adversary proceeding came on before the Court on September 28, 1993, for hearing on cross-motions for summary judgment made by the Plaintiff ("the Debtor") and Defendant County of Ramsey ("Ramsey County"). The Debtor appeared by his attorney, David E. Kirkman. Ramsey County appeared by M. Jean Stepan, Assistant County Attorney. Upon the pleadings presented on the motions, the arguments of counsel, and the other files and records in this adversary proceeding, the Court grants the Debtor's motion, and denies Ramsey County's motion.

NATURE OF PROCEEDING

The Debtor, an individual resident of the state of Minnesota, filed a voluntary petition for relief under Chapter 11 on May 6, 1992. Under color of a proof of claim filed in the Debtor's case on September 28, 1992, designated as Claim No. 13, Ramsey County asserted an unsecured priority claim against him, arising out of "Taxes or penalties of government units--11 U.S.C. Section 507(a)(7)."

In his complaint in this adversary proceeding, the Debtor recited various facts surrounding the creation of Ramsey County's claim, as well as those of Defendants Department of Revenue, State of Minnesota ("the Department of Revenue") and Internal Revenue Service ("the IRS"). As to Ramsey County, he requested relief in the form of a declaratory judgment that it does not have an

enforceable lien against his property under Minnesota law. In the event of a holding favorable to Ramsey County on that issue, he requested alternative relief avoiding its lien, determining it to be subordinate to perfected statutory liens in favor of the Department of Revenue and the IRS, or determining that it had not attached to his "partnership interests."

In its answer, Ramsey County prayed for a declaratory judgment holding that it had a valid lien against all of the Debtor's personal property, including his "partnership interests," holding that that lien has priority over all other competing liens, and holding that the lien is not subject to avoidance at the Debtor's instance.

MOTIONS AT BAR

The Debtor and Ramsey County both move for summary judgment pursuant to Fed. R. Bankr. P. 7056,(FN1) as to those issues that run solely between them. As limited,(FN2) the issues are whether Ramsey County does hold a valid, perfected lien against all of the Debtor's personal property; and, if it does, whether that lien may be avoided at his instance under color of 11 U.S.C. Section 545(2). (FN3)

UNDISPUTED FACTS

The parties have stipulated to the relevant facts.

The disputes in litigation in this adversary proceeding arose out of the Debtor's activity as a real estate developer and investor. At all relevant times, he was the general partner of Basswood Investment Partners ("Basswood"). In turn, Basswood was a general partner of Lincoln Fort Road Housing Limited Partnership ("Lincoln"). Basswood was a Minnesota general partnership; Lincoln was a Minnesota limited partnership.

In November, 1982, Lincoln obtained an interest in, and control of, a large office and apartment complex in St. Paul, Minnesota, under a rather novel arrangement that involved the Saint Paul Port Authority ("the Port Authority"). The project was originally developed prior to 1980 by Austin/King Housing Enterprises ("Austin/King"). The Port Authority had provided financing to Austin/King in connection with the project, with funds raised through a bond issue. It had taken security for this financing through a deed-and-leaseback: on September 15, 1980, Austin/King had conveyed the fee title to the project to the Port Authority by deed, and Austin/King and the Port Authority simultaneously had entered into a 30-year lease of the project back to Austin/King. The rental obligation under the lease tracked the amortization of the underlying bond financing. At the end of the lease term the lessee had the right to purchase the property from the lessor for the sum of \$1.00.

In the 1982 transaction, Lincoln took an assignment of the interest that Austin/King held in the project under this arrangement. After that, Ramsey County assessed taxes on the project(FN4) from 1983 through 1987. Lincoln defaulted on these tax obligations as they became due in 1987-1988, as well as on rent payments owing to the Port Authority. It conveyed its interest in the project to the Port Authority via a deed in lieu of foreclosure that was effective on January 3, 1988.

In August, 1989, Ramsey County began procedures to collect the delinquent taxes attributable to the project, under Minn. Stat. c. 277. In March, 1990, it commenced litigation in the Minnesota State District Court for the Second Judicial District, Ramsey County, to collect the delinquent taxes from Lincoln and Basswood. It did not name the Debtor as a party-defendant to this action.

On September 21, 1990, the Ramsey County District Court ordered the entry of judgment for the delinquent taxes in favor of Ramsey County. Pursuant to that order, a judgment against Lincoln and Basswood was entered on May 9, 1991.

Lincoln and Basswood took an appeal from the judgment. In an unpublished decision filed on March 28, 1992, the Minnesota Court of Appeals remanded the case to the Ramsey County District Court for further proceedings. After granting review, the Minnesota Supreme Court reversed the Court of Appeals in a decision dated December 31, 1992, and affirmed the judgment entered in Ramsey County District Court.(FN5)

DISCUSSION

As noted, the two movants have stipulated to the facts just found. The governing law does not appear to contradict their conclusions as to materiality. The issues argued on these motions, then, are ripe for summary adjudication. *In re Sunde*, 149 B.R. 552, 554 (Bankr. D. Minn. 1992); *In re Ramy Seed Co.*, 57 B.R. 425, 430 (Bankr. D. Minn. 1985). As it turns out, the very first issue is dispositive and the outcome is in favor of the Debtor.

As recited *supra* at n. 4, the parties have stipulated that the underlying tax liability was assessed pursuant to the following provision of Minn. Stat. Section 469.155, subd. 5:

. . . During the term of the revenue agreement,(FN6) except as provided in [Minn. Stat. Section 469.155, subd.] 17, a tax shall be imposed and collected upon the project or, pursuant to the provisions of [Minn. Stat. Section] 272.01, [subd.] 2, for the privilege of using and possessing the project, in the same amount and to the same extent as though the contracting party were the owner of all real and personal property comprising the project...

In turn, at the times relevant to this adversary proceeding,(FN7) Minn.

Stat. Section 272.01, subd. 2, provided in pertinent part:

(a) When any real or personal property which for any reason is exempt from ad valorem taxes, . . . is leased, . . . or otherwise made available and used by a private individual, association, or corporation in connection with a business conducted for profit, there shall be imposed a tax, for the privilege of so using or possessing such real or personal property, in the same amount and to the same extent as though the lessee or user was the owner of such property.

. . .

(c) Taxes imposed by this subdivision shall be due and payable as in the case of personal property taxes and such taxes shall be assessed to such lessees or users of real or personal property in the same manner as taxes assessed to owners of real or personal property, except that such taxes shall not become a lien against the property. When due, the taxes shall constitute a debt due from the lessee or user to the state, township, city, county and school district for which the taxes were assessed and shall be collected in the same manner as personal property taxes.

The Minnesota Supreme Court's opinion, of course, settled the question of whether Lincoln and Basswood, as business entities, were personally liable for the taxes so assessed. The Debtor, in turn, does not contest that he, in his status as a general partner of Basswood, became personally liable for the debt prior to his bankruptcy filing, by operation of Minn. Stat. Section 323.14.(FN8)

The

question, really, is whether a lien to secure the Debtor's derivative liability as partner was created by the following provision of Minn. Stat. Section 272.50:

The taxes assessed upon personal property, with lawful penalties, interest, and costs, shall be a first and perpetual lien . . . upon all of the personal property then owned by the person assessed from and including January 2 in the year in which they are levied, until they are paid . . .(FN9)

In arguing that it did not, the Debtor first posits that the tax in question was assessed upon an interest in real property, and not personal property; thus, as the Debtor would have it, Section 272.50 was not triggered against anyone when Lincoln's liability was fixed and liquidated. In response, Ramsey County maintains that Lincoln's interest as lessee was personality, and not an estate or property right in the real estate itself.

The Plaintiff's argument is colorable if one looks at Section 272.50 in isolation; however, it is beside the point. By providing that the tax imposed on a lessee of tax-exempt real estate is to "be collected in the same manner as personal property taxes," Section 272.01, subd. 2(c) makes the legal characterization of the taxed property right wholly irrelevant, insofar as the identity of the taxing authorities' collection and enforcement remedies is concerned. The Debtor does not--and cannot reasonably--deny that the attachment and enforcement of a statutory lien in favor of a taxing authority is a means of "collecting" a tax. Regardless of whether the lien of Section 272.50 applies solely by the terms of that statute, Section 272.01, subd. 2(c) empowers Ramsey County to use it, as against the parties to whose assets it attaches. The discussion really need go no further than that.(FN10)

All of this, however, means only that Ramsey County has the benefit of the lien under Section 272.50 against the persons or entities that are statutorily subject to that remedy. As he convincingly argues, the Debtor is not among the members of that class. By its terms, Section 272.50 attaches a lien to "the personal property of the person assessed" (emphasis added). Section 272.01, subd. 2(c) empowered Ramsey County to assess the tax liability in question "to the lessees or users" of the underlying real estate. Here, only Lincoln (and, possibly, Basswood(FN11)) fit the bill as "lessee(s)" under the statute. Only its (or their) personal property is subject to the lien. The parties have not stipulated that the Debtor was a named lessee, and the record (again by negative inference) fairly screams that he was not.(FN12) The Debtor's personal liability on account of the tax

debt

is entirely derivative, arising solely by operation of statute as a result of his legal status as a general partner. The governing statute, then, does not subject him or his assets to collection of the underlying debt via the enforcement remedy of the tax lien.(FN13) Ramsey County has no lien against the Debtor's personal property, and can assert no secured claim against him for the purposes of his Chapter 11 case.

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On the stipulated facts, the Debtor has demonstrated that he is entitled to judgment as a matter of law on the signal issue running between him and Ramsey County. Since all of the other issues briefed and argued by those two parties assumed a holding adverse to the Debtor on that issue, it is not necessary to treat them. There is no just reason for delay;(FN14) thus, judgment will be entered for the Debtor against Ramsey County.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED:

1. That the Plaintiff's motion for summary judgment is granted.
2. That the motion of Defendant County of Ramsey for summary judgment is denied.

3. That, as of May 6, 1992, Defendant County of Ramsey did not hold a valid or enforceable lien against the Plaintiff's personal property under color of Minn. Stat. Section 272.50.

LET JUDGMENT BE ENTERED IN ACCORDANCE WITH TERM 3 HEREOF.
BY THE COURT:

GREGORY F. KISHEL
U.S. BANKRUPTCY JUDGE

(FN1)This rule makes Fed. R. Civ. P. 56 applicable in adversary proceedings in bankruptcy. In pertinent part, Fed. R. Civ. P. 56(c) provides that, upon a motion for summary judgment,

[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, [submitted in support of the motion] if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

(FN2) Neither the Department of Revenue nor the IRS have participated

in the motions at bar, and their interests are not implicated under the framing of the issues presented. Apparently, the relative priority of their liens is to be determined later, in some other fashion.

(FN3)The text of this statute provides:

The trustee may avoid the fixing of a statutory lien on property of the debtor to the extent that such lien--

. . .

(2)is not perfected or enforceable at the time of the commencement of the [bankruptcy] case against a bona fide purchaser that purchases such property at the time of the

commencement of the case, whether or not such a purchaser exists . . .

As a debtor-in-possession under Chapter 11, of course, the Debtor has "all the rights . . . and shall perform all of the functions and duties . . . of a trustee serving in a [bankruptcy] case . . ." 11 U.S.C. Section 1107(a).

(FN4) The Port Authority was a tax exempt entity and, as such, the real estate to which it held title, such as the project in question here, was "exempt" from assessment of *in rem*, *ad valorem* real estate taxes. Because the project was leased, taxes were assessed under Minn. Stat. Sections 469.155, subd. 5 and 272.01, subd. 2.

(FN5)

This decision was published as *County of Ramsey v. Lincoln Fort Road Housing Limited Partnership*, 494 N.W.2d 276 (Minn. 1992).

(FN6) Minn. Stat. Section 469.155 is a part of the Minnesota Municipal Industrial Development Act; it sets forth the powers of Minnesota municipalities and redevelopment agencies in relation to public economic development initiatives. Its subd. 5 empowers municipalities to

enter into a revenue agreement with any person, firm, or . . . private corporation . . . so that payments required thereby to be made to the contracting party are fixed and revised as necessary to produce income and revenue sufficient to provide for the prompt payment of principal of and interest on all bonds issued [under Section 469.155] when due.

The lease between the Port Authority and Lincoln either contained such a revenue agreement, or accompanied one. See 494 N.W.2d at 278.

(FN7) In 1989, the Minnesota Legislature amended Minn. Stat. Section 272.01, subd. 2, to add a new subd. 2(d). If it had been applicable here, this new provision probably would have obviated this litigation. The parties acknowledge, however, that the amendment was prospective only.

(FN8) In pertinent part, this statute provides:

All partners [in any partnership governed by Minn. Stat. c. 323] are liable

(1) Jointly and severally for everything chargeable to the partnership under [Minn. Stat. Sections] 323.12 and 323.13;

(2) Jointly for all other debts and obligations of the partnership . . .

The Debtor's personal liability results whether this statute is applied to him, as a general partner of Basswood, and then to Basswood, as a general partner of Lincoln; or just to the

Debtor, as general partner of Basswood, as to Basswood's personal liability as adjudicated by the Minnesota Supreme Court.

(FN9)The Minnesota Legislature repealed this statute in 1991; however, it remains in effect for liens that arose prior to January 1, 1992, the effective date of the repealer. 1991 Minn. Laws. c. 291, art. 15, Section 10-11.

(FN10)It is fortunate for Ramsey County that it need not, by the saving graces of Section 272.01, subd. 2(c). Relying on Grava v. County of Pine, 268 N.W.2d 723 (Minn. 1978), the Debtor very cogently argues that Lincoln's right under the lease--to occupy and use the project-- was "real property" for all purposes under the general taxation scheme of Minn. Stat. c. 272. Grava involved several persons who had deeded parcels of real estate along the St. Croix River to the federal government under the Wild and Scenic Rivers Act, reserving personal access to and use of the property for periods of 15 or 25 years. Applying the expansive definition of Minn. Stat. Section 272.03 (defining "real property" to include "the land itself . . . and all rights and privileges appertaining to it (emphasis added)), the Grava court held that the Minnesota Legislature had fully intended to consider such interests as the reservations-of-use before it as real estate, fully subject to local taxation as such. 268 N.W.2d at 725-727. Ramsey County does not come up with a convincing argument to blunt or deflect the broad thrust of Grava's reasoning, and it is not unreasonable that it does not. Minn. Stat. Sections 469.155, subd. 5 and 272.01, subd. 2 (a) both term the taxed asset in question here the "privilege" of use or possession. That "privilege" "belonged or "appertained" to the project here as much as the reserved rights of use for terms certain did to the riparian lands at issue in Grava, and it was no more or less "severed" from the fee interest. Perhaps most tellingly, the Grava court pointed to Section 272.01, subd. 2--the very statute at issue here--as an analogue enactment that reflected a common legislative intent as to the legal classification of taxable rights arising out of contractual relationships that split private rights of use or possession from fee title held in a government. 268 N.W.2d at 726-727.

(FN11)

The Debtor and Ramsey County have stipulated that "[f]rom 1983 through 1987 the Taxes were assessed to and in the name of Lincoln." At least by dint of successive negative inferences from this stipulated fact, Basswood was not a named lessee under the lease. There is possible evidence of a contrary state of affairs in County of Ramsey v. Lincoln Fort Road Housing Limited Partnership; there, the Minnesota Supreme Court recited that

[i]n 1982, Austin/King assigned its interest in the revenue agreement to . . . Lincoln . . . and Basswood . . . ,

494 N.W.2d at 278 (emphasis added), and then went on to refer to both of them as being in default in obligations to make rent and tax payments. The remainder of the opinion never quite identifies the basis of Basswood's predicate liability

under the lease, whether direct (as a named lessee) or derivative (as a general partner of the liable named lessee). This inconsistency leaves Basswood's status under Sections 272.01, subd. 2(c) and 272.50 unclear. Luckily, however, that status has no bearing on the matter at bar.

(FN12) Among other things, Ramsey County did not name the Debtor as a defendant in the state-court tax-collection litigation--and one simply cannot conceive of a taxing authority failing to join every legally-chargeable party.

(FN13)

Thus, the dispute at bar is distinguishable from *Lidberg v. United States*, 375 F. Supp. 631 (D. Minn. 1974). In *Lidberg*, the court held that the federal tax lien under 26 U.S.C. Section 6321 had attached to the personal assets of the partners of the taxpayer-partnership, because the statute applied the lien to "each person liable under the Federal tax laws." 375 F. Supp. at 633 (emphasis added). Clearly, the predicate liability under the federal tax lien statute can be either direct or derivative; under the Minnesota statute in question, here, however, it must be direct.

(FN14) This holding is expressly made to comply with Fed. R. Civ. P. 54(b), as incorporated by Fed. R. Bankr. P. 7054(a); since the disposition of the Debtor's and Ramsey County's cross-motions for summary judgment does not dispose of all of the issues raised by all of the parties, this rule allows "the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon [such] an express determination . . ." As the Debtor's counsel has noted during several hearings in this adversary proceeding and in his client's main bankruptcy case, the resolution of the secured status of Ramsey County's claim is the major factor delaying the formulation of a plan of reorganization. The remaining issues involving the taxing authorities are routine in nature and may well be consensually resolved. Since the present adjudication settles the only issue seriously contested thus far, the concern over the prospect of piecemeal appeals raised by the Eighth Circuit in *Interstate Power Co. v. Kansas City Power & Light Co.*, 992 F.2d 804, 806-807 (8th Cir. 1993) does not arise.