

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
THIRD DIVISION**

In re:

Cynthia Lou Meislahn,
Debtor.

**Bky. No. 97-37732
Chapter 7 Case**

Cynthia Lou Meislahn,
Plaintiff,

Adv. 99-3031

v.

Catherine Brown Furness,
Defendant.

ORDER

This matter came on for hearing on March 17, 1999 on the Defendant's motion for summary judgment. William L. Bodensteiner appeared for the Debtor-Plaintiff, Cynthia Lou Meislahn. Catherine Brown Furness, the Defendant, appeared Pro se.

This matter is a core proceeding and the Court has jurisdiction pursuant to 28 U.S.C. § 157 and 1334. Based upon all of the files, memoranda, and proceedings herein, and based upon the arguments of counsel, the Court makes the following **ORDER** pursuant to the Federal and Local Rules of Bankruptcy Procedure:

I. Facts

During the summer of 1997 the Plaintiff-Debtor in this case sought the Defendant's representation in a divorce case already underway in Freeborn County¹. On or about August 20, 1997, Ms. Meislahn signed a retainer agreement with Ms. Brown Furness which allowed that any settlement Ms. Meislahn received in the divorce would be paid to the Catherine Brown Furness Law Firm and granting "the Catherine Brown Furness Law Office the authority to pay any

¹File Number F4-96-1096, Freeborn County, Minnesota.

balance due out of . . . these monies before transferring the balance to me[.]” Def.’s Aff. In Supp. Of Mot. For Summ. J., Ex. 1.

The agreement also allowed that Ms. Meislahn would pay no cash retainer but granted Ms. Brown Furness a lien on any settlement proceeds or property received as part of the divorce. Specifically, an additional clause was added to the end of the retainer agreement, separately signed by both parties, stating: “This agreement contains no retainer amount all due & owing shall be paid from house lien or proceeds or from cash settlement.” Id.

In addition to the retainer agreement, Ms. Meislahn also signed an “Attorney’s Lien Agreement” on August 20, 1997. The lien agreement states in part:

C. I understand that I am giving the Catherine Brown Furness Law Office a lien on my homestead and cash property settlement to insure that all attorney’s fees and costs are paid in full if I am not able to pay all attorney’s fees and costs owing prior to the conclusion of the dissolution action.

. . .

G. I am surrendering valuable rights in order to obtain legal services.
Id., Ex. 2.

Ms. Brown Furness served the attorney for her client’s husband with a “Notice of Claiming Attorney’s Lien” on September 23, 1997.

There is no dispute that Ms. Brown Furness provided valuable legal services to Ms. Meislahn. By mid-November, Ms. Meislahn, and her then husband, had entered a written stipulation resolving the contested issues of the divorce proceeding. The stipulation was reduced to proposed findings of facts, conclusions of law and order for judgment, and after revision Ms. Brown Furness sent the final documents to opposing counsel for approval on or about November 25, 1997. Ms. Brown Furness was unaware that Ms. Meislahn had already filed the voluntary

petition commencing her bankruptcy case under Chapter 7 of the Code on November 24, 1997².

Ms. Brown Furness received notice of the bankruptcy filing on December 3, 1997.

The Plaintiff's voluntary petition listed the Defendant as an unsecured creditor with a liquidated claim in the amount of \$4500 for legal services. The Defendant filed a proof of claim for a secured claim of \$4,921.22 for legal services between August 15, 1997 and December 12, 1997. Ms. Meislahn received her discharge on March 18, 1998. After the discharge was entered, the Defendant filed her notice of intent to claim an attorney's lien pursuant to Minn. Stat. §481.13.

Ms. Meislahn believes her debt to Ms. Brown Furness was discharged by this Court's order of discharge filed March 18, 1998, and in her complaint seeks a finding of contempt against Ms. Brown Furness for her continued efforts to collect the debt and perfect her disputed attorney's lien on property she exempted from her bankruptcy estate.

Ms. Brown Furness believes she had a valid attorney's lien against certain property of the Plaintiff-Debtor at the time Ms. Meislahn sought bankruptcy protection. Ms. Brown Furness points to a retainer agreement, attorney lien agreement, and the operation of Minn. Stat. §481.13 in support of her lien. She argues that her collection efforts, including the recording of a lien against property in Freeborn County, Minnesota, are valid efforts to foreclose the lien.

²Ms. Meislahn's bankruptcy filing prevented the immediate resolution of the divorce proceedings. The District Court Judge declined to sign the judgment and decree dissolving the marriage, and the husband petitioned the court to vacate the stipulation. The District Court apparently did vacate certain provisions of the stipulation for divorce, since certain debts, which were at least in part the basis of support obligations, were discharged by the bankruptcy. Apparently Ms. Meislahn's bankruptcy attorney handled all aspects of the divorce proceeding after December 3, 1997.

II. Analysis

Summary Judgment

Rule 56 Civ. P. applies to adversary proceedings in bankruptcy under the provisions of Rule 7056 of the Federal Rules of Bankruptcy Procedure. Summary judgment:

shall be rendered forthwith if the pleadings, answers to interrogatories, and admissions on file, together with the affidavits, 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. Fed R. Civ. P. 56(c).

In determining summary judgment “the function of the presiding court is not to weigh evidence and to make credibility determinations, or to attempt to determine the truth of the matter, but is, solely to determine whether there is a genuine issue for trial.” Reis v. Wintz Properties (In re Wintz Companies), 230 B.R. 848 at 857 (B.A.P. 8th Cir. 1999). In considering what factual determinations remain for trial “the [c]ourt views the fact[s] in a light most favorable the nonmoving party and allows that party the benefit of all reasonable inferences to be drawn from the evidence.” Prudential Ins. Co. v. Hinkel, 121 F.3d 364 at 366 (8th cir. 1997).

Statutory Lien Under Minn.Stat. § 481.13

The Defendant claims a statutory lien under Minn.Stat. § 481.13. The statute provides:

Minn. Stat. 481.13. Lien for attorneys' fees

An attorney has a lien for compensation whether the agreement therefor be expressed or implied:

(1) Upon the cause of action from the time of the service of the summons therein, or the commencement of the proceeding, and upon the interest of the attorney's client in any money or property involved in or affected by any action or proceeding in which the attorney may have been employed, from the commencement of the action or proceeding, and, as against third parties, from the time of filing the notice of such lien claim, as provided in this section;

(2) Upon a judgment, and whether there be a special agreement as to compensation, or whether a lien is claimed for the reasonable value of the services, the lien shall extend to the amount thereof from the time of giving notice of the claim to the judgment debtor, but this lien is subordinate to the rights existing between the parties to the action or proceeding;

(3) The liens provided by clauses (1) and (2) may be established, and the amount thereof determined, by the court, summarily, in the action or proceeding, on the application of the lien claimant or of any person or party interested in the property subject to such lien, on such notice to all parties interested therein as the court may, by order to show cause, prescribe, or such liens may be enforced, and the amount thereof determined, by the court, in an action for equitable relief brought for that purpose. Judgment shall be entered under the direction of the court, adjudging the amount due.

(4) If the lien is claimed on the client's interest in real estate involved in or affected by the action or proceeding, such notice of intention to claim a lien thereon shall be filed in the office of the county recorder or registrar of titles, where appropriate, and therein noted on the certificate or certificates of title affected, in and for the county within which the same is situated. If the lien is claimed on the client's interest in personal property involved in or affected by the action or proceeding, the notice shall be filed in the same manner as provided by law for the filing of a security interest. Minn. Stat. § 481.13.

“The nature, extent, and validity of the statutory lien are matters governed by state law.” Pierce v. Aetna Life Ins. Co. (In re Pierce), 809 F.2d 1356 at 1359 (8th Cir. 1986).

The issue is whether the filing requirements of Minn. Stat. § 481.13(4) are necessary steps in the creation of § 481.13 liens, or simply requirements of their perfection against third parties. If filing is a necessary step in creation of the lien, then the Defendant was unsecured at the commencement of the bankruptcy case and the post discharge attempt to *create* a lien based on the discharged debt would be in violation of 11 U.S.C. § 524. However, if filing is required merely to perfect an existing lien, then the post discharge filing by the Defendant was simply the enforcement of a surviving lien. Enforcement of liens that survive bankruptcy, against exempt property, generally does not violate § 524; and enforcement is permissible even though the

underlying debt has been discharged, and, whether or not the liens are perfected.³ Stated most simply, if complying with Minn. Stat. § 481.13(4) is a prerequisite to the creation of the statutory lien, summary judgment is inappropriate for the Defendant. If Minn. Stat. § 481.13(4) describes the requirements for perfection of the already existing lien, then the Defendant is entitled to summary judgment.

Minn. Stat. 481.13 has four subdivisions. The first and second describe the liens; the third provides for the judicial establishment, determination of amount, and enforcement of a lien; and the fourth requires that notice of intention to claim the lien be filed with the appropriate public repositories for the filing of liens and notice of security interests generally against real estate and personal property.

Previous reported cases have examined the enforceability, or perfection, of an attorney's lien against third parties. See In re Pierce, 53 B.R. 825, (Bankr. D. Minn. 1985); Village of New Brighton v. Jamison, 278 N.W.2d 321 (Minn. 1979); Keene v. Stattman, 256 N.W.2d 295 (Minn. 1977); Middleton v. Harvey, Thorfinnson & Scoggin, P.A., 1990WL 77076 (Minn. App.). The Eighth Circuit has noted that "it appears that the legislature intended this procedure [in § 481.13(4)] to amount to perfection of the attorney's interest." In re Pierce, 809 F.2d 1356 (8th Cir. 1986). Construing the recording requirements of § 481.13(4) as perfection requirements, not requirements for the creation of the lien, is consistent with the equitable purpose of the statute:

³The bankruptcy trustee may avoid liens "not perfected or enforceable at the time of the commencement of the 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." 11 U.S.C. § 545(2). A debtor can avoid certain unperfected *involuntary* liens under 11 U.S.C. § 522(h) on exempt property, but cannot avoid *voluntary* unperfected liens not otherwise avoidable under 11 U.S.C. § 522(f). The liens claimed here are not avoidable under § 522(f).

In general, a charging lien is the equitable right of any attorney to have fees and costs due him for services in a particular suit secured by the judgment or recovery in such suit. 7A C.J.S. Attorney and Client S 359 (1980). The theory behind the charging lien is that a successful party should not be permitted the fruits of the judgment secured by the attorney's services without paying for those services. Boline, 345 N.W.2d at 288 (citing Schroeder, Siegfried, Ryan & Vidas v. Modern Elec. Prods., Inc., 295 N.W.2d 514 (Minn.1980)). St. Cloud Nat'l Bank & Trust Co. v. Brutger, 488 N.W.2d 852 at 855 (Minn. Ct. App. 1992).

In this case the Debtor-Plaintiff signed a detailed retainer and separate lien agreement. She understood that attorney's fees would be paid from the settlement of her divorce.

This reasoning is consistent with the decision in Williams v. Dow Chemical Co. which determined that an attorney's lien either arises at the commencement of a case, or when an attorney first makes an appearance in a case. Williams v. Dow Chemical Co., 415 N.W.2d 20 at 26 (Minn Ct. App. 1987). The validity of the attorney's lien depended not upon when it was perfected as to third parties, but when the attorney first officially appeared before the court for her client.

The purpose of Minn Stat. § 481.13 is to allow clients to engage attorneys when they might otherwise be unable to afford representation. If the attorney is successful, they will be compensated out of the proceeds of the lawsuit. The attorney's rights are limited against third parties by the perfection provisions in subdivision 4. However, the filing requirements are not prerequisites to the creation of the lien rights regarding the affected property as between the debtor and the lien creditor.

III.

Based on the foregoing, it is hereby **ORDERED**:

- 1) The Defendant's motion for summary judgment is granted;
- 2) The Defendant's post discharge actions to enforce her attorney's lien did not violate 11U.S.C. § 524.
- 3) The Plaintiff shall take nothing from this action.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: May 19, 1999

By the Court:

/s/ Dennis D. O'Brien

Dennis D. O'Brien

Chief U.S. Bankruptcy Judge

ELECTRONIC NOTICE OF ENTRY AND FILING ORDER OR JUDGMENT Filed and Docket Entry made on <u>May 19, 1999</u> Patrick G. De Wane, Clerk By <u>DLR</u> Deputy Clerk
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STATE OF MINNESOTA)
) ss.
COUNTY OF RAMSEY)

I, Doretta Raymond, hereby certify: That I am the Judicial Assistant for Chief Judge Dennis D. O'Brien of the United States Bankruptcy Court for the Third Division of the District of Minnesota, at St. Paul, Minnesota; that on May 19, 1999, true and correct copies of the annexed **ORDER** were placed by me in individually stamped official envelopes; that said envelopes were addressed individually to each of the persons, corporations, and firms at their last-known addresses appearing hereinafter; that said envelopes were sealed and on the day aforementioned were placed in the United States mails at St. Paul, Minnesota, to:

WILLIAM BODENSTEINER, ESQ.
309 S. MAIN STREET
AUSTIN, MN 55912

CATHERINE BROWN FURNESS, ESQ.
P. O. BOX 603
OWATONNA, MN 55060

CYNTHIA LOU MEISLAHN
914 AUTUMN STREET
ALBERT LEA, MN 56007

and this certificate is made by me.

/S/Doretta Raymond

Filed On May 19, 1999
Patrick G. De Wane, Clerk
By dlr, Judicial Assistant