

May 28, 2004

**Barbara A.
Schmerhorn
Clerk**

NOT FOR PUBLICATION
**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE TENTH CIRCUIT**

IN RE A.C. RENTALS, INC., an
Oklahoma Corporation,

Debtor.

BAP No. WO-03-096

A.C. RENTALS, INC.,

Plaintiff – Appellee,

v.

ASHLEY H. HOUGH,

Defendant – Appellant.

Bankr. No. 02-10540-WV
Adv. No. 02-1164-WV
Chapter 11

ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court
for the Western District of Oklahoma

Before NUGENT, McNIFF, and THURMAN, Bankruptcy Judges.

NUGENT, Bankruptcy Judge.

The parties did not request oral argument, and after examining the briefs and appellate record, the Court has determined unanimously that oral argument would not materially assist in the determination of this appeal. Fed. R. Bankr. P. 8012. The case is therefore ordered submitted without oral argument.

Ashley H. Hough (Ashley) appeals a Judgment of the United States Bankruptcy Court for the Western District of Oklahoma in favor of A.C. Rentals, Inc., the Chapter 11 debtor-in-possession (AC), avoiding her lien against AC's real property pursuant to

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

11 U.S.C. § 544(a)(3).¹ For the reasons stated below, we AFFIRM the bankruptcy court's Judgment.

I. Background

Ashley was married to Charles H. Hough (Charles). At all times relevant to this appeal, Charles was the sole shareholder of AC, the debtor-corporation. AC owns forty-four tracts of real property located in Washita County, Oklahoma (the "Real Property").

Ashley and Charles divorced in 2000. Their divorce proceedings in the District Court of Washita County, Oklahoma culminated in a telephonic hearing before that Court at which the parties orally announced the terms of a settlement. Ashley was awarded, in relevant part, alimony in lieu of property division in the amount of \$325,000. This award was partially secured by a lien on AC's Real Property. The District Court orally approved the parties' settlement (Oral Divorce Order). Ashley's attorney stated that she would prepare and submit a divorce decree.

A divorce decree was prepared, but Charles refused to sign it and, as a result, Ashley moved to settle the journal entry. Just prior to a hearing on Ashley's motion, Charles filed a Chapter 13 petition thus staying the proceedings in the couple's divorce case. Ashley obtained an order from the bankruptcy court in Charles's Chapter 13 case granting her relief from the automatic stay to enforce the divorce court's Oral Divorce Order and to proceed in divorce court proceedings (Relief From Stay Order). Charles appealed the Relief From Stay Order, and it was affirmed by a panel of this Court.²

Several weeks after the Relief From Stay Order was affirmed, AC filed its Chapter 11 petition. On AC's petition date, Charles had not paid Ashley according to the Oral Divorce Order and, therefore, Ashley's lien against AC's Real Property had

¹ Unless otherwise stated, all future statutory references in the text are to title 11 of the United States Code.

² *In re Hough*, No. WO-01-059, 2002 WL 518687 (10th Cir. BAP Jan. 8, 2002).

not been extinguished. But, a divorce decree memorializing the Oral Divorce Order had not been entered, and Ashley had not filed any notice of her lien against AC's Real Property.

One day after AC filed its Chapter 11 petition, Ashley filed a document entitled "Lien on Real Property" in the County Clerk's office in Washita County, Oklahoma (Lien Notice). In the Lien Notice, Ashley identifies, in relevant part, her lien on AC's Real Property pursuant to the Oral Divorce Order.

AC filed a Complaint against Ashley, seeking to avoid her lien against its Real Property as an unauthorized post-petition transfer pursuant to § 549, and requesting damages pursuant to § 362(h) for Ashley's alleged wilful violation of the automatic stay. Ashley answered AC's Complaint by denying that any stay violation was wilful and stating that she did not know that AC had filed a Chapter 11 petition when she filed her Lien Notice. Cross motions for summary judgment were filed.

AC's motion did not refer to § 549 and only cursorily mentioned § 362, stating that Ashley's postpetition filing of the Lien Notice "could be argued" to have violated the stay.³ Instead, AC emphasized Ashley's failure to perfect her lien by recording and referring to § 544. In her combined response and cross-motion for summary judgment, Ashley took no exception to AC's "amendment on the fly" and attempted to rebut AC's § 544 arguments. In the meantime, a Consent Decree of Divorce was entered by the District Court in Ashley and Charles's divorce case. This Decree memorialized the Oral Divorce Order, including Ashley's lien against AC's Real Property, in writing.

The bankruptcy court granted AC's motion for summary judgment, stating in its separate Memorandum Opinion that although Ashley's lien against AC's Real Property was valid, it had not been perfected as against bona fide purchasers and therefore was

³ Motion for Summary Judgment at 2, *in* Appellant's Appendix at 11. It is unclear whether AC, a corporate entity, would have had standing to pursue damages under § 362(h) inasmuch as that section expressly applies only to "individuals" who have suffered damages by a wilful stay violation. We make no comment on that issue since AC did not press the § 362(h) cause of action.

avoidable by AC as a hypothetical bona fide purchaser under § 544(a)(3).

Ashley timely appealed the bankruptcy court's final Judgment.⁴ The parties have consented to this Court's jurisdiction because they have not elected to have this appeal heard by the United States District Court for the Western District of Oklahoma.⁵

II. Discussion

We review a bankruptcy court's grant of summary judgment *de novo*, applying the same legal standard used by the bankruptcy court pursuant to Federal Rule of Civil Procedure 56, made applicable in bankruptcy under Federal Rule of Bankruptcy Procedure 7056.⁶ It is undisputed that summary judgment was appropriate in this case because cross motions for summary judgment were filed, and no party argued that there was a "genuine issue as to any material fact."⁷ Rather, the only issue herein is whether the bankruptcy court erred in avoiding Ashley's equitable lien against AC's Real Property under § 544(a)(3) based on the uncontested facts. Our *de novo* review of this legal issue compels us to affirm the bankruptcy court's Judgment avoiding Ashley's equitable lien.⁸

Section 544(a)(3) provides:

- (a) The trustee shall have, as of the commencement of the case, and *without regard to any knowledge of the trustee or of any creditor*, the rights and powers of, or may avoid any transfer of property of the debtor . . . that is voidable by—

. . .

- (3) a bona fide purchaser of real property . . . from the debtor,

⁴ See 28 U.S.C. § 158(a)(1); Fed. R. Bankr. P. 8002(a).

⁵ See 28 U.S.C. § 158(c); Fed. R. Bankr. P. 8001(e).

⁶ See, e.g., *Simms v. Okla. ex rel. Dep't of Mental Health & Substance Abuse Servs.*, 165 F.3d 1321, 1326 (10th Cir. 1999).

⁷ Fed. R. Civ. P. 56(c); Fed. R. Bankr. P. 7056.

⁸ See, e.g., *Elder v. Holloway*, 510 U.S. 510, 516 (1994) (questions of law reviewed *de novo*); *Salve Regina Coll. v. Russell*, 499 U.S. 225, 238 (1991) (under *de novo* review, "no form of appellate deference is acceptable.")

against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.⁹

As a debtor in possession, AC has all the rights and powers of a “trustee” under § 544(a)(3)¹⁰ and had standing to avoid Ashley’s lien under that section.

As § 544(a)(3) expressly states, whether or not AC had actual knowledge of the creation of Ashley’s lien against its Real Property, AC could avoid the transfer if it could have been avoided by a hypothetical bona fide purchaser of the Real Property (BFP) on AC’s petition date. Under Oklahoma law, a purchaser of real property is a BFP if it takes the property with an “absence of notice, actual or constructive, of outstanding rights of others.”¹¹ Although actual notice of an interest in real property would prevent a purchaser from being a BFP under Oklahoma law, § 544(a)(3) makes actual notice irrelevant in determining whether to avoid a transfer. Thus, the bankruptcy court was required to decide whether a BFP of AC’s property on the petition date would have constructive notice of Ashley’s interest in that property.¹²

At Oklahoma law, “[c]onstructive notice is notice imputed by the law to a person not having actual notice.”¹³ “Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, and who omits to make such inquiry with reasonable diligence, is deemed to have constructive notice of

⁹ 11 U.S.C. § 544(a)(3) (emphasis added).

¹⁰ *Id.* § 1107(a).

¹¹ *Luschen v. Stanton*, 137 P.2d 567, 570 (Okla. 1943) (quotation omitted), *quoted in Big Four Petroleum Co. v. Quirk*, 755 P.2d 632, 634 (Okla. 1988); *see Watkins v. Watkins*, 922 F.2d 1513, 1514 (10th Cir. 1991) (interpreting Oklahoma law, and stating that constructive notice applies to determine BFP status).

¹² *See Watkins*, 922 F.2d at 1514 (applying constructive notice standard to determine BFP status under § 544(a)(3) and Oklahoma law).

¹³ Okla. Stat. Ann. tit. 25, § 12, *quoted in Burgess v. Independent School District No. 1*, 336 P.2d 1077, 1081 (Okla. 1959).

the fact itself.”¹⁴ Thus, constructive notice exists under Oklahoma law when a reasonably prudent person would inquire into the rights of others in property.¹⁵ It is generally understood that land records indicating any defect in the owner’s title create constructive notice because they put a prudent person upon inquiry as to the nature of the defect.¹⁶ “Under Oklahoma law, [therefore,] a purchaser of land takes the property with constructive notice of whatever appears in the conveyances constituting his chain of title.”¹⁷ While notice of an equitable lien against real property created in a divorce decree need not be recorded in compliance with the Oklahoma statute applicable to judgment liens to be valid, some information must be placed of record to put subsequent purchasers on constructive notice of the lien.¹⁸ Typically, this notice is accomplished by filing a divorce decree creating an equitable lien in the county where the land is located.¹⁹

Therefore, under Oklahoma law, someone acquiring an interest in the Real Property on AC’s petition date would have had no constructive notice of Ashley’s lien. Because Ashley never placed anything of record prior to AC’s petition date, a reasonably prudent person searching the land records would have no means of discovering Ashley’s rights in AC’s Real Property. This hypothetical purchaser would

¹⁴ Okla. Stat. Ann. tit. 25, § 13, *quoted in Burgess*, 336 P.2d at 1081.

¹⁵ *Burgess*, 336 P.2d at 1079.

¹⁶ *Id.*; *Miller v. J.I. Case Threshing Mach. Co.*, 300 P. 399 (Okla. 1931); *see* Okla. Stat. Ann. tit. 16, § 16 (“Every conveyance of real property acknowledged or approved, certified and recorded as prescribed by law from the time it is filed with the register of deeds for record is constructive notice of the contents thereof to subsequent purchasers, mortgagees, encumbrancers or creditors.”), *quoted in Big Four*, 755 P.2d at 634.

¹⁷ *Watkins*, 922 F.2d at 1514 (citing *Jonas v. Dunn*, 270 P. 46, 50 (Okla. 1928)).

¹⁸ *First Community Bank v. Hodges*, 907 P.2d 1047, 1053 (Okla. 1995) (Okla. Stat. Ann. tit. 12, § 706, the statute governing the creation and perfection of judicial liens, does not apply to liens created in a divorce decree).

¹⁹ *Id.*

therefore be a BFP as of the petition date. Standing in the shoes of a hypothetical BFP, AC could therefore exercise its rights and avoid Ashley's lien under § 544(a)(3). Accordingly, the bankruptcy court did not err entering Judgment in favor of AC avoiding Ashley's lien against AC's Real Property under § 544(a)(3).

Ashley argues on appeal that this case is controlled by *Watkins v. Watkins*,²⁰ where the Court of Appeals for the Tenth Circuit held that a bankruptcy trustee could not invoke § 544(a)(3) to avoid a divorce-created equitable lien against the debtor's real property because no hypothetical BFP existed under Oklahoma law. We disagree.

In *Watkins*, the debtor and his spouse jointly owned real property. When they divorced, the debtor was granted sole title to the property, and the property was impressed with an equitable lien in favor of his former spouse. The lien was evidenced by the divorce decree on file in the state court, but the spouse did not file a notice of lien in the county records where the property was located. Despite the spouse's unrecorded lien, the Tenth Circuit held that constructive notice of the lien existed that precluded the creation of a BFP under Oklahoma law and, thus, the trustee's avoidance of the lien under § 544(a)(3). Constructive notice existed because the chain of title to the property showed the debtor and former spouse as joint owners of the property. Proof of the debtor's sole ownership of the property required review of the judicial decree in the couple's divorce case, and that same decree created the spouse's lien in the property. Therefore, the trustee was "deemed to have constructive notice of title defects apparent on the face of the record in proceedings in which the decree was entered"—the divorce decree.²¹

The facts in the present case are very different from those in *Watkins*. AC owned the Real Property prior to Ashley and Charles's divorce – it was not transferred to AC as part of the divorce proceedings. Unlike *Watkins*, therefore, the chain of title

²⁰ 922 F.2d 1513 (10th Cir. 1991).

²¹ *Id.* at 1514.

to the Real Property would not in any way lead a reasonably prudent person to review papers filed in Ashley and Charles's divorce case where Ashley's lien was created. In addition, we note that, in contrast to *Watkins*, even if a person searching AC's title in the Real Property had actual knowledge of the divorce case, no review of the real estate records as of AC's petition date would have disclosed the existence or attachment of Ashley's lien. While the lien was created in the Oral Divorce Order, nothing had been reduced to writing as of AC's petition date; the Consent Decree of Divorce was entered several months after AC filed its Chapter 11 petition. Given these factual distinctions, *Watkins* simply is not pertinent to this case.

As acknowledged by the bankruptcy court, Ashley's equitable lien against AC's real property was valid even though she did not record it. But, to be effective as against BFPs, Ashley was required to give constructive notice of the lien. Ashley maintains that she was unable to perfect her equitable lien because of her difficulties with Charles in obtaining the Consent Decree of Divorce. This argument is without merit. The lien existed when the District Court approved Ashley and Charles's settlement in the divorce case²² and, therefore, Ashley could have provided notice of it immediately after the Oral Divorce Order was pronounced. She did not do so. Instead, she did not file her Lien Notice against the Real Property until after AC filed its Chapter 11 petition. As a result, not only was the Lien Notice potentially void as having been filed in violation of the automatic stay²³ and avoidable under § 549(a) as an unauthorized postpetition transfer, but it was also ineffective in making constructive notice as of AC's petition date to avoid the creation a hypothetical BFP under § 544(a)(3).

Ashley asserts that Charles's actual knowledge of her lien against AC's Real

²² Okla. Stat. Ann. tit. 12, § 696.2(E) ("adjudication of any issue shall be enforceable when pronounced by the court in the following actions: divorce; separate maintenance"), *quoted in Hough*, 2002 WL 518687 at *4.

²³ *See generally* 11 U.S.C. § 362(a); *Franklin Sav. Ass'n v. Office of Thrift Supervision*, 31 F.3d 1020, 1023 (10th Cir. 1994) (actions taken in violation of the stay are void).

Property precludes the application of § 544(a)(3), but this argument disregards the fact that Charles and AC are separate legal entities. And, even if Charles's actual knowledge could somehow be imputed to AC, Ashley's argument fails because the debtor in possession's *actual* knowledge of the transfer to be avoided is irrelevant under the express terms of § 544(a)(3).

Finally, Ashley contends that equitable principles bar AC's avoidance of her lien. She claims that because of Charles's alleged bad acts, AC holds the Real Property in constructive trust for her and, therefore, it is not property of AC's estate under § 541(d) to which § 544(a)(3) applies. Ashley also maintains that AC is equitably estopped from avoiding her lien against the Real Property because of Charles's alleged misconduct. These arguments cannot be addressed by this Court because Ashley did not raise them below.²⁴ Moreover, even were we to consider them, Ashley's equitable argument is predicated on alleged misconduct of Charles, not of AC. There is no record of wrongdoing by AC nor any record showing that Charles's wrongdoing should be imputed to AC. There is no reversible error.

III. Conclusion

For the reasons stated above, we AFFIRM.

²⁴ See, e.g., *Tele-Communications, Inc. v. Comm'r*, 104 F.3d 1229, 1233 (10th Cir. 1997) (appellate court will not consider new theories for the first time on appeal, parties should "give it everything they've got at the trial level") (quotations and citations omitted); *Bancam. Commercial Corp. v. Mosher Steel of Kansas, Inc.*, 100 F.3d 792, 798-99 (10th Cir.), *op. am. on other grounds*, 103 F.3d 80 (10th Cir. 1996) (same); *Walker v. Mather (In re Walker)*, 959 F.2d 894, 896 (10th Cir. 1992) (same).