

**UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
Harrisonburg Division**

IN RE:

**MICHAEL WESLEY TOLLEY
REBECCA ANN TOLLEY,**

Case No. 07-50514

Debtors

**MICHAEL WESLEY TOLLEY
REBECCA ANN TOLLEY,**

Plaintiffs

v.

**Adversary Proceeding
No. 07-05031**

OBAUGH FORD, INC.,

Defendant

DECISION AND ORDER

At Harrisonburg in said District this 27th day of May, 2008:

The matter before the court arises as a result of an adversary proceeding filed by the debtors against Obaugh Ford, Inc. (herein Obaugh) under 11 U.S.C. § 506(d) to void a judgment lien obtained by Obaugh.¹ Obaugh filed a claim as a secured creditor in the Chapter 7 proceeding because it obtained a prepetition judgment in Augusta County General District Court which it docketed on January 29, 1999, in the Circuit Court of Augusta County. Thereafter, the female debtor acquired an interest in Augusta County real estate and Obaugh's judgment lien

¹ Section 506(d) states that to the extent a secured claim is disallowed any lien that secures the claim is void.

attached .

The parties stipulated the facts in this case. Both parties filed motions for summary judgment, submitted memoranda of authority in support of their motions for summary judgment and argued the matter before the court on May 7, 2008, in Harrisonburg, Virginia. For the reasons stated in this decision and order, the court holds that the Obaugh judgment lien is not void and the debtors' complaint is dismissed.

Summary of the Stipulated Facts

Obaugh obtained a judgment in Augusta County General District Court against Rebecca Ann Tolley on August 24, 1998. The judgment arose as a result of a deficiency claim which Obaugh asserted after liquidation of an automobile which collateralized its loan. An examination of the warrant in debt obtained by Obaugh against Mrs. Tolley reveals that she filed a counterclaim on August 20, 1998. Notations on the warrant in debt show two dispositions, a judgment in favor of Obaugh for the deficiency claim and a dismissal of Mrs. Tolley's counterclaim.

Mrs. Tolley noted an appeal of the dismissal of her counterclaim. This is evidenced by a note on the warrant in debt and is consistent with the Augusta County General District Court's processing of the appeal to the Circuit Court of Augusta County.² The Circuit Court of Augusta County processed and ruled on the appeal as if only the counterclaim was appealed. In addition, upon request of Obaugh, the Clerk of the General District Court issued an abstract of the judgment which Obaugh presented to the Clerk of the Circuit Court of Augusta County for recordation in order to perfect its judgment lien against any property owned or

² The General District Court retained the Obaugh civil warrant and sent only the counterclaim to the Circuit Court.

thereafter acquired in Augusta County by Mrs. Tolley. The record is clear that Mrs. Tolley pursued only an adjudication of her counterclaim at the Circuit Court level.³ The Circuit Court of Augusta County denied her counterclaim and the case concluded. Upon Mrs. Tolley's acquisition of an interest in real property in 1999, the judgment lien attached by operation of law. Mrs. Tolley and her husband filed a Chapter 13 proceeding on July 30, 2007, and now seek to disallow the secured claim of Obaugh.

Positions of the Parties

Mrs. Tolley takes the position that Code of Virginia, § 16.1-106 et. seq., requires that, upon appeal, there be a trial *de novo* of all issues determined by the General District Court which results in an annulment or voiding of the General District Court judgment order in its entirety. Since the Circuit Court of Augusta County, on appeal, determined only the counterclaim of Mrs. Tolley, she asserts there is no valid judgment in favor of Obaugh and the judgment lien which attached to real estate which she acquired is void. In summary, Mrs. Tolley argues that her appeal encompassed the entire proceeding in the General District Court and not just her counterclaim despite the fact that the record is clear that she treated the appeal as one of the counterclaim only and the General District Court and Circuit Court of Augusta County treated the appeal as an appeal only of the counterclaim.

Obaugh takes the position that Mrs. Tolley abandoned her right to appeal the judgment of Obaugh Ford when she noted an appeal from the General District Court to the Circuit Court of her counterclaim and that the judgment at the General District Court level became a judgment lien upon docketing with the Circuit Court of Augusta County. Thus,

³ Mrs. Tolley was represented by counsel both at the General District Court level and at the Circuit Court level.

Obaugh argues that since the secured claim is allowable, the lien on Mrs. Tolley's real estate is not void.

Discussion

Code of Virginia, § 16.1-106, recites, in part, "From any order entered or judgment rendered in a court not of record in a civil case . . . there shall be an appeal of right . . . to a court of record.

Code of Virginia, § 16.1-113, governs the trial of the appeal. It provides for a retrial of the case and permits the court to hear all legal evidence "whether or not it was produced before the court from which the appeal is taken." The case notes to section 16.1-113 of the Code of Virginia recite the holding of Addison v. Salyer, 185 Va. 644, 40 S.E. 2d 260 (1946):

An appeal from the trial justice properly perfected, transfers the entire record to the circuit court for a retrial as though originally brought therein. The judgment of the trial justice is completely annulled by the appeal and is not thereafter effective for any purpose.

Based upon the holding in Addison, if the appeal was properly perfected, the judgment of the General District Court was rendered a nullity and the debtors' position in this case prevails, notwithstanding both the intent of the female debtor to appeal only the counterclaim and the Circuit Court's disposition of the case in a manner consistent with that intent.

Obaugh argues that the female debtor failed to post an appeal bond and, therefore, failed to meet all the requirements for proper perfection. Section 16.1-107 recites that "No appeal shall be allowed unless and until the party applying for the same . . . shall give bond, in an amount and with sufficient surety approved by the judge or by his clerk. . . ." Obaugh argues

that the Circuit Court did not derive jurisdiction under section 16.1-106 to decide the appeal because of lack of perfection. Yet, the Circuit Court proceeded with the appeal presented without requiring a bond. On appeal, no party objected to the lack of bond or raised the issue. Case notes to Code of Virginia, § 16.1-107, indicate that omission by the general district court of an appeal bond is not fatal to oust the circuit court of jurisdiction because it can fix the bond issue under Code of Virginia, § 16.1-114.1.⁴ See, Jenkins v. Bertram, 163 Va. 672, 177 S.E. 204 (1934).

It is clear that the procedure followed in the appeal of this case did not precisely follow the Code of Virginia's statutory provisions. However, the wording of Code of Virginia, § 16.1-114.1, provides a means for the circuit court to use equitable powers "to promote substantial justice to all parties and to bring about a trial of the merits of the controversy." In her appeal, Mrs. Tolley wanted an adjudication solely of the adverse ruling of her counterclaim. She abandoned any trial *de novo* of the judgment awarded Obaugh and the Augusta County General District and Circuit Courts accommodated Mrs. Tolley's request for review of the counterclaim.

The Augusta General District Court did not require a bond for the appeal. The Augusta Circuit Court elected to try the appeal with no bond. This court holds that it was within the discretion of the Augusta County Circuit Court to exercise its equitable powers to dispose of the appeal solely on the counterclaim issue and subsumed within that disposition was a finding that the judgment in favor of Obaugh was final and binding upon her.

⁴ Code of Virginia, § 16.1-114.1, is entitled "Principles applicable in trials of appeals and removals; defective or irregular warrants or motions. - Actions or proceedings appealed . . . shall be tried according to the principles of law and equity, and when the same conflict the principles of equity shall prevail. This section shall be liberally construed, to the end that justice is not delayed or denied by reasons of errors in the pleadings or in the form of the proceedings."

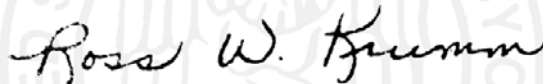
Conclusion

This court believes that it would be inequitable to now find the judgment of Obaugh became a nullity eight years after it was granted because Mrs. Tolley got the justice she pursued when she appealed to the Augusta County Circuit Court. Because of the way Mrs. Tolley proceeded from the Augusta County General District Court to the Augusta County Circuit Court, the only judgment of the District Court that was annulled by the appeal was the counterclaim. The judgment granted Obaugh Ford, Inc., by the Augusta County General District Court on August 24, 1998, became final as to Mrs. Tolley, notwithstanding her appeal to the Circuit Court of Augusta County of an adverse ruling in the same proceeding on a counterclaim she asserted on August 20, 1998. Obaugh's subsequent docketing of its judgment on January 29, 1999, in the Circuit Court of Augusta County gave it a valid judgment lien which attached to an interest in real estate which Mrs. Tolley acquired on June 23, 1999. Accordingly, it is

ORDERED:

That the debtors' request to void the judgment lien of Obaugh Ford, Inc. under 11 U.S.C. § 506(d) is **DENIED**, and the adversary proceeding is **DISMISSED**. Obaugh's claim is **ALLOWED** as a secured claim in the above-captioned proceeding and the judgment lien docketed by Obaugh Ford, Inc. remains in full force and effect. .

Copies of this order are directed to be sent to Roland S. Carlton, Jr., Esquire, counsel for the plaintiffs; and to Susan B. Read, Esquire, counsel for the defendant.



Ross W. Krumm

Ross W. Krumm
U. S. Bankruptcy Judge