

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF KENTUCKY
LONDON DIVISION**

IN RE:

**BARRY D. VAUGHT and
PATTIE M. VAUGHT
Debtors**

**Chapter 13
Case No. 11-60069
Judge Joseph M. Scott**

MEMORANDUM OPINION AND ORDER

This matter comes before the Court pursuant to the Debtors' Motion to Avoid the Lien of Larry Hamilton (Doc. 46), and Larry Hamilton's Response (Doc. 51). Because Larry Hamilton attempted to create a judgment lien postpetition, the Debtors' motion is hereby GRANTED. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334(b) and it is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (O).

I.

Larry Hamilton ("Hamilton") obtained a default judgment against the Debtors on January 21, 2011. The Debtors filed their Chapter 13 bankruptcy petition three days later. On February 10, 2011, Hamilton attempted to perfect his judgment lien after the bankruptcy petition had been filed. Counsel for Hamilton stated in a letter to counsel for the Debtor that this was done in reliance on court's holding in *In re Butler Const. Co.*, 110 B.R. 281 (W.D. Ky. 1989). The Debtor now moves for Hamilton's lien to be avoided because it was perfected in violation of the automatic stay.

II.

Upon the filing of a bankruptcy petition, an automatic stay is placed on all efforts of creditors to enforce a prepetition judgment against the debtor. 11 U.S.C. § 362(a)(2). Notwithstanding the automatic stay, Hamilton filed a notice of his judgment against the Debtors postpetition. This was apparently done in reliance upon *In re Butler*, which involved an action brought by a debtor to avoid a mechanic's lien that was perfected postpetition. The bankruptcy

court held that a mechanic's lien may be perfected postpetition in accordance with KRS § 376.010 and § 546(b) of the Bankruptcy Code. In reaching this conclusion, the court reasoned:

[T]he power and authority which the Bankruptcy code gives to trustees in Section 545(2) is effectively limited, or taken away, in this case by section 546(b). See 4 Collier on Bankruptcy Section 545.04 (15th ed. 1989) on pages 545-20, 21 wherein it is stated:

Consequently, if the holder of a statutory lien that the trustee could avoid under Sec. 545(2) still has, as of the date of the filing of the petition, under applicable non-bankruptcy law, the opportunity to perfect his lien against an intervening interest holder, then *the holder of the statutory lien may perfect his interest, within the time allowed by the applicable law, against the trustee notwithstanding the intervention of the bankruptcy case.*

It is clear that Section 546(b) permits the post-petition perfection of a mechanic's lien to be effective against a trustee provided Kentucky law would permit this result. This position is supplemented by Section 362(b)(3) which permits such a post-petition perfection notwithstanding the automatic stay. The mere filing of the bankruptcy petition in this case should not cut off [the lien creditor's] right to timely perfect its mechanic's lien in accordance with Kentucky law so as to deprive it of the opportunity of sharing pro-rata with other mechanic's lien holders who perfected post-petition. To hold as [the movant] suggests, would thwart the result which would be reached under state law except for the filing of the bankruptcy, and therefore such a holding is expressly prohibited by Section 546(b).

In re Butler Const. Co., 110 B.R. 281, 283 (W.D. Ky. 1989) (emphasis in original).

The court in *Butler* was addressing liens that were created pre-petition, but not perfected until post-petition. The Debtor argues that Hamilton's reliance on *Butler* is misplaced because judgment liens, unlike mechanic's liens, are not created until after the recording of the notice of judgment lien in the county clerk's office. Hamilton, however, argues that under KRS § 426.720, the judgment itself is the lien, and therefore he held a statutory lien on the date of the petition.

Hamilton's argument that the judgment itself is a lien is incorrect. In reaching his conclusion, Hamilton relies upon only a portion of KRS § 426.720, which states in part that "a final judgment for the recovery of money . . . shall act as a lien . . ." However, Hamilton disregards the most applicable portion, wherein the statute states that the lien is not created until notice is filed with the county clerk's office and served on the debtor:

A final judgment for the recovery of money or costs in the courts of record in this Commonwealth, whether state or federal, shall act as a lien upon all real estate in which the judgment debtor has any ownership interest, in any county *in which the following first shall be done*:

- (1) The judgment creditor or his counsel shall file with the county clerk of any county a notice of judgment lien containing the court of record entering the judgment, the civil action number of the suit in which the judgment was entered, and the amount of the judgment, including principal, interest rate, court costs, and any attorney fees;
- (2) The County clerk shall enter the notice in the lis pendens records in that office, and shall so note the entry upon the original of the notice;
- (3) The judgment creditor or his counsel shall send to the last known address of the judgment debtor, by regular first class mail, postage prepaid, or shall deliver to the debtor personally, a copy of the notice of judgment lien, which notice shall include the text of KRS 427.060 and also the following notice, or language substantially similar:

“Notice to Judgment Debtor. You are entitled to an exemption under KRS 427.060, reprinted below. If you believe you are entitled to assert an exemption, seek legal advice.” and;
- (4) The judgment creditor or his counsel shall certify on the notice of judgment lien that a copy thereof has been mail to the judgment debtor in compliance with subsection (3) of this section.

KRS § 426.720 (emphasis added). Therefore, by the language of the statute itself, it is clear that the judgment does not become a lien until the judgment creditor has filed a notice with the county clerk and provided notice to the judgment debtor. The judgment itself does not create the lien.

The Debtor points the court to *In re Excel Engineering, Inc.*, 224 B.R. 582 (W.D. Ky. 1998), which distinguishes the holding in *Butler*. In *Excel*, the bankruptcy court held that a subcontractor on a public works project violated the automatic stay when it filed a statement of lien post-petition. In reaching this holding, the court noted the distinction between the mechanic’s lien statute used in *Butler*, and the public works lien statute. The distinction is that liens on public works projects are not created until the lien statement is properly filed and served, whereas mechanic’s liens relate back and are created before they are filed with the clerk. *Id.* at 589-90. The court therefore found *Butler* distinguishable because it involved a post-petition

attempt to “*perfect* liens that had been created pre-petition, and thus, were already in existence at the time bankruptcy was commenced.” *Id.* at 590 (emphasis in original).

Like the subcontractor in *Excel*, when Hamilton filed his notice of judgment lien post-petition, he was attempting to create his lien. Although § 362(b)(3) contains an exception to the general stay provisions, it only permits:

. . . any act to *perfect*, or to maintain or continue the *perfection* of, an interest in property to the extent that the Trustee’s rights and powers are subject to such perfection under Section 546(b) of this title or to the extent that such act is accomplished within the period under Section 547(e)(2)(A) of this title.

11 U.S.C § 362(b)(3) (emphasis added). This section does not, by its terms, permit an act to *create* a lien. It only applies to such actions that concern an interest in property which the creditor had at the time the bankruptcy was filed. *In re Excel*, 224 B.R. at 589. Hamilton did not hold an interest in the Debtor’s property because he did could not have a lien until he filed the notice with the county clerk and provided notice to the Debtor. Therefore, Hamilton violated the automatic stay by attempting to file notice of his judgment postpetition. *Id.* at 592 (“As a general rule, the § 362 automatic stay enjoins virtually all efforts by a creditor to collect on debts, take possession of collateral, enforce or create a lien, or set-off a debt against the debtor.”).

III.

Because Hamilton violated the automatic stay by filing a notice of his judgment against the Debtors in an attempt to create a lien, it is hereby ORDERED that the Debtors’ Motion to Avoid the Lien of Larry Hamilton is GRANTED.

Copies to:

Marcia A. Smith, Esq.

John T. Mandt, Esq.

Paul F. Henderson, Esq.

John L. Daugherty, Esq.

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***The affixing of this Court's electronic seal below is proof this document has been signed by the Judge and electronically entered by the Clerk in the official record of this case.***



**Signed By:**  
**Joseph M. Scott, Jr.**  
**Bankruptcy Judge**  
**Dated: Wednesday, April 20, 2011**  
**(jms)**