

**United States Bankruptcy Court
District of New Mexico**

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Comments: Memorandum Opinion on Trustee's Objection to Proof of Claim of Taos County

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UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

In re:

ANITA M. HUTT,

Debtor.

No. 7-03-12936 SS

**MEMORANDUM OPINION ON TRUSTEE'S
OBJECTION TO PROOF OF CLAIM OF TAOS COUNTY**

This matter came before the Court for hearing on the Trustee Yvette J. Gonzales' Amended Objection to the Proof of Claim of Taos County ("Taos")(doc 32). The Trustee appears through her attorney James Askew. The County appears through its attorney Barbara A. Martinez. This is a core proceeding. 28 U.S.C. § 157(b)(2)(B).

On September 30, 2003, the Taos County Treasurer timely filed proof of claim 4 ("Claim"), in the amount of \$2,766.87, for debts incurred in 1999, 2000, 2001 and 2002 for property taxes. The claim asserts priority status under 11 U.S.C. § 507(8). Attached to the proof of claim is a printout giving the property address, code, and legal description.

On September 22, 2004, the Trustee filed the Amended Objection to the Claim ("Objection"). The Objection asserts that the claim is secured by real estate and does not fit within the definition of a priority tax claim as defined in 11 U.S.C. § 507(a)(8).

On September 24, 2004, Trustee filed a notice of abandonment of all real estate. (Doc. 35). See 11 U.S.C. § 554.

On September 27, 2004, Taos responded to the Objection, claiming that Taos did not have a lien against the Debtor's real property, and that its claim indeed fit within 11 U.S.C. § 507(a)(8). (Doc 36).

The Court conducted a preliminary hearing on the Claim and Objection on October 18, 2004, and requested that the parties brief the issues. Having considered the briefs, and being otherwise sufficiently advised, the Court issues this memorandum opinion.

Section 507, **Priorities**, provides:

(a) The following expenses and claims have priority in the following order:

...

(8) Eighth, allowed unsecured claims of governmental units, only to the extent that such claims are for-

...

(B) a property tax assessed before the commencement of the case and last payable without penalty after one year before the date of the filing of the petition.

Because the overriding objective in bankruptcy cases is the equal distribution of a debtor's limited resources among its creditors, Section 507 priorities are narrowly construed.

State Ins. Fund v. Southern Star Foods, Inc. (In re Southern

Star Foods, Inc.), 144 F.3d 712, 714 (10th Cir.), cert. denied, 525 U.S. 978 (1998). See also In re Columbia Packing Co., 47 B.R. 126, 130 (Bankr. D. Mass. 1985)(No matter how worthy the objective is of a priority, it reduces the funds available for other unsecured creditors. Priorities should be construed strictly.)

Section 507(a)(8) unambiguously applies only to "unsecured claims of government units." See, e.g., United States v. TM Building Products, Ltd. (In re TM Building Products, Ltd.), 231 B.R. 364, 370-71 (S.D. Fla. 1998):

The plain language of § 507(a)(8) states that its application only pertains to unsecured claims, to protect these creditors "in the likely event that there will be insufficient funds in the estate to distribute if all taxes were to be paid in full as a priority." In re Olson, 154 B.R. 276, 281 (Bankr. D. N.D. 1993). However, the presence or absence of a recorded Notice of Federal tax Lien at the time a petition for Chapter 11 relief is filed will control how a claim, such as Appellant's, is treated in bankruptcy. See United States v. Creamer, 195 B.R. 154, 156 (M.D. Fla. 1996); In re Reichert, 138 B.R. 522, 526-27 (Bankr. W.D. Mich. 1992). If a Notice of Federal Tax Lien is recorded before the petition in bankruptcy is filed, the creditor is classified as "secured" and the priority rules of § 507(a)(8) do not apply to that secured claim. See id. If, on the other hand, a Notice of Federal Tax Lien is not recorded before the petition, the claims are unsecured claims, governed by § 507(a)(8) and may be given priority status. See In re Olson, 154 B.R. at 280.

In this case, Appellant's tax liens listed in the Plan arose on the date of assessment, and were recorded prior to Appellee's filing of its petition

in bankruptcy. Thus, these claims are not "unsecured claims of governmental units," and § 507(a)(8) does not apply. Having recorded the tax liens pre-petition, Appellant holds secured claims, which are not entitled to priority under § 507(a)(8).

(Emphasis in original; footnote omitted.) See also In re The Pasta Café Corp., 284 B.R. 564, 568 (Bankr. D. Md. 2002); In re McKissick, 197 B.R. 206, 207 (Bankr. M.D. Pa. 1996); In re Wrigley, 195 B.R. 914, 915 (Bankr. E.D. Ark. 1996); In re Olson, 154 B.R. 276, 281 (Bankr. D. N.D. 1993); In re Broadway 704-706 Assoc., 154 B.R. 44, 46 (Bankr. S.D. N.Y. 1993); In re Bonhard, 145 B.R. 23, 24 (Bankr. N.D. Ohio 1992); In re Reichert, 138 B.R. 522, 526 (Bankr. W.D. Mich. 1992).

The Bankruptcy Code defines what is secured and what is unsecured in 11 U.S.C. § 506(a):

An allowed claim of a creditor secured by a lien on property in which the estate has an interest ... is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, ... , and is an unsecured claim to the extent that the value of such creditor's interest ... is less than the amount of such allowed claim.

The existence of a lien on property is determined by reference to state law. Virginia Beach Federal Savings and Loan Ass'n. v. Wood (In re Wood), 901 F.2d 849, 851 (10th Cir. 1990) (citing Butner v. United States, 440 U.S. 48, 55-57 (1979).) See also Matter of Christy, 44 U.S. 292, 316 (1845):

There is no doubt that the liens, mortgages, and other securities within the purview of this proviso, as far as they are valid by the state laws, are not to be annulled, destroyed, or impaired under the proceedings in bankruptcy; but they are to be held of equal obligation and validity in the courts of the United States as they would be in the state courts. The District Court, sitting in bankruptcy, is bound to respect and protect them. But this does not and cannot interfere with the jurisdiction and right of the District Court to inquire into and ascertain the validity and extent of such liens, mortgages, and other securities, and to grant the same remedial justice and relief to all the parties interested therein as the state courts might or ought to grant.

Therefore, the Court turns to New Mexico law to determine if there is a lien on Debtor's property to secure the property tax claim.

N.M. Stat. Ann. § 7-38-48 (1978) provides:

A. ... [T]axes on real property are a lien against the real property from January 1 of the tax year for which the taxes are imposed. The lien runs in favor of the state and secures the payment of taxes on the real property and any penalty and interest that become due. The lien continues until the taxes and any penalty and interest are paid. The lien created by this section is a first lien and paramount to any other interest in the property, perfected or unperfected.

Therefore, under state law, property tax liens arise automatically through operation of law. See also City of Sunland Park v. Santa Teresa Services Co., 134 N.M. 243, 255, 75 P.3d 843, 855 (Ct. App.), cert. denied, 134 N.M. 179, 74 P.3d 1071 (2003) ("Unknown at common law, tax liens are imposed

by statute to help ensure payment of the taxes."); Coulter v. Gough, 80 N.M. 312, 313, 454 P.2d 969, 970 (1969)(Taxes are a charge against the land.) There is no provision in the law for the lien to be waived; the lien "continues" until all amounts due are paid. Cf. City of Sunland Park, 134 N.M. at 255, 75 P.3d at 855 ("[T]he tax lien can only be enforced by sale of the property or personal collection action.")

The Court therefore finds and concludes that the property tax claim is a secured claim¹. Section 507 does not apply. The Trustee's objection should be sustained. The Court will enter an Order disallowing Claim 4 in its entirety.

The Court will briefly address Taos' other arguments:

1. The claim is not secured because Taos does not have a lien, the state of New Mexico does.

N.M. Stat. Ann. § 7-38-48 does state that the property tax lien "runs in favor of the state." However, the tax itself is imposed by the state. N.M. Stat. Ann. § 7-37-2. The county treasurers only have the responsibility and

¹ Trustee's later abandonment of the property does not change the fact that the claim is secured. Claims are determined "as of the date of the filing of the petition." 11 U.S.C. § 502(b). "Section 506 automatically operates upon all property in which the estate has an interest at the time the bankruptcy petition is filed." Dewsnup v. Timm, 502 U.S. 410, 431 (1992)(Scalia, J., dissenting). See also Whalley v. American Ins. Co. (In re Whalley), 202 B.R. 58, 62 (Bankr. W.D. Pa. 1996).

authority for collecting the taxes, penalties and interest imposed by the Property Tax Code. N.M. Stat. Ann. § 7-37-42(A). And, even that authority ends when a taxpayer becomes delinquent. N.M. Stat. Ann. § 7-38-62; Colfax County v. Angel Fire Corp., 115 N.M. 146, 150, 848 P.2d 532, 536 (Ct.App. 1993)(The Taxation and Revenue Department has the "exclusive authority" to collect delinquent property taxes.) Therefore, it appears that the County acts as an agent for the state. The state has the claim, and the state has the lien.

The Court also points out that there are not two debts here, one to the state and one to Taos. It is the same debt. For bankruptcy purposes, a state is "not an amalgam of separate, independent, and self-sustaining branches." Wyoming Dept. of Transportation v. Straight (In re Straight), 143 F.3d 1387, 1391 (10th Cir.), cert. denied, 525 U.S. 982 (1998). Rather, the state is regarded as a unified entity with different arms through which it carries out its business. Id.

2. Taos was only informing the Court and Debtor that there were outstanding property taxes. "That is all."

"A proof of claim executed and filed in accordance with [the Federal Bankruptcy Rules] shall constitute prima facie evidence of the validity and amount of the claim."

Fed.R.Bankr.P. 3001(f). Bankruptcy Code Section 726 dictates how property is distributed from an estate. Section 726(a)(1)

requires that the first distributions go to priority claims. Only after all priority claims are paid in full do unsecured creditors receive anything. One of the trustee's major duties is to maximize the estate for the benefit of unsecured creditors. See, e.g., Barber v. McCord Auto Supply, Inc. (In re Pearson Industries, Inc.), 178 B.R. 753, 760 (Bankr. C.D. Ill. 1995). And, specifically, the trustee "shall" examine proof of claim and object to the allowance of any that are improper. 11 U.S.C. § 704(5).

Therefore, by filing the proof of claim, Taos was doing far more than merely informing the Court and the Debtor that property taxes were owed. Its claim demanded money from the estate at the expense of unsecured creditors under an unsupported legal theory, required the Trustee to incur attorney fees to object to it, and required the Court to expend its time determining if Taos had any legal basis for relief. It also was waiving sovereign immunity, perhaps for the entire state of New Mexico. See Straight, 143 F.3d at 1392; 11 U.S.C. § 106. See also In re Franklin Savings Corp., 385 F.3d 1279, 1285 (10th Cir. 2004).

3. Taos' claim fits within the language of Section 507 and the legislative intent supports that conclusion.

Actually, Taos' claim squarely fits outside the language of Section 507. Section 507(a)(8)(B) gives priority to "a

property tax assessed before the commencement of the case and last payable without penalty after one year before the date of the filing of the petition." (Emphasis added.) The proof of claim on its face states that it is for tax years 1999, 2000, 2001, and 2002. In New Mexico, property taxes are due in two equal installments, on November 10 of the year in which the bill was prepared, and the following April 10. N.M. Stat. Ann. § 7-38-38. Taxes not paid within 30 days of their due date are delinquent. N.M. Stat. Ann. § 7-38-46. Delinquent taxes immediately start accruing interest and penalties. N.M. Stat. Ann. §§ 7-38-49, 50. So, the taxes on the proof of claim for prior years were not payable within one year without penalty. Furthermore, the Court finds that the legislative intent of this section is to limit the amount of priority property taxes payable to only those governmental units that do not have access to property from which to satisfy their claims, and then only to recent claims, in order to maximize the return to unsecured creditors.

4. Debtor's debt is personal to the taxpayer, so is not a secured claim.

Taos cites to N.M. Stat. Ann. 7-38-47, which provides:

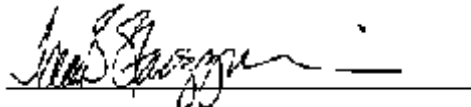
Property taxes imposed are the personal obligation of the person owning the property on the date on which the property was subject to valuation for property taxation purposes and a personal judgment may be rendered against him for the payment of

property taxes that are delinquent together with any penalty and interest on the delinquent taxes. The sale or transfer of property after its valuation date does not relieve the former owner of personal liability for the property taxes imposed for that tax year.

This section does not help Taos. Indeed, the vast majority of secured creditors also have an in personam claim against the debtor. That does not mean, however, that they are unsecured creditors.

5. The State of New Mexico did not have notice of this bankruptcy.

To the contrary, New Mexico did have notice. It is local practice in this Court to include the New Mexico Taxation and Revenue Department on every mailing list. Also, reference to the docket in this case shows that on April 16, 2003, the Bankruptcy Noticing Center mailed the notice of bankruptcy in this case to the NM Taxation and Revenue Department, Bankruptcy Section, P.O. Box 22690, Santa Fe, New Mexico 87502-2690 (doc 4).



Honorable James S. Starzynski
United States Bankruptcy Judge

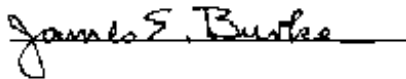
I hereby certify that on April 6, 2005, a true and correct copy of the foregoing was electronically transmitted, faxed, delivered, or mailed to the listed counsel and/or parties.

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A handwritten signature in cursive script that reads "James S. Bustee". The signature is written in black ink and is positioned above a solid horizontal line.