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John C. Sittner v. Karen H. Schriever, Trustee of The Karen H. Schriever Family Trust; Bruce Gildea; Shirlynn Gildea; and Joy Hale : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JOHN C. SITTNER,

Plaintiff/Appellant,

vs.

KAREN H. SCHRIEVER, Trustee of
The Karen H. Schriever Family Trust;
BRUCE GILDEA; SHIRLYNN GILDEA;
and JOY HALE,

Defendants/Appellees.

)
)
) **APPELLANT'S REPLY BRIEF TO**
) **BRIEF OF APPELLEES GILDEA**
)
)

Case No. 971759

(Priority No. 15)

***Appeal from Summary Judgment of The Third District Court, Salt Lake County
Judge Homer Wilkinson***

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Utah Court of Appeals

DEC 18 2000

**Paulette Stagg
Clerk of the Court**

IN THE UTAH COURT OF APPEALS

JOHN C. SITTNER,)	
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Plaintiff/Appellant,)	<i>APPELLANT'S REPLY BRIEF TO</i>
)	<i>BRIEF OF APPELLEES GILDEA</i>
vs.)	
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KAREN H. SCHRIEVER, Trustee of The Karen H. Schriever Family Trust; BRUCE GILDEA; SHIRLYNN GILDEA; and JOY HALE,)	Case No. 971759
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Appeal from Summary Judgment of The Third District Court, Salt Lake County
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Plaintiff/Appellant Sittner submits the following *Brief* in reply to the *Brief of Appellees Bruce and Shirlynn Gildea* (“*Gildeas’ Brief*”):

I. REPLY TO GILDEAS’ STATEMENT OF THE CASE

A. Reply to Gildeas’ Course of Proceedings and Disposition Below.

Gildeas’ Brief at page 7 states that after Gildea obtained a stay order from the trial court and reopened his bankruptcy case, that the bankruptcy judge awarded Gildea costs, attorney’s fees and “also awarded him punitive damages,” citing *Rec. 594-600* (Transcript of bankruptcy judge’s ruling). While not relevant to this appeal, the statement is plainly incorrect, the bankruptcy judge only reimbursed Gildea for attorney’s fees incurred and awarded no punitive damages. [*Rec. 599*].

Also Gildeas' Brief at page 7 while admitting that the U.S. District Court reversed the bankruptcy judge's decision and vacated the order, states that the judge "affirmed the bankruptcy judge's rationale for awarding sanctions against Sittner." This statement is nonsensical because the court could not reverse and vacate the entire decision of the bankruptcy judge while effectively affirming the rationale. Apparently Gildeas intend that this Court understand that the federal district judge agreed with the conclusion of the bankruptcy judge, but this was just a conclusion without any rationale or analysis by the federal district judge, in contrast to the careful and reasoned analysis with citation of cases set forth by the judge to support her decision to reverse and vacate the bankruptcy decision. [Rec. 1042-1045].

Sittner acknowledges that Gildeas' Brief at page 8 admits that the reversed bankruptcy court's decision and the conclusion of the federal district judge were presented in support of their motion for summary judgment, which the trial court relied on in granting their motion.

B. Reply to Gildeas' Statement of Facts.

In Gildeas' Brief under part "C" *Statement of Facts*, paragraph 14 states, "by classifying his claim as unsecured, Sittner was able to receive a higher distribution in the case than he would have received had he simply pursued foreclosure on his lien. [Rec. 177]." But Rec. 177 is page 7 from Gildeas' argument in their memorandum in opposition to Plaintiff's motion for summary judgment, the statement is not a fact and cannot be properly considered. See *Pratt v. Mitchell Hollow Irrigation Co.*, 813 P.2d 1169, 1171

(Utah 1991). Gildeas' Brief repeats this statement several times in their argument, even though it is without factual support and is not correct.

Gildeas' *Statement of Facts*, paragraph 15, states that at no time during the bankruptcy case did Sittner ever attempt to seek relief from the automatic stay citing "Rec. 132" in support. However this is page 3 of *Sittner's Affidavit* and it does not say this. Once again this is not a proper factual statement and must be disregarded. See *Pratt*.

Gildeas' *Statement of Facts*, paragraph 16, says that notwithstanding Gildeas' bankruptcy discharge, that "Sittner continued to undertake collection efforts against Gildea." Of course no record support is cited for this statement which is not factual and is indeed false and must be disregarded. See *Pratt*. Sittner's complaint does not seek any money recovery from Gildea, only declaratory relief to permit judgment execution on the property to be completed. [Rec. 7-8].

Gildeas' *Statement of Facts*, paragraph 17, states that although Gildea was discharged he never received the benefit of that discharge because Sittner has denied him a "fresh start". No record citation is offered to support this statement which is not a fact, is indeed false and cannot be considered. See *Pratt*.

II. A BANKRUPTCY DISCHARGE DOES NOT VOID LIENS AND A JUDGMENT CREDITOR CAN HAVE AN UNSECURED CLAIM AND RECEIVE A DISTRIBUTION ON IT AND BY DOING SO DOES NOT WAIVE OR RELINQUISH THE JUDGMENT LIEN.

In Gildeas' Brief under *Argument I.*, Gildeas contend that Sittner somehow surrendered his judgment lien by electing to receive a small dividend from Gildea's

bankruptcy estate for Sittner's unsecured claim. In Gildeas' *Argument I.A.*, Gildeas readily admit that the holder of a lien against collateral, by classification under the *Bankruptcy Code*, 11 U.S.C. §506, has a secured claim only to the extent of the value of the collateral securing the debt or claim with the balance of the claim being unsecured. But Gildeas point out that regardless of whether a claim is secured or unsecured, a Chapter 7 debtor who obtains a discharge is relieved of all personal liability on the claim, which is the effect of a discharge under 11 U.S.C. §524. Gildeas also admit that while a discharge prohibits the holder of a lien from collecting a prepetition debt as a personal liability of the debtor or from recovering money damages against the debtor, the holder is "not generally prohibited from repossessing and/or foreclosing on his collateral."

Gildeas then reason that while typically a judgment lien survives a bankruptcy discharge order, in this case Sittner waived his right to assert a secured claim because he filed an unsecured claim and because he filed an unsecured claim that he became subject to the discharge order and lost his right to foreclose on the judgment lien.

Of course Gildea does not cite any cases or any bankruptcy code provision that supports this proposition, because it is not supportable. Gildea seems to miss the entire point once again of the plain statutory effect of a bankruptcy discharge, namely that it does not void liens nor say that it does, but instead only extinguishes the debtor's personal liability. (See numerous cases cited in *Appellant's Brief*). Gildea goes on in section "B" to insist that if Sittner intended to retain his judgment lien that he had to mark his claim as "*secured*" even though the subject property had no recoverable value to satisfy Sittner's judgment.

This is contrary to Gildeas' admission that in bankruptcy a claim is only "*secured*" to the extent that there is value sufficient to satisfy the lien interest, and to the extent that there is not, it is "*unsecured*".

In this case where the senior secured debt encumbrance on Gildeas' property during the bankruptcy case exceeded the value of the property, there was no recoverable value for Sittner's junior lien, so under *Section 506(a)* the secured portion would be zero. Therefore the entire claim by statutory classification is unsecured and Sittner was entitled to participate fully as an unsecured creditor. Of course Sittner is not entitled to be paid twice for the amount owed on the claim, so if the distribution from the bankruptcy estate had been sufficient to extinguish the entire debt obligation evidenced by the judgment, then Sittner could not have recovered any more and under Utah law on judgments Sittner would be required to enter a satisfaction extinguishing the judgment. But in this case the dividend was approximately ten percent (10%), so Sittner had a substantial balance remaining uncollected, after applying the dividend he received from the bankruptcy estate.

Gildea also misses the point entirely that Sittner does not contend or argue for purposes of bankruptcy claims administration that he had a secured claim. To the contrary, as just analyzed, because the judgment lien on Gildeas' property had no recoverable value during the bankruptcy case, Sittner certainly did not have a "*secured claim*" within the definition and classification under *11 U.S.C. §506*. Once again the fact that during the bankruptcy there was no equity above the senior debt encumbrance on Gildeas' property to have benefitted Sittner's junior lien does not mean that there won't be value at a later time

through property appreciation or by reduction in principal of the senior debt that could after case closing be of benefit to Sittner's judgment lien in the future. In this regard see *In re Sanders*, 156 B.R. 667 (D. Utah 1993), *Aff'd* 39 F.3d 258 (10th Cir. 1994). In *Sanders*, a Chapter 7 discharge case, the bankruptcy court ruled that where the judgment lienholder had no equity in the property to which the lien could attach after allowing for senior liens and the debtor's Utah homestead exemption, that the lien could be avoided. Judge Winder reversed and held that the lien could not be avoided, saying that any equity build-up from the pay down of existing mortgages following the bankruptcy and any post-petition appreciation in the value of the property rightly accrues to the benefit of the judgment lienholder. 156 B.R. at 670-71. The Tenth Circuit agreed. 39 F.3d at 262. In accord *In re Cerniglia*, 137 B.R. 722, 723 (Bkrcty S.D. Ill.1992).

Therefore, Sittner was entitled to retain his judgment lien on property not sold for the benefit of the estate and to receive a distribution on his unsecured claim in an amount that did not satisfy the full debt evidenced by the judgment. And if subsequent to bankruptcy case closing, sufficient equity is built-up in the property above the senior debt to benefit Sittner's attached lien, then he was entitled to foreclose the judgment lien to attempt to recover the balance remaining due on the judgment.

III. THE STIPULATION SIGNED BY GILDEAS' BANKRUPTCY TRUSTEE AND SITTNER EXPRESSLY PRESERVED AND LEFT UNAFFECTED SITTNER'S JUDGMENT LIEN ON PROPERTY ABANDONED OR NOT ADMINISTERED BY CASE CLOSING.

Gildeas assert under *Argument I. C.* that by the express terms of the stipulation made between Sittner and the bankruptcy trustee, that Sittner “agreed to waive his lien and be treated as an unsecured creditor.” However, the stipulation made with the bankruptcy trustee to settle an adversary proceeding seeking to avoid Sittner’s judgment lien as a preferential transfer (analyzed in more detail in *Appellant’s Brief, VII. Argument B. 4.*, p. 26-29) does not say that Sittner waives his judgment lien. Instead it says that Sittner waives any right to assert a secured claim to property of the estate or any funds that constitute proceeds of property of the estate, and for this purpose acknowledges that any and all claim he has is an unsecured prepetition claim. But the second sentence says, **“Defendant’s rights respecting property abandoned by the estate or not administered by closing are preserved and unaffected hereby.”**

Gildeas would like very much to successfully claim that under the stipulation Sittner waived his judgment lien on any and all property of the estate regardless of whether it was sold or administered to benefit the estate and would like to ignore the second sentence preserving Sittner’s rights with respect to his judgment lien on property abandoned by the estate or not administered by closing. Indeed Gildeas’ Brief goes on to state at p. 25 footnote 2 that the second sentence is gratuitous and really has no meaning when read in the context of the trustee’s action to avoid a preferential judgment lien. But this is completely

contrary to proper contract interpretation which requires the court to look at the purpose and complete writing itself to ascertain the parties' intentions and in so doing must consider each contract provision in relation to all of the other with a view toward giving effect to all and ignoring none. *Jones v. ERA Brokers Consolidated*, 2000 UT 61, 6 P.3d 1129, 1131 (Utah 2000).

In the context of the trustee's adversary proceeding against Sittner to avoid the judgment lien as a preferential transfer made within ninety (90) days of the bankruptcy petition, the only interest a Chapter 7 trustee could have is avoiding the lien on property sold for the benefit of the estate, and as Sittner pointed out in *Appellant's Brief*, the trustee may not avoid the judgment lien except in connection with the sale of property's beneficial to the estate. *Ernst v. Sears Roebuck & Co.*, 26 B.R. 959 (Bkrtcy S.D. Ohio, 1983). When the trustee abandons property of the estate under *11 U.S.C. §554*, either after notice and hearing or by inaction by failing to administer scheduled property by case closing, the trustee has no interest in the property and cannot avoid a lien as a preferential transfer. *In re Sucy*, 32 B.R. 506 (Bkrtcy D.Me. 1983). In *Sucy* the trustee filed an adversary complaint seeking to avoid an attachment lien as a preferential transfer made within ninety (90) days on the debtor's real property, but the trustee later by notice abandoned the property pursuant to *11 U.S.C. §554(a)*, and the court held that the trustee having abandoned the property no longer had any interest in whether the lien was preferential or not since granting relief would not benefit the estate, so the trustee's complaint was dismissed as moot. *Id.* at 507.

Therefore, duly considering the purpose and context for the short stipulation settling the adversary proceeding, and not ignoring the second sentence, it becomes very clear that while Sittner waived his right to assert a secured claim in property of the estate, or proceeds from property sold for the benefit of the estate, that his judgment lien on any property abandoned or not administered by closing was preserved and unaffected, just like the stipulation says. This stipulation was approved after notice to all interested parties by order of the bankruptcy court, and clearly establishes that Sittner did not waive his judgment lien rights on the subject property which was later abandoned by the estate on case closing.

Notwithstanding the plain language and meaning of the stipulation which is not ambiguous, Gildea goes on to cite *In re Uiterwyk Corp.*, 109 B.R. 478 (Bkrtcy M.D. Fla. 1990), as supporting the conclusion that Sittner lost his “*secured status*” (Gildea does not say this equates to losing his judgment lien) by participating in the bankruptcy case as an unsecured creditor. But *Uiterwyk* is inapposite, since it did not involve a Chapter 7 liquidation bankruptcy or property abandoned by the estate, but instead involved a Chapter 11 reorganization bankruptcy. In *Uiterwyk*, the creditor MHT claiming the right to a charging lien, had entered into a stipulation with the unsecured creditors’ committee settling an adversary proceeding challenging the validity of its lien by agreeing on a formula for distribution of the proceeds of the lawsuit and making no exception or reservation for the charging lien. The court rejected the creditors’ committee’s argument that MHT’s charging lien had been waived or was barred by estoppel, but said that MHT was bound by its stipulation and held that because the plan of reorganization had already been confirmed and

did not provide for the charging lien, that under *11 U.S.C. §1141*, the rights of the parties were frozen and fixed upon confirmation of the plan. *Id.* at 480. Under *11 U.S.C. §1141(a)*, confirmation of a reorganization plan is binding on the debtor, all creditors and equity security holders, and there is no analogous provision for a Chapter 7 liquidation bankruptcy.

Unlike the stipulation made by Sittner which expressly preserves Sittner's lien rights respecting property abandoned or not administered by closing, no exception was made in the stipulation agreed to by MHT in *Uiterwyk* and MHT made no objection to the order confirming the plan that made no provision for the charging lien, and upon confirmation as the court held the plan became absolutely binding upon MHT. *Uiterwyk* simply has no application to Gildeas' Chapter 7 case or to property abandoned by the trustee as was the case here.

IV. THE LIMITATION PERIOD ON SITTNER'S JUDGMENT LIEN WAS TOLLED DURING GILDEAS' BANKRUPTCY AND DURING THE TIME SITTNER HAS BEEN CHALLENGING OR APPEALING ADVERSE RULINGS DEFEATING HIS LIEN RIGHTS.

Gildeas' Brief under *Argument III.* admits that during Gildeas' bankruptcy case the limitation period upon Sittner's judgment lien was tolled by the automatic stay, a statutory injunction under *11 U.S.C. §362* which prevents enforcement of liens against property of the estate until such property is no longer part of the estate or until relief from the stay is granted by order of the bankruptcy court. Gildeas argue that the automatic stay only tolled Sittner's limitation period for 2.1 years, instead of the full six (6) years of the case, because Gildeas say the automatic stay was lifted to permit the senior lienholder, Appellee Joy Hale,

formerly Joy Horsley, to foreclose on her security interest. Gildeas assert that the order of relief from stay for creditor Hale had the effect of taking the subject property out of the bankruptcy estate and therefore Sittner could have proceeded with foreclosure on his lien.¹ However, Gildeas' conclusion is erroneous, the relief from stay granted to creditor Joy Hale to foreclose does not remove the property from the estate, nor permit Sittner to have proceeded with foreclosure on his lien.

When a bankruptcy is filed, under *11 U.S.C. §541* an estate is created that is comprised of all the debtor's legal or equitable interests in property. Thereafter under *11 U.S.C. §554*, property may be abandoned from the bankruptcy estate: (a) after notice and a hearing the trustee may abandon property that is burdensome or of inconsequential value or benefit to the estate; (b) on request of a party in interest and after notice and hearing, the court may order the trustee to abandon property that is burdensome or of inconsequential value or benefit to the estate; (c) unless the court orders otherwise, property scheduled that is not otherwise administered at the time of closing of the case is abandoned to the debtor; but, *Section 554(d)* provides, **"Unless the court orders otherwise, property of the estate**

¹Of course it seems reasonable to believe that since this action for declaratory relief to permit Sittner's judgment lien execution proceedings to be completed was commenced before the expiration of the original eight (8) year judgment life, and with the tolling conceded by Gildeas that at commencement of this action there was at least 2.3 years remaining that there should have been no reason why Sittner could not have gotten declaratory relief and completed foreclosure or execution. Of course there is a reason and that is the adverse claims made by Defendants and the adverse rulings procured thereby, which as a practical matter prevented enforcement the same as if a statutory injunction or other stay had been entered.

that is not abandoned under this section and that is not administered in the case remains property of the estate.” [Emphasis added].

In this case there is no dispute that the subject property was scheduled in Gildeas’ bankruptcy as property of the estate, that the trustee did not sell the property for the benefit of the estate and had expressed an intention to abandon the property, but no order of abandonment was entered, so upon case closing the property was automatically abandoned to the debtor by operation of *Section 554(c)*.² Since Gildeas contend that the relief from stay granted to Joy Hale caused the property to no longer be property of the estate, under *Section 554(d)*, the order for relief would have to say that the subject property will no longer be property of the estate.

The “*Order Vacating Stay as to Creditor Joy Horsley*” (copy Gildeas’ Brief, *Appdx. 4*) says in paragraph 1. that the relief is granted vacating the automatic stay “*as to herself*”; in paragraph 2. that she may immediately proceed to foreclose her security interest pursuant to the laws of the State of Utah without further order of the court, and in paragraph 3. that the property affected is the subject property. The order does not say that the property is no longer estate property nor grant relief from the stay to Sittner or any other creditor to foreclose, only Joy Hale (Horsley).

An order for relief from stay only permits the moving creditor to proceed specifically in compliance with the order which may not be impliedly expanded. *Matter of Dibbern*, 61

²See *Appellant’s Brief, Statement of Facts*, ¶’s 10 and 11, for supporting facts cited, including that Gildeas admitted the property was abandoned to him in ¶11 of Gildeas’ *Answer to Plaintiff’s Complaint*.

B.R. 730, 732 (Bkrcty D.Neb 1986). Thus, only Joy Hale could foreclose under the order of relief and not Sittner, and it is undisputed in this case that she did not foreclose or complete a foreclosure sale of the property, even though relief specifically for such purpose was granted to her by the order.

Lifting the automatic stay to permit a secured creditor to foreclose does not effect an abandonment or removal of the property from the bankruptcy estate absent such foreclosure sale. *In re Nebel*, 175 B.R. 306, 311 (Bkrcty D.Neb. 1994); *In re Angel*, 142 B.R. 194, 198 (Bkrcty S.D. Ohio 1992); *In re Ridgemont Apartment Assocs*, 105 B.R. 738, 741 (Bkrcty N.D. Ga. 1989); 4 *Collier on Bankruptcy* ¶554.02[4], at 554-7 (15th ed. 1999). Since the property was not sold at a foreclosure sale by Joy Hale, the property continued to be property of the estate and Sittner continued to be enjoined by the automatic stay applicable to him from enforcing his judgment lien against the property. Accordingly, Sittner's judgment lien enforcement was subject to the stay during the entire six (6) year period the property remained part of the bankruptcy estate and only terminated so he could proceed with foreclosure or execution upon case closing when the property was deemed abandoned to the debtor. This six (6) year period must be removed from and not counted in the eight (8) year limitation period on enforcing his judgment.

While Sittner is entitled to the full six (6) year period of suspension caused by Gildeas' bankruptcy filing and case, even if Gildeas' argument were correct that Sittner was only entitled to tolling by the bankruptcy of 2.1 years, when added together with the few months remaining on the original judgment life, Sittner still had 2.3 years from the date of

commencement of this action to have obtained the declaratory relief and to have completed the foreclosure or execution proceedings sought in the action. This period of time would have been more than sufficient had it not been for Defendants/Appellees asserting from the outset of the case in their answers that Sittner's judgment lien was barred and unenforceable by the bankruptcy discharge or bankruptcy case or by the lapse of the statute of limitations.³ Thus the assertion in Gildeas' Brief at p. 32-33 that the doctrine of equitable tolling in *Free v. Farnsworth*, 188 P.2d 731 (Utah 1948), does not apply here because Sittner has not been defending against adverse claims but instead has only been defending against adverse rulings is plainly wrong.

First, Sittner surely has been defending against the adverse claims of Defendants which procured the adverse albeit erroneous rulings that held that Sittner had no enforceable judgment lien and could not foreclose or proceed by execution sale on the subject property. The first adverse ruling was based on a motion for summary judgment by Appellee Schriever in March 1994, approximately six months after the commencement of the action, and then in September 1994, Sittner was able to overturn this adverse ruling and have summary judgment granted in his favor. However this favorable ruling was short-lived since about six months later after Sittner moved for partial summary judgment on reserved issues, the trial judge stayed proceedings so Gildea could reopen his bankruptcy case where he then

³See *Appellant's Brief*, p. 4, referring to the defenses asserted in Gildeas' answer [Rec. 30-33] and in other Defendants' answers [Rec. 34-43], which were vigorously asserted by them during this case and resulted in several adverse rulings defeating Sittner's judgment lien and right to foreclose, including the ruling that is on appeal before this Court.

obtained a ruling adverse to Sittner that he could not enforce his judgment lien. This adverse bankruptcy ruling, immediately resulted in an adverse trial court ruling, and remained in effect for more than one year until reversed by the U.S. District Court. Approximately six more months elapsed again before Schriever moved for summary judgment and the summary judgment was granted in March 1997, which is the adverse ruling Sittner is appealing in this case. All total, Sittner was only free from adverse orders defeating his lien for less than 2.3 years.

Gildeas miss the entire point of *Free v. Farnsworth*, that the effect of the adverse claims asserted by Defendants to prevent enforcement of Sittner's judgment lien and particularly the adverse rulings or orders procured thereby which held that Sittner had no judgment lien or could not enforce the judgment, operated as a practical matter to prevent his enforcing the judgment, just as effectively as if a stay of enforcement had been ordered by the court or an injunction entered. Therefore, under *Free* all during such time period the limitation period is tolled and suspended. *Id.* at 734-35.

The equitable tolling under *Free* prevents the totally unjust result that would occur if Defendants could hang on to their adverse rulings just long enough to permit the limitation period on the judgment to expire and then simply assert the bar of the limitation period to defeat recovery on the judgment lien and to defeat the court's jurisdiction and power to fashion remedies and to grant relief. Other state court decisions have found implied exceptions to judgment limitation periods under similar circumstances when the judgment

creditor is prevented from enforcing the judgment. 46 Am. Jur. 2d “Judgments” §471 (1994).

Under the circumstances here, Sittner is entitled to equitable tolling at least through the periods that Sittner has been subject to adverse rulings, including the summary judgment on appeal here, which taken together with the tolling during Gildeas’ bankruptcy case results in Sittner’s judgment still being viable and enforceable, if and when this Court reverses the erroneous summary judgment of the trial court and permits Sittner to finally complete foreclosure or execution proceedings on the judgment and have the relief to which he is entitled.

V. GILDEAS MAY NOT ASSERT ALTERNATIVE GROUNDS NOT PRESENTED TO THE TRIAL COURT FOR AFFIRMING AN AWARD OF ATTORNEY’S FEES.

Gildeas’ Brief under *Argument V.* appears to recognize that the trial court in awarding attorney’s fees against Sittner under *Utah Code Ann. §78-27-56*, committed fatal error by failing to have grounds for or to have adopted a finding that Sittner’s action was not brought or asserted in “good faith.” Of course as Sittner pointed out in *Appellant’s Brief*, it is ridiculous that the trial judge could have found the declaratory relief action to be frivolous and wholly without merit, since the law and more than ample authority cited demonstrates that Sittner action is well taken, that his judgment lien survived the bankruptcy and could not have been avoided and was not avoided, and the complaint was filed even before the elapse of the original eight year judgment life, so the statute of limitations could not have been grounds for dismissal of the complaint. Despite the foregoing and the judge having

even granted summary judgment in favor of Sittner after first granting summary judgment for Defendants, still the judge was predisposed to award attorney's fees under *Section 78-27-56* to Defendants each time they won without regard to the standards or requirements and without regard to analysis or reason and certainly without making any finding or pointing to any conduct that could constitute subjective "*bad faith*."

Therefore, to avoid the infirmity, Gildeas now assert that this Court can consider an alternative basis for affirming the trial court's award of attorney's fees, at least for Bruce Gildea, namely that Sittner by bringing this action violated the bankruptcy discharge and therefore was in contempt of the bankruptcy court. However, Gildeas' reliance upon *Higgins v. Salt Lake County*, 855 P.2d 231, 235 (Utah 1993), stating that a grant of summary judgment can be affirmed on any grounds available to the trial court, even if not relied on below, is certainly not applicable here. The key is that the grounds asserted must have been available to the trial court and that means presented as an alternative basis for the decision even if not adopted by the trial court. See *Hill v. Seattle First National Bank*, 827 P.2d 241, 245 (Utah 1992); *Tuck v. Godfrey*, 981 P.2d 407, 412-13 (Utah App. 1999).

Gildeas did not present their new claim or ground for attorney fees to the trial court. See Gildeas' memorandum on the first motion for summary judgment [*Rec.* 171-180] making no such argument; see also Schriever's memorandum in support of her third motion for summary judgment [*Rec.* 1062-1084] in which Gildeas filed a joinder [*Rec.* 1141], which makes no such argument nor mentions such grounds. The only grounds for awarding attorney's fees in Schriever's memorandum joined in by Gildeas was under *Section 78-27-56*

[Rec. 1083-84]. Therefore, Gildeas cannot rely upon the so-called claim of “contempt” sanctions as an alternative basis for affirming an award of attorney’s fees here.

In any event, Sittner’s action for declaratory relief to determine the priority of the liens and to permit execution proceedings to be completed does not violate the bankruptcy discharge which only restrains and enjoins the commencement or continuation of an action to collect or recover a debt as a personal liability of the debtor. As already pointed out hereinbefore, Gildeas admit that an action against the debtor to foreclose a lien or to repossess collateral is not a violation of the discharge injunction and Sittner already cited substantial authority that this is indeed the case. Therefore, it does not make any sense at all for Gildeas to argue that Sittner’s action, which does not in any way seek a money judgment against Gildeas, but only attempts to determine the priority of the liens and to enlist the Court’s aid in directing execution sale proceedings on the judgment lien property, could be a violation of the discharge injunction, it certainly is not. This would be true even if Gildeas were correct that somehow Sittner waived his judgment and lien during the bankruptcy case. It still would not make an action not seeking to recover money or to collect money or damages from the debtor a violation of the terms of the discharge order.

The cases cited by Gildeas are completely inapposite to the circumstance of Sittner’s action. *In re Barbour*, 77 B.R. 530 (Bkrtcy E.D.M.C. 1987), involved an action filed post-discharge and closing against the debtor that sought to recover \$233,950 as a personal liability from the debtor. The creditor knew of the discharge and the action is expressly prohibited by the plain terms of the discharge. Also Gildeas’ citation of *In re Miller*, 81

B.R. 669 (Bkrcty M.D. Fla. 1988), is inapposite. In *Miller*, the creditor knowing of the discharge threatened to sue and hold the bankrupt debtors liable for a monetary amount and then filed a complaint in state court seeking a large money judgment against the debtor. *Id.* at 670. This was held to be a sanctionable violation of the discharge and it surely appears to be.

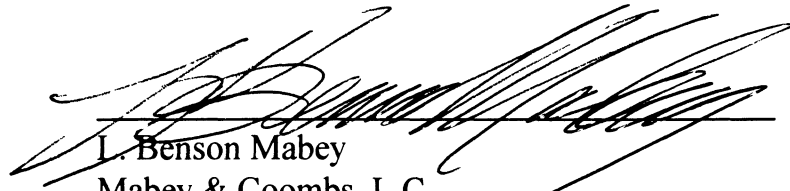
Neither of the foregoing cases have anything whatsoever to do with the declaratory action filed by Sittner which seeks no damages from the debtor, Gildea, nor recovery from the debtor of any debt. Sittner by bringing the action did not violate Gildeas' discharge injunction and this argument is completely unavailing as a basis to affirm the erroneous award of attorney's fees by the trial court.

VI. CONCLUSION

The trial court's summary judgment and legal conclusions are erroneous and are not supported by the law and constitute error and must be reversed. Sittner's judgment and lien was not rendered unenforceable by Gildea's discharge and survived his bankruptcy case and was not waived by any action taken in the case, and it passed through the case and remained enforceable *in rem* against the subject property and it must be reinstated. The statute of limitations on Sittner's judgment was suspended during the period the bankruptcy stay in Gildea's case was in effect which was from the commencement of the case until the subject property was no longer a part of the estate, and that occurred by statutory abandonment on case closing in April of 1992. Accordingly Sittner's judgment did not expire until the end of 1999, well after the trial judge's adverse decision on appeal here. Accordingly the

limitation period should be reinstated so that Sittner has the additional two years following the conclusion of this case to complete execution proceedings, and this Court should direct that equitable tolling applies until the completion of the case on remand. Costs should be awarded to Sittner.

RESPECTFULLY SUBMITTED this 14th day of December, 2000.



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Attorneys for Plaintiff/Appellee John C. Sittner

CERTIFICATE OF SERVICE

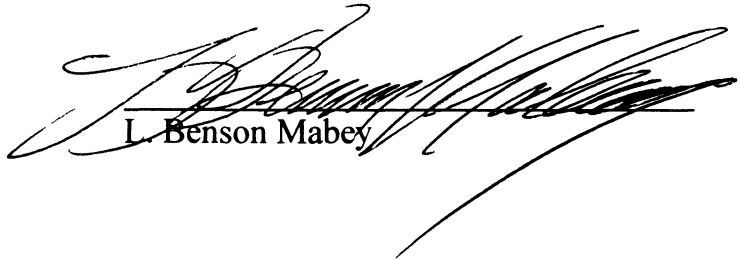
I hereby certify that I mailed a true and correct copy of ***APPELLANT'S
REPLY BRIEF TO BRIEF OF APPELLEES GILDEA***, through the U.S. Mail, postage prepaid, to the following parties:

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