

Appeal No. 04-1594-FT

Cir. Ct. No. 94SC000059E

**WISCONSIN COURT OF APPEALS
DISTRICT II**

MEGAL DEVELOPMENT CORPORATION,

PLAINTIFF-RESPONDENT,

v.

**CRAIG SHADOF, D/B/A SPECTRUM INVESTMENTS, AND
SUSAN SHADOF,**

DEFENDANTS-APPELLANTS.

FILED

OCT 27, 2004

Cornelia G. Clark
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Anderson, P.J., Nettesheim and Snyder, JJ.

Pursuant to WIS. STAT. RULE 809.61 (2001-02)¹ this court certifies the appeal in this case to the Wisconsin Supreme Court for its review and determination.

ISSUE

Does WIS. STAT. § 806.19(4) require the satisfaction of a judgment debt discharged in bankruptcy where the debtor's homestead equity exceeds the allowable homestead exemption and where the debtor failed to seek discharge of the judgment lien in the bankruptcy court?

¹ All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

FACTS

The facts of this case are straightforward and undisputed. In March 1994, Megal Development Corporation (Megal) obtained a small claims judgment for eviction and money damages in excess of \$40,000 against Craig and Susan Shadof. In February 2003, the Shadofs filed for Chapter 7 bankruptcy relief with the United States Bankruptcy Court for the Eastern District of Wisconsin. The Shadofs included the Megal judgment as a dischargeable debt on Schedule D of their bankruptcy forms. In due course, the bankruptcy court discharged the Shadofs' debts, including the debt represented by the Megal judgment. Coming out of bankruptcy, the Shadofs' homestead equity exceeded their \$40,000 homestead exemption.

On June 16, 2003, the Shadofs filed an application with the Waukesha County Circuit Court seeking an order satisfying the Megal judgment and the judgment lien pursuant to WIS. STAT. § 806.19(4). This statute provides that a person who has secured a discharge of a judgment debt in bankruptcy may apply to the circuit court for an order satisfying the underlying judgment. Initially, Judge Donald J. Hassin granted the Shadofs' request and signed an order to that effect. Later, however, Megal filed an objection, prompting Judge Hassin to vacate the order and schedule the matter for further proceedings.

The matter was then assigned to Judge Mark Gempeler. The parties filed extensive briefs. Following a series of hearings, Judge Gempeler adopted Megal's argument premised upon the distinction between the in personam liability and in rem liability created by a judgment debt. Judge Gempeler held that the Shadofs' in rem liability was not discharged in bankruptcy. The Shadofs do not contest this portion of Judge Gempeler's ruling. However, Judge Gempeler

further ruled that the Shadofs were not entitled to a satisfaction of the Megal judgment and judgment lien pursuant to WIS. STAT. § 806.19(4) because their postbankruptcy homestead equity exceeded their homestead exemption, and the Shadofs had not sought to discharge the judgment lien created by the judgment debt in the bankruptcy court. The Shadofs appeal.

THE PARTIES' ARGUMENTS

WISCONSIN STAT. § 806.19(4) reads in relevant part:

Any person who has secured a discharge of a judgment debt in bankruptcy ... may submit an application for an order of satisfaction of the judgment and an attached order of satisfaction to the clerk of the court in which the judgment was entered.²

The Shadofs contend that WIS. STAT. § 806.19(4) is clear and unambiguous and, therefore, should be applied as written. They also point to case law stating that upon proper application, a judgment debtor is entitled to a satisfaction of the judgment and judgment lien.³ In addition, they note the observation made by one commentator regarding the enactment of the original version of the current § 806.19(4): “A valuable right given to [bankrupts] by the 1943 Session of the Wisconsin Legislature is the compulsory satisfaction of a judgment against the bankrupt if the debt has been scheduled and is discharged in

² WISCONSIN STAT. § 806.19 goes on to set out other requirements with which the debtor must comply. Those are not at issue in this case.

³ See *Bastian v. LeRoy*, 20 Wis. 2d 470, 475, 122 N.W.2d 386 (1963); *Aetna Cas. & Sur. Co. v. Lauerman*, 12 Wis. 2d 387, 389, 107 N.W.2d 605 (1961); *Doughboy Indus., Inc. v. Hipke*, 26 Wis. 2d 578, 579, 133 N.W.2d 290 (1965); *Zywicke v. Brogli*, 24 Wis. 2d 685, 688, 130 N.W.2d 180 (1964); *Wiebke v. Richardson & Sons, Inc.*, 83 Wis. 2d 359, 367, 265 N.W.2d 571 (1978); *Coraci v. Noack*, 61 Wis. 2d 183, 192-93, 212 N.W.2d 164 (1973).

[their] bankruptcy proceedings.” Reginald I. Kenney, *Creditors Rights under the Bankruptcy Act*, 33 Marq. L. Rev. 135, 136 (1949-50).

The Shadofs further contend that whenever the courts have imposed restrictions upon a debtor’s right to a satisfaction of a judgment debt under WIS. STAT. § 806.19(4),⁴ the legislature has responded with amendatory language reconfirming that the statute places a clear and unambiguous duty on the circuit court to grant the discharged debtor’s request for satisfaction of the judgment.

For instance, in *State Central Credit Union v. Bigus*, 101 Wis. 2d 237, 304 N.W.2d 148 (Ct. App. 1981), the court of appeals was required to reconcile the satisfaction of judgment provisions of WIS. STAT. § 806.19(4) with WIS. STAT. § 806.15(1), which confers a lien in favor of a judgment creditor against the property of the judgment debtor. At the time, the final sentence of § 806.15(1) stated, “A judgment based upon a claim discharged in bankruptcy shall upon entry of the order of satisfaction or discharge cease to be and shall not thereafter become a lien on any real property of the discharged person then owned or thereafter acquired.” *Bigus*, 101 Wis. 2d at 240. At the same time, the final sentence of § 806.19(4) read, “The entry of such order of satisfaction of judgment shall bar any other action in the courts of this state against such bankrupt person based upon the judgment so satisfied.” *Bigus*, 101 Wis. 2d at 240. The court referred to the two statutes as “apparently conflicting remedial statutes.” *Id.* at 241.

⁴ When we refer to WIS. STAT. § 806.19(4), we are also referring to predecessor versions of the statute.

Interpreting the final sentence of WIS. STAT. § 806.15(1), the court of appeals concluded that the lien created by the statute endured so long as the underlying judgment was obtained before a satisfaction order was entered under WIS. STAT. § 806.19(4). *Bigus*, 101 Wis. 2d at 243. In addition, the court noted that the final sentence of § 806.19(4) referred only to the bankrupt person and not the person's *property*. *Bigus*, 101 Wis. 2d at 243.

In response to *Bigus*, the legislature amended WIS. STAT. § 806.15(1) by removing the final sentence of the statute. *In re Spore*, 105 B.R. 476, 485 (Bankr. W.D. Wis. 1989) (“In 1986, the Wisconsin legislature removed the ambiguity from WIS. STAT. § 806.19(4) by removing the last sentence of WIS. STAT. § 806.15(1) and recreating WIS. STAT. § 806.19(4).”). In addition, the current version of § 806.19(4) does not include the final sentence that existed at the time of *Bigus*.

Another example offered by the Shadofs is the legislature's response to the decision of the Dane County Circuit Court in *Overhead Door Co. of Madison, Inc. v. Hazard*, 86-CV-6223. At the time of *Overhead*, WIS. STAT. § 806.19(4) read, in relevant part, “Any person who has secured a discharge in bankruptcy *that renders void one or more judgments....*” The circuit court ruled that a judgment must be specifically “found void” in the bankruptcy proceeding before it was eligible for discharge under § 806.19(4). In response, the legislature removed the “void” language from the statute, requiring only that the judgment be discharged. 1995 Wis. Act 393.

Megal's response rests principally on the United States Supreme Court's holding in *Dewsnup v. Timm*, 502 U.S. 410, 418 (1992), that a discharge

in bankruptcy discharges only the bankrupt's in personam liability, not the bankrupt's in rem liability:

Under the Bankruptcy Act of 1898, a lien on real property passed through bankruptcy unaffected. This Court recently acknowledged that this was so. *See Farrey v. Sanderfoot*, 500 U.S. 291, 297 ... (1991) (“Ordinarily liens and other secured interests survive bankruptcy.”); *Johnson v. Home State Bank*, 501 U.S. 78, 84 ... (1991) (“Rather, a bankruptcy discharge extinguishes only one mode of enforcing a claim—namely, an action against the debtor in personam—while leaving intact another—namely, an action against the debtor in rem.”).

As to WIS. STAT. § 806.19(4), Megal again relies on *Dewsnup*, arguing that the statute does not apply to the debtor's in rem liability where, as here, the judgment debtor's equity exceeds the \$40,000 homestead exemption set out in WIS. STAT. § 815.20(1).⁵ Megal points to the *Dewsnup* statement that the benefit of any increase in the value of the property belongs to the creditor:

We think, however, that the creditor's lien stays with the real property until the foreclosure.... Any increase over the judicially determined valuation during bankruptcy rightly accrues to the benefit of the creditor, not to the benefit of the debtor and not to the benefit of other unsecured creditors.

Dewsnup, 502 U.S. at 417.

Megal further argues that if the Shadofs wanted to avoid their in rem liability and to protect their excess homestead equity from the judgment lien, their obligation was to seek an avoidance of the lien in the bankruptcy action pursuant to 11 U.S.C. § 522(f) (2004). *See In re Fred E. Schoonover*, 331 F.3d 575, 578 (7th Cir. 2003) (“But [the creditor] had a judicial lien, and though this may not

⁵ Megal also argues that the cases cited by the Shadofs in support of their interpretation of WIS. STAT. § 806.19(4) all predate *Dewsnup v. Timm*, 502 U.S. 410 (1992).

have given him a security interest in the accounts it did give him a valuable entitlement: to wait out the bankruptcy and enforce the lien at its conclusion, unless the debtor asked the bankruptcy court for relief. “[A] creditor’s right to foreclose on [a lien] survives or passes through the bankruptcy.”).

Since *Dewsnup* awards the debtor’s equity in excess of the homestead exemption to the creditor, Megal further argues that the Shadofs’ interpretation of WIS. STAT. § 806.19(4) results in an unconstitutional taking of a creditor’s property. Megal says that we can avoid that constitutional dilemma by construing the statute to bar the Shadofs’ claim for satisfaction.

The Shadofs respond that the *Dewsnup* distinction between in personam liability and in rem liability and the fact that in rem liability “passes through” bankruptcy are of no consequence. They argue that neither the bankruptcy statutes nor the declarations of the federal courts may preempt the authority of the Wisconsin legislature to decree the level of protection it chooses to accord to a Wisconsin judgment debtor who has received a discharge in bankruptcy. Under that authority, the Shadofs contend that the legislature has chosen via WIS. STAT. § 806.19(4) to protect all of a bankrupt’s homestead equity.

As to Megal’s constitutional concerns, the Shadofs argue that a creditor has no “inalienable” right to a lien. Instead, the Shadofs assert that the allowance for a lien is a matter of statutory grace, not constitutional right. Therefore, the legislature may decree those circumstances under which the protections of a lien are abrogated. The Shadofs say that WIS. STAT. § 806.19(4) is such a circumstance.

ANALYSIS

On the surface, WIS. STAT. § 806.19(4) appears to clearly and unambiguously entitle a judgment debtor to a satisfaction of a judgment debt that has been discharged in bankruptcy. However, lurking below the surface are the federal bankruptcy statutes and decisions of the federal courts, including the United States Supreme Court. This body of federal law, particularly *Dewsnup*, makes clear that a bankruptcy discharges only the debtor's in personam, not in rem, liability. This law makes equally clear that the in rem liability passes through the bankruptcy unless the debtor asks the bankruptcy court to discharge the lien. So the ultimate question is whether this body of federal law either preempts § 806.19(4) or, at a minimum, limits the statute to only those situations where the debtor's homestead equity does not exceed the homestead exemption.

We certify this case to the Wisconsin Supreme Court for a number of reasons. First, the parties agree that this is a case of first impression.⁶ Second, and more importantly, the case involves significant interests of both judgment creditors and judgment debtors, including matters of constitutional dimension. Third, this is a “federalism” case, pitting state law as represented by WIS. STAT. § 806.19(4) against the federal bankruptcy statutes and federal case law, including the United States Supreme Court's opinion in *Dewsnup*. We submit that the supreme court is the more appropriate forum to resolve a federalism issue. Fourth,

⁶ The uncertainty of the law in this area is demonstrated by the proceedings in the trial court. Judge Hassin originally ruled for the Shadofs. Later, he vacated his ruling. Although Judge Gempeler ultimately ruled for Megal, he noted earlier in the proceedings that the Shadofs likely had the better of the argument. As such, he described his ruling as a “judicial flip of the coin.” Given the persuasive arguments that exist on both sides of the issue, any ruling we might make could be similarly described.

although a less compelling reason for certification, both the parties and Judge Gempeler recognized that this case was headed for appellate review, regardless of the outcome. For that reason, Judge Gempeler entered an immediate stay of his order. Like Judge Gempeler, we have no reason to think that the losing party will accept our decision without seeking further review by the supreme court. Thus, this case is ultimately headed for the supreme court.

We respectfully ask the supreme court to accept jurisdiction over this appeal.

