

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEW MEXICO

In re:  
ANDREW J. PERKINS,  
Debtor.

No. 13-12-12191 SS

**ORDER DENYING MOTION TO  
AVOID JUDICIAL LIEN (doc 13)**

This matter came before the Court on November 5, 2012 for a final pretrial conference on Debtor's Motion to Avoid Judicial Lien held by New Mexico Taxation and Revenue ("Motion"). The Taxation and Revenue Department appeared through its attorney James C. Jacobsen, Assistant Attorney General. Debtor did not appear.

The Court has reviewed the Motion, the response by Taxation and Revenue (doc 33) and Debtor's Reply (doc 45) and finds that it must be denied. Bankruptcy Code section 101(36) defines "judicial lien" as a "lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding." In contrast, a "statutory lien" is a

lien arising solely by force of a statute on specified circumstances or conditions, or lien of distress for rent, whether or not statutory, but does not include security interest or judicial lien, whether or not such interest or lien is provided by or is dependent on a statute and whether or not such interest or lien is made fully effective by statute.

11 U.S.C. § 101(53). Statutory liens and judicial liens are mutually exclusive. Willis v. Strother (In re Strother), 328 B.R. 818, 820 (10<sup>th</sup> Cir. BAP 2005)(citing In re Thompson, 240 B.R. 776, 781 (10<sup>th</sup> Cir. BAP 1999)). Only judicial liens are

subject to avoidance under section 522(f)(1)(A). Id. This classification comports with the statutory history:

The legislative history reveals the following:  
A statutory lien is only one that arises automatically and is not based upon an agreement to give a lien or judicial action: Mechanics', materialmen's and warehousemen's liens are examples. Tax liens are also included in the definition of statutory liens. House Report No. 95-595, 95th Cong. 1st Sess. (1977) 314; Senate Report No. 95-989, 95th Cong. 2d Sess. (1978) 27, U.S. Code Cong. & Admin. News 1978, pp. 5787, 5813, 6271.

Taylor v. West End Federal S & L Assoc. (In re Taylor), 17 B.R. 586, 588-89 (Bankr. W.D. Pa. 1982). See also Barstow v. Internal Revenue Service (In re Markair, Inc.), 272 B.R. 710, 713 n.2 (D. Alaska 2001):

"A statutory lien is a lien that arises strictly by operation of law without either the consent of the debtor or the involvement of a court in its creation. Typical statutory liens are mechanics' liens and tax liens." 1 Robert E. Ginsberg & Robert D. Martin, Ginsberg & Martin On Bankruptcy, § 6.02[D][2] (4th ed. 2001) (footnote omitted).

In New Mexico, tax liens in favor of the state arise by operation of law. See N. M. S. A. 1978, § 7-1-37, which provides, in relevant part:

A. If any person liable for any tax neglects or refuses to pay the tax after assessment and demand for payment as provided in Section 7-1-17 NMSA 1978 or if any person liable for tax pursuant to Section 7-1-63 NMSA 1978 neglects or refuses to pay after demand has been made, unless and only so long as such a person is entitled to the protection afforded by a valid order of a United States court entered pursuant to Section 362 or 1301 of Title 11 of the United States Code, as amended or renumbered, the amount of the tax shall be a

lien in favor of the state upon all property and rights to property of the person.

B. The lien imposed by Subsection A of this section shall arise at the time both assessment and demand, as provided in Section 7-1-17 NMSA 1978, have been made or at the time demand has been made pursuant to Section 7-1-63 NMSA 1978 and shall continue until the liability for payment of the amount demanded is satisfied or extinguished.

Therefore, the Court finds and concludes that the tax liens asserted against the Debtor's residence are statutory liens and may not be avoided under 11 U.S.C. § 522(f)(1)(A).

**IT IS ORDERED** that Debtor's Motion to Avoid Judicial Lien held by New Mexico Taxation and Revenue (doc 13) is denied without prejudice.



Honorable David T. Thuma  
United States Bankruptcy Judge

Date entered on docket: November 5, 2012

Copies to:

Andrew J Perkins  
PO Box 23672  
Santa Fe, NM 87502

James C Jacobsen  
111 Lomas NW Ste 300  
Albuquerque, NM 87102-2368

Yvette J. Gonzales  
Trustee  
PO Box 1037  
Placitas, NM 87043-1037

United States Trustee  
PO Box 608  
Albuquerque, NM 87103-0608