

Dated: April 20, 2007
The following is SO ORDERED:




David S. Kennedy
UNITED STATES CHIEF BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re

ALLSTATE FINANCIAL CORPORATION

Case No. 02-26345-K

Debtor.

Chapter 7

RICHARD T. DOUGHTIE III, Bankruptcy
Trustee of the Estate of Allstate
Financial Corporation, the above-named
Chapter 7 Debtor,

Plaintiff,

vs.

Adv. Proc. No. 04-00264

DAVID H. GWALTNEY, LORETTA GWALTNEY,
and the LORETTA GWALTNEY DECLARATION
OF TRUST,

Defendants.

**MEMORANDUM AND ORDER DENYING DEFENDANTS’
“MOTION FOR EXPEDITED RELIEF FROM LIEN *LIS PENDENS*”
COMBINED WITH RELATED ORDERS AND NOTICE OF THE ENTRY THEREOF**

This core proceeding¹ came to be heard on April 17, 2007, upon the Motion of the above-named defendants, David H. Gwaltney (“Mr. Gwaltney”), Loretta Gwaltney (“Mrs. Gwaltney”), and the Loretta Gwaltney Declaration of Trust (“Trust”), for expedited relief from the lien *lis pendens* previously filed by the plaintiff, Richard T. Doughtie, III, Trustee of the estate of Allstate Financial Corporation, the above-named Chapter 7 debtor (“Trustee”), against the Trust’s real property located at 2820 Oakleigh Lane, Germantown, Tennessee 38138, and also on the objection of the trustee thereto.²

Upon statements of counsel, consideration of the defendants’ instant motion and the trustee’s objection thereto, and the entire record in this case, the court makes the following findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052.

The relevant background facts and contentions of the parties may be briefly summarized as follows: On April 13, 2004, the plaintiff/trustee filed a complaint seeking, *inter alia*, to avoid asserted fraudulent conveyances made by the defendants herein. In conjunction with this complaint, the trustee also filed a notice of lien *lis pendens* on April 20, 2004, against the real property owned by the Trust located at 2820 Oakleigh Lane, Germantown, Tennessee 38138, which serves as the residence of the defendants, Mr. Gwaltney and Mrs. Gwaltney.³ It is estimated that the home has a value in excess of \$400,000 and is unencumbered.

¹ See 28 U.S.C. § 157(b)(2)(A).

² This motion is similar to the motion filed on April 14, 2005, by the defendants styled “Motion for Discharge of Lien *Lis Pendens*,” which was denied without legal prejudice by the court on September 28, 2005.

³ See TENN. CODE ANN. §§ 20-3-101, *et seq.*

Trustee's 19 page amended complaint under 11 U.S.C. §§ 548(a), 544(b), and 547(b) and TENN. CODE ANN. §§ 66-3-101, et seq. alleges, inter alia, that the defendant, Mr. Gwaltney, was the founder and officer and/or consultant of the above-named chapter 7 debtor, Allstate Financial Corporation ("Allstate") while the defendant, Mrs. Gwaltney, was the sole shareholder of Allstate; that the defendants, Mr. and Mrs. Gwaltney, along with others, engaged in a massive scheme to defraud ultimately about 90 investors of Allstate of approximately \$13.1 million; that a portion of the improper funds derived by the defendants, Mrs. and Mrs. Gwaltney were used to purchase the residence located at 2820 Oakleigh Lane, Germantown, Tennessee; that title to the residence was originally placed in the name of the defendant, Mrs. Gwaltney; and that in April 2003, after the bankruptcy filing of Allstate, the defendant, Mrs. Gwaltney, transferred the title to the residence to the Trust. Defendants strongly deny that they engaged in any fraudulent activities and seek a dismissal of this complaint in accordance with the answers filed on July 8, 2004.

As noted earlier, on April 14, 2005, almost a year after the filing of the notice of the lien *lis pendens*, the defendants filed a "Motion for Discharge of the Lien *Lis Pendens*," to which the trustee objected. The April 14, 2005 motion was heard by the court and denied via an oral bench ruling made in open court on September 8, 2005; the order memorializing the court's bench ruling that denied the motion for discharge of the lien *lis pendens* without prejudice to the defendants to renew the motion was entered on September 28, 2005.

On March 30, 2007, the defendants renewed their attempts to obtain relief from the lien *lis pendens* by filing the instant motion. Simply stated, defendants, Mr. and Mrs. Gwaltney, seek to borrow against the home to raise funds to pay their criminal attorneys and also pay their living expenses. On April, 16, 2007, the trustee filed an objection to this renewed motion. In the instant motion, the defendants, in essence, renew their prior statements that the Trust asset (*i.e.*, the home) cannot be traced to proceeds realized from the chapter 7 corporate debtor, Allstate Financial Corporation.

Defendants assert that the relief sought is in accord with applicable case law regarding civil forfeiture cases that grant relief from the civil forfeiture in order to pay for criminal defense attorney fees citing to concern for the rights to counsel of the defendants, Mr. and Mrs. Gwaltney, under the Fifth and Sixth Amendments.⁴ Defendants, Mr. and Mrs. Gwaltney, also contend that their circumstances have changed since the previous motion was considered in that the defendants, Mr. and Mrs. Gwaltney, have exhausted all other assets available to compensate their criminal defense counsels and their ongoing living expenses (except for Mr. and Mrs. Gwaltney's Social Security income). It perhaps is important to note that the criminal charges the defendants, Mr. and Mrs. Gwaltney, are defending against were filed after the filing of this civil complaint that provides the basis of the lien *lis pendens*; indeed, the criminal charges were filed after the notice of the lien *lis pendens* was filed. Further, the criminal defense attorneys for Mr. and Mrs. Gwaltney, James Garts, Jr., Esquire, for Mr. Gwaltney and Gerald F. Easter, Esquire, for Mrs. Gwaltney, have already been paid \$104,292 and \$8,212 respectively (as well as additional amounts that have been paid to other criminal attorneys).

In opposition to the defendants' instant motion seeking a discharge of the lien *lis pendens*, the trustee contends, *inter alia*, that the defendants have shown insufficient special circumstances that have changed since this court's prior ruling on this issue; that the defendants have in fact depleted their financial resources (*e.g.*, three certificates of deposits aggregating approximately \$300,000) to the possible detriment of their creditors; that the defendants' reliance on civil forfeiture case law is inapplicable and distinguishable from the private action lien *lis pendens* at issue here.⁵ The trustee also reminds this court that the Trust is not a defendant in the criminal actions and that the Trust actually holds legal title to the real property, which, as noted, serves as the

⁴ See, *e.g.*, *U.S. v. Michelle's Lounge*, 39 F.3d 684 (7th Cir. 1994); *U.S. v. Michelle's Lounge*, 126 F.3d 1006 (7th Cir. 1997).

⁵ See, *e.g.*, *U.S. v. Riviuccio*, 661 F.Supp. 281 (E.D.N.Y. 1987); *U.S. Bissell*, 866 F.2d 1343 (11th Cir. 1989).

residence of the defendants, Mr. and Mrs. Gwaltney.

The court commends all of the attorneys involved in these proceedings for their zealous advocacy and also for their succinct and well articulated written and oral statements concerning the background facts, reported law, and arguments regarding the law on this subject matter. Considering a totality of the particular facts and circumstances, the court finds, based upon applicable state and federal laws, that the common law doctrine of lien *lis pendens* has long been recognized and the lien should not be lifted, discharged, or modified at this time in these proceedings. Moreover, the lien *lis pendens* doctrine was codified by the State of Tennessee in 1932 and provides a protection of third parties from accessing or otherwise impacting property subject to a valid dispute between the main parties as well as putting the world on notice of the pending litigation regarding the subject property. Absent a hearing and delving into the trustee's underlying complaint, this court is reluctant, at this stage of the litigation, to find, as the defendants argue, that the subject property is in no way linked to the proceeds of the debtor, Allstate Financial Corporation, or that the transfer was or was not in any way fraudulent or preferential in nature, as such transactions are defined under applicable bankruptcy and state law. As such, it is the opinion of this court, at this time, that the lien *lis pendens* is validly of record and concomitantly finds no justification, at this time, to make a modification thereto or otherwise provide relief therefrom.

Turning to the matter of civil forfeiture, the court finds, at this time, that the trustee's position and written objection to the instant motion are persuasive under the existing circumstances. The lien *lis pendens*, indeed the underlying complaint, both predate and are unrelated to the criminal proceedings pending against Mr. and Mrs. Gwaltney. Though not dispositive in and of itself, this coupled with the fact that Mr. and Mrs. Gwaltney have not been restricted in any way by this lien *lis pendens* from previously accessing their apparently numerous other assets, the lien *lis pendens* in the instant action is far removed from the instances in those cases where the civil or criminal forfeiture removed all assets from the control of the criminal defendants in such

a way as to render the acquisition of paid criminal defense counsel difficult if not impossible. Of course, the Constitution and the Fifth and Sixth Amendments are important considerations here; however to say that the restriction on this single asset of the Trust impacts the respective rights of Mr. and Mrs. Gwaltney to criminal defense counsel to such a degree may be difficult to countenance in that the criminal attorneys have already been collectively paid in excess of \$130,000. (It is yet to be determined whether the creditors of Allstate will receive anything.)

Based on the foregoing, coupled with the adoption of the prior court's oral findings of fact and conclusions of law rendered on September 8, 2005, in conjunction with the defendants' earlier "Motion for Discharge of the Lien *Lis Pendens*" filed in this cause, the court finds that the defendants' instant motion for relief from the lien *lis pendens* should be denied, at this time, without prejudice to the defendants to renew the motion based upon the existence of appropriate changed circumstances.

The Bankruptcy Court Clerk shall cause a copy of this Order and Notice to be sent to the following:

Richard T. Doughtie, Esquire
Chapter 7 Trustee
239 Adams
Memphis TN 38103

Michael P. Coury, Esquire
Attorney for Chapter 7 Trustee
One Commerce Square
40 S. Main St., Suite 2000
Memphis TN 38103

Steven N. Douglass, Esquire
Attorney for the Defendants
David H Gwaltney, Loretta Gwaltney, and
Loretta Gwaltney Declaration of Trust
2700 One Commerce Square
Memphis TN 38103

Robert Campbell Hillyer, Esquire
Attorney for Chapter 7 Trustee
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James R. Garts, Jr., Esquire
Attorney for the Defendant,
David H. Gwaltney
2700 One Commerce Square
Memphis TN 38103

Gerald Easter, Esquire
Attorney for Mrs. Loretta
Gwaltney
369 N. Main St.
Memphis, TN 38103

United States Trustee
200 Jefferson #400
Memphis, TN 38103

All Creditors Reflected on the Mailing Matrix

IT IS SO ORDERED AND NOTICE IS HEREBY GIVEN.