UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

IN RE:	**Chapter 7**
CHRISTOPHER & ANNE RITTHALER,	**Bankruptcy No. 00 B 73447**
Debtors.	

MEMORANDUM OPINION DENYING DEBTORS' MOTION TO REOPEN

This matter comes before the Court on the Motion to Reopen Chapter 7 Case brought by the debtors, Christopher and Anne Ritthaler, (the "Debtors"). The Debtors seek to reopen their Chapter 7 case pursuant to 11 U.S.C. § 350(b) and Bankruptcy Rule 5010. For the reasons set forth herein, the motion is denied.

JURISDICTION

The Court has jurisdiction to decide this matter pursuant to 28 U.S.C. § 1334 and Internal Operating Procedure 15(a) of the United States District Court for the Northern District of Illinois. This matter constitutes a core proceeding under 28 U.S.C. § 157(b)(2)(K).

FACTS AND BACKGROUND

Carolyn Ritthaler, a creditor (the "Creditor"), obtained a judgment against the Debtors for $15,000 in the Nineteenth Judicial Circuit Court, McHenry, Illinois, case no. 99 AR 490, on May 12, 2000. A memorandum of judgment was recorded on September 6, 2000, at the McHenry County Recorder's Office. The Debtors filed the present bankruptcy case on October 26, 2000, and an order of discharge was entered

on February 21, 2001. During the course of the bankruptcy, no action was taken with respect to the judgment lien which existed by reason of the memorandum of judgment. On February 26, 2002, the Debtors refinanced their home, and it appears that the memorandum of judgment was not discovered or otherwise called to their attention. On August 21, 2003, approximately 30 months after the discharge in bankruptcy, the Creditor filed a complaint on the real estate lien in the Nineteenth Judicial Circuit Court of McHenry County, Illinois. On April 16, 2004, a judgment of foreclosure and sale was entered in that state court action. It appears uncontroverted from the pleadings that one of the debtors, Ann Ritthaler, appeared and defended the foreclosure action.

It is the Creditor's contention that the Debtors were represented by counsel in the foreclosure action, which concluded 38 months after entry of the discharge order. The Debtors failed within that period of time to seek relief from the Bankruptcy Court. Accordingly, it is the Creditor's position that the doctrine of laches precludes the Debtors from reopening their Chapter 7 case due to their inaction and failure to exercise due diligence.

DISCUSSION

The present case issue in this matter is very similar to one previously decided by this Court in *In re Killion*, 00 B 70802. In that matter this Court, in an oral ruling, granted a motion to reopen conditioned upon the debtor reimbursing the creditor for the actual costs it incurred in enforcing its lien. Accordingly, the analysis will begin as it did in that case.

Section 350(b) of the Code provides: "A case may be reopened in the court in

which such case was closed to administer assets, to accord relief to the debtor, or for other cause." 11 U.S.C. § 350(b). The Seventh Circuit, in *Matter of Bianucci*, 4 F.3d 526 (7th Cir. 1993), recognized that neither § 350(b) nor § 522(f) set a time limit. In that case, the creditor received a distribution on its unsecured claim and had previously obtained a confession of judgment, which created a judicial lien on the debtors' real property. More than 2 years after the case was closed, the debtors suspected the creditor still held a lien and requested that the lien be released. The creditor refused. Approximately 5 months later, the creditor filed a motion to revive its judgment in state court. At that time, the debtors filed a motion to reopen their bankruptcy case and to avoid the lien.

The Court reasoned that while the passage of time in itself does not constitute prejudice, delay may be prejudicial when combined with other factors. *Id.* at 528. The Court held that the delay in time combined with the court costs and attorneys fees incurred by the creditor provided ample reason for the Bankruptcy court to deny the motion to reopen. The Court stated in dicta that while it may be permissible for a court to condition reopening on reimbursement of expenses incurred by the creditor, they declined to require a court to do so. *Id.* at 529.

In the present case, the Creditor asserts that the passage of time together with the events which occurred indicate that the Debtors had knowledge or should be charged with having knowledge of the existence of the judicial lien. Ordinarily, the refinancing of the Debtors' home would have brought the existence of the judicial lien to their attention. In fact, such a lien would have ordinarily been an obstacle to refinancing or would have been required to have been removed at the time of such a transaction. It

appears that the title company did not discover the lien for some reason and that the refinance proceeded as if it did not exist. Under these circumstances, it is difficult to see how the Debtors could have been charged with knowledge of the lien's existence.

The Debtors' knowledge of the judgment during the course of the bankruptcy does not equate with knowledge that a memorandum of judgment was recorded. This Court is not prepared to hold that all debtors or debtors' counsel must conduct a title search on the debtors' real estate in each bankruptcy case in the absence of suspected problems of that nature. This Court notes that motions to reopen post-discharge for the purpose of avoiding liens are somewhat common.

The question is whether the passage of time and other factors constitute prejudice to the Creditor. Here, a complaint for foreclosure was filed and served on the Debtors approximately 30 months following their discharge in bankruptcy. The foreclosure action was apparently litigated for a period of approximately 8 months before a judgment was entered on April 16, 2004. During this period the Debtors were represented by counsel, and no action was taken to reopen the bankruptcy case in order to avoid the lien. While the Debtors assert that their attorney was not familiar with bankruptcy law and was merely representing them in the foreclosure, attorneys are presumed to be competent in the matters which they undertake, and clients are generally bound by the actions of their attorney. *See Horwitz v. Holabird & Root*, No.89351, 2004 WL 1118511, at *4 (Ill. May 20, 2004).

In the present case, the Debtors and their attorney in the course of the foreclosure had actual knowledge for a period of at least 8 months during the pendency of that action that the judgment lien existed. The fact that their attorney was unaware of

their bankruptcy remedy, or perhaps elected to defend the foreclosure on its merits, is no less prejudicial to the creditor and does not insulate the Debtors from the doctrine of laches.

This Court finds this case analogous to *Bianucci*. There, the Court found the delay, a 5 month period during which the debtors had actual knowledge that the judgment lien had never been avoided, was inordinate. More importantly, the Court concluded that the inordinate delay combined with the creditor's expenses, which were incurred in the state court action and in defense before the appellate court, provided "ample reason for the Bankruptcy Court to decline to reopen the case." *Id.* at 529. Similarly, this Court finds that the passage of time, at least 8 months during the pendency of the foreclosure action, combined with the expenses the Creditor incurred to litigate the state court foreclosure action to judgment constitute prejudice.

While this Court granted the motion to reopen in *Killion* on the condition that the debtor reimburse the creditor, this Court is not required to do so. The option to so grant a motion to reopen is within the discretion of this Court. The Court declines to do so in this matter. Therefore, the Debtors' motion to reopen is denied.

Dated: September 7, 2004

MANUEL BARBOSA
United States Bankruptcy Judge