

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In Re:) Chapter 7
)
LAWRENCE D. LINGO,) Case No. 99-3195(PJW)
)
Debtor and Plaintiff,)
)
vs.)
)
ESTATE OF SAMUEL J. CURCIO,)
)
Defendant.)

MEMORANDUM OPINION

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Date: January 29, 2001

WALSH, J.

Before the Court is the motion (Doc. # 43) of chapter 7 debtor Lawrence D. Lingo ("Debtor") to avoid a judicial lien on his residence in favor of the Estate of Samuel J. Curcio ("Curcio"). The Debtor contends § 522(f)¹ entitles him to avoid Curcio's lien in its entirety because the lien impairs the Debtor's exemption. Curcio objects on the basis that § 522(f) does not permit avoidance of a lien if the Debtor has no equity to which the exemption can apply. For the reasons set forth below, I will grant the Debtor's motion in part.

FACTS²

Debtor filed a voluntary chapter 13 petition on September 10, 1999. Debtor converted the case to one under chapter 7 on February 16, 2000. A discharge entered on June 3, 2000.³

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Unless otherwise indicated, all references to "§___" are to a section of the Bankruptcy Code, 11 U.S.C. § 101 et. seq.

2

This Opinion constitutes this Court's findings of fact and conclusions of law under Fed.R.Bank.P. 7052.

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I make these findings according to the docket in this matter, of which I take judicial notice pursuant to Fed.R.Evid. 201 and Fed.R.Bankr.P. 9017. I also take judicial notice, pursuant to the Debtor's suggestion, see Debtor's Letter Brief dated January 17, 2001, Doc. # 52 at 2, of the proof of claims filed by National City Mortgage (Claim No. 4) and Wilmington Postal Federal Credit Union (Claim No. 9). See Levine v. Egidi, 1993 WL 69146, at *2 (N.D. Ill. 1993) (bankruptcy judge may take judicial notice of his or her own docket); In re Paolino,

Debtor declares his personal residence at 1 Ohio Avenue, Wilmington, Delaware has a fair market value of \$100,000.00 on his Schedule A, Real Property, appended to his petition. Pursuant to state law, which permits Debtor to exempt property having an aggregate fair market value of \$5,000.00, Debtor claimed a \$1,000.00 exemption in his residence. See 10 Del. C. § 4914. He applied the balance of his available exemption to other property interests.

The property is subject to two mortgages and Curcio's judicial lien. According to proofs of claims filed in Debtor's case, the first mortgage in favor of National City Mortgage (Claim No. 4) has a balance due of \$76,243.60. The second mortgage in favor of Wilmington Postal Federal Credit Union (Claim No.9) has a balance due of \$16,352.32. Curcio's judicial lien is for \$54,932.98 (Claim No. 6).

On December 13, 2000, I held a hearing for purposes of determining the value of Debtor's residence which the parties dispute. Debtor maintains it is \$100,000 and Curcio submits it is much lower. Both agree, however, that I should value the property as of the petition date.

1991 WL 284107, at *12 n.19 (Bankr. E.D. Pa. 1991) ("courts may take judicial notice of the contents of their own dockets."). Curcio did not submit any evidence contradicting the balances on the nonavoidable liens and does not dispute their validity.

At the hearing, the Debtor testified that water damage occurred in the basement of his residence which he believed would cost \$5,000 to \$7,000 to repair. He said the water damage was a result of a possible crack in the foundation of the house. He further testified that to his knowledge, the house next door to his sold for \$72,000.00. Accordingly, the Debtor testified he believed the value of the residence was approximately \$94,000.00. The Debtor did not provide estimates from contractors regarding the water damage in the basement.

Neither the Debtor nor Curcio provided a written appraisal of the residence. Curcio did not dispute the existence of water damage in the basement. At the hearing, Curcio did not submit any evidence in favor of a higher value for Debtor's residence. Curcio relied on cross-examination of the Debtor and argued in favor of a lower value for the residence.

Accordingly, I find that the fair market value of Debtor's residence as of the petition date was \$94,000.00. I find Debtor's testimony credible as to the existence of water damage in his basement and the approximate cost to repair the foundation. I also believe his undisputed testimony regarding the prior sale of a similar property in his neighborhood for much less than \$100,000.00.

DISCUSSION

The Debtor argues that § 522(f) mandates the avoidance of a lien that impairs an exemption to which he is otherwise entitled. Debtor argues that Curcio's lien must be avoided in its entirety because the equity in his property is less than the amount of his claimed exemption.

Curcio responds with two arguments. First, Curcio maintains Debtor has no equity to which his exemption can apply, and accordingly, Debtor has no exemption that Curcio's lien can impair. As a corollary to this position, Curcio also appears to argue that § 522(f) only permits lien avoidance to the extent of the Debtor's equity in the residence, rather than to the full amount of his allowable exemption. Second, Curcio argues that § 522(f) only permits avoidance of a lien to the extent of the claimed exemption, i.e., only \$1,000.00 of Curcio's lien may be avoided, if at all.

I am not persuaded that either party's position is correct. In pertinent part, § 522(f) provides as follows:

(f)(1) Notwithstanding any waiver of exemptions but subject to paragraph (3), the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is--

(a) a judicial lien . . .

(f)(2)(A) For the purposes of this subsection, a lien shall be considered to impair an exemption to the extent that the sum of --

(i) the lien;

(ii) all other liens on the

property; and
 (iii) the amount of the
 exemption that the debtor
 could claim if there were
 no liens on the property;

exceeds the value that the debtor's interest
 in the property would have in the absence of
 any liens.

11 U.S.C. § 522(f).

Application of § 522(f)(2)(A) to the facts of this case
 is as follows: the judicial lien (\$54,932.98) plus all other liens
 on the property (\$76,243.60 + \$16,352.32) and the amount of the
 exemption that the debtor could claim if there were no liens on the
 property (\$1,000.00) totals \$148,528.90 (\$54,932.98 + \$76,243.60 +
 \$16,352.32 + \$1,000.00 = \$148,528.90). This amount exceeds the
 value of the Debtor's interest in the property in the absence of
 any liens (\$94,000.00) by \$54,528.90 (\$148,528.90 - \$94,000.00 =
 \$54,528.90). Thus Curcio's judicial lien impairs the Debtor's
 exemption to the extent of \$54,528.90 and is avoided in that
 amount. The balance of Curcio's lien (\$404.08) is not avoided.

Perhaps an easier method for understanding the § 522(f)
 formula is as set forth in In re Piersol, 244 B.R. 309, 311 (Bankr.
 E.D. Pa. 2000):

1. Determine the value of the property
 on which the judicial lien is sought
 to be avoided.

\$94,000.00

2. Deduct the amount of all liens not
 to be avoided from Step 1.

$$\begin{aligned} & \$94,000.00 - [\$76,243.60 + \$16,352.32] = \\ & \$1,404.08 \end{aligned}$$

3. Deduct the Debtor's allowable exemptions from Step 2.

$$\begin{aligned} & \$1,404.08 - \$1,000.00 = \\ & \$404.08 \end{aligned}$$

4. Avoidance of all judicial liens results unless Step 3 is a positive figure.
5. If Step 3 results in a positive figure, do not allow avoidance of liens to that extent only.

Curcio's lien is not avoided to the extent of \$404.08.

In re Piersol, 244 B.R. at 311-12 (noting that this formula was expressly approved by the Supreme Court in Owen v. Owen, 500 U.S. 305, 313 n.5, 111 S.Ct. 1833 (1991) and by Congress in amending § 522(f) in 1994).

Curcio's first argument that § 522(f) cannot avoid a lien if the debtor lacks equity in the property was overruled by the Bankruptcy Reform Act of 1994. As explained in In re Whitehead, 226 B.R. 539, 540-41 (Bankr. W.D.N.Y. 1998):

The formula provided by Congress in Section 522(f)(2)(A) . . . specifically eliminates all liens on the debtor's property to determine the value of the debtor's interest in the property. As a result, for purposes of determining impairment, the formula creates equity, even if the debtor otherwise has no equity in the property.

The Section 522(f)(2)(A) formula negates the strict statutory construction analysis, utilized by a number of courts prior to the enactment of the Bankruptcy Reform Act of 1994, which resulted in their conclusion that

the specific provisions of [state law] required ... debtors to have equity over and above unavoidable liens for an exemption to be available which could be impaired by a judgment lien, and thus avoided by the use of Section 522(f)(1). . . .

The Legislative History to the Bankruptcy Reform Act of 1994 has made it clear that it was always the intention of Congress in enacting Section 522(f)(1), that a debtor would be entitled to avoid the fixing of judicial liens, and take advantage of the applicable federal or state homestead exemption, even if a debtor did not have equity in their residence over otherwise unavoidable liens.

Congress also rejected the methodology employed in City Nat'l Bank v. Chabot (In re Chabot), 992 F.2d 891, 894-95 (9th Cir. 1993) and followed by Menell v. First Nat'l Bank of Boston (In re Menell), 37 F.3d 113, 115-16 (3d Cir. 1994) which held that § 522(f) permits a debtor to avoid a judicial lien only to the extent that the lien impairs an exemption as measured by the debtor's equity in the property rather than by the amount of the claimed exemption. Jones v. Mellon Bank, N.A. (In re Jones), 183 B.R. 93, 95 (Bankr. W.D. Pa. 1995). According to Congress this situation occurs

where the judicial lien the debtor seeks to avoid is partially secured. Again, in an example where the debtor has a \$10,000.00 homestead exemption, a \$50,000.00 house and a \$40,000.00 first mortgage, most commentators and courts would have said that a judicial lien of \$20,000.00 could be avoided in its entirety . . . However, a few courts, including In re Chabot, 992 F.2d 891 (9th Cir. 1992), held that the debtor could avoid only \$10,000.00 of the judicial lien in this situation, leaving the creditor after

bankruptcy with a \$10,000.00 lien attached to the debtor's exempt interest in property . . . The formula in . . . section [522(f)(2)(A)] would not permit this result.

In re Jones, 183 B.R. at 95 quoting H.R.REP. No. 103-384, at 53 (1994), reprinted in 1994 U.S.C.C.A.N. 3362.

The cases on which Curcio relies, Nelson v. Scala, 192 F.3d 32 (1st Cir. 1999), and Lehman v. VisionSpan, Inc.(In re Lehman), 205 F.3d 1255 (11th Cir. 2000), address a situation not implicated here. At issue in Nelson and Lehman is the value of the debtor's interest in property for purposes of § 522(f) where the debtor owns the property as a co-tenant or as a joint tenant. In such circumstances the § 522(f) formula does not work flawlessly.

In Nelson, for example, the debtor and his wife each owned a 50% interest in their residence. 192 F.3d at 33. The bankruptcy court determined the house had a fair market value of \$185,000.00. Accordingly, the debtor's interest in the property was \$92,500.00. The debtor was entitled to an exemption of \$12,500.00. Id. The debtor's residence was subject to four nonavoidable liens, totaling \$134,626, and a judicial lien of \$24,000. Id. Thus apart from the judicial lien, the debtor and his wife had net equity in the residence of \$50,374 (\$185,000 - \$134,626 = \$50,374).

The debtor moved to avoid the judicial lien under § 522(f). A straight application of the formula using the debtor's 50% interest in the property as the value of his interest leads to full avoidance of the judicial lien notwithstanding sufficient

equity to pay the lien in full.⁴ Id. at 34.

This problem arises because the literal language of § 522(f) in a co-ownership situation causes a reduction in the value of the debtor's ownership interest without a correlating reduction in the amount of the debtor's nonavoidable liens (e.g., the mortgage) used for the impairment calculation. The statutory language does not account for any asymmetry of obligation as between a debtor and co-owner where both are obligated on nonavoidable liens but only the debtor is obligated on the judicial lien. Nelson, 192 F.3d at 35-36. Not surprisingly, courts are divided on how to apply § 522(f) in this context. Some hold that they should follow the literal reading of the statute, see Zeigler Eng'g Sales, Inc. v. Cozad (In re Cozad), 208 B.R. 495 (B.A.P. 10th Cir. 1997), while others adjust the asymmetry. See Lehman, 205 F.3d at 1257-58; Nelson, 192 F.3d at 36.

Fortunately, I need not decide this issue to decide the outcome of the present controversy. Debtor is the sole owner of the residence. Nelson and Lehman are therefor not relevant. A straightforward application of § 522(f) results in partial

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The calculation is as follows: the lien (\$26,000) plus all other liens on the property (\$134,626) plus the debtor's exemption in the absence of any liens (\$12,500) exceeds the value of the debtor's interest in the property (\$92,500) by \$80,626 ($[\$26,000 + \$134,626 + \$12,500] - \$92,500 = \$80,626$). Thus the lien impairs the debtor's exemption to the extent of \$80,626 and is avoided in that amount, i.e., entirely. Nelson, 192 F.3d at 34.

avoidance of Curcio's lien.

CONCLUSION

For the reasons stated above, I will grant Debtor's motion to avoid Curcio's judicial lien to the extent Curcio's lien impairs Debtor's exemption in the residence. According to the formula set forth in § 522(f), Curcio's judicial lien impairs the Debtor's exemption to the extent of \$54,528.90 and is avoided in that amount. The balance of Curcio's lien (\$404.08) is not avoided.

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ORDER

For the reasons set forth in the Court's Memorandum Opinion of this date, the motion (Doc. # 43) of debtor Lawrence D. Lingo to avoid the judicial lien of the Estate of Samuel J. Curcio is granted in part. The judgment lien of the Estate of Samuel J. Curcio, docketed in the Superior Court for the State of Delaware in and for New Castle County at 97J-09-158, is hereby avoided in the amount of \$54,528.90.

Peter J. Walsh
United States Bankruptcy Judge

Date: January 29, 2001