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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re
SIMEON KIRIKOWE,
Debtor.

Case No. 93-50889-MM
Chapter 13

**MEMORANDUM OPINION AND
ORDER THEREON**

INTRODUCTION

Before the Court for consideration are the debtor's motion to avoid judicial lien pursuant to 11 U.S.C. § 522(f)(1) and confirmation of the debtor's second amended chapter 13 plan. At issue is the debtor's entitlement to a homestead exemption under California law. This Court concludes that under 522(f)(1), the judgment lien may be avoided because it effectively impairs the debtor's exemption. For the reasons set forth below, the motion to avoid judicial lien is granted, and the debtor's second amended chapter 13 plan is confirmed.

FACTS

The debtor, Simeon Kirikowe, filed his chapter 13 petition on February 10, 1993. He had recorded a declaration of homestead on June 13, 1992 pursuant to California Code of Civil Procedure § 704.920. On February 9, 1993, one day prior to the petition date, Linda Smith Hansen recorded an abstract of judgment against the debtor's property in the County Recorder's Office of Santa Clara County, creating an involuntary lien against the debtor's property during the ninety day period immediately preceding the petition date.

The debtor's residence is valued at \$240,000. There exist a first deed of trust against the property

1 in the amount of \$183,000 and a second deed of trust against the property in the amount of \$12,000.
2 After deducting the total amount of liens and the debtor's declared homestead in the amount of \$50,000,
3 there remains no equity in the debtor's residence with which to satisfy the Hansen judgment lien. On that
4 basis, the debtor has filed a motion under 11 U.S.C. § 522(f)(1) to avoid the judgment lien. The debtor's
5 second amended plan also provides that the Hansen lien be avoided and the underlying claim treated as
6 an unsecured claim.

7 DISCUSSION

8 A. The Debtor Is Entitled To Homestead Exemption 9 Under California Law

10 The Supreme Court has addressed the construction of and the application of § 522(f)(1) to avoid
11 a lien on the debtor's homestead. Owen v. Owen, 111 S.Ct. 1833, 1836-37 (1991). The Court stated
12 that the proper inquiry is not whether a judicial lien impairs an exemption to which the debtor is in fact
13 entitled. Instead, courts must inquire whether the lien impairs an exemption to which the debtor would
14 have been entitled but for the lien at issue. Id. While questions of impairment and lien avoidance under
15 § 522(f)(1) are controlled by federal law, the extent to which property is exempt is controlled by state
16 law. In re Herman, 120 Bankr. 127 (Bankr. 9th Cir. 1990).

17 The policy underlying the California homestead exemption is to protect property from existing
18 debts and to prevent creditors from taking all property belonging to a judgment debtor in order to satisfy
19 creditors' claims. Yager v. Yager, 7 Cal. 2d 213, 217 (1936). See also Becker v. Lindsay, 16 Cal. 3d
20 188, 194 (1976); Schoenfeld v. Norberg, 267 Cal. App. 2d 496 (1968); Rich v. Ervin, 86 Cal. App. 2d
21 386, 390-91 (1948). "The broad purpose of the homestead laws is to promote the security of the home,
22 and to place such property beyond the reach of the consequences of the homeowner's economic
23 misfortune." Swearingen v. Byrne, 67 Cal. App. 3d 580 (1977)(quoting Schoenfeld v. Norberg, 267 Cal.
24 App. 2d 496 (1968)). The California homestead law should be applied in the broadest manner in order
25 to accomplish its benevolent purpose. In re Sanford, 8 Bankr. 761, 765-76 (N.D. Cal. 1981)(citing San
26 Diego White Truck Co. v. Swift, 96 Cal. App. 3d 88 (1979)).

27 Under California's statutory scheme addressing exemptions, a person may assert an entitlement to the
28 homestead exemption in one of two ways. First, C.C.P. § 704.720 provides a debtor with an automatic

1 homestead available upon a forced sale of the property.¹ The second basis by which a debtor may assert
2 an entitlement to a homestead exemption under California law arises from C.C.P. § 704.920, which
3 authorizes a declared homestead.²

4 The clear public policy of these two exemptions is to provide that one or the other exemption
5 applies if a dwelling qualifies as a homestead. 5 Miller & Starr, California Real Estate § 13.1 (2d ed.
6 1989). However, the two exemptions are separate and distinct. Id. The declared homestead and the
7 automatic exemption each confer different rights on the homesteader, and there is no overlap between
8 these rights. Webb v. Trippet, 235 Cal. App. 3d 647 (1991). One may have rights under the declared
9 homestead law, or rights under the automatic exemption law, or both, or neither. Id.

10 One difference between the automatic homestead and the declared homestead under California
11 law is that the declared homestead entitles the debtor to the exemption upon a voluntary sale of the
12 homestead property³ while the automatic homestead entitles the debtor to the exemption only upon a

14 ¹C.C.P. § 704.720(b) provides in relevant part:

15 (b) If a homestead is sold under this division or is damaged or destroyed or is
16 acquired for public use, the proceeds of sale or of insurance. . . are exempt in the
amount of the homestead exemption provided in Section 704.730.

17 The debtor is not entitled to the automatic homestead upon a voluntary sale of the property, In re Cole, 93 B.R.
18 707 (Bankr. 9th Cir. 1988), or upon a sale pursuant to a deed of trust. C.C.P. § 703.010(b); Spencer v. Lowery, 235 Cal.
19 App. 3d 1636 (1991). Historically, the automatic homestead had been construed to apply only to execution sales of
homestead property to enforce a money judgment and not to all involuntary sales. In re Pladson, 154 B.R. 305, 306-07
(N.D. Cal. 1993)(construing C.C.P. § 704.720(b)); Spencer v. Lowery, 235 Cal. App. 3d 1636. However, the legislature
20 enacted an emergency amendment to C.C.P. § 703.140 in reaction to Pladson which makes it clear that the automatic
homestead, as well as the declared homestead, applies in bankruptcy cases. C.C.P. § 703.140(a), as amended, provides in
21 relevant part:

22 (a) In a case under Title 11 of the United States Code, all of the exemptions
23 provided by this chapter including the homestead exemption. . . are applicable
regardless of whether there is a money judgment against the debtor or whether a
money judgment is being enforced by execution sale or any other procedure. . . .

24 The legislative note reveals that the amendment does not change, but is declaratory of existing law.

25 ²C.C.P. § 740.920 provides in relevant part:

26 A dwelling in which an owner or spouse of an owner resides may be selected as a declared homestead pursuant to this article
by recording a homestead declaration in the office of the county recorder of the county where the dwelling is located.

27 ³C.C.P. § 704.960(a) provides:

28 (a) If a declared homestead is voluntarily sold, the proceeds of sale are exempt in the amount provided by Section
704.730 for a period of six months after the date of sale.

1 forced execution sale. C.C.P. § 704.720(b).⁴ Another major distinction is that a judgment lien attaches
2 to a declared homestead only in the amount of any surplus over the total of all prior liens and
3 encumbrances and the amount of the homestead. C.C.P. § 704.950(c).⁵

4 Whether the Hansen judicial lien attached to the debtor's property is a threshold issue for the
5 Court as it addresses lien avoidance under § 522(f). See In re Chabot, 992 F.2d 891 (9th Cir. 1993).
6 This case is factually distinguishable from Chabot because there was excess equity of \$230,046.70 in the
7 Chabot residence to which the judicial lien attached pursuant to C.C.P. § 704.950(c). There is no surplus
8 equity in the Kirikowe residence to which the Hansen lien may attach.

9 There is no dispute that Kirikowe is entitled to the benefits of a declared homestead exemption
10 under § 704.920. As a result, the Hansen judicial lien did not attach because there was no surplus equity
11 in the Kirikowe residence over and above the total of all prior recorded deeds of trust and the debtor's
12 declared homestead exemption of \$50,000 to which the Hansen judicial lien could attach. C.C.P. §
13 704.950(c). The Hansen judicial lien is unenforceable under California law because it never attached to
14 Kirikowe's property.

15 **B. The Judicial Lien Impairs The Debtor's Homestead By**
16 **Requiring Payments Under A Chapter 13 Plan**
17 **And By Creating A Cloud On Title**

18 11 U.S.C. § 522(f)(1) provides that the debtor may avoid the fixing of a judicial lien on an interest
19 of the debtor in property to the extent that the lien impairs an exemption to which the debtor would have
20 been entitled. Issues of impairment and lien avoidance under § 522(f)(1) are determined by reference to

21 ⁴See fn. 1.

22 ⁵C.C.P. § 704.950 provides in relevant part:

- 23 (a) [A] judgment lien on real property. . . does not attach to a declared homestead if . . .
24 (1) A homestead declaration describing the declared homestead was recorded prior to the time the abstract or
25 certified copy of the judgment was recorded to create the judgment lien.
(2) The homestead declaration names the judgment debtor or the spouse of the judgment debtor as a declared
homestead owner.

26 * * *

- 27 (c) A judgment lien attaches to a declared homestead in the amount of any surplus over the total of the following:
28 (1) All liens and encumbrances on the declared homestead at the time the abstract of judgment or certified copy
of the judgment is recorded to create the judgment lien.
(2) The homestead exemption set forth in Section 704.730.

1 federal law. Herman, 120 Bankr. at 129. See also Owen v. Owen, 111 S.Ct. 1833.

2 To determine whether § 522(f)(1) is applicable, courts must inquire whether the lien impairs an
3 exemption to which the debtor would have been entitled but for the lien itself. Owen v. Owen, 111 S.Ct.
4 at 1836-37. Since Kirikowe would otherwise be entitled to the declared homestead exemption but for
5 the Hansen lien, § 522(f)(1) is applicable and may be invoked to extinguish that lien. Id.

6 Under In re Chabot, the Ninth Circuit determined that a lien "impairs" an exemption if the amount
7 of the exemption is diminished in value. In re Chabot, 992 F.2d at 895. In dicta, the Ninth Circuit noted
8 that any future appreciation should accrue to the benefit of the creditor. Chabot, 992 F.2d at 895-96.
9 See also In re Hyman, 967 F.2d 1316, 1321 (9th Cir. 1992). However, in the context of a chapter 13
10 case, any prospective future appreciation in the value of the residence does not alter the payments under
11 the chapter plan because the amount of the lien creditor's claim is determined as of the filing date. 11
12 U.S.C. § 502(b).

13 In a chapter 13 case, unless the lien is avoided, the debtor is compelled to make Chapter 13 plan
14 payments to a judicial lien creditor. 11 U.S.C. § 1326(a). As a result, the debtor's ability to realize the
15 full value of the homestead is diminished by the necessity of immediate payments under the chapter 13
16 plan, and the value of the debtor's claim of a homestead exemption is impaired by the chapter 13
17 payments. In re Gancarz, 108 B.R. 392 (Bankr. D.N.H. 1989); In re Greene, 85 B.R. 747 (Bankr. N.D.
18 Ohio 1988); In re Windfelder, 82 B.R. 367 (Bankr. E.D. Pa. 1988).

19 Secondly, although the Hansen lien did not attach to the debtor's homestead under California law,
20 it effectively created a cloud on the debtor's title to the property. The lien, if allowed to remain, prevents
21 he debtor from selling or refinancing the real property without paying the Hansen lien.⁶

22 The Court concludes that lien avoidance under § 522(f)(1) is an appropriate procedure by which
23 to extinguish an unenforceable lien in a chapter 13 case. The Court further concludes that the recordation
24 of a judicial lien, even a lien which did not attach to the property, effectively creates a cloud on title that

25 _____
26 ⁶The practice of title companies in California is to require that all recorded interests, whether or not enforceable, be paid
27 from the proceeds of a transaction prior to the closing of escrow on a sale or a refinance. The Ninth Circuit Bankruptcy
28 Appellate Panel has stated that courts should apply a practical approach to determining the impact that a judicial lien may have
on the debtor's ability to use a given piece of exempt property to achieve his or her fresh start. In re Herman, 120 B.R. 127, 131
(Bankr. 9th Cir. 1990). The Court further noted that where the creditor's lien has no present economic value, the lien is
essentially a cloud on the debtor's title and right to future enjoyment of the property, and the lien impairs the exemption. Id.

1 qualifies as an impairment under § 522(f)(1). Because Kirikowe's homestead exemption is impaired by
2 the Hansen lien, the lien may be avoided pursuant to § 522(f)(1). Inasmuch as the lien is avoided
3 pursuant to § 522(f)(1), the objection to confirmation of the debtor's chapter 13 plan is overruled.
4

5 **CONCLUSION**

6 Based on the foregoing reasons, the debtor's motion to avoid judicial lien is granted, and the
7 debtor's second amended plan is confirmed.

8 Good cause appearing, IT IS SO ORDERED.
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