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Wednesday, December 26, 2001

UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

In re

YURY and IRINA TRUBNIKOV,

No. 01-11202

[Debtor](#) (s).

Memorandum on Motion to Avoid Lien

Prior to bankruptcy, debtors Yury and Irina Trubnikov sold their home at 4 Bay Way, San Rafael, California, to creditors Ruslan Torshev, Fatima Evloeva and Vakha Evloev under a lease option agreement. After a trial, a state court found that the Trubnikovs had made material misrepresentations and ordered the agreement rescinded. The court further found that the creditors had a purchaser's lien on the property to secure about \$240,000.00 in damages, attorneys' fees and costs. The Trubnikovs then commenced [Chapter 11](#) bankruptcy proceedings and have moved to avoid the creditors' lien pursuant to § 522(f)(1)(A) of the [Bankruptcy Code](#). The creditors oppose the motion on grounds that their lien is a statutory lien rather than a judicial lien.

California Civil Code § 3050 provides:

One who pays to the owner any part of the price of real property, under an agreement for the sale thereof, has a special lien upon the property, independent of possession, for such part of the amount paid as he may be entitled to recover back, in case of a failure of consideration.

A lien is not a judicial lien if the [creditor](#) had an interest in the property before the occurrence of judicial action. *In re Boyd*, 31 B.R. 591, 594 (D.C. 1983), aff'd 741 F.2d 1112 (8th Cir. 1984). Just because a creditor resorts to judicial process to enforce a lien does not

mean that a lien is an avoidable judicial lien. In re Thompson, 240 B.R. 776, 781 (10th Cir. BAP 1999); In re Harpole, 260 B.R. 165, 172 (Bkrtcy.D.Mont. 2001). California Civil Code § 3050 gives a purchaser of realty who rescinds a contract for the vendor's fraud a lien on the property for the portion of the purchase price paid before rescission. Montgomery v. Meyerstein (1921) 186 Cal. 459. Since the creditors in this case had such a lien by statute prior to the commencement of their state court lawsuit, their lien is a statutory lien rather than a judicial lien and is accordingly not avoidable under § 522(f)(1)(A) of the Bankruptcy Code. Their use of the courts to enforce their lien did not transform it into a judicial lien. For the foregoing reasons, the Trubnikovs' motion will be denied. Counsel for the creditors shall submit an appropriate form of order.

Dated: December 26, 2001

Alan Jaroslovsky

U.S. [Bankruptcy Judge](#) 

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