

This is a corrected version of the Memorandum and Order filed on February 15, 2007 that incorrectly stated the property address as 56 Harvest Lane.



SO ORDERED.

SIGNED this 22 day of February, 2007.

Dale L. Somers

Dale L. Somers
UNITED STATES BANKRUPTCY JUDGE

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

In re:

**MICHAEL WALTER LEWIS and
LORI MELISSA LEWIS,**

DEBTORS.

**CASE NO. 03-15320
CHAPTER 7**

**MEMORANDUM AND ORDER GRANTING DECKER & MATTISON CO., INC.'S
MOTION FOR SUMMARY JUDGMENT AND
DENYING COUNTRYWIDE'S MOTION FOR SUMMARY JUDGMENT
ON DEBTORS' MOTION PURSUANT TO 11 U.S.C. § 522(f)(1)
TO AVOID JUDICIAL LIEN OF DECKER & MATTISON CO., INC.**

The Court has taken under advisement the summary judgment motions filed in this contested matter initiated by the Debtors' Motion Pursuant to 11 U.S.C. § 522(f)¹ to Avoid

¹ This case was filed before October 17, 2005, when most provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 become effective. All statutory references to the Bankruptcy Code are to 11 U.S.C. §§ 101 - 1330 (2004), unless otherwise specified. All references to the

Judicial Lien of Decker & Mattison Co., Inc. ("Motion"). Debtors Michael and Lori Lewis appear by W. Thomas Gilman, of Redmond & Nazar, L.L.P. Decker & Mattison Co., Inc. ("D&M") appears by Dan W. Forker, Jr., of Forker, Suter & Rose. Countrywide Home Loans, Inc. ("Countrywide") appears by John J. Cruciani, Michael D. Fielding, and Scottie S. Kleypas, of Blackwell Sanders Peper Martin LLP. There are no additional appearances. The Court has jurisdiction.²

NATURE OF THE ACTION.

Debtors seek to avoid the fixing of a judgment lien on residential property commonly known as 6 Harvest Lane, Hutchinson, Kansas (hereafter "Property"). On May 23, 2003, after Debtors purchased the Property but before they had resided there, D&M obtained a default judgment in the Reno County District Court against Debtor Mike Lewis and Eales Plumbing Heating & Air, Inc. Debtors filed under Chapter 7 on September 26, 2003 and claimed the Property as their exempt homestead. There were no timely objections to the homestead exemption. On May 21, 2004, the Court entered its discharge order. On July 25, 2005, Debtors conveyed the Property to Debtor Lori Lewis' parents, Larry and Vicki Day. The purchase was financed by Countrywide, whose mortgage on the Property was recorded on July 25, 2005. D&M claims that its judgment lien attached to the Property and in a superior position to the lien of Countrywide.

Federal Rules of Bankruptcy Procedure are to Fed. R. Bankr. P. (2004), unless otherwise specified.

² This Court has jurisdiction pursuant to 28 U.S.C. § 157(a) and §§ 1334(a) and (b) and the Standing Order of the United States District Court for the District of Kansas that exercised authority conferred by § 157(a) to refer to the District's Bankruptcy judges all matters under the Bankruptcy Code and all proceedings arising under the Code or arising in or related to a case under the Code, effective July 10, 1984. A motion to avoid a lien is a core proceeding which this Court may hear and determine as provided in 28 U.S.C. § 157(b)(2)(K). There is no objection to venue or jurisdiction over the parties.

Debtors filed this lien avoidance action in December 2005, contending Debtors may avoid the fixing of a lien arising from the D&M judgment because it impairs their homestead exemption, within the meaning of § 522(f)(1). Countrywide, whose interests are aligned with the Debtors,³ filed a motion for summary judgment.⁴ Countrywide argued that the Debtors' exemption rights are determined as of the date of filing, that D&M is estopped from objecting to the debtors' exemption of the Property as their homestead because of failure to timely object to their homestead election in accord with Rule 4003(b),⁵ and that Countrywide has standing to assert the Debtors' homestead right. D&M responded with a motion for summary judgment and replied to the motion of Countrywide.⁶ D&M asserted that because the judgment lien attached to the Property before it qualified as Debtors' homestead, the lien could not be avoided; that § 522(f)(1) does not preclude a lien creditor from asserting its equitable rights when it did not object to a debtors' homestead exemption using the procedure of Rule 4003(b); and that §105 allows the court to prevent the unjust result of lien avoidance. Countrywide responded to D&M's motion.⁷ It argued against D&M's positions and asserted that it, rather than D&M, was entitled to summary judgment because D&M's lien did not attach to the Property for one of two alternative reasons, either because the Days were the equitable owners of the Property or because

³ The parties agree that Countrywide has standing.

⁴ Doc. 118. Countrywide also filed a supplemental motion. Doc. 121.

⁵ Fed. R. Bankr. P. 4003(b) (providing that a party in interest may object to an exemption within 30 days after the meeting of creditors); *see Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992) (holding that unless an objection is filed challenging the debtor's exemption, the exemption is allowed, even if the debtor has no colorable basis for the exemption).

⁶ Docs. 127 & 128.

⁷ Doc. 135.

it was the Debtors' homestead. Debtors adopted the pleadings of Countrywide.⁸ D&M replied to Countrywide's response to D&M's motion for summary judgment.⁹

SUMMARY JUDGMENT STANDARDS.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."¹⁰ A genuine issue of material fact is a factual dispute that may affect the outcome of the case and one that a reasonable trier of fact could find in favor of either party.¹¹ Therefore, in order for the nonmoving party to defeat a motion for summary judgment it need only present evidence from which a trier of fact might return a verdict in their favor.¹² In determining this, all evidence and inferences are viewed in the light most favorable to the nonmoving party.¹³ If the nonmoving party demonstrates that a reasonable jury could find for it, there is a genuine issue of material fact and summary judgment is inappropriate.¹⁴ However, Federal Rule 56(e), made applicable in adversary proceedings by Bankruptcy Rule 7056,¹⁵ provides that:

⁸ Doc. 136.

⁹ Doc. 137.

¹⁰ Fed. R. Civ. P. 56(c). Future references to the rules in the text shall be to the rule number only.

¹¹ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

¹² *Id.* at 257.

¹³ *Id.* at 255.

¹⁴ *Id.* at 257.

¹⁵ Fed. R. Bankr. P. 7056.

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not respond, summary judgment, if appropriate shall be entered against him.

The local Federal District Court rules, made applicable in bankruptcy proceedings,¹⁶ highlight the obligation of the non-moving party, by providing in part: “If the party opposing summary judgment relies on any facts not contained in the movant’s memorandum, that party shall set forth each additional fact in a separately numbered paragraph, supported” in accord with Rule 56 standards.¹⁷

FINDINGS OF UNCONTROVERTED FACTS.

The Debtors purchased the Property¹⁸ for the use of Larry and Vicki Day (hereafter “Days”), the parents of Debtor Lori Lewis. The Days immediately began living there. After the purchase of the Property, Debtors purchased another residence on 1502 West 15th Street, Hutchinson, where they resided for 5 years until approximately the end of July or August 1, 2003.¹⁹

¹⁶ D. Kan. LBR preface ¶ 3.

¹⁷ D. Kan. Rule 56.1.

¹⁸ Debtors’ schedules state that the Property secured a claim of Washington Mutual Home Loan in the amount of \$62,864.60 and had a value of \$75,000.

¹⁹ The 15th Street residence is listed in Debtors’ schedules as having a value of \$145,000., subject to liens of \$136,878.34 and a contract for sale of one adjoining acre.

On July 6, 1998, the Debtors entered into a land contract to sell the Property to the Days.²⁰ The Court has not been provided a copy of the contract or any explanation of its terms, leading it to conclude that it is a standard land contract, the legal effects which are well established under Kansas law. From the time the Days moved to the Property until the land contract was made, the Days made the mortgage payments. From the time the land contract was signed in 1998 through 2005, the Days did not pay the Debtors but rather made the Debtors' mortgage note payments directly to the mortgage holder. During that period of time, the Debtors never made any payments on the note secured by the Property.

Debtors state they decided to move into the Property on approximately July 30, 2002, a year before they actually moved, because they knew in the future they would not be able to afford the 15th Street property, where they were residing. This fact is not controverted. On July 7, 2003, D&M obtained a judgment in the amount of \$65,625,82, plus post judgment interest and court costs, in the District Court of Reno County, against Debtor Michael Lewis in Case No, 03-CV-263, *Decker & Mattison Co., Inc. v. Eales Plumbing, Heating & Air Inc., and Mike Lewis*.²¹

²⁰ Although D&M, in its reply to Countrywide's response to D&M's motion for summary judgment (Doc. 137), suggests in argument that the land contract may be bogus, D&M stated in its own statement of uncontroverted facts in support of its motion for summary judgment that "immediately after the debtors bought the property, the Days entered into a land contract on July 6, 1998 with the debtors to purchase 6 Harvest Lane." (Doc. 127, statement of material facts, ¶ 4). This same fact was repeated by D&M in its response to Countrywide's motion for summary judgment. (Doc. 128). In response, Countrywide controverted only the word "immediately." (Doc. 135). D&M, if it wished to challenge the legitimacy of the contract for deed or its legal efficacy, was required by the summary judgment rules to present statements of fact, properly supported, from which the Court could conclude there was a genuine issue for trial. It failed to do so.

²¹ The suit had been filed on May 23, 2003.

Lori Lewis and her children moved from the 15th Street residence to the Property in late July or August 1, 2003, while Michael Lewis went to Missouri to look for work. Michael Lewis wanted to stay in Hutchinson, but it was not financially feasible. When Lori and the children left the Property depended on where Michael Lewis found employment. The move was made for Lori's and the children's safety because D&M had sent men with guns onto the Lewis's 15th Street property in July 2003. When she moved to the Property, Lori Lewis did not change her driver's license because they had too many other things affecting them at the time. Some furniture was placed in the Property, and other items were placed in storage.

This bankruptcy was filed on September 26, 2003. The Property was stated to be Lori Lewis's address, and Michael Lewis stated he lived in Missouri. On Schedule C, the Debtors claimed the Property as their exempt homestead. There were no objections to the homestead claim, and the homestead exemption was allowed. The Court entered a discharge order on May 21, 2004.

ANALYSIS.

A. Section 522(f)(1).

Section 522(f)(1) provides "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 debtor would have been entitled," if such lien is a judicial lien, except for judicial liens which secure certain debts for alimony, support, or maintenance. The purpose of judicial lien avoidance is to protect the debtor's exemptions²² and thereby, the fresh start.²³ "In order for a debtor to avoid the lien under

²² *Farrey v. Sanderfoot*, 500 U.S. 291, 297 (1991).

²³ 2 *Norton on Bankruptcy* 2d ¶ 46:24 (Norton, auth & ed.-in- chief 2006).

§ 522(f)(1), the debtor must show: ‘(1) that the lien is a judicial lien; (2) that the lien is fixed against an interest of the debtor in property; and (3) that the lien impairs an exemption to which the debtor would otherwise be entitled.’”²⁴

B. D&M asserts rights under a judicial lien.

It is undisputed that any lien resulting from the entry of judgment in favor of D&M against Debtor Michael Lewis is a judicial lien. The Code defines a judicial lien as meaning a “lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding.”²⁵ A lien is defined as meaning a “charge against or interest in property to secure payment of a debt or performance of an obligation.”²⁶ In Kansas, the judgment lien statute provides in part as follows:

Any judgment rendered in this state by . . . a district court of this state in an action commenced under chapter 60 of the Kansas Statutes Annotated shall be a lien on the real estate of the judgment debtor within the county in which the judgment is entered. . . . [t]he lien shall be effective from the time at which the petition stating the claim against the judgment debtor was filed but not to exceed four months prior to the entry of the judgment.²⁷

Subject to case law limitations, a judgment lien in favor of D&M attached to the real property interests of Debtor Michael Lewis in Reno County, as of May, 23, 2003, the date the claim of D&M against Debtor was filed.²⁸

²⁴ *McCart v. Jordana (In re Jordana)*, 232 B.R. 469, 473 (10th Cir. BAP 1999), quoting *Henderson v. Belknap (In re Henderson)*, 18 F.3d 1305, 1308 (5th Cir. 1994).

²⁵ 11 U.S.C. § 101(36).

²⁶ 11 U.S.C. § 101(37).

²⁷ K.S.A. 60-2202(a).

²⁸ K.S.A. 60-2202, quoted above.

C. There was no “fixing” of D&M’s judgment lien to the Property.

Lien avoidance may be granted only when a lien is “fixed” to an existing property interest of the debtor.²⁹ A lien is fixed when there is a fastening of liability.³⁰ To avoid a lien, the debtor must have had an interest in property to which the lien could attach before the lien attached to that interest.³¹ Whether the debtor had a property interest to which the lien was “fixed” is determined by state law.³²

Under Kansas law “a judgment lien attaches merely to the interest of the judgment debtor in land, and nothing more.”³³ It attaches to real property interests held on the effective date of the lien and those after acquired.³⁴ A judgment lien does not attach to a homestead³⁵ or to personal property interests.³⁶ A vendor’s interest under a land contract is personal property.³⁷ Therefore, if a judgment debtor has transferred his entire equitable interest in land to a third

²⁹ *Farrey v. Sanderfoot*, 500 U.S. at 296.

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 299.

³³ *Smith v. Savage*, 3 Kan. App. 556, 43 P. 847 (1896).

³⁴ *Wichita Fed. Sav. & Loan Ass’n v. North Rock Road Ltd. P’ship*, 13 Kan. App.2d 678, 779 P.2d 442 (1989) rev. denied Nov. 7, 1989.

³⁵ *Morris v. Ward*, 5 Kan. 239 (1869).

³⁶ *High Plains Oil, Ltd. v. Nat’l City Bank of Cleveland, Ohio*, 22 Kan. App.2d 968, 972, 925 P.2d 846, 850 (1996) rev’d other grounds 263 Kan.1, 946 P.2d 1382 (1997).

³⁷ *City of Arkansas City v. Anderson*, 12 Kan. App.2d 490, 749 P.2d 505 (1988) rev. denied April 1, 1988.

person before the entry of judgment and nothing remains in him except bare legal title, a judgment does not become a lien.³⁸

The uncontroverted facts establish that Debtors sold the Property by contract to the Days on July 6, 1998.³⁹ Therefore, as of May 23, 2003, the date when the judgment lien became effective, the Debtors had only legal title to the Property and rights under the contract for deed. There are no facts before the Court to distinguish this case from the rule stated in *Emery v. Farmers' State Bank*⁴⁰ that judgment liens do not attach when the judgment debtor's interest in property is that of a vendor's interest under a contract for deed. In *Emery*, prior to the entry of a judgment in favor of a bank against Bennett and Emery, Bennett, as part of a separation from his wife, who was the daughter of Emery, contracted with his wife to sell her two lots free and clear of encumbrances. After the judgment was entered, Bennett procured the release of any judgment lien of the bank on the two lots. The bank also levied upon property of Emery. Emery sought an injunction. On appeal from the trial court's denial of Emery's motion for an injunction, the Kansas Supreme Court rejected Emery's suretyship defense that bank had acted to his prejudice when it released the judgment lien on the two lots, finding that no judgment lien had attached.

The court stated:

. . . [I]t appears that Bennett had transferred the full equitable title he held in the lots to his wife, the daughter of the plaintiff, a considerable time before the judgment was rendered. This left in Bennett no more than a naked legal title, and this he had bound himself to convey. A judgment cannot attach to a mere naked

³⁸ *Emery v. Farmers' State Bank*, 97 Kan. 231, 155 P. 34 (1916).

³⁹ See note 20, above.

⁴⁰ *Emery v. Farmers' State Bank*, 97 Kan. at 231, 155 P. at 34.

legal estate nor to any greater interest than the judgment debtor has in the land.⁴¹

In this case also, the judgment lien did not attach to the Debtors' interests in the Property.

Likewise, assuming that the Debtors acquired a homestead or possessory interest in the Property when Debtors decided they could not afford the 15th Street property or when Lori Lewis and the children moved to the Property at the end of July or first of August, 2003, the judgment lien also did not attach to this exempt homestead interest.⁴² In addition, the judgment lien did not attach to the Days' equitable interest in the property because they were not the judgment debtors with respect to the D&M judgment.⁴³

For the foregoing reasons, no judgment lien was fixed on the Debtors' interests in the Property.⁴⁴ There being no "fixing" to avoid, the Debtors fail to satisfy the second element of lien avoidance.

D. The Court declines to rule whether D&M is bound by the allowance of the homestead exemption for the Property.

⁴¹ *Id.*, 97 Kan. at 234, 155 P. at 35.

⁴² *Morris v. Ward*, 5 Kan. 239 (1869).

⁴³ Countrywide also argues, that in any event, because Lori Lewis was not a defendant in the D&M litigation and no judgment was entered against her, a judgment lien could not attached against the homestead or at least against her interest in the Property, citing *King v. Wilson*, 95 Kan 390, 148 P. 752 (1915); *Hofman v. Demple*, 53 Kan. 792 , 37 P. 976 (1894); and *Morris v. Ward*, 5 Kan. 239 (1869). The Court has not considered this issue because it has concluded that the judgment lien did not attach to the Property.

⁴⁴ Some courts have held that a debtor is entitled to lien avoidance, even though under state law the lien was not "fixed," to remove any post-petition cloud over the homestead title which might continue absent avoidance. *E.g., In re Cisneros*, 257 B.R. 332 (D.N.M. 2000). In this case, the parties have not specifically asked for this relief. The Debtors transferred the deed to the Property post-petition and lien avoidance is raised for the purpose of clearing the Days' title and the lien priority of Countrywide. The Court therefore does not address this issue.

The third element of § 522(f)(1) lien avoidance requires the debtor to establish the property subject to the lien would otherwise be exempt. Debtors and Countrywide contend that because the Debtors' scheduled homestead exemption of the Property was granted by the absence of a timely objection, exempt status is established and D&M may not challenge the homestead character of the Property in defense of lien avoidance. Their position is grounded upon the established principle that unless an objection is filed challenging a claimed exemption, the exemption is allowed, even if the debtor has no colorable basis for the exemption.⁴⁵ Some courts have held this rule applies in § 522(f)(1) actions.⁴⁶ In response, D&M relies upon cases from other courts holding that the allowance of an exemption for the purpose of determining the estate's interest is not binding on a creditor defending a lien avoidance action⁴⁷ and, if the lien holder objects to the exemption in defense to the § 522(f)(1) action, a separate determination of this element is required.⁴⁸

Because the Court has found that the judgment lien did not attach to the Property as a matter of Kansas law, such that there was no "fixing" of a lien to avoid under the Code, this case can be decided without the Court deciding the issue of D&M's ability to challenge the homestead exemption. The Court therefore declines to consider the issue.

⁴⁵ *Taylor v. Freeland & Kronz*, 503 U.S. at 638.

⁴⁶ *E.g., In re Towns*, 74 B.R. 563, 567 (Bankr. S.D. Iowa 1987).

⁴⁷ *E.g., In re Patterson*, 275 B.R. 578 (Bankr. D. Colo. 2002).

⁴⁸ D&M also argues that in the event the Court finds that D&M is barred from challenging the Debtors' claimed homestead exemption in the Property by failure to timely object in accord with Rule 4003(b), the Court should invoke § 105(a) to allow the parties to litigate the legitimacy of the lien and avoid an unjust outcome. The Court also declines to rule on this issue as determination of D&M's ability to challenge the homestead is not necessary to the Court's judgment.

CONCLUSION.

The Court denies the summary judgment motion of Countrywide and grants D&M's motion for summary judgment based on its contention that Debtors have not established the elements for lien avoidance. Under Kansas law, D&M does not have a judgment lien in the Property. There was no "fixing" of a lien on an interest of the Debtors in property, and this is a necessary element to a claim under § 522(f)(1). There are no material facts in controversy, and the lien avoidance motion must be denied as a matter of law. The Court declines to rule on whether the determination that the Property is Debtors' exempt homestead for purposes of the bankruptcy estate is binding upon D&M in this action.

The foregoing constitute Findings of Fact and Conclusions of Law under Rule 7052 of the Federal Rules of Bankruptcy Procedure and Rule 52(a) of the Federal Rules of Civil Procedure. A judgment based upon this ruling will be entered on a separate document as required by Federal Rule of Bankruptcy Procedure 9021 and Federal Rule of Civil Procedure 58.

IT IS SO ORDERED.

###