



SO ORDERED.

SIGNED this 10 day of March, 2005.

Dale L. Somers

Dale L. Somers
UNITED STATES BANKRUPTCY JUDGE

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

In Re:

LORI ANNE BUSTOS,

DEBTOR.

ROBERT A. BUSTOS,

PLAINTIFF,

v.

LORI A. BUSTOS,

DEFENDANT.

**CASE NO. 03-16074-7
CHAPTER 7**

ADV. NO. 04-5043

MEMORANDUM OF DECISION

This proceeding is before the Court for a determination of the defendant-debtor's ability to avoid a lien on her homestead that was awarded to the plaintiff in their divorce. Plaintiff Robert A. Bustos ("Plaintiff") appears by counsel Grady Young. Defendant-debtor

Lori A. Bustos (“Debtor”) appears by counsel Robert Lattin. The Court has reviewed the relevant materials and is now ready to rule.

The parties have submitted this matter to the Court for decision based on stipulated facts. In their divorce case, the state court awarded the Plaintiff a lien to secure a judgment for his share of the equity in the parties’ marital homestead, and also ordered the Debtor to pay the Plaintiff an additional amount as part of the division of their personal property. Under the circumstances, the Court concludes that although the Debtor’s personal liability on all the debts is dischargeable, the lien remains a valid *in rem* claim against her homestead that she cannot avoid.

FACTS

While they were married, the Plaintiff and the Debtor jointly owned a home in Coffeyville, Kansas. When they were divorced in July 2002, the state court awarded the home to the Debtor, but gave the Plaintiff a lien on the home to secure a judgment of \$9,627 for his share of the equity in it. The court also gave the Plaintiff a judgment for \$3,238 to equalize the division of the parties’ personal property. Although the Plaintiff’s complaint that commenced this proceeding might be read to suggest that he was contending the personal property judgment was also secured by the lien on the home, the brief he has filed indicates he contends the lien secured only the \$9,627 real property judgment. The parties stipulated that as of February 4, 2004, the Debtor had paid \$7,600 toward the lien on the home.

The Debtor filed a Chapter 7 bankruptcy petition in November 2003, claiming the home to be exempt under Kansas law as her homestead. She received a discharge in February 2005. Relying on the Supreme Court's decision in *Farrey v. Sanderfoot*,¹ the Plaintiff argues that his lien on the Debtor's homestead cannot be avoided and survives her discharge. The Debtor contends that she can avoid the lien and that her discharge eliminates her remaining payment obligations under the property division portion of the divorce decree.

DISCUSSION

A. The Debtor cannot avoid the Plaintiff's lien on her homestead.

The Debtor relies on § 522(f)(1)(A) of the Bankruptcy Code as authority for her to avoid the Plaintiff's lien on her homestead. As relevant here, that section provides:

(f)(1) . . . 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 . . . , if such lien is —

(A) a judicial lien, other than a judicial lien that secures a debt —

(i) to a . . . former spouse . . . of the debtor, for alimony to, maintenance for, or support of such spouse . . . in connection with a . . . divorce decree . . . ; and

(ii) to the extent that such debt —

(I) is not assigned to another entity . . . ; and

(II) includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony [or] maintenance. . . .²

The Debtor contends that the Plaintiff's lien satisfies all the criteria identified in subsection (f)(1)(A). But *Farrey v. Sanderfoot* makes clear that the resolution of this dispute may, as

¹500 U.S. 291 (1991).

²11 U.S.C.A. § 522(f)(1)(A).

the Plaintiff claims, lie in the preliminary criteria in subsection (f)(1) that a debtor can “avoid” only “the fixing of a lien on an interest of the debtor in property.” The Supreme Court explained this language means for lien avoidance to be available, the debtor had to have the property interest before the lien attached to it, saying:

The statute does not say that the debtor may undo a lien on an interest in property. Rather, the statute expressly states that the debtor may avoid “the fixing” of a lien on the debtor’s interest in property. The gerund “fixing” refers to a temporal event. That event — the fastening of a liability — presupposes an object onto which the liability can fasten. The statute defines this pre-existing object as “an interest of the debtor in property.” Therefore, unless the debtor had the property interest to which the lien attached at some point *before* the lien attached to that interest, he or she cannot avoid the fixing of the lien under the terms of § 522(f)(1). [Footnote omitted.]³

Like this case, *Farrey* involved an attempt to avoid a lien imposed in a state court divorce decree, and the Court explained that state law would control whether the debtor ever had the property interest to which the lien fixed, before it fixed.⁴ While the state law that will apply to that question can vary depending on where the debtor lives or where the property is located, the Supreme Court’s approach to interpreting § 522(f)(1) controls all bankruptcy courts’ consideration of that provision.

In this case, the question then becomes whether, under Kansas law, the Debtor had the homestead interest to which the Plaintiff’s lien attached before the lien was fixed on that interest. In *In re Hilt*,⁵ former Kansas Bankruptcy Judge John Flannagan noted that two

³500 U.S. at 296 (emphasis in original).

⁴500 U.S. at 299.

⁵175 B.R. 747 (Bankr.D.Kan. 1994).

other former Kansas bankruptcy judges, Judge Pusateri and Judge Pearson, had issued unpublished decisions after *Farrey* was decided in which they concluded that a debtor could not avoid a former spouse's lien on his or her homestead where both the homestead property and the lien had been awarded in the same divorce decree.⁶ Although he disagreed with the reasoning of those decisions, Judge Flannagan reached the same result by a different route.⁷ More recently, current Kansas Bankruptcy Judge Janice Miller Karlin issued two decisions agreeing with Judge Flannagan's decision in *Hilt*.⁸ After reviewing all these decisions and considering K.S.A. 2003 Supp. 60-1610(b), K.S.A. 2003 Supp. 23-201(b), and the Kansas Supreme Court's decision in *Cady v. Cady*,⁹ this Court agrees that, one way or another, a debtor who was awarded Kansas real property in a Kansas divorce decree that also gave his or her former spouse a lien on that real property received the property with the lien already fixed, and the debtor cannot avoid the lien under § 522(f)(1) of the Bankruptcy Code.¹⁰

⁶175 B.R. at 752 (citing *Schmidt v. Schmidt (In re Schmidt)*, Case No. 90-42457-7, Adv. No. 90-8195 (Bankr.D.Kan. Aug. 17, 1992) (Pusateri, J.) and *In re Nickel*, Case No. 92-12852 (Bankr.D.Kan. Feb. 17, 1994) (Pearson, J.)). *Schmidt* is now available on Westlaw at 1992 WL 695766. The Court notes that the property involved in *Schmidt* became the debtor's homestead only after it was awarded in the divorce.

⁷175 B.R. at 752-55.

⁸*In re Hartman*, Case No. 04-42526-13, Memorandum and Order Denying Confirmation, slip op. at 3-7 (Bankr.D.Kan. Feb. 3, 2005); *In re Rothwell*, Case No. 04-41153-13, Memorandum and Order Sustaining in Part, and Denying in Part, Objection to Chapter 13 Plan, slip op. at 9-15 (Bankr.D.Kan. Feb. 3, 2005).

⁹224 Kan. 339 (1978).

¹⁰*See 4 Collier on Bankruptcy*, ¶ 522.11[4] at p. 522-87 (Resnick & Sommer, eds.-in-chief, 15th ed. revised 2004) (Since *Farrey*, "[t]he courts have uniformly held that judicial liens in support of divorce decrees were not subject to avoidance because the creditor's judicial lien did not affix to the debtor's interest, at least when the divorce decree created new property interests by reallocating marital property.")

The Debtor suggests that this case is factually distinguishable from *Hilt* because in that case the debtor's former spouse had assigned his lien to a bank. This distinction would be relevant, however, only if the criteria listed in subsection (f)(1)(A) of § 522 had to be reached. The requirement in subsection (f)(1) that the lien fix on an interest of the debtor in property is a prerequisite to those criteria. If the lien did not fix on the debtor's property interest, the lien is not avoidable, whether the criteria in subsection (f)(1)(A) are met or not. As indicated, four bankruptcy judges for the District of Kansas have previously concluded that Kansas law means a debtor who was awarded real property in a divorce subject to a lien in favor of his or her former spouse never had the property interest without the lien attached to it, so the lien cannot be avoided under § 522(f)(1). This Court reaches the same conclusion in this case.

B. The Debtor's personal obligation to pay the debt secured by the lien is dischargeable, but the lien will remain as an enforceable in rem claim against her homestead.

The Debtor contends that her debt to the Plaintiff is not excepted from her discharge by § 523(a)(5). The Court believes the Plaintiff is not contesting this proposition; he is only disputing the Debtor's ability to avoid his lien on her homestead. The Debtor seems to be suggesting that the dischargeability of her personal liability on the underlying debt affects her ability to avoid the Plaintiff's lien. When § 522(f) was amended in 1994, language similar to that used in § 523(a)(5) was added to it,¹¹ increasing the chances of mistakenly

¹¹See Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 304(d), reprinted in App. Vol. E *Collier on Bankruptcy*, App. Pt. 9(a) at p. App. Pt. 9-42 (Resnick & Sommer, eds.-in-chief, 15th ed. rev.

linking lien avoidance under § 522(f) with nondischargeability under § 523(a)(5). But the concepts remain distinct. If, as the Court concluded earlier, the Debtor cannot avoid the Plaintiff's lien, the lien survives her discharge as an *in rem* claim against her property, even though her personal liability on the debt is discharged.

CONCLUSION

The Court concludes that the Plaintiff's lien on the Debtor's homestead cannot be avoided under § 522(f)(1), and that the Plaintiff retains an *in rem* claim against the homestead to the extent of the lien. The Debtor's personal liability to the Plaintiff, however, has been eliminated by her Chapter 7 discharge.

The foregoing constitutes 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 on this ruling will be entered on a separate document as required by FRBP 9021 and FRCP 58.

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