

1
2
3
4
5
6 UNITED STATES BANKRUPTCY COURT
7 EASTERN DISTRICT OF CALIFORNIA

8 In re
9 WILLIAM P. IRWIN

Case No. 04-19318-A-7F
DC No. SPD-5

10 Debtor.
11 _____/

FINDINGS OF FACT AND
CONCLUSIONS OF LAW RE
MOTION TO COMPEL TRUSTEE
TO ABANDON PROPERTY OF ESTATE

12
13 A hearing was held October 5, 2005, on a motion to compel
14 the trustee to abandon property of the estate. The moving party
15 is Tracy Barry, liquidating trustee of the William P. Irwin and
16 Jo Ann Irwin Revocable Living Trust ("Barry"). Opposition to the
17 motion was filed by Thomas N. Ohanian, individually and as
18 trustee for the Ralph Ohanian Revocable Living Trust
19 (collectively "Ohanian").

20 Following the hearing, the court took the matter under
21 submission. This memorandum contains findings of fact and
22 conclusions of law required by Federal Rule of Bankruptcy
23 Procedure 7052 and Federal Rule of Civil Procedure 52. This is a
24 core proceeding as defined in 28 U.S.C. §157(b)(2)(A) and (O).

25 Background Facts.

26 William Irwin filed a chapter 7 case on November 3, 2004.
27 He died on November 7, 2004. When William Irwin filed his
28 bankruptcy case, he owned property located at 1441 Morris Avenue,

1 Fresno, California (the "Residence"). At the date the chapter 7
2 case was filed, the Residence had a fair market value of
3 \$425,000. The debtor claimed an exemption in the Residence of
4 \$150,000 pursuant to California Code of Civil Procedure
5 § 704.730(a)(3). As of the date the bankruptcy case was filed,
6 the debtor owed \$188,647 on a note secured by a deed of trust
7 against the Residence held by Bank of America and a total of
8 \$17,482.92 secured by a tax lien against the Residence. As of
9 the petition date, the Residence was further encumbered by
10 judicial liens totaling in excess of \$300,000. A total of about
11 \$656,129 in the consensual liens, the judgment liens, and the
12 debtor's exemption meant that there was no equity in the
13 Residence for the bankruptcy estate.

14 The chapter 7 trustee filed a report of no distribution on
15 February 18, 2005, and the deadline to object to that report
16 passed with no filings of objections by any party.

17 On July 11, 2005, the court entered an order granting Tracy
18 Barry's motion to avoid judicial liens, avoiding the judicial
19 liens of creditors Ohanian and Jim O'Neal against the Residence
20 in their entirety and the judicial lien held by Richard Gunner
21 and George Andros against the Residence partially to the extent
22 that the principal and accrued prejudgment interest exceeded the
23 sum of \$68,870.08. As a result of that lien avoidance order, the
24 sum of the encumbrances against the Residence and the debtor's
25 homestead exemption equals \$425,000, or the fair market value of
26 the Residence. Therefore, there is no nonexempt equity for
27 unsecured creditors.

28 The Residence is in more than normal disrepair due to

1 deferred maintenance.

2 Ohanian appealed from the order to avoid judgment liens.
3 Ohanian also appealed from the court's order allowing Tracy Barry
4 to substitute as real party in interest for the deceased debtor.
5 Ohanian sought a stay in the bankruptcy court of the lien
6 avoidance order pending the outcome of the appeal. Fed. R. Bankr.
7 P. 8005. The court ordered a stay of limited duration. The
8 court ordered a stay to be in effect until thirty days after any
9 motion to abandon may be entered.

10 Legal Issues.

11 The propriety of abandonment.

12 Bankruptcy Code § 554(b) states that a party in interest may
13 move the bankruptcy court to compel a trustee to abandon any
14 property of the estate that is "burdensome to the estate or that
15 is of inconsequential value to the estate." Here, the chapter 7
16 trustee has not opposed the motion to abandon. At oral argument,
17 the chapter 7 trustee stated that there is no equity for
18 unsecured creditors. This is true whether Ohanian is successful
19 in his appeal or not.

20 Does Ohanian's appeal divest this court of jurisdiction over
21 the motion to abandon?

22 A timely filing of a notice of appeal divests the trial
23 court over those aspects of the case involved in the appeal. In
24 re Padilla, 222 F.3d 1184, 1190 (9th Cir. 2000). So, if the
25 motion to abandon directly implicates the issues on appeal, then
26 this court may have no jurisdiction to rule on the motion.

27 In Padilla, the United States Trustee moved to dismiss the
28 debtor's petition for bad faith under Bankruptcy Code § 707(a).

1 The bankruptcy court granted the motion and dismissed the case.
2 Padilla timely appealed to the Bankruptcy Appellate Panel. The
3 Bankruptcy Appellate Panel reversed the order dismissing the
4 petition and remanded the case for reinstatement. The trustee
5 filed a notice of appeal to the Ninth Circuit. However, the
6 trustee did not move to stay the BAP's judgment. The bankruptcy
7 court then, having reinstated Padilla's bankruptcy case,
8 proceeded with the bankruptcy, discharged Padilla's debts, and
9 closed the case. The trustee did not object to the discharge.

10 The Ninth Circuit held that the timely filing of the appeal
11 by the United States Trustee divested the bankruptcy court of
12 jurisdiction to proceed with those aspects of the case involved
13 in the appeal. This rule divesting lower courts of jurisdiction
14 over those aspects of a case involved in an appeal is a judge-
15 made doctrine. It is designed to avoid confusion and waste of
16 time that might flow from putting the same issues before two
17 courts at the same time. Id. (citations and internal quotations
18 omitted). In Padilla, "the bankruptcy court's discharge of
19 Padilla's debts and closure of the case drastically changed the
20 status quo and amounted to a final adjudication of the
21 substantial rights directly involved in the appeal." Id. Thus,
22 the bankruptcy court lacked jurisdiction to proceed with the
23 bankruptcy case during the appeal.

24 Here, Ohanian asserts that three issues on appeal may be
25 implicated if the court grants the motion to abandon. Ohanian
26 has raised as issues on appeal whether Barry has standing;
27 whether the estate has an interest in the property; and whether
28 Ohanian has no interest in the property because his lien has been

1 avoided.

2 However, Barry asserts that even if Ohanian were to win
3 those issues on appeal, the property would still be burdensome
4 and of inconsequential value to the estate.

5 Has Barry presented admissible evidence and has she met her
6 burden of proof?

7 Property of the estate may be abandoned if it is burdensome
8 of or inconsequential value to the estate. Under Bankruptcy Code
9 § 704, the trustee should not take possession of assets that have
10 no value to the estate or only have nominal value. Collier on
11 Bankruptcy ¶ 704.02 (15th ed. Rev. 2004) at p. 704-6.

12 "Indeed, the legislative history of the Code made clear
13 Congress' displeasure with prior practices under which
14 trustees' administration of 'nominal asset cases' benefitted
only the trustees themselves."

15 Id.

16 Ohanian asserts that the estate includes the interests of
17 the secured creditors of the case. Ohanian refers to himself as
18 a "stakeholder" in the estate. However, Ohanian is either a
19 secured creditor (if he wins on appeal) or an unsecured creditor
20 (if Barry wins the appeal).

21 Ohanian is correct that a trustee is a fiduciary to secured
22 creditors in that the trustee has a duty to exercise reasonable
23 care of properties of the estate that serve as collateral for
24 secured claims. In re Pearson, 178 B.R. 753 (Bankr. C.D. Ill.
25 1995). The bankruptcy court in Pearson went on to say:

26 "The chapter 7 trustee has two major roles. The first is to
27 expeditiously liquidate the debtor's non-exempt assets, in a
28 way that maximizes the return to the debtor's unsecured
creditors. The second major role is an investigatory one.
Beyond these few exceptions, the trustee takes the estate as

1 it exists on the date of the petition. The trustee's major
2 goal is to try to produce an estate for the debtor's
3 unsecured creditors, and the trustee will try to do so in
4 several ways. The first and most obvious is to liquidate
5 the debtor's non-exempt property that is not subject to
liens. The second is to pursue causes of action belonging
to the debtor. The third is to pursue the trustee's own
causes of action to recover money or property under the
trustee's avoiding powers."

6 Id. at 760-761 (internal quotations, ellipses and footnotes
7 omitted).

8 The chapter 7 trustee's duties with respect to secured
9 creditors are more limited.

10 "In addition to the statutory duties enumerated in 11 U.S.C.
11 § 704 the chapter 7 trustee is considered to be a fiduciary
12 of the secured creditors with the duty to exercise
13 reasonable care as custodian of the properties which serve
14 as collateral for the secured claims. . . . It is a
15 fundamental concept in bankruptcy that a trustee's primary
16 duty is to the unsecured creditors rather than to the
17 secured creditors. The secured creditors, for the most
part, should be able to look to their collateral for
satisfaction of their claims. If there is no equity in the
collateral for the bankruptcy estate or if the property is
burdensome to the estate, the trustee generally abandons the
property pursuant to 11 U.S.C. § 554(a). . . . A Chapter 7
Trustee should not act as a mere conduit for the benefit of
secured creditors only."

18 Id. at 761 (citations, internal quotations and brackets omitted).

19 So, for purposes of § 554(b), benefit to the estate means
20 benefit to the unsecured creditors.

21 Conclusion.

22 In the court's view, the issues on the motion to abandon are
23 very different from the issues on appeal. Regardless of the
24 outcome of the appeal, there will be no property in the estate
25 for the trustee to administer. The Residence has no excess
26 equity available for unsecured creditors. No one has challenged
27 the exemption claimed by the debtor when the case was filed. The
28 only question is whether the Ohanian judgment lien should remain

1 as an encumbrance against the Residence.

2 The only benefit of not granting the motion to abandon would
3 be to Ohanian in that he would not be put to the task of seeking
4 a further stay of the order avoiding his lien. There would be no
5 benefit to unsecured creditors.

6 For the above reasons, the motion to compel abandonment will
7 be granted. The court will issue a separate order.

8 DATED: January 12, 2006.

9
10 /S/

WHITNEY RIMEL

United States Bankruptcy Judge