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4 UNITED STATES BANKRUPTCY COURT
5 EASTERN DISTRICT OF CALIFORNIA
6 SACRAMENTO DIVISION
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10 In re) Case No. 01-23174-A-7
11)
12 ROBERT and DEOLINDA BOGETTI,) Docket Control No. RM-3
13)
14 Debtors.) Date: August 17, 2006
Time: 9:00 a.m.
_____)

15 **MEMORANDUM DECISION**

16 On or about October 9, 1997, the debtors created a trust,
17 the Robert P. Bogetti and Deolinda M. Bogetti Retirement Plan and
18 Trust. The res of the trust includes real property located at
19 3950 W. Durham Ferry Road, Tracy, California ("the property").
20 The debtors were both the settlors and the beneficiaries of the
21 trust.

22 On May 16, 2000, Bank of America ("BofA") obtained a
23 judgment against the debtors in the amount of \$2,621,081.03.
24 BofA recorded an abstract of the judgment in San Joaquin County
25 on May 24, 2000 and again on May 25, 2000. The resulting
26 judicial liens retroactively attached to the property by virtue
27 of a writ of attachment identifying the property and recorded on
28 or about December 2, 1998.

1 On June 26, 2000, the debtors filed this bankruptcy case.
2 The debtors claimed the property as exempt pursuant to Cal. Civ.
3 Proc. Code § 704.730(a)(3). They also claimed their interest in
4 the trust, as well as the property, exempt under Cal. Civ. Proc.
5 Code § 704.115(b).

6 The debtors argued in an adversary proceeding, Adv. No. 01-
7 2122, that BofA's judicial lien was avoidable for reasons having
8 nothing to do with 11 U.S.C. § 522(f)(1)(A). In that proceeding,
9 the debtors maintained that the writ of attachment was defective,
10 thereby preventing the relation back of the abstracts of
11 judgment. This allegedly meant that the abstracts became
12 effective within 90 days of the filing of the petition, making
13 the resulting judicial liens avoidable as preferential transfers.
14 See 11 U.S.C. § 547(b).

15 On BofA' motion, however, the court dismissed the adversary
16 proceeding on July 9, 2001, ruling:

17 The debtors have an interest in the trust but not in
18 the res of the trust. The property of the trust is
19 owned by the trustees [of the Bogetti's trust] ... The
20 real property is not now property of the estate and an
21 action under 11 U.S.C. § 547 cannot lie. The motion
will be granted. Because it is yet possible for the
[property in the trust] to become property of the
estate, the complaint will be dismissed without
prejudice.

22 See Minutes of Hearing, July 9, 2001. An appeal of the dismissal
23 followed but it was voluntarily dismissed by the debtors.

24 Next, the United States Trustee and BofA objected to the
25 debtors' claims of exemptions. On October 4, 2001, the court
26 issued a Memorandum Decision, sustaining the objection to the
27 section 704.115 exemptions and overruling the objection to the
28 section 704.730 exemptions.

1 As to the \$125,000 homestead exemption claimed pursuant to
2 section 704.730 in connection with the property, the court
3 concluded:

4 1. The trust held legal title to the property.

5 2. The debtors, as beneficiaries of the trust, held a
6 beneficial interest in the trust but not in the
7 property in the trust. This interest is property of
8 the bankruptcy estate even though the trust instrument
9 contained a spendthrift provision. If enforceable,
10 this provision would prevent the debtors' beneficial
11 interest in the trust from becoming property of the
12 estate. However, the spendthrift provision was
13 unenforceable under California law because the settlors
14 and the beneficiaries were the same persons. See Cal.
15 Probate Code § 15304(a) (making self-settled
16 spendthrift trusts unenforceable).

17 3. The debtors, as settlors of the trust, had a
18 beneficial interest in the property held in trust even
19 though the trust purported to be irrevocable. In
20 substance, the trust was revocable because the debtors
21 were the only beneficiaries and Cal. Probate Code §
22 15403(a) permits all beneficiaries to agree to
23 terminate an irrevocable trust. As a result, the
24 property held in trust remained subject to the claims
25 of the debtors' creditors. See Cal. Probate Code §§
26 18200. Further, the invalidity of the spendthrift
27 provision also meant that the creditors of the
28 debtors/settlors, but for the bankruptcy petition,
could satisfy their claims against the property and the
other trust assets. See Cal. Probate Code § 15304(a).

4. Because the interest of the debtors as settlors of
the trust in trust assets could be reached by their
creditors, those assets are also subject to the reach
of the bankruptcy trustee.

5. However, because the property and other trust
assets are subject to claims of creditors and the
trustee, the debtors, as settlors of the trust, are
entitled to claim exemptions in the trust property.
See Cal. Probate Code § 18201.

6. Therefore, the court overruled the objections to
the debtors' homestead exemption pursuant to Cal. Civ.
Proc. Code § 704.730(a)(3) in the amount of \$125,000.¹

¹ The court sustained other objections to exemptions
other than the homestead exemption. However, those exemptions
and objections are not germane to the motion now before the

1 The debtors appealed this court's order, contending that its
2 earlier dismissal of Adv. Pro. 01-2122 on the ground that the
3 legal interest in the trust property was not property of the
4 estate meant that the debtors' beneficial interest in the trust
5 and in the trust property also was not property of the estate.

6 The Bankruptcy Appellate Panel rejected this assertion, and
7 in affirming the decision of this court, concluded on May 14,
8 2002:

9 . . . The question, for purposes of determining
10 property of the estate, is whether debtors have a legal
11 or beneficial interest in the property. Because the
12 legal and beneficial interests in trust property are
held by separate entities, it was not error for the
bankruptcy court to determine whether each of those
interests is property of the estate.

13 . . .

14 A debtor's beneficial interest in property is
15 property of the estate, unless excluded because it is
16 subject to an antialienation clause that is enforceable
17 under nonbankruptcy law. [Citations omitted.] The
18 trust in this case contains an antialienation
19 provision. However, because debtors are the settlors
of the trust, as well as its beneficiaries, the
provision restraining alienation is unenforceable under
California law. Cal. Probate Code § 15304(a). As a
result, debtors' beneficial interest in the trust or
the trust corpus is property of the estate.

20 The decision of the Bankruptcy Appellate Panel was affirmed
21 by the Ninth Circuit on August 18, 2003.

22 The debtors now move to avoid BofA's judicial lien pursuant
23 to 11 U.S.C. § 522(f)(1)(A). Given the court's prior conclusion
24 that the debtors could claim a homestead exemption, the
25 avoidability of BofA's judicial lien pursuant to section
26 522(f)(1)(A) is ripe for decision.

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court.

1 The court first must decide the extent of the debtors'
2 interest in the property they have exempted.

3 BofA maintains that the debtors' interest is limited to just
4 \$125,000 of equity in the property. On the date of the petition,
5 the remainder of the property was owned by the trust, not the
6 debtors. Consequently, just as the debtors could not avoid the
7 transfer of an interest in the property under section 547(b) they
8 did not own that property, they cannot avoid a judicial lien
9 encumbering the property under section 522(f)(1)(A) because it
10 belonged to the trust when the petition was filed.

11 The debtors counter that they had, on the date of the
12 petition, and continue to have, a beneficial interest in the
13 entire property. Therefore, the value of the entire property as
14 of the petition date, not just \$125,000, must be determined. If
15 the unavoidable liens plus their homestead exemption exceed that
16 value, then the arithmetical formula in 11 U.S.C. § 522(f)(2)(A)
17 requires BofA's judicial lien be avoided in its entirety and
18 stripped from the property.

19 As noted above, the court previously determined that the
20 trust, despite its ostensible irrevocability, was in fact
21 revocable.

22 Had the trust been irrevocable, the debtors would have had
23 no right to exempt any portion of the trust property.² Only when
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25 ² At oral argument, counsel for the debtor suggested that
26 the court had not previously determined that the trust was
27 revocable. In fact, the court did come to that conclusion in its
28 Memorandum Decision dated October 4, 2001. The court has not, as
yet, determined that the trust has been revoked. If the court
had not decided the issue of the trust's revocability, and if the
trust is irrevocable, the debtors could not claim an exemption in
the trust res. See Cal. Probate Code §§ 18200.

1 a trust is revocable may the creditors of the settlor satisfy
2 their claims from the property contributed to the trust by the
3 settlor. See Cal. Probate Code § 18200. Only if it is subject
4 to the claims of creditors, the settlor may exempt the trust
5 property to the extent allowed by Cal. Civ. Proc. Code §§
6 703.101, *et seq.* See Cal. Probate Code § 18201.

7 Assuming that the trust is revocable, as the court
8 previously determined, what interest did the debtors have in the
9 property when they filed their petition?

10 Under California law, a settlor's right to revoke a trust is
11 not inconsistent with the establishment of the trust and the
12 right does not make the trust void. The right to revoke is a
13 mere privilege and it does not prevent the vesting of legal title
14 of the trust res in the trust. See Estate of Willey, 128 Cal. 1,
15 9-10 (1900). The trust remains operative and absolute until the
16 right to revoke is exercised. Id. Until a trust is revoked, it
17 or its trustee owns the trust res.

18 So, on the date the debtors filed their bankruptcy petition,
19 the trust owned the property. Nonetheless, the debtors also had
20 an interest in the property but their interest was limited, as
21 BofA maintains, to the \$125,000 exemption.

22 When the petition was filed, the bankruptcy trustee³
23 acquired the status of "a creditor that extends credit to the
24 debtor at the time of the commencement of the case, and obtains,
25 at such time and with respect to such credit, a judicial lien on

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27 ³ This case was originally filed under chapter 11 and the
28 debtors remained in possession. Nonetheless, a debtor in
possession is a trustee for purposes of section 544(a). See 11
U.S.C. § 1107(a).

1 all property on which a creditor on a simple contract could have
2 obtained such a judicial lien....” 11 U.S.C. § 544(a)(1). See,
3 also In re Kelley, 300 B.R. 11, 17 (B.A.P. 9th Cir. 2003); In re
4 Pike, 243 B.R. 66, 70 (B.A.P. 9th Cir. 1999) (holding that the
5 filing of a bankruptcy petition constitutes a “forced sale” for
6 purposes of the California’s homestead exemption laws).

7 As noted above, California law permits a creditor of a
8 settlor of a revocable trust to satisfy a claim against the
9 settlor from property held by the trust. This right, by virtue
10 of section 544(a)(1), gave the bankruptcy estate an interest in
11 the property.⁴ The interest of the estate also triggered the
12 debtors the right to claim a homestead exemption in the property.
13 But, the debtors can claim nothing more in the property. The
14 remaining interest in the property, as well as other nonexempt
15 trust property, remains property of the trust subject to the
16 claims of the bankruptcy estate.

17 BofA’s judicial lien, as it concedes, is subject to the
18 debtors’ \$125,000 homestead exemption, whether the exemption is
19 asserted in or out of bankruptcy court. Even without this
20 concession, it is unnecessary to grant the debtors’ motion in
21 order to establish that their exemption is allowed. The court
22 has already allowed their homestead exemption.

23 This motion is necessary only insofar as it is possible to
24 avoid the fixing of the judicial lien on the real property.
25 Because the debtors did not own that property when the petition
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27 ⁴ The fact that bankruptcy estate succeeds to any right
28 of the debtors, as the trust’s settlors and beneficiaries, to
revoke the trust, also gives the estate an interest in the
property.

1 was filed, this is not possible. The debtors may not utilize
2 section 522(f)(1)(A) to avoid a judicial lien that encumbers
3 property owned by another.

4 BofA also maintains that it holds a post-petition claim for
5 approximately \$50,000 that is secured by the property and must be
6 deducted from the debtors' \$125,000 homestead exemption. Because
7 the court cannot grant the debtor's motion, there is no need to
8 decide this issue.

9 A separate order will be entered.

10 Dated:

11 By the Court

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13 Michael S. McManus, Chief Judge
14 United States Bankruptcy Court
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