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4 UNITED STATES BANKRUPTCY COURT
5 EASTERN DISTRICT OF CALIFORNIA
6 FRESNO DIVISION

7 In re) Case No. 06-10227-B-13
8 Bob A.C. Meeks, II and)
9 Darlene Meeks,)
Debtors.)
_____)

10 **MEMORANDUM DECISION RE MOTION TO AVOID JUDICIAL**
11 **LIEN Of PACIFIC BELL DIRECTORY AND SBC ADVERTISING, L.P.**

12 David R. Jenkins, Esq., appeared on behalf of the debtors, Bob A.C. Meeks, II and
13 Darlene Meeks (the "Debtors").

14 Robert E. Blue, Esq., of Coleman & Horowitz, LLP, appeared on behalf of Pacific
15 Bell Directory, a California Corporation, and SBC Advertising, L.P., a Delaware
16 L.P. ("Pacific Bell").

17 M. Nelson Enmark, Esq., appeared in his capacity as the chapter 13 trustee (the
18 "Trustee").

19 Before the court is the Debtors' motion to avoid the judicial lien of Pacific
20 Bell. The court has jurisdiction over this proceeding pursuant to 28 U.S.C. § 1334
21 and 11 U.S.C. § 522. This is a core proceeding pursuant to 28 U.S.C.

22 §§ 157(b)(2)(A), (B) and (K). For the reasons set forth below, the Debtors' motion
23 to avoid the judicial lien will be granted to the extent that Pacific Bell's judicial
24 lien impairs their homestead exemption.

25 **Background.**

26 This bankruptcy commenced under chapter 7 on March 7, 2006. The
27 Debtors' bankruptcy schedules list the real property located at 9178 N. Recreation
28 in Fresno, California, as their residence (the "Residence"). The Debtors valued the
Residence in their schedules at \$289,000. The Residence was subject to a first
deed of trust in the amount of \$226,979.70 and a statutory lien in favor of the

1 Fresno County Tax Collector in the amount of \$3,328.41. The unavoidable liens
2 totaled approximately \$230,308.11. The Debtors amended their homestead
3 exemption and claimed an exemption in the amount of \$75,000¹ pursuant to 11
4 U.S.C. § 522(b)(3)(A)² and California Code of Civil Procedure § 704.730(a)(2).
5 There were no objections and the amended homestead exemption is now final.
6 Based on the amount of the unavoidable liens and the homestead exemption, there
7 will not be any “non-exempt” equity in the Residence unless the value of the
8 Residence is found to exceed \$305,308.11.

9 Pacific Bell holds a judgment against the Debtors from the Fresno County
10 Superior Court in the amount of \$65,538.14. An abstract of that judgment was
11 recorded as a lien against the Residence on July 19, 2005. As of the petition date,
12 the amount of the judgment lien with accrued interest exceeded \$70,000.

13 Debtors filed their First Modified Chapter 13 Plan (the “Plan”) on May 30,
14 2006. Included in the Plan was this motion under § 522(f)(1)(A) to avoid Pacific
15 Bell’s judicial lien on the grounds that said lien impaired their homestead
16 exemption. Pacific Bell opposed the Debtors’ motion based on an appraisal which
17 valued the Residence at \$320,000. Pacific Bell argues that there is some non-
18 exempt equity in the Residence to which its lien can attach without impairing the
19 exemption. Resolution of the lien avoidance issue determines, *inter alia*, whether
20 the Plan is feasible and whether it can be confirmed. Confirmation of the Plan,
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22 ¹The Debtors originally claimed a \$500 exemption pursuant to Cal. Code
23 of Civil Procedure § 703.140. They amended the exemption to the higher amount
24 after Pacific Bell objected to confirmation of the original chapter 13 plan on the
25 grounds that the plan did not provide for its secured claim. It then became
apparent that the original exemption did not cover all of the equity in the
Residence and that the Plan would not be feasible unless the Debtors could avoid
the judicial lien.

26 ²Unless otherwise indicated, all chapter, section and rule references are to
27 the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and to the Federal Rules of
28 Bankruptcy Procedure, Rules 1001-9036, as enacted and promulgated after the
effective date of The Bankruptcy Abuse Prevention and Consumer Protection Act
of 2005, Pub. L. 109-8, Apr. 20, 2005, 119 Stat. 23.

1 and Pacific Bell's objection thereto, are also under submission and the court's
2 ruling on those matters is on file herewith.

3 Pacific Bell submitted a declaration, supported by an appraisal, from
4 Kaaryn A. File, a certified real estate appraiser (the "Appraisal"). Ms. File valued
5 the Residence at \$320,000 based on recent sales of three comparable properties
6 ("Comp. Sales") in the same neighborhood. The Debtors contend that the Comp.
7 Sales are not truly "comparable" in three categories. The Debtors state that the
8 three Comp. Sales have tile roofs, while the Residence has a shake roof,
9 warranting a downward adjustment from the Appraisal of \$25,000 to \$30,000.
10 The Debtors state that the Comp. Sales were all recently painted and well
11 landscaped, while the Residence was painted in 1991 and has inferior landscaping,
12 warranting an additional downward adjustment of approximately \$10,000. Finally,
13 the Debtors state that the Comp. Sales have covered patios, while the Residence
14 does not, warranting another downward adjustment of \$4,000. In summary, the
15 Debtors contend that the Residence should be valued approximately \$39,000 to
16 \$44,000 less than the Appraisal.

17 Pursuant to Rule 43 of the Fed. Rules of Civ. P. and Local Rule 9014-1 of
18 The United States Bankruptcy Court, Eastern District of California, parties are
19 entitled to request an evidentiary hearing with regard to any disputed issue of
20 material fact such as the value of the Residence. Neither party made a request to
21 present oral testimony or cross-examine a witness. Therefore, the court must base
22 its decision on the evidence in the record.

23 **Analysis.**

24 Pursuant to § 522(f)(2), a judicial lien impairs a debtor's homestead
25 exemption to the extent that the sum of the judicial lien, other non-avoidable liens,
26 and the available exemption, "exceeds the value that the debtor's interest in the
27 property would have in the absence of any liens." Bankruptcy Code § 522(a)(2)
28 defines the term "value" to mean "fair market value as of the date of the filing of

1 the petition”

2 To prevail on a motion to avoid a judicial lien, the debtor must show that
3 (1) he has an interest in the homestead property; (2) he is entitled to a homestead
4 exemption; (3) the asserted lien impairs that exemption; and (4) the lien is a
5 judicial lien. 11 U.S.C. § 522(f)(1)(A); *Morgan v. Federal Deposit Insurance*
6 *Corp. (In re Morgan)*, 149 B.R. 147, 151 (9th Cir. BAP 1993); *Premier Capital,*
7 *Inc. v. Philip V. DeCarolis and Timothy P. Smith (In re DeCarolis)*, 259 B.R. 467,
8 471 (1st Cir. BAP 2001). As the moving party, the debtor carries the burden of
9 proof on all factors. *DeCarolis*, 259 B.R. at 471. However, once the debtor
10 establishes that the value of the exempt property did not exceed the exemption plus
11 the unavoidable liens, the burden shifts to the opponent to prove that the exempt
12 property had a higher value, *i.e.*, that there was non-exempt equity at the
13 commencement of the case. The court does not need to make a finding of the
14 exact value unless it is first persuaded that there was some non-exempt equity
15 which must be allocated to the judicial lienholder(s).

16 Here, the parties do not dispute that the Debtors have an interest in the
17 Residence, and there is no dispute as to the validity of the amended homestead
18 exemption. The parties do not dispute that Pacific Bell’s lien is a potentially
19 avoidable judicial lien. Thus, the dispositive question is whether the fair market
20 value of the Residence was more than \$305,308.11 at the commencement of the
21 case, the threshold above which there will remain non-exempt equity in the
22 Residence for application to Pacific Bell’s judicial lien.

23 The value of the Residence is listed in the Debtors’ schedules and in the
24 Debtor’s declaration in support of the motion at \$289,000. The motion explains
25 the Debtors’ valuation as follows: “value is based on the debtors’ comparison of
26 their residence to others in their neighborhood that have either sold or are for sale.”
27 The Debtors offer no specifics or back-up details regarding the basis for their
28 opinion.

1 The Debtors offered their opinion of value as the owners of the Residence
2 pursuant to Fed.R.Ev. 701. Ms. File offered her opinion as an expert witness
3 pursuant to Fed.R.Ev. 702. The court must determine how much weight to give
4 the competing opinions of value. The Debtor's testimony is subject to the same
5 critical analysis as that of an independent appraiser. Based on the differences
6 between the parties' respective positions, the court must carefully scrutinize the
7 methods by which the competing opinions were derived. When the owner of
8 property is unable to provide a detailed explanation of how he or she arrived at a
9 value for the property, the testimony may be insufficient to establish in the court's
10 mind an "actual belief . . . derived from the evidence" as to the validity of the
11 owner's opinion. *Russell*, Bankruptcy Evidence Manual § 701.2 at page 1218
12 (West 2006 edition), quoting *In re Brown*, 244 B.R. 603, 612 (Bankr. W.D.Va.
13 2000).

14 Here, the Debtors are permitted to give an opinion of the value of the
15 Residence, but they are not qualified as experts to appraise the Residence. Neither
16 are they qualified to give an opinion regarding the value differences between the
17 Residence and the Comp. Sales. For example, the Debtors may testify from their
18 personal knowledge that the Residence has a shake roof. However, they are not
19 qualified as experts to testify that a shake roof is worth \$25,000 to \$30,000 less
20 than a tile roof. Consequently, the court cannot give much weight to the Debtors'
21 testimony regarding the value of the Residence and their efforts to compare the
22 Residence with the Comp. Sales.

23 Based on the Appraisal, Pacific Bell asserts that the value of the Residence
24 is \$320,000. The Debtors contend that material differences between the Residence
25 and the Comp. Sales, warrant a downward adjustment of up to \$44,000. This
26 would result in an "adjusted value" of \$276,000. However, this "adjusted value" is
27 \$13,000 below the Debtor's own stated opinion of the Residence's value. The
28 discrepancy between the Debtors' opinion of value as stated in their schedules, and

1 the “adjusted value” as suggested in their declaration, further mitigates the weight
2 which the court can give to the Debtor’s testimony.

3 Based on the evidence presented, the court finds that the value of the
4 Residence is approximately \$320,000. The unavoidable liens plus the amended
5 homestead exemption total \$305,308.11. The Residence therefore has \$14,691.89
6 of non-exempt equity. Pacific Bell’s judgment lien impairs the Debtors’
7 homestead exemption to the extent that the value of its judicial lien exceeds the
8 non-exempt equity. Therefore, Pacific Bell’s judicial lien will be partially
9 avoided, but will survive in the amount of \$14,691.89.

10 **Conclusion.**

11 Based on the foregoing, the court finds and concludes that the judicial lien
12 of Pacific Bell impairs the Debtors’ homestead exemption to the extent that the
13 value of the judicial lien exceeds \$14,691.89 as of the commencement of the case.
14 The Debtors’ motion to avoid the judicial lien of Pacific Bell will be granted in
15 part. Debtors’ counsel shall submit an appropriate order consistent with this
16 Memorandum Decision.

17 DATED: August 24, 2006

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19 /s/ W. Richard Lee
20 W. Richard Lee, Judge
21 United States Bankruptcy Court
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