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UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF CALIFORNIA

In re  
ROBERT NACHO RODRIGUEZ  
  
Debtor.

Case No. 01-60484-A-7K  
DC No. FPS-2  
  
FINDINGS OF FACT AND  
CONCLUSIONS OF LAW RE  
MOTION TO AVOID LIEN

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A hearing was held January 27, 2006, on the motion to avoid lien filed by the debtor. Creditors Commercial Trade Bureau of California, Woody E. Bryant, and Washburn, Briscoe & McCarthy ("Creditors") opposed the motion. Following the hearing, the court took the matter under submission. This memorandum contains findings of fact and conclusions of law required by Federal Rule of Bankruptcy Procedure 7052 and Federal Rule of Civil Procedure 52. This is a core proceeding as defined in 28 U.S.C. §157(b)(2)(A) and (O).

Background Facts.

Robert Rodriguez had an earlier chapter 7 case. In 1998, he was a debtor in a chapter 7 case, and his discharge was denied.

On November 14, 2001, Mr. Rodriguez filed the present chapter 7 case. Prior to that time, on June 21, 1999, he obtained title to his residence, located at 7308 Calle Los Batiquitos, Bakersfield, California, (the "Residence").

On October 7, 1999, Woody E. Bryant recorded a judgment lien

1 in the amount of \$710,698.41, and on November 10, 1999, his  
2 assignee recorded a judgment lien in the same amount in the  
3 official records of Kern County.

4 Creditors filed an adversary proceeding against Mr.  
5 Rodriguez in the 2001 case, and the court determined that the  
6 obligation of Rodriguez to Creditors is nondischargeable.

7 After reopening the bankruptcy case he filed in 2001, Mr.  
8 Rodriguez moved to avoid the judgment liens of Creditors under  
9 Bankruptcy Code § 522(f). Mr. Rodriguez testified that at the  
10 time he filed his 2001 bankruptcy petition, the fair market value  
11 of the Residence was \$270,000; it was encumbered by a deed of  
12 trust in the amount of \$219,000; and he had claimed an exemption  
13 of \$75,000. Thus, doing the calculations required by Bankruptcy  
14 Code § 522(f)(2), the liens impaired Mr. Rodriguez's exemption  
15 and should be avoided.

16 Creditors make several arguments in support of their  
17 objection to the lien avoidance motion. First, they say that  
18 because the debt has been determined to be nondischargeable, the  
19 lien may not be avoided. Second, they assert that the debtor  
20 refinanced the Residence in 2003. They assert that as a result  
21 of this refinance, he waived his declared homestead, and  
22 therefore the judgment lien has priority. According to  
23 Creditors, they are now in first position on the Residence.  
24 Creditors also assert that the current value of the Residence is  
25 in excess of \$600,000. Finally, Creditors assert that Rodriguez  
26 has no standing to bring the lien avoidance motion because he  
27 deeded the property to his wife as her sole and separate property  
28 in 2004. Additionally, although not set forth in Creditors'

1 written opposition, at oral argument Creditors' attorney posited  
2 that the debtor had waived any right to avoid the lien because of  
3 delay.

4 Legal Conclusions.

5 Creditors' arguments must fail. Creditors place a great  
6 deal of reliance on a Bankruptcy Appellate Panel decision, In re  
7 Chiu, 266 B.R. 743 (9<sup>th</sup> Cir. BAP 2001). In that case, the  
8 debtors owned property subject to a homestead exemption at the  
9 time they filed their bankruptcy case. They later sold it. The  
10 Bankruptcy Appellate Panel reasoned that in order to have  
11 standing to pursue a lien avoidance motion, the debtors must have  
12 some kind of economic interest in the proceeds of the sale of the  
13 homestead property. Creditors argue here that because Rodriguez  
14 claims no present economic interest in the Residence, he had no  
15 standing to bring the lien avoidance motion.

16 However, Creditors ignored the decision of the Ninth Circuit  
17 Court of Appeals affirming the Bankruptcy Appellate Panel in  
18 Chiu. In re Chiu, 304 F.3d 905 (9<sup>th</sup> Cir. 2002). In affirming  
19 the result in Chiu, the Ninth Circuit came to a different  
20 conclusion about standing. The court stated that under  
21 § 522(f)(1), a debtor may avoid a lien if three conditions are  
22 met. First, there has to be a fixing of a lien on an interest of  
23 the debtor on property. Second, such lien must impair an  
24 exemption to which the debtor would have been entitled. Third,  
25 the lien must be a judicial lien. Id. at 908. The court then  
26 phrased the issue as whether for purposes of applying  
27 § 522(f)(1), "the debtor must have an interest in the exempt  
28 property at the time of moving to avoid the lien, at the time of

1 filing for bankruptcy, or at the time when the lien 'fixed' or  
2 'attached.'" Id. The court concluded that the critical inquiry  
3 was whether the debtor possessed the interest to which the lien  
4 attached before the lien in fact was attached. The debtor need  
5 not have an interest in the property subject to the lien at the  
6 time the debtor moves to avoid the lien. Therefore, Rodriguez  
7 had standing to move to avoid the lien.

8 The nondischargeability of the debtor's obligation to  
9 Creditors does not prevent the debtor from avoiding the  
10 Creditors' lien. Section 522(c) first states the general rule  
11 that property exempted under 522 is not liable for a debt that  
12 arose before the commencement of the case. Section 522(c) then  
13 sets forth exceptions to that general rule. None of those  
14 exceptions applies to Creditors here. A Washington bankruptcy  
15 court has analyzed the question of whether liens securing  
16 nondischargeable prepetition debts not described in § 522(c) may  
17 be avoided under § 522(f). In re Slater, 188 B.R. 852 (Bankr.  
18 E.D. WA. 1995). The Washington bankruptcy court stated:

19 "We find most persuasive, the argument . . . that because 11  
20 U.S.C. § 522(c) specifically enumerates certain non-  
21 dischargeable pre-petition debts for which exempt property  
22 is liable, Congress clearly intended the avoidance powers of  
23 § 522(f) to be used to avoid judicial liens on exempt  
24 property secured by non-dischargeable debts not specifically  
25 protected by § 522(c)." Id. at 856.

26 Therefore, the fact that the judgment lien secures a  
27 nondischargeable debt does not prevent the debtor here from  
28 avoiding it.

29 Similarly, the fact that the debtor, after filing this  
30 chapter 7 case, refinanced the Residence and then transferred it  
31 to his wife, does not preclude avoidance of the lien. He did

1 have an interest in the Residence at the time the lien affixed,  
2 and he had an interest in the Residence at the time he filed his  
3 chapter 7 case. In re Chiu, 304 F.3d at 908.

4 The only remaining issue is whether Creditors were  
5 prejudiced by the two years between the closing of the present  
6 bankruptcy case and the filing of the motion to avoid the lien.  
7 There is no deadline to bring a motion to avoid a lien under  
8 § 522(f). The bankruptcy case must be open, or the debtor must  
9 reopen it, in order to avoid a lien. Fed. R. Bankr. P. 4003(d).  
10 Nonetheless, a creditor may argue that laches prevents reopening  
11 a case and granting a motion to avoid a lien if the lapse of time  
12 caused unfair prejudice to the creditor. The Ninth Circuit has  
13 addressed this question in In re Chabot, 992 F.2d 891 (9<sup>th</sup> Cir.  
14 1993).<sup>1</sup> The court observed that absent a prejudicial delay, an  
15 avoidance action might be brought at any time. Id. at 893. The  
16 court observed that the key factor in allowing the late avoidance  
17 of a lien under § 522(f) is whether the creditor is sufficiently  
18 prejudiced so that it would be inequitable to allow avoidance of  
19 the lien. Id., citing In re Ricks, 89 B.R. 73, 75-76 (9<sup>th</sup> Cir.  
20 BAP 1988).

21 But the court cannot find that there was prejudice to  
22 Creditors here. The case was closed on February 26, 2004. The  
23 Debtor did not transfer the interest in the Residence to his wife

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25 <sup>1</sup>The Bankruptcy Reform Act of 1994 amended 11 U.S.C. §  
26 522(f)(2) to overrule the holding in Chabot that a judgment lien  
27 will be avoided only to the extent it is secured by the debtor's  
28 property on the bankruptcy petition date. See, e.g., Jones v.  
Heskett, 180 B.R. 575, 577 (9<sup>th</sup> Cir. BAP 1995). That does not  
affect the Chabot court discussion of prejudice referred to  
herein.

1 until June 2004. During that time, Creditors could have executed  
2 on their lien. Of course, had they commenced lien enforcement  
3 proceedings, the Debtor would likely have earlier reopened the  
4 bankruptcy case to move to avoid the lien. Creditors have not  
5 come forward with any evidence of any prejudice. The lapse of  
6 time in and of itself is not sufficient prejudice.

7 For all the foregoing reasons, the debtor's motion to avoid  
8 lien will be granted. Counsel for the debtor may submit a  
9 separate form of order consistent herewith.

10 DATED: March 6, 2006.

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WHITNEY RIMEL, Judge  
United States Bankruptcy Court