

1 UNITED STATES BANKRUPTCY COURT
2 EASTERN DISTRICT OF CALIFORNIA
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4 In re:) Case No. 05-25124-D-13L
5 HARVEY ZALL &) Docket Control Nos. KSR-4
6 SELMA JANET ZALL,) KSR-6
7 Debtors.)
_____)

8 MEMORANDUM DECISION

9 Creditor T&F Construction Co., Inc. ("T&F"), has objected to
10 certain claims of exemption filed by Harvey Zall and Selma Janet
11 Zall (the "Debtors"). These claims of exemption relate to the
12 Debtors' interest in residential real property at 598 Rivercrest
13 Drive, Sacramento, California (the "Residence").

14 For the reasons set forth below, the court will overrule the
15 objections.

16 I. INTRODUCTION

17 The Debtors filed their joint Chapter 13 petition on April
18 29, 2005. In the A-Schedule filed with their petition, the
19 Debtors valued the Residence in the amount of \$300,000. In their
20 D-Schedule, the Debtors identified a number of encumbrances
21 against the Residence, including a 1993 judgment lien in favor of
22 "F&T Construction" (apparently referring to T&F) described as
23 "disputed" and in the amount of \$10,000.

24 In their C-Schedule filed April 29, 2005, the Debtors
25 claimed the amount of \$125,000 in regard to the Residence as
26 exempt, and identified California Code of Civil Procedure ("CCP")
27 section 704.730(a)(3) as the law providing for the claimed
28 exemption. In an amended C-schedule filed August 23, 2005, the

1 Debtors increased the exemption claim amount for the Residence to
2 \$150,000, again looking to CCP section 704.730(a)(3) as the
3 provision for such exemption.

4 On July 1, 2005, T&F filed an objection, bearing Docket
5 Control No. KSR-4, to the Debtors' \$125,000 claim of exemption as
6 to the Residence (the "Initial Objection"). The Initial
7 Objection was timely under Federal Rule of Bankruptcy Procedure
8 4003(b), the Meeting of Creditors having not yet been concluded
9 as of that date. T&F set the Initial Objection (after amending
10 the notice) for a hearing to be conducted on August 23, 2005. On
11 August 9, 2005, the Debtors filed written opposition to the
12 Initial Objection. At the August 23 hearing on the Initial
13 Objection, both parties and the trustee appeared, and the court
14 continued the hearing to September 27, 2005 and set a briefing
15 schedule pursuant to the request of the parties.

16 As noted above, the Debtors filed an amended C-Schedule on
17 August 23 that increased the exemption claim as to the Residence,
18 to \$150,000. On August 30, 2005, T&F filed a timely objection to
19 that claim as well, bearing Docket Control No. KSR-6 (the "Second
20 Objection"). T&F set the Second Objection for a hearing to be
21 conducted on September 27, 2005. At the September 27 hearing,
22 the court set a briefing schedule for the Second Objection at the
23 request of the parties, and both the Initial Objection and the
24 Second Objection were set to be heard on October 25, 2005.¹

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27 1. Although the filing of the amended C-schedule mooted the
28 Initial Objection, the court permitted briefing on both matters at
the request of the parties. Hereinafter, the Initial Objection and
the Second Objection will be referred to collectively as "the
Objections."

1 Both the Debtors and T&F filed supplemental pleadings
2 pursuant to the briefing schedules, and the record closed on
3 October 14, 2005, with the filing of the Debtors' supplemental
4 reply. Pursuant to the request of the parties, the court heard
5 oral arguments on October 25, 2005, as to both of the Objections.

6 In these proceedings, no evidence was submitted that the
7 Debtors have recorded a declaration of homestead in regard to the
8 Residence. As such, and based on the parties' representations,
9 the court finds that the Debtors claimed their exemption for the
10 Residence pursuant to CCP section 704.720, the so-called
11 "automatic" homestead or dwelling exemption in California.²
12 Under California law, the exemption for an individual debtor's
13 dwelling owned in fee simple does not require that anything be
14 recorded; this exemption applies to an involuntary or forced sale
15 pursuant to levy by a judgment creditor. CCP § 704.720(b); In re
16 Yau, 115 B.R. 245, 248 (Bankr. C.D. Cal. 1990). Pursuant to this
17 "automatic" homestead exemption, the property cannot be sold in a
18 forced sale unless the bid received exceeds the amount of the
19 judgment debtor's homestead exemption, plus the additional amount
20 necessary to satisfy all liens on the property, "including but
21 not limited to any attachment or judicial lien." CCP § 704.800;
22 In re Pike, 243 B.R. 66, 70 (B.A.P. 9th Cir. 1999).

23 Evidence submitted by T&F in support of the Objections
24 indicates that on August 24, 1993, the Santa Clara County
25 Superior Court entered a judgment in favor of T&F and against the
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28 2. The exemption provisions related to a declared homestead, at
CCP sections 704.910 through 704.995, are therefore inapplicable in
this case.

1 Debtors (the "Judgment"). The record also indicates that on
2 October 4, 1993, T&F recorded an abstract of judgment in regard
3 to the Judgment, in the amount of \$100,741.81, in the Official
4 Records of the County of Sacramento, in which county the
5 Residence is located.

6 By way of an application filed with the Santa Clara County
7 Superior Court, T&F renewed the Judgment on September 6, 2000, in
8 the amount of \$171,294.56. T&F later filed a proof of claim in
9 this case, asserting a secured claim in the amount of \$249,842 as
10 of the date the Debtors filed their Chapter 13 petition. To
11 date, no objection has been filed by any party to T&F's proof of
12 claim.

13 T&F asserts, and the Debtors have not disputed, that the
14 homestead exemption amount available to the Debtors as of October
15 4, 1993 was \$100,000 under California law.

16 II. ANALYSIS

17 This court has jurisdiction over the Objections pursuant to
18 28 U.S.C. sections 1334 and 157(b)(1). The Objections are core
19 proceedings under 28 U.S.C. section (b)(2)(B). The Objections
20 were brought pursuant to Federal Rule of Bankruptcy Procedure
21 4003(b).

22 The objecting party, in this case T&F, bears the burden of
23 proving that a claimed exemption is improper. Fed. R. Bankr. P.
24 4003(c). In this case, T&F has objected solely to the amount of
25 exemption claimed as to the Residence, and argues that the
26 exemption amount is limited to \$100,000. T&F relies primarily on
27 two authorities in support of its position, but the court finds
28 that other authorities control in this case.

1 A. T&F's Arguments

2 In its Memorandum of Points and Authorities filed July 1,
3 2005, T&F "concedes that the [Residence] is a homestead, and that
4 one of the Debtors is over the age of [sixty-five]." The ground
5 for T&F's objection is thus not that the Residence fails to
6 qualify as property subject to exemption under CCP sections
7 704.720 and 704.730, or that the Debtors fail to meet the express
8 requirements for the exemption amount provided for those over the
9 age sixty-five under CCP section 704.730(a)(3)(A).

10 Instead, T&F's objection goes solely to the amount of
11 exemption that the Debtors can claim for the Residence in this
12 case. T&F maintains that CCP section 703.750(c) dictates that
13 the amount the Debtors may claim as exempt in this bankruptcy
14 case is limited to \$100,000, the amount available to the Debtors
15 as judgment debtors to T&F as of October 3, 1993, when T&F
16 obtained its judicial lien.

17 In support of its position, T&F looks primarily to two
18 reported cases. One is In re Morgan, 157 B.R. 467 (Bankr. C.D.
19 Cal. 1993). That case was decided before enactment of the
20 Bankruptcy Reform Act of 1994, which included amendments to
21 section 522(f). In Morgan, the debtors had recorded a
22 declaration of homestead several years before two creditors had
23 obtained judgments against the debtors and recorded abstracts of
24 those judgments in the county in which the debtors' homestead was
25 located. Before the bankruptcy was initiated, the creditors
26 proceeded in the state court for a forced sale of the residence,
27 and the court made the necessary findings regarding the value of
28 the home and the proper amount of the homestead exemption. Id.

1 at 468. But the bankruptcy case was apparently initiated before
2 the sale of the residence could go forward.

3 In Morgan, the debtors then claimed a homestead exemption in
4 the bankruptcy case, in an amount that exceeded the amount
5 allowed by the state court. The debtors looked to the fact that
6 applicable law had increased the amount to which they would be
7 entitled, effective approximately two months before the
8 bankruptcy case had been initiated. Morgan, 157 B.R. at 468.
9 The creditors objected to the claimed exemption, and the
10 bankruptcy court sustained the objection.

11 The bankruptcy court stated two primary reasons for
12 sustaining the objection. One reason was its decision, based on
13 res judicata, to abide by the recent findings of the state court
14 that fixed the lower exemption amount available to the debtors.
15 Id. at 470. Another reason was the language in CCP section
16 704.965, applying to recorded homesteads, that provides that
17 where "the judgment creditor obtained a lien on the declared
18 homestead prior to the operative date of [an amendment changing
19 the available homestead amount], the exemption . . . shall be
20 determined as if that amendment had not been enacted." Id. at
21 469 (quoting CCP § 704.965).

22 In this matter, T&F looks to the reasoning in Morgan and
23 asks this court to apply the language of CCP section 703.050(c)
24 in the manner the Morgan court applied CCP section 704.965. This
25 would limit the Debtors' homestead exemption in this bankruptcy
26 case to \$100,000.

27 The second case relied on by T&F is Bernhanu v. Metzger, 12
28 Cal. App. 4th 445 (4th Dist. 1992). In Bernhanu, the creditor

1 obtained a judgment and had recorded it in the county of the
2 judgment debtor's residence, before the time the judgment debtor
3 recorded a declaration of homestead regarding the property. Id.
4 at 447-48. The homestead declaration was recorded days after the
5 homestead exemption amount was increased in California. The
6 trial court had granted the judgment debtor an exemption in the
7 lower amount in effect as of the date the judgment lien had been
8 obtained, and an appeal followed. The appeals court affirmed the
9 trial court, and in so doing reviewed the language of both CCP
10 section 703.965 and 703.050(c). Id. at 447-48.

11 This court is not persuaded, however, that the holdings of
12 Morgan and Bernhanu are applicable in this case. As explained
13 below, revisions to section 522(f) of the Bankruptcy Code that
14 were adopted after Bernhanu was decided, and holdings by the
15 Bankruptcy Appellate Panel of the Ninth Circuit (the "Panel")
16 that were issued after Morgan was decided, dictate a unified
17 approach to the determination of exemptions and the avoidance of
18 judicial liens, under which exemption rights and rights to avoid
19 judicial liens are determined as of the date of the filing of the
20 bankruptcy petition. This court declines to apply Bernhanu also
21 because it does not involve application of section 522 of the
22 Bankruptcy Code.³

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25 3. There are also some factual differences between this case
26 and Morgan and Bernhanu that lead this court to limit their
27 applicability. Both Morgan and Bernhanu involve recorded homesteads,
28 rather than the "automatic" homestead exemption applicable here.
Both cases also involve the interpretation of CCP § 704.965, which,
again, goes to cases in which a homestead declaration has been
recorded. The Morgan decision rests at least in part on principles
of res judicata as to a state court's earlier findings, and there are
no such findings here.

1 B. The Court Must Look Beyond a Single Judgment Creditor's Lien
2 in Applying Section 522

3 In general, the property of a debtor's bankruptcy estate is
4 determined as of the date the commencement of the case. See 541
5 U.S.C. § 541(a) (with specific exceptions, property of the estate
6 is defined as of case commencement). The same general principal
7 applies to the exemption of property from the estate: "It is
8 well-established that the nature and extent of exemptions [are]
9 determined as of the date that the bankruptcy petition is filed."
10 In re Chiu, 266 B.R. 743, 751 (B.A.P. 9th Cir. 2001) (citations
11 omitted). "Because lien avoidance is part and parcel of the
12 exemption scheme, the right to avoid a judicial lien must also be
13 determined as of the petition date." Id. (citations omitted).

14 In section 522(b) of the Bankruptcy Code, Congress permitted
15 states to "opt out" of the federal exemption scheme set forth in
16 section 522(d), and California has done so. But this policy of
17 permitting states to require its residents to make use of state
18 exemptions in bankruptcy is not absolute.

19 Instead, the courts must apply state-imposed exemption
20 provisions "with whatever other competing or limiting policies
21 the statute contains." Owen v. Owen, 111 S. Ct. 1833, 1838
22 (1991). As stated by another court, "the construction given to
23 state exemption statutes for the purposes of bankruptcy exemption
24 analysis must comport with both the underlying policies of the
25 Bankruptcy Code and state enactment." In re Frost, 111 B.R. 306,
26 311 (Bankr. C.D. Cal. 1990) (citations omitted; interpreting
27 section 522(f) and California law to permit avoidance of state
28 tax lien as a judicial lien impairing a debtor's exemptions).

1 In Owen, the Supreme Court considered provisions in
2 Florida's exemption law that exclude from a homestead exemption
3 property that is encumbered by pre-existing judicial liens.
4 Owen, 111 S. Ct. at 1834-35. The Court found that this provision
5 was in conflict with the policy set forth in section 522(f) of
6 the Bankruptcy Code, which permits bankruptcy debtors to avoid
7 judicial liens to the extent the lien impairs an exemption to
8 which a debtor would have been entitled under section 522(b).
9 Owen, 111 S. Ct. at 1838.

10 In 1994, Congress clarified and advanced the holding in
11 Owen, by adopting a mathematical formula under which the courts
12 are to determine when a judicial lien impairs an exemption of the
13 debtor. That formula expressly requires the court to consider
14 "the amount of the exemption that the debtor could claim if there
15 were no liens on the property" in calculating the extent of
16 impairment. 11 U.S.C. § 522(f)(2)(A)(iii) (emphasis added); see
17 140 Cong. Rec. H. 10,770 (Oct. 4, 1994), reprinted in 1 Collier
18 Pamphlet Ed. Bankruptcy Code (2005) § 522, at 426-28 (discussing
19 judicial opinions, including Owen, relevant to the revisions made
20 to section 522(f)).

21 In a case decided after Morgan, the Panel refused to do as
22 T&F has urged the court to do in this case, which would be to
23 look solely to the date judgment creditors recorded abstracts of
24 judgment in order to determine the amount of the debtor's
25 exemption for a homestead. In In re Mayer, 167 B.R. 186 (B.A.P.
26 9th Cir. 1994), judgment creditors objected to a debtor's claim
27 of an "automatic" homestead exemption, on the ground that the
28 debtor did not reside at the property in question as of the date

1 the judgment creditors obtained their judgment liens (the debtor,
2 however, lived there at the time the bankruptcy petition was
3 filed). In the alternative, the creditors argued, as T&F argues
4 here, that the debtor was limited to a smaller homestead
5 exemption amount in effect at the time the judgment liens were
6 created. The bankruptcy court sustained the objections to the
7 debtor's claim of exemption, and also granted the creditors'
8 concurrent motion for relief from stay, to go forward with a
9 forced sale of the homestead under state law.

10 On appeal, the Panel vacated that part of the bankruptcy
11 court's decision that sustained the objection to exemption. The
12 Panel disagreed with the bankruptcy court's determination that
13 the amount of the homestead exemption must be limited to the
14 amount allowed on the date the judicial liens attached. The
15 Panel stated as follows:

16 The [creditors'] judgment lien is not relevant in
17 determining whether [the debtor] is entitled to the
18 homestead exemption listed in his schedules. The
19 filing of the petition constitutes an attempt by the
20 trustee to levy on the property. It is this
21 hypothetical levy the court must focus on[,] in
analyzing [the debtor's] entitlement to a homestead
exemption. The existence of the [creditors'] judgment
lien may impact a trustee's decision to abandon or sell
property of the estate, but it does not affect the
exemption that [the debtor] is entitled to claim.

22 Mayer, 167 B.R. at 189 (citations omitted).

23 This hypothetical levy has been repeatedly sustained in
24 cases applying section 522, including proceedings to avoid liens
25 under section 522(f). In In re Pike, 243 B.R. 66 (B.A.P. 9th
26 Cir. 1999), the Panel applied this principle to determine that a
27 judgment lien created before the time the judgment debtor
28 recorded a homestead declaration nevertheless impaired the

1 debtor's "automatic" homestead exemption as to the home in the
2 debtor's subsequent chapter 7 case. The Panel affirmed the
3 bankruptcy court's avoidance of the judgment lien, observing as
4 follows:

5 [The judgment creditor] places great significance on
6 his status in a voluntary sale context, but such status
7 is irrelevant This is because the filing of a
8 bankruptcy petition is the functional equivalent of a
9 forced or involuntary sale under California law, thus
10 allowing a claiming debtor to have the rights, benefits
11 and protections of the automatic homestead provisions.

12 Pike, 243 B.R. at 70 (citations omitted).

13 Cases like Pike and Mayer are predicated on an understanding
14 that lien avoidance under section 522(f) require the courts to
15 "'disregard some element of reality' and consider, in the
16 abstract, whether the debtor would be entitled to an exemption
17 under state law if the lien did not exist. The object of this
18 test is to determine whether the actual existence of the lien
19 deprives the debtor of potential property rights which would be
20 available absent the lien." In re Hastings, 185 B.R. 811, 814
21 (B.A.P. 9th Cir. 1995), quoting Owen v. Owen, 111 S. Ct. 1833
22 (1991).

23 The analysis in Pike and Mayer is consistent with the
24 express language of section 522(f) of the Bankruptcy Code, under
25 which the court is to look to the amount of the exemption that
26 the debtor could claim if there were no liens on the property.
27 Pike and Mayer thus look to the time the bankruptcy trustee's
28 hypothetical lien comes into play, which is the date of the
29 bankruptcy filing. When determining either the debtor's rights
30 to exemptions or rights to avoid judicial liens, the court

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1 therefore is not to look to the time a particular creditor or
2 creditors may have obtained a pre-petition judicial lien.

3 Because of the express language of section 522(f) of the
4 Bankruptcy Code, and because the determination of a debtor's
5 exemptions in a bankruptcy case is integral to the findings
6 necessary to the avoidance of a lien, this court is persuaded
7 that the language and structure of section 522, and the reasoning
8 that supports the Panel's decisions in Pike, Hastings, and Mayer,
9 dictate that in this case the Debtors are entitled to claim as
10 exempt the \$150,000 stated in their amended C-Schedule, rather
11 than the \$100,000 amount urged by T&F. The court is further
12 persuaded by the fact that in Mayer, the Panel expressly rejected
13 looking to pre-petition judicial liens for a determination of the
14 amount of a debtor's California homestead exemption. Finally,
15 because the Bernhanu case does not involve the application of
16 exemption laws under section 522, the court finds that it does
17 not apply in this case.

18 III. CONCLUSION

19 For the reasons set forth above, the court will overrule the
20 Second Objection. The court will overrule the First as moot, due
21 to the Debtors' August 23, 2005 amended exemption claim. The
22 August 23, 2005 exemption claimed by the Debtors as to the
23 Residence, in the amended amount of \$150,000, will therefore be
24 sustained. The court will issue orders consistent with this
25 memorandum.

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27 Dated: November 15, 2005

/s/
ROBERT S. BARDWIL
United States Bankruptcy Judge