

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Michael S. McManus
Bankruptcy Judge
Sacramento, California

April 29, 2015 at 10:00 a.m.

1. 10-21180-A-13 ROBERT MACBRIDE

CONTINUED EVIDENTIARY HEARING
RE: MOTION FOR CONFIRMATION
THAT DEBTOR HAD CURED MORTGAGE
DEFAULT, MOTION FOR DAMAGES,
MOTION FOR SANCTIONS
5-8-14 [194]

Tentative Ruling: None.

2. 14-30118-A-7 VIRGINIA CHAMBERLAIN
TMP-5
VS. UNIFUND CCR PARTNERS

MOTION TO
AVOID JUDICIAL LIEN O.S.T.
4-10-15 [52]

Final Ruling: The court finds that a hearing will not be helpful to its consideration and resolution of this matter. Accordingly, it is removed from calendar for resolution without oral argument.

The motion will be denied.

The debtor once again asks the court to avoid "the \$195 balance of the" judicial lien of Unifund CCR Partners.

In its March 23, 2015 ruling granting in part the debtor's motion to reconsider the prior dismissal of the debtor's lien avoidance motion as to Unifund's judicial lien, the court ruled as follows:

"Although the debtor is asking the court to reconsider the dismissal "without prejudice" of her motion to avoid the lien of CCR Unifund Partners (Docket 34), this court stated in its March 9, 2015 order: 'The court will not reconsider the dismissal of the prior motion to avoid lien[,] [h]owever, if that motion is served correctly by 5:00 p.m. on March 9, the court will considered [sic] it anew on March 23.' Docket 29.

"Turning to the merits of the lien avoidance motion, a judgment was entered against the debtor in favor of Unifund CCR Partners for the sum of \$35,714.36 on September 2, 2008. The abstract of judgment was recorded with Siskiyou County on September 23, 2008. That lien attached to the debtor's one-half interest in the a residential real property in Fort Jones, California.

"The motion will be granted in part pursuant to 11 U.S.C. § 522(f)(1)(A). The subject real property had an approximate value of \$100,000 as of the petition date. Dockets 17 & 1. The unavoidable liens totaled \$63,610 on that same date, consisting of a first mortgage in favor of Ameristar Financial Services in the amount of \$59,200 and a second mortgage in favor of CA Rural Home Mortgage in the amount of \$4,410. Docket 1, Schedule D.

April 27, 2015 at 10:00 a.m.

"After accounting for the unavoidable liens, the equity in the property totals \$36,390 (\$100,000 minus \$63,610). The debtor's one-half interest in the equity amounts to \$18,195. The debtor claimed an exemption pursuant to Cal. Civ. Proc. Code § 703.140(b)(1) in the amount of \$18,000 in Schedule C. Docket 1, Schedule C.

"The respondent holds a judicial lien created by the recordation of an abstract of judgment in the chain of title of the subject real property. After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is \$195 of equity to support the judicial lien (the debtor's \$18,195 equity in the property minus the debtor's \$18,000 exemption claim). Therefore, the fixing of this judicial lien fully impairs the debtor's exemption of the real property, except for \$195, and its fixing will be avoided subject to 11 U.S.C. § 349(b)(1)(B), except for \$195."

Docket 50.

The court's ruling on the debtor's lien avoidance motion, heard on March 23 in conjunction with the reconsideration motion reads "[t]he motion will be granted in part and denied in part in accordance with the ruling on the debtor's motion to reconsider the prior dismissal of this motion (DCN TMP-4), also being heard on this calendar." Docket 49.

Now, the debtor is seeking to have the remaining \$195 lien avoided. This request is based on the debtor's amendment of Schedule C to increase the pertinent exemption to \$18,195. The Amended Schedule C was filed on March 20, 2015. Docket 45.

There are several problems with the debtor's subject motion. The court already adjudicated her request for avoidance of the entire lien, ruling that there is equity to support \$195 of the lien, thereby leaving \$195 of the lien in tact. Docket 50. The court's prior adjudication - which is now part of the docketed minutes from the March 23 hearing - precludes the court from revisiting the avoidance of the lien. The principles of claim and issue preclusion bar the relitigation of the debtor's motion. The court has adjudicated this motion on the merits already.

The debtor filed the Amended Schedule C on Friday, March 20, increasing the exemption to \$18,195. That was done three days prior to the March 23 hearing on the motion to reconsider. The debtor also filed a supplemental declaration on Sunday, March 22 at 4:16 p.m., the day before the March 23 hearing, advising the court of the increased exemption claim and asking for avoidance of the entire lien. Docket 48. In that declaration, the debtor's counsel also informed the court that he would not be appearing at the March 23 hearing due to a conflict. Id.

However, the amendment of the lien avoidance and reconsideration motions was untimely. The Amended Schedule C and the supplemental declaration were not even docketed as of the morning of March 23, when the court held hearings on the motions. They were docketed on March 23 at 12:37 p.m. and 12:38 p.m., after the March 23 hearings had ended.

No national or local bankruptcy rule authorizes any moving party to supplement a motion by filing pleadings one day or three days prior to the hearing on the motion. On the contrary, Fed. R. Bankr. P. 9006(d) provides: "A written motion, other than one which may be heard ex parte, and notice of any hearing shall be served not later than seven days before the time specified for such

hearing, unless a different period is fixed by these rules or by order of the court." Local Bankruptcy Rule 9014-1(f)(2) requires that all motions, including supporting evidence, be filed and served at least 14 days prior to the scheduled hearing.

Neither did the court authorize the debtor to supplement her motions one day or three days prior to the hearing. The debtor's lien avoidance and reconsideration motions were set for hearing on March 23 pursuant to an order shortening time. Docket 29. The court required that the motions be served "by 5:00 p.m. on March 9," for the court to consider them on March 23. Docket 29 at 2. Thus, the entirety of the motions should have been filed and served as ordered by the court, on March 9 and not later.

Additionally, the debtor never served the March 22 supplemental declaration in support of the lien avoidance motion heard on March 23. There is no proof of service on the docket indicating that the supplemental declaration was served on anyone, much less the respondent.

If the debtor did not wish the court to leave \$195 of the lien intact, the debtor's counsel should have appeared at the March 23 hearing to voluntarily dismiss the motions or to continue the hearings. The court allows telephonic appearances on law and motion hearings. Because no one appeared, the court adopted its tentative rulings on both motions, leaving \$195 of the lien intact. Id.

By failing to follow the rules, the debtor's counsel has created a procedural nightmare of a simple lien avoidance motion. To make matters worse, the debtor's counsel failed to appear at the hearing on a motion even though he did not agree with the court's proposed adjudication that was made available several days prior to the hearing date. The court's proposed rulings for the March 23 hearings were posted on the court's website on March 19.

There is no basis for reconsideration of the court's March 23 ruling on the lien avoidance motion. This motion will be denied.

As a final note, even if the court were to ignore the foregoing issues, the Amended Schedule C, based upon which the debtor is relying to seek avoidance of the remaining \$195 lien of Unifund, was not served on all creditors. It was served only on the chapter 7 trustee, United States Trustee and the respondent.

Hence, the time for objections to the new \$18,195 exemption claim has not even started to run. "[A] party in interest may file an objection to the list of property claimed as exempt within 30 days after the meeting of creditors held under §341(a) is concluded or within 30 days after any amendment to the list or supplemental schedules is filed, whichever is later." Fed. R. Bankr. P. 4003(b). This is further basis for denying this motion.