

APR 30 2007

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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:

PATRICIA IGLESIAS,) BAP No. CC-06-1316-BKN
)
) Bk. No. RS 05-25245-DN
 Debtor.)
)

PATRICIA IGLESIAS,)
)
 Appellant,)

v.)
)
 OSI COLLECTION SERVICES, INC.,)
)
 Appellee.)

MEMORANDUM¹

Argued and Submitted on March 21, 2007 at
Pasadena, California

Filed - April 30, 2007

Appeal from the United States Bankruptcy Court
for the Central District of California

Honorable David N. Naugle, Bankruptcy Judge, Presiding

Before: BRANDT, KLEIN and NIELSEN,² Bankruptcy Judges.

¹ This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

² Hon. George B. Nielsen, Jr., United States Bankruptcy Judge for the District of Arizona, sitting by designation.

1 Chapter 7³ debtor moved to avoid a judicial lien on a residence
2 which she allegedly held with her son as joint tenants. Debtor argued
3 the judicial lien only attached to her one-half interest, and should be
4 entirely avoided as it impaired her claim of homestead exemption.

5 After a contested hearing, the bankruptcy court partially avoided
6 a creditor's judicial lien. Debtor appealed, seeking reversal and
7 avoidance of the entire lien, arguing that the bankruptcy court
8 miscalculated under § 522(f)(1)(A).

9 We VACATE and REMAND.
10

11 I. FACTS

12 In 2004, OSI Collection Services, Inc. ("OSI") brought a collection
13 action in state court against Patricia Iglesias ("Iglesias") and
14 Konnacomm, a business of which Iglesias was managing shareholder. The
15 briefs do not detail the nature of the action, alluding only to an
16 advertising contract, but the particulars are not relevant to this
17 appeal.

18 Just prior to commencement of OSI's action, in late April 2004,
19 Iglesias sold her home in Escondido, California, which she owned in fee
20 simple. She later acquired an interest in residential property in
21 Temecula, Riverside County, California (the "Property"), which was
22 purchased in early May 2004: initially, only Cory Iglesias ("Cory"),
23

24 ³ Absent contrary indication, all "Code," chapter and section
25 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 prior to
26 its amendment by the Bankruptcy Abuse Prevention and Consumer
27 Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23, as the case from
28 which the adversary proceeding and these appeals arise was filed
before its effective date (generally 17 October 2005). All "Rule"
references are to the Federal Rules of Bankruptcy Procedure, all
"FRCP" references are to the Federal Rules of Civil Procedure, and
"CCP" references to the California Code of Civil Procedure.

1 debtor's son, held title to the Property, even though Iglesias
2 apparently used the proceeds of sale of her Escondido property as the
3 down payment. The words "Patricia Iglesias and" were scratched out on
4 the Grant Deed for the Property, leaving only Cory on title. Iglesias
5 explained that the reason title was taken in Cory's name was because she
6 "did not qualify for a home loan due to the OSI judgment against me."⁴
7 Declaration of Patricia Iglesias in Reply to Opposition . . . , 6 March
8 2006. However, on 23 July 2004, Cory granted Iglesias a one-half
9 interest in the Property, so that Cory and Iglesias purportedly held
10 title as joint tenants thereafter.

11 Meanwhile, Iglesias filed her first chapter 7 petition on 21 May
12 2004, which stayed the OSI trial in state court. One month post-
13 petition, that case was dismissed without prejudice because of Iglesias'
14 failure to file necessary documents.

15 Thereafter, OSI's state court litigation proceeded, and on
16 26 August 2004, the state court entered judgment in favor of OSI against
17 Iglesias (and Konnacomm) for \$192,969.23 (the "Judgment") (not in the
18 excerpts of record). Approximately eleven months later, on 25 July
19 2005, OSI recorded the Judgment abstract in Riverside County.

20 Iglesias filed the subject chapter 7 petition on 16 October 2005.
21 In schedule A, she listed her one-half interest in the Property (jointly
22 held with Cory); she valued the entire fee at \$420,000, and her interest
23 at \$210,000. The Property was encumbered by a \$300,000 mortgage (the
24 underlying loan documents are not in the excerpts of record but the
25 encumbrance is undisputed. There was no objection to Iglesias' \$50,000
26

27
28 ⁴ We note that the Grant Deed to the Property was recorded on
3 May 2004, which predates entry of the Judgment on 26 August 2004.

1 claim of a homestead exemption under CCP § 704.730(a)(1). Iglesias
2 listed OSI's claim of \$233,199 as "disputed and unsecured."

3 On 31 January 2006, Iglesias filed a motion under § 522(f)(1)(A)
4 to avoid OSI's judicial lien. In support, she filed her own declaration
5 and that of a real estate agent, contending that the Property was
6 actually worth \$400,000, less than the scheduled value, due to the need
7 for repair. She did not file an amended schedule A. OSI submitted no
8 evidence on the value of the Property.

9 Iglesias asserted that OSI's judicial lien could only attach to her
10 one-half interest in the Property, and that deducting her \$50,000
11 homestead exemption and the mortgage, the judicial lien was entirely
12 avoidable. OSI's response raised two issues: characterization of
13 Iglesias' ownership interest in the Property, and the proper calculation
14 of equity under § 522(f)(2)(A) where Property is held in joint tenancy.
15 OSI argued that Iglesias was the true owner of the entire fee, despite
16 the Grant Deed. Second, even if Iglesias were a joint tenant, based on
17 In re Nielsen, 197 B.R. 665 (9th Cir. BAP 1996), OSI contended that the
18 formula should be:

| | | |
|----|----------------------------|------------------|
| 19 | Full Value of the Property | \$420,000 |
| 20 | 1st mortgage | [295,500] |
| 21 | Homestead exemption | <u>[50,000]</u> |
| 22 | Remaining equity | \$ 74,500 |

23 After a brief contested (but non-evidentiary) hearing on 14 March
24 2006, the bankruptcy court acknowledged a split of authority, but
25 followed the Nielsen line of authority and adopted OSI's calculation.
26 Without explanation, the bankruptcy court implicitly found that Iglesias
27 owned the entire Property and that its value was \$420,000, and granted
28 the motion to avoid the lien up to \$118,196 (the excess over \$74,500).

1 Order Avoiding Lien, 25 August 2006. Iglesias timely appealed. Neither
2 Cory nor the chapter 7 trustee are parties to this appeal.

3 4 **II. JURISDICTION**

5 The bankruptcy court had jurisdiction via 28 U.S.C. § 1334(b) and
6 § 157(b) (1) and (2) (A), (B) and (K), and we do via 28 U.S.C. § 158(a) (1)
7 and (c).

8 9 **III. ISSUE**

10 Whether there are sufficient findings of facts to permit review.

11 12 **IV. STANDARDS OF REVIEW**

13 A. A factual finding is clearly erroneous if the appellate court,
14 after reviewing the record, has a firm and definite conviction that a
15 mistake has been committed. Anderson v. Bessemer City, 470 U.S. 564,
16 573 (1985).

17 B. Under Rule 7052, findings must be:

18 sufficiently explicit to give the appellate court a clear
19 understanding of the basis of the trial court's decision, and
20 to enable it to determine the ground on which the trial court
21 reached its decision. Appropriate findings not only "compel
22 the bankruptcy judge to focus on the appropriate criteria,"
but also facilitate "focused" and "efficient" review for
determining if the proper factors were considered and
independent judgment exercised by the court.

23 In re Hotel Hollywood, 95 B.R. 130, 134 (9th Cir. BAP 1988) (citations
24 omitted).

25 26 **V. DISCUSSION**

27 The underlying issues presented to us are the Property's value and
28 the lien avoidance calculation under § 522(f) (2) (A), which states:

1 For the purposes of this subsection, a lien shall be
2 considered to impair an exemption to the extent that the sum
of--

- 3 (i) the lien;
- 4 (ii) all other liens on the property; and
- 5 (iii) the amount of the exemption that the debtor could
claim if there were no liens on the property

6 exceeds the value that the debtor's interest in the property
would have in the absence of any liens.

7 (emphasis added). The purpose of lien avoidance is to protect the
8 debtor's exemptions, and lien avoidance rights are determined as of the
9 petition date. In re Goswami, 304 B.R. 386, 392 (9th Cir. 2003).

10 To prevail on a motion to avoid a judicial lien, the debtor has the
11 burden of proving that (1) she has an interest in the homestead
12 property; (2) she is entitled to a homestead exemption; (3) the asserted
13 lien impairs that exemption; and (4) the lien is a judicial lien. In re
14 DeCarolis, 259 B.R. 467, 471 (1st Cir. BAP 2001). Lien avoidance is a
15 contested matter. Rule 4003(d); See In re Nunez, 196 B.R. 150, 158 (9th
16 Cir. BAP 1996).

17 The parties do not dispute that the judicial lien is potentially
18 avoidable, and there is no objection to the homestead exemption. The
19 judicial lien attaches even if Iglesias' interest is equitable:

20 [a] judgment lien on real property attaches to all interests
21 in real property in the county where the lien is created
22 (whether present or future, vested or contingent, legal or
equitable) that are subject to enforcement of the money
judgment against the judgment debtor

23 CCP § 697.340(a).

24 This leaves only the first (interest) and third (impairment) lien
25 avoidance elements at issue.

26 Determination of an interest in property generally requires an
27 adversary proceeding under Rule 7001(2) ("proceeding to determine the
28 validity, priority, or extent of a lien or other interest in property").

1 See also In re Loloe, 241 B.R. 655, 660 (9th Cir. BAP 1999) (motion
2 procedure cannot be used to circumvent the requirement of an adversary
3 proceeding).

4 It is not improper to determine the debtor's interest in the exempt
5 property in determining a lien avoidance motion. But as a Rule 9014
6 contested matter, the requirements of Rule 7052 (incorporating FRCP 52)
7 apply, requiring findings on disputed issues of material fact. Rule
8 9014(c); In re Harris, 279 B.R. 254, 260 (9th Cir. BAP 2002); Hotel
9 Hollywood, 95 B.R. at 133-34. See In re Cox, 349 B.R. 4 (Bankr. E.D.
10 Cal. 2006); In re Koopal, 226 B.R. 888 (Bankr. D. Idaho 1998). And Rule
11 9014(d) requires that "testimony of witnesses with respect to disputed
12 material factual issues shall be taken in the same manner as testimony
13 in an adversary proceeding."

14
15 1. Interest?

16 There was conflicting evidence on the nature of Iglesias' interest
17 (under California law) in the Property. Iglesias took the position that
18 the deed taken in joint tenancy established a prima facie case of joint
19 tenancy, and that OSI, as the party challenging the presumption, had the
20 burden of producing evidence to overcome that presumption. Arsenian v.
21 Meketarian, 138 Cal. App. 2d 627, 631, 292 P.2d 293, 295 (1956).
22 However, OSI arguably raised sufficient evidence to rebut the
23 presumption: Iglesias made the entire down payment and her name on the
24 deed was scratched out. The record is unclear as to who actually made
25 the payments on the deed of trust: debtor's declaration stated that she
26 and Cory each paid one half of the mortgage payment, but OSI's counsel
27 asserted that debtor testified otherwise at the § 341 meeting of
28 creditors, saying that "she has paid most of the payments on the trust

1 deed." Dec. Of Rentto, February 2006, paragraph j. The transcript of
2 the meeting is not in the excerpts of record.

3 OSI misstates the bankruptcy court's ruling, asserting that it
4 found Iglesias to be the "equitable owner" of the entire fee, and goes
5 so far as to argue that this "finding" moots any need to discuss the
6 case law. The hearing transcript reflects no such finding. Rather, the
7 bankruptcy court queried whether anyone had brought a fraudulent
8 conveyance or attempt to hinder, delay, and defraud based on "parking
9 this money. . . ."

10 As there was no evidentiary hearing, and the bankruptcy court made
11 no findings of fact to support its decision, we cannot determine how it
12 reached its conclusion.

13 14 2. Value?

15 Iglesias indirectly argues that the bankruptcy court erred by
16 failing to consider her evidence of value, and lacked a sound basis for
17 its implied finding. The lien avoidance calculation requires a finding
18 of "value," which is defined under § 522(a)(2) to mean "fair market
19 value as of the date of filing the petition[.]" Once the moving party
20 establishes value, the burden shifts to the opponent to prove that the
21 property has a different value. OSI submitted no evidence on value but
22 simply used the \$420,000 figure from debtor's schedule A in its
23 calculation.

24 The bankruptcy court evidently adopted the scheduled property value
25 of \$420,000 in the § 522(f) calculation. It thus rejected the debtor's
26 declaration, admissible under Federal Rule of Evidence 701, and that of
27 her real estate agent. The court did not explicitly determine the
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1 Property's value. It did so without an evidentiary hearing on a
2 disputed and material factual issue, and without express findings.

3
4 **VI. CONCLUSION**

5 Without findings on these disputed factual issues, we cannot
6 determine how the bankruptcy court reached its conclusion, nor its basis
7 for doing so without the evidentiary hearing mandated by Rule 9014.

8 Accordingly, we VACATE the order and REMAND.
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