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U.S. BKCY. APP. PANEL OF THE NINTH CIRCUIT UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:			١	ח זים	Νο	CC	-06-1	Э1 <i>С</i> т	ד א ד
PATRICIA IGLES	IAS,		<i>)</i>)	BAP	NO.	CC-	-00-1	310-1	NVC
	Debtor.)))	Bk.	No.	RS	05-2	5245-	-DN
PATRICIA IGLES	IAS,))						
	Appellant	,)						
V.))	мЕ	мо	R A	A N D	U M¹	
OSI COLLECTION	SERVICES,	INC.,)						
	Appellee.)))						
	Argued and	Submi	tted	on N	Marcl	າ 21	20	07 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.

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.

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

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

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

We VACATE and REMAND.

I. FACTS

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

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

Absent contrary indication, all "Code," chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 prior to its amendment by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23, as the case from 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.

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

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

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

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

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.

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

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

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

Full Value of the Property	\$420,000
1st mortgage	[295,500]
Homestead exemption	[50,000]
Remaining equity	\$ 74 , 500

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

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

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omitted).

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the lien avoidance calculation under § 522(f)(2)(A), which states:

II. JURISDICTION

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

III. **ISSUE**

Whether there are sufficient findings of facts to permit review.

STANDARDS OF REVIEW IV.

- A factual finding is clearly erroneous if the appellate court, after reviewing the record, has a firm and definite conviction that a mistake has been committed. Anderson v. Bessemer City, 470 U.S. 564, 573 (1985).
- Under Rule 7052, findings must be:

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

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

The underlying issues presented to us are the Property's value and

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

(I) the lien;

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

exceeds the value that the <u>debtor's interest in the property</u> would have in the absence of any liens.

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

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

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

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

CCP § 697.340(a).

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

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

<u>See also</u> <u>In re Loloee</u>, 241 B.R. 655, 660 (9th Cir. BAP 1999) (motion procedure cannot be used to circumvent the requirement of an adversary proceeding).

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

1. <u>Interest?</u>

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

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

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

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

2. Value?

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

The bankruptcy court evidently adopted the scheduled property value of \$420,000 in the § 522(f) calculation. It thus rejected the debtor's declaration, admissible under Federal Rule of Evidence 701, and that of her real estate agent. The court did not explicitly determine the

Property's value. It did so without an evidentiary hearing on a disputed and material factual issue, and without express findings.

VI. CONCLUSION

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

Accordingly, we VACATE the order and REMAND.