

APR 02 2007

**HAROLD S. MARENUS, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT**

NOT FOR PUBLICATION

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT**

6	In re:)	BAP No. CC-06-1299-DMoPa
)	
7	WILLIAM E. HANSON;)	Bk. No. SA 05-16710-TA
	SHARON D. HANSON,)	
8)	
	Debtors.)	
9)	
	_____)	
10	WILLIAM E. HANSON;)	
	SHARON D. HANSON,)	
11)	
	Appellants,)	
12)	
	v.)	MEMORANDUM¹
13)	
	DAVID DOBBS; AMRANE COHEN,)	
14	Trustee,)	
)	
15	Appellees.)	
16	_____)	

Argued and Submitted on March 22, 2007
at Pasadena, California

Filed - April 2, 2007

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

Honorable Theodor C. Albert, Bankruptcy Judge, Presiding

Before: DUNN, MONTALI and PAPPAS, Bankruptcy Judges.

¹This 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.

1 Debtors William E. and Sharon D. Hanson (the "Hansons")
2 appeal the bankruptcy court's Order Granting Motion for Order
3 Directing Trustee to Pay Over to David Dobbs the Money Due Him
4 (the "Disbursement Order"), directing the chapter 13 trustee to
5 pay to judgment lien creditor David Dobbs ("Dobbs") \$252,008.56
6 from the proceeds from sale of the Hansons' residence. We
7 AFFIRM.

8
9 **I. FACTS**

10 The facts are not in dispute. Dobbs obtained an Alaska
11 judgment for fraud plus punitive damages in the amount of
12 \$54,973.95 against the Hansons in 1979. Dobbs obtained a
13 "sister-state judgment" (the "Judgment") for the same amount in
14 California on or about February 29, 1980. Dobbs renewed the
15 Judgment in 1990 and 2000, and it became a lien ("Judgment Lien")
16 on the Hansons' residence property in Irvine, California (the
17 "Residence"). The Hansons never filed a declaration of homestead
18 on the Residence.

19 Apparently, the Hansons experienced financial difficulties,
20 because they stopped making mortgage payments on the Residence in
21 December 2004. The Hansons filed a chapter 13² bankruptcy
22 petition (the "First Chapter 13 Case") on May 10, 2005, in order
23

24 ²Unless otherwise indicated, all chapter, section and rule
25 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and
26 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as
27 enacted and promulgated prior to the effective date of most of
28 the provisions of the Bankruptcy Abuse Prevention and Consumer
Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23 ("BAPCPA"),
because the case from which this appeal arises was filed before
the BAPCPA effective date (generally October 17, 2005).

1 to stop a foreclosure sale of the Residence. The First Chapter
2 13 Case was dismissed on August 23, 2005, based on the inability
3 of the Hansons to propose a feasible chapter 13 plan.

4 The Hansons filed a chapter 7 bankruptcy petition on
5 September 15, 2005 (the "Second Bankruptcy Case"). Over Dobbs'
6 objections, the Hansons were allowed to convert the Second
7 Bankruptcy Case to chapter 13 on March 8, 2006.

8 On March 24, 2006, the Hansons filed a motion to avoid the
9 Judgment Lien pursuant to § 522(f) (the "Lien Avoidance Motion").
10 Dobbs opposed the Lien Avoidance Motion. Before Dobbs'
11 opposition to the Lien Avoidance Motion could be heard, the
12 Hansons filed a motion to authorize a sale of the Residence free
13 and clear of liens, pursuant to § 363(f) (the "Sale Motion").
14 The Sale Motion was heard and granted on May 23, 2006. The order
15 approving the Sale Motion was entered on June 14, 2006, providing
16 that 1) undisputed liens and encumbrances and costs of sale would
17 be paid and 2) remaining sale proceeds would be held by the
18 chapter 13 trustee pending resolution of any outstanding lien
19 disputes. At Dobbs' request, the Sale Order provided that "[a]ll
20 remaining claims of lien shall attach to proceeds." The Sale
21 Order was not appealed.

22 The Lien Avoidance Motion was heard on June 20, 2006, and
23 the bankruptcy court entered its Order Re Debtors' Motion to
24 Avoid Lien of David Dobbs Under 11 U.S.C. § 522(f) (the "§ 522(f)
25 Order") on July 7, 2006. In the § 522(f) Order, the bankruptcy
26 court determined 1) that the appropriate date to use in
27 establishing the value of the Residence was the filing date of
28 the Second Bankruptcy Case, 2) that the value of the Residence on

1 policy objectives behind protecting the homestead exemption, we
2 are bound by the provisions of the Bankruptcy Code and are not
3 free to follow policy preferences beyond the limits of statutory
4 authority. Norwest Bank Worthington v. Ahlers, 485 U.S. 197,
5 206, 108 S.Ct. 963, 969, 99 L.Ed.2d 169 (1988) (“[W]hatever
6 equitable powers remain in the bankruptcy courts must and can
7 only be exercised within the confines of the Bankruptcy Code.”);
8 In re Plaza de Diego Shopping Ctr., Inc., 911 F.2d 820, 830-31
9 (1st Cir. 1990) (“[T]he bankruptcy court’s equitable discretion
10 is limited and cannot be used in a manner inconsistent with the
11 commands of the Bankruptcy Code.”).

12 The avoidance of judicial liens in bankruptcy is governed by
13 federal law, specifically, the provisions of § 522(f). Owen v.
14 Owen, 500 U.S. 305, 309-14 (1991). Section 522(f) provides in
15 relevant part as follows:

- 16 (1) Notwithstanding any waiver of exemptions . . . ,
17 the debtor may avoid the fixing of a lien on an
18 interest of the debtor in property to the extent that
19 such lien impairs an exemption to which the debtor
20 would have been entitled under subsection (b) of this
21 section, if such lien is--
22 (A) a judicial lien. . . .
23 (2)(A) For purposes of this subsection, a lien shall
24 be considered to impair an exemption to the extent that
25 the sum of--
26 (i) the lien;
27 (ii) all other liens on the property; and
28 (iii) the amount of the exemption that the debtor
could claim if there were no liens on the
property;
exceeds the value that the debtor’s interest in the
property would have in the absence of any liens. . . .

As noted above, the bankruptcy court decided the Lien
Avoidance Motion and held that the Judgment Lien was avoided to
the extent that it exceeded \$252,008.56, and that decision was

1 not appealed.⁴ However, the Hansons argue that the bankruptcy
2 court's lien avoidance decision was based on a hypothetical lien
3 foreclosure sale on the petition date, and that decision must be
4 revisited in light of the net proceeds realized from the actual
5 sale that was approved postpetition pursuant to § 363(f).

6 Before the bankruptcy court, the Hansons argued that three
7 amounts needed to be deducted from the unavoids portion of the
8 Judicial Lien in order to preserve the full amount of the
9 Hansons' homestead exemption: 1) postpetition mortgage payments
10 that the Hansons did not make; 2) postpetition depreciation in
11 the value of the Residence; and 3) costs of sale. In this
12 appeal, the Hansons have abandoned their argument that the
13 unavoids portion of the Judgment Lien should be surcharged for
14 mortgage payments that the Hansons failed to make postpetition.
15 However, they continue to pursue their arguments that
16 postpetition depreciation in the value of the Residence and costs
17 of a voluntary sale of the Residence should be borne by Dobbs and
18 charged against the unavoids portion of the Judgment Lien.

19 In the § 522(f) Order, the bankruptcy court specifically
20 held that the appropriate date to use in determining the value of
21 the Residence for lien avoidance purposes was the petition date
22 in the Second Bankruptcy Case. That holding was not appealed and
23 is consistent with prior decisions of this court. "It is well-
24 established that the nature and extent of exemptions is
25 determined as of the date that the bankruptcy petition is filed."

26
27 ⁴Thus, as of the petition date, Dobbs had a judicial
28 determination that he held an unavoidable judgment lien to the
extent of \$252,008.56.

1 Culver, LLC v. Chiu (In re Chiu), 266 B.R. 743, 751 (9th Cir. BAP
2 2001), citing White v. Stump, 266 U.S. 310, 313, 45 S.Ct. 103, 69
3 L.Ed. 301 (1924); In re Kim, 257 B.R. 680, 685 (9th Cir. BAP
4 2000); In re Wolf, 248 B.R. 365, 367-68 (9th Cir. BAP 2000); and
5 In re Rowe, 236 B.R. 11, 14 (9th Cir. BAP 1999).

6 In the § 522(f) Order, the bankruptcy court also determined
7 the value of the Residence to be \$815,000, and that determination
8 was not appealed. The Hansons complain that since the § 363(f)
9 sale price was \$800,000, they stand to lose the \$15,000 decrease
10 in value, as a deduction from their homestead exemption, unless
11 that amount is surcharged against the Judgment Lien.⁵

12 This issue raises a cautionary note with respect to which
13 party bears the risk of a decrease in the value of partially
14 exempt property postpetition in various circumstances. In a
15 period of generally increasing real estate prices, in cases where
16 the estate's interest in debtors' residential properties has been
17 abandoned, debtors often have reaped the benefits of appreciating
18 homestead properties. See, e.g., Chiu, 266 B.R. at 746 n. 2 and
19 751-52. Where the residential property is not abandoned,
20 subsequent appreciation benefits the estate. See Hyman v.
21 Plotkin (In re Hyman), 967 F.2d 1316 (9th Cir. 1992). However,

22 _____
23 ⁵Dobbs argues that the claimed \$15,000 decrease in value is
24 in effect illusory because in the Addendum to the sale agreement
25 for the Residence, the Hansons obtained the right to remain in
26 the Residence for a period of six months following the sale
27 without having to pay any rent. The record reflects that in
28 bargaining between the Hansons and the buyers of the Residence,
the buyers offered to purchase the Residence for \$820,000.
Whether or not there actually was a decrease in value from the
petition date to the closing of the Hansons' voluntary sale of
the Residence is not material to our decision.

1 the market forces influencing the values of real property do not
2 operate as a one-way upward ratchet. Real estate prices are not
3 exempt from the reality that what goes up may come down, and our
4 decisions make clear that the operations of the market
5 postpetition do not disturb determinations as to lien avoidance
6 and exemption rights as of the petition date. See, e.g., Harris
7 v. Herman (In re Herman), 120 B.R. 127, 130 (9th Cir. BAP 1990):

8 [A]ny post-petition disposition of the property or
9 post-petition change in the identity of the property
10 into proceeds has no impact upon the exemption
11 analysis. (citations omitted) . . . The limitation
12 upon the exemption of any proceeds from a subsequent
13 sale of the residence is not relevant.⁶

14 If the value of the Residence fell postpetition, any such
15 loss of value was for the account of the Hansons in the event of
16 a voluntary sale, as the unavowed portion of the Judgment Lien
17 was determined as of the petition date in the Second Bankruptcy
18 Case. When the Hansons sought approval of their proposed sale of
19 the Residence pursuant to § 363(f) postpetition, the unavowed
20 portion of the Judgment Lien would have to be paid from the sale
21 proceeds. Section 522(c)(2)(A)(i) provides:

22 Unless the case is dismissed, property exempted under
23 this section is not liable during or after the case for
24 any debt of the debtor that arose . . . before the

25

26 ⁶In Hyman, the Ninth Circuit analogized a postpetition
27 forced sale of the debtors' residence by the chapter 7 trustee to
28 an execution sale by a judgment lienholder and held that the
debtors were entitled to the full amount of their homestead
exemption under state law and no more. Hyman, 967 F.2d at 1321.
Hyman did not address the situation before us, where the Hansons
moved for approval of a voluntary sale of the Residence and also
moved for avoidance of a judicial lien pursuant to § 522(f),
securing final approval on both before the Disbursement Motion
was filed.

1 commencement of the case except -

2 (2) a debt secured by a lien that is -
3 (A)(i) not avoided under subsection (f) . . . of
4 this section. . . .

5 See, e.g., Katz v. Pike (In re Pike), 243 B.R. 66, 70 (9th Cir.
6 BAP 1999) (“[I]n a voluntary sale, Katz’s lien either would have
7 to be satisfied by the proceeds or it would remain on the
8 property.”). The bankruptcy court did not err in declining to
9 surcharge the unavoids portion of the Judgment Lien with any
10 postpetition decrease in value of the Residence fixed through the
11 Hansons’ voluntary sale.

12 The Hansons further argue that the unavoids portion of the
13 Judgment Lien should be surcharged with the costs of sale,
14 relying heavily on our decision in Kenpak Converters, Inc. v.
15 Patterson (In re Patterson), 139 B.R. 229 (9th Cir. BAP 1992).
16 In Patterson, the debtors’ home was sold free and clear of liens
17 pursuant to § 363(f). “After undisputed senior encumbrances were
18 paid, a balance of \$122,000 remained.” Id. at 230. The Hansons
19 assume that the “balance of \$122,000” referred to means net sale
20 proceeds, and from that assumption, they conclude that the
21 bankruptcy court and this Panel in Patterson “were confronted
22 with the question of how to divide the net sales proceeds between
23 debtors’ homestead, a judicial lien, and a subordinate consensual
24 lien.” Appellants’ Brief, p. 10 (emphasis in original).

25 Under the specific fact pattern in Patterson, this Panel
26 reversed the bankruptcy court and held that the senior judgment
27 lien of Kenpak Converters was avoided to the extent that it
28 exceeded \$122,000 minus the amount of the debtors’ \$45,000
homestead exemption, which was committed to payment of the

1 subordinate consensual lien of Rolling Hills. Patterson, 139
2 B.R. at 231-32. Nothing in the Patterson decision suggests that
3 any issue was raised before this Panel as to the appropriateness
4 or necessity of deducting costs of sale in considering judicial
5 lien avoidance. As a consequence, it provides no binding
6 precedent as to the treatment of costs of sale in the lien
7 avoidance context. Ball v. Payco-Gen. Am. Credits, Inc. (In re
8 Ball), 185 B.R. 595 (9th Cir. BAP 1995).

9 The formula for judicial lien avoidance under § 522(f) is
10 set forth in § 522(f)(2)(A), which totals all liens on the
11 subject property and the amount a debtor could claim as a
12 homestead exemption, and allows liens to be avoided to the extent
13 that the total as so computed exceeds the value the debtor's
14 interest in the property would have if there were no such liens.
15 The statutory formula makes no mention and provides no deduction
16 for costs of sale.⁷ As noted at the outset of this discussion,
17 however much we sympathize with a policy objective, we are not
18 authorized to implement any such policy objective in a manner
19 that is not consistent with the provisions of the Bankruptcy
20 Code.

21 Section 363(f) clearly does not allow for further lien
22 avoidance after a final lien avoidance determination has been
23
24

25
26 ⁷The Ninth Circuit analyzed the California homestead
27 exemption statutes in Hyman and found that costs of sale did not
28 have to be accounted for in a forced sale under California law.
See Hyman, 967 F.2d at 1320 ("There is no statutory requirement
that the sale price also account for selling costs. . . .").

1 made pursuant to § 522(f).⁸ A sale of property free and clear of
2 liens can be approved pursuant to § 363(f) only if at least one
3 of five conditions has been satisfied:

- 4 (1) applicable nonbankruptcy law permits sale of such
property free and clear of such [lien] interest;
- 5 (2) such entity [the lienholder] consents;
- 6 (3) such interest is a lien and the price at which such
property is to be sold is greater than the aggregate
value of all liens on such property;
- 7 (4) such interest is in bona fide dispute; or
- 8 (5) such entity could be compelled, in a legal or
equitable proceeding, to accept a money satisfaction of
such [lien] interest.

9
10 Under applicable nonbankruptcy law in California, a sale of
11 real property can be closed free of judicial liens only if such
12 liens are paid, or the judicial lien creditor consents to a sale
13 that does not pay its lien in full. See, e.g., CAL. CODE CIV.

14

⁸In their Reply Brief and at oral argument, the Hansons
15 asserted that in proposing the sale of their residence pursuant
16 to § 363(f), they were exercising a right or power of a trustee
under § 1303. As a result, the Hansons argue that the sale
17 should be viewed as involuntary and analogized to an execution
18 sale, requiring that their homestead exemption be paid in full
before claims of judgment lien creditors are paid, consistent
19 with California law. See CAL. CODE CIV. PROC. § 704.850. This
argument was not raised by the Hansons either before the
20 bankruptcy court or in their opening Appellants' Brief.
Generally, an appellate court will not "consider matters on
21 appeal that are not specifically and distinctly argued in
appellant's opening brief." U.S. v. Ullah, 976 F.2d 509, 514
22 (9th Cir. 1992), quoting Miller v. Fairchild Indus., Inc., 797
23 F.2d 727, 738 (9th Cir. 1986). However, even if we exercised our
discretion to consider the Hansons' argument, they have not
24 provided any explanation as to what difference it makes in this
case whether they moved for approval of the Residence sale in
25 their role as debtors or in the right of a trustee. They still
26 proposed a voluntary sale, as they admitted before the bankruptcy
court, and the sale had to satisfy the requirements of § 363(f),
27 as discussed infra. While their argument is creative, it
ultimately is powerless to overcome the fact that the amount of
28 the Judgment Lien that could be avoided was finally determined in
the § 522(f) Order.

1 PROC. § 704.800 (Thomson/West 2007).⁹ Dobbs has not consented to
2 the sale of the Residence without receiving payment in full of
3 the unavaoided amount of the Judgment Lien. The remaining
4 proceeds from sale of the Residence are not sufficient to pay
5 both the unavaoided Judgment Lien and the Hansons' homestead claim
6 in full. Since the § 522(f) Order finally determined the
7 unavaoided amount of the Judgment Lien, that amount is not in bona
8 fide dispute. Dobbs could be compelled to accept a money
9 satisfaction of the Judgment Lien, but not for less than the
10 unavaoided amount of the Judgment Lien. See CAL. CODE

11
12 ⁹CAL. CODE CIV. PROC. § 704.800 is titled "Insufficient sale
13 bids" and provides:

14 (a) If no bid is received at a sale of a homestead
15 pursuant to a court order for sale that exceeds the
16 amount of the homestead exemption plus any additional
17 amount necessary to satisfy all liens and encumbrances
18 on the property, including but not limited to any
19 attachment or judgment lien, the homestead shall not be
20 sold and shall be released and is not thereafter
21 subject to a court order for sale upon subsequent
22 application by the same judgment creditor for a period
23 of one year.

24 (b) If no bid is received at the sale of a homestead
25 pursuant to a court order for sale that is 90 percent
26 or more of the fair market value determined pursuant to
27 Section 704.780, the homestead shall not be sold unless
28 the court, upon motion of the judgment creditor, does
29 one of the following:

(1) Grants permission to accept the highest bid that
exceeds the amount of the minimum bid required by
subdivision (a).

(2) Makes a new order for the sale of the homestead.

Under this statute, the minimum bid must exceed the sum of
amounts owed on senior liens and the amount of the judgment
debtor's homestead exemption. See Bratcher v. Buckner, 109 Cal.
Rptr. 2d 534, 542 (2001); Rourke v. Troy, 21 Cal. Rptr. 2d 660
(1993).

1 Civ. Proc. § 704.800(a) (Thomson/West 2007). Accordingly, the
2 requirements of § 363(f) are not met unless the unavaoided
3 Judgment Lien is paid in full, without deduction for costs of
4 sale.

5 The Hansons argue from the legislative history of the 1994
6 amendments to § 522(f) in support of their position that it is
7 not appropriate for the bankruptcy court to order payment in full
8 of the unavaoided amount of the Judgment Lien at the expense of
9 their homestead exemption:

10 The second situation is where the judicial lien the
11 debtor seeks to avoid is partially secured. Again, in
12 an example where the debtor has a \$10,000 homestead
13 exemption, a \$50,000 house and a \$40,000 first
14 mortgage, most commentators and courts would have said
15 that a judicial lien of \$20,000 could be avoided in its
16 entirety. Otherwise, the creditor would retain all or
17 part of the lien and be able to threaten postbankruptcy
18 execution against the debtor's interest which, at the
19 time of the bankruptcy is totally exempt. However, a
20 few courts, including the Ninth Circuit in In re
21 Chabot, 992 F.2d 891 (9th Cir. 1992), held that the
22 debtor could only avoid \$10,000 of the judicial lien in
23 this situation, leaving the creditor after bankruptcy
24 with a \$10,000 lien attached to the debtor's exempt
25 interest in property. This in turn will result, at a
26 minimum, in any equity created by mortgage payments
27 from the debtor's postpetition income--income which the
28 fresh start is supposed to protect--going to the
benefit of the lienholder. It also may prevent the
debtor from selling his or her home after bankruptcy
without paying the lienholder, even if that payment
must come from the debtor's \$10,000 exempt interest.
The formula in the section would not permit this
result.

23 H.R. Rep. 103-835, at pp. 52-54 (Oct. 4, 1994), reprinted in 1994
24 U.S.C.C.A.N. 3340, 3361-63. The amendments to § 522(f)
25 effectively overruled the decision in In re Chabot, but that is
26 not the issue before us.¹⁰

27
28 ¹⁰In this case, the Hansons apparently did not make
postpetition mortgage payments; so, at least one of the interests
(continued...)

1 **VI. CONCLUSION**

2 The bankruptcy court decided the Lien Avoidance Motion under
3 the 1994 version of § 522(f) and determined that the Judgment
4 Lien was avoided only to the extent it exceeded \$252,008.56. The
5 § 522(f) Order incorporating that determination was not appealed
6 and became final. Neither § 522(f) nor § 363(f) nor any other
7 provision of the Bankruptcy Code authorizes us to give the
8 Hansons a second bite at the apple. Once the unavowed portion of
9 the Judgment Lien was finally determined pursuant to § 522(f),
10 the bankruptcy court was not authorized to revisit the issue in
11 order to avoid impairment of the Hansons' homestead exemption in
12 light of a deficiency in proceeds remaining from the voluntary
13 sale of the Residence. The bankruptcy court did not err in
14 concluding that it was not appropriate to surcharge costs of sale
15 or any depreciation in value of the Residence against the
16 unavowed amount of the Judgment Lien.

17 We AFFIRM.

18
19
20
21
22
23
24
25
26
27

¹⁰ (...continued)
28 Congress sought to protect through the 1994 amendments to
§ 522(f), as reflected in the foregoing quotation from the
legislative history, is not concerned here.