

FEB 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NOT FOR PUBLICATION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

In re:)	BAP No.	CC-06-1140-DTMO
)		
HUMBERTO LUNA; CAROLINA LUNA,)	Bk. No.	LA 01-43591-VZ
)		
Debtors.)		
_____)		
)		
HUMBERTO LUNA; CAROLINA LUNA,)		
)		
Appellants,)		
)		
v.)	MEMORANDUM ¹	
)		
CALIFORNIA NATIONAL BANK,)		
fka PEOPLE'S BANK OF)		
CALIFORNIA,)		
)		
Appellee.)		
_____)		

Argued and Submitted on January 17, 2007
at Pasadena, California

Filed - February 2, 2007

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

Honorable Vincent P. Zurzolo, Chief Bankruptcy Judge, Presiding.

Before: DUNN, TCHAIKOVSKY² and MONTALI, 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. Leslie J. Tchaikovsky, Bankruptcy Judge for the Northern District of California, sitting by designation.

1 **I. INTRODUCTION**

2 The debtor-appellants Humberto and Carolina Luna ("Debtors")
3 appeal the bankruptcy court's order denying their motion to avoid
4 the judicial lien of appellee California National Bank (the
5 "Bank") on their residence property. We REVERSE and REMAND for a
6 further evidentiary hearing.

7 **II. FACTS**

8 The Debtors filed a voluntary chapter 7 bankruptcy petition
9 on November 8, 2001.³ In their Schedule D, the Debtors listed
10 the Bank's civil judgment in case no. BC238375 as a secured
11 obligation (the "Judgment Lien") in an unknown amount. The
12 Debtors received their discharge on April 15, 2002, and their
13 chapter 7 case was closed on April 29, 2002. The Debtors did not
14 file a motion to avoid the Judgment Lien before their chapter 7
15 case was closed.

16 Apparently, the Debtors attempted unsuccessfully to obtain
17 refinancing for their residence in late 2004, as an escrow agent
18 contacted the Bank in December 2004 to request a payoff for the
19 Judgment Lien. The Debtors moved to reopen their chapter 7 case
20 in July 2005. The bankruptcy court granted the Debtors' motion
21 to reopen by order entered on August 4, 2005. The order provided
22 that the case would remain open for 120 days from the date of
23 entry of the order reopening "to allow debtors to pursue the
24 relief requested in the Motion."

25
26 ³ Unless otherwise indicated, all "Code," chapter and
27 section references are to the federal Bankruptcy Code, 11 U.S.C.
28 §§ 101-1330, prior to its amendment by the Bankruptcy Abuse
Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Pub.
L. 109-8, 119 Stat. 23, as the case from which this appeal arises
was filed before October 17, 2005, the effective date of most
BAPCPA provisions.

1 The Debtors served their motion to avoid the Bank's lien
2 (the "Motion to Avoid Lien") on November 8, 2005, and filed it
3 with the bankruptcy court on November 22, 2005. The Bank filed
4 its Opposition (the "Opposition") to the Motion to Avoid Lien on
5 November 23, 2005. The Bank set a hearing on the Opposition for
6 January 3, 2006. However, once the Opposition was filed, under
7 Central District of California Local Bankruptcy Rule 9013-
8 1(g) (3), it was the Debtors' responsibility to schedule the
9 hearing on the Motion to Avoid Lien. Since the Debtors failed to
10 schedule their Motion to Avoid Lien for hearing, no hearing on
11 the Motion to Avoid Lien was conducted by the bankruptcy court on
12 January 3, 2006, even though counsel for the Debtors and the Bank
13 were at the court expecting to be heard.

14 Thereafter, on January 17, 2006, after the 120-day period
15 from the date of entry of the order reopening the case had run,
16 the Debtors' attorney finally scheduled the Motion to Avoid Lien
17 for a hearing to be held on March 21, 2006. On February 23,
18 2006, the Debtors filed an appraiser's declaration in support of
19 their Motion to Avoid Lien. On March 7, 2006, the Bank filed
20 objections to the Debtors' evidence, a Supplemental Opposition to
21 the Motion to Avoid Lien supported by the declaration of the
22 Bank's counsel, and a Request for Judicial Notice of certain
23 documents in the record tending to support the Bank's arguments.
24 On March 9, 2006, the Debtors filed a response to the Bank's
25 Opposition.

26 The Motion to Avoid Lien was heard on March 21, 2006 (the
27 "March 21st Hearing"), and the bankruptcy court entered an order
28 denying the Motion to Avoid Lien on March 30, 2006. The

1 bankruptcy court denied the Motion to Avoid Lien because
2 "procedural irregularities" caused by the Debtors' counsel
3 resulted in the Motion to Avoid Lien not being set for hearing in
4 a timely manner. The Debtors filed a timely Notice of Appeal on
5 April 7, 2006.

6 **III. JURISDICTION**

7 The bankruptcy court had jurisdiction under 28 U.S.C.
8 §§ 1334 and 157(b)(1) and (b)(2)(C), and we have jurisdiction
9 under 28 U.S.C. § 158(c).

10 **IV. ISSUE⁴**

11 Whether the bankruptcy court erred in denying the Motion to
12 Avoid Lien where the Bank did not demonstrate prejudice.

13 **V. STANDARDS OF REVIEW**

14 We review issues of statutory construction and conclusions
15 of law, including interpretation of provisions of the Bankruptcy
16 Code, de novo. In re Tran, 309 B.R. 330, 333 (9th Cir. BAP
17 2004), aff'd, 177 Fed. Appx. 754 (9th Cir. 2006). "Questions
18 regarding the right of a debtor to claim exemptions are questions
19 of law subject to de novo review[.]" In re Arnold, 252 B.R. 778,
20 784 (9th Cir. BAP 2000).

21 The question as to whether denial of the Debtors' Motion to
22 Avoid Lien was appropriate in light of the "procedural
23 irregularities" and lack of timeliness cited by the bankruptcy
24 court presents a mixed question of law and fact. A mixed
25 question is presented when the factual circumstances are
26 established, the applicable law is undisputed, and the issue is

27
28 ⁴ Debtors set out four issues in their opening brief. We
have organized our discussion around a single driving issue.

1 whether under the facts of the situation, the law was
2 appropriately applied. In re Bammer, 131 F.3d 788, 792 (9th Cir.
3 1997). We review mixed questions of law and fact de novo. Id.

4 **VI. DISCUSSION**

5 Subject to certain exceptions that are not relevant in this
6 case, Section 522(f)(1)(A) provides that a debtor

7 may avoid the fixing of a lien on an interest of the
8 debtor in property to the extent that such lien impairs
9 an exemption to which the debtor would have been
entitled under subsection (b) of this section, if such
lien is--(A) a judicial lien....

10 This appeal is all about timing. The Bank focuses on a
11 number of circumstances in the record to justify the bankruptcy
12 court's denial of the Debtors' Motion to Avoid Lien.

13 When the Debtors filed their bankruptcy petition and
14 schedules in 2001, they were aware of the Judgment Lien, as
15 reflected in their Schedule D, but they took no steps to avoid
16 the Judgment Lien before their case closed in 2002. The
17 continued existence of the Judgment Lien apparently intruded on
18 the Debtors' consciousness again when they attempted to refinance
19 their residence property in late 2004; yet, they did not move to
20 reopen their chapter 7 case to move to avoid the Judgment Lien
21 until July 2005.

22 When the case was reopened for 120 days on August 4, 2005,
23 to allow the Debtors to file the Motion to Avoid Lien, it took
24 Debtors' counsel 96 days to prepare and serve the motion and 110
25 days to file it with the court. When the Opposition was filed
26 one day after the Motion to Avoid Lien was filed, Debtors'
27 counsel did not schedule a hearing, as required by the local
28 rules of the bankruptcy court. As a result, the hearing that the

1 Bank's counsel attempted to schedule for its Opposition on
2 January 3, 2006, did not go forward. After the 120-day period
3 specified in the order reopening Debtors' case had expired,
4 Debtors' counsel finally scheduled a hearing on the Motion to
5 Avoid Lien for March 21, 2006, but Debtors' counsel did not file
6 an appraiser's declaration in support of the motion until
7 February 23, 2006, after the hearing had been scheduled and long
8 after the Motion to Avoid Lien had been filed.

9 In light of that record, as admitted by substitute counsel
10 for the Debtors at the March 21st Hearing, "the work on behalf of
11 the [Debtors] has not been stellar by any stretch of the
12 imagination." Transcript of March 21st Hearing, p. 16.

13 However, the Bank's focus sidesteps the remedial purpose of
14 § 522(f): "[T]he purpose of lien avoidance under § 522(f) is to
15 protect a debtor's exemptions." Goswami v. MTC Distributing (In
16 re Goswami), 304 B.R. 386, 392 (9th Cir. BAP 2003), citing In re
17 Pederson, 230 B.R. 158, 163 (9th Cir. BAP 1999). In a better
18 world, debtors and their counsel uniformly would act
19 expeditiously after they file their bankruptcy petitions to bring
20 their motions to avoid judgment liens to issue before their cases
21 close. However, there is no time limit to file motions to avoid
22 liens specified in § 522(f), or indeed, in the Bankruptcy Code.
23 Yazzie v. Postal Fin. Co. (In re Yazzie), 24 B.R. 576, 577 (9th
24 Cir. BAP 1982).

25 "The key factor in allowing the late avoidance of a lien
26 pursuant to § 522(f) is whether the creditor is sufficiently
27 *prejudiced* so that it would be *inequitable* to allow avoidance of
28 the lien." ITT Financial Serv. v. Ricks (In re Ricks), 89 B.R.

1 73, 75-76 (9th Cir. BAP 1988). See also City Nat'l Bank v.
2 Chabot (In re Chabot), 992 F.2d 891, 893 (9th Cir. 1993) ("Absent
3 a prejudicial delay, an avoidance action may be brought at any
4 time....CNB basically argues that the Chabots waited too long to
5 bring the avoidance action. This is not sufficient to show
6 prejudice...."); In re Biannucci, 4 F.3d 526, 528 (7th Cir.
7 1993) ("Passage of time in itself does not constitute
8 prejudice....But delay may be prejudicial when it is combined
9 with other factors."); and Goswami, 304 B.R. at 392 ("In the
10 absence of prejudice, lien avoidance actions are not barred
11 either by entry of a discharge order or the closing of the
12 bankruptcy case.").

13 In this case, at the March 21st Hearing, the bankruptcy
14 court pressed the Bank's counsel to explain what prejudice his
15 client had suffered as a result of the Debtors' failure to bring
16 their Motion to Avoid Lien to issue earlier. While the colloquy
17 extends over several pages of the transcript of the March 21st
18 Hearing, in the final analysis, the only prejudice that the
19 Bank's counsel could point to was the alleged unreasonable and
20 inherently prejudicial impact of a four and a half year delay in
21 getting the Motion to Avoid Lien to a hearing. See Transcript,
22 March 21st Hearing, pp. 5-10.

23 As noted above, the mere passage of time, without more, does
24 not constitute the type of prejudice that justifies denial of a
25 lien avoidance motion. See Chabot, 992 F.2d at 893; and Yazzie,
26 24 B.R. at 578. From the record, it appears that Debtors'
27 counsel may have been both dilatory and less than adroit
28 procedurally in bringing the Debtors' Motion to Avoid Lien before

1 the bankruptcy court. However, in light of the purpose of
2 § 522(f) to allow debtors to protect and in some cases, salvage
3 their exemptions, the lack of a time limit in the Bankruptcy Code
4 on lien avoidance motions and the lack of prejudice demonstrated
5 by the Bank, we determine that it is inappropriately harsh to
6 impose the consequences of the tardiness and procedural mistakes
7 of Debtors' counsel on the Debtors by denying the Motion to Avoid
8 Lien. Accordingly, we reverse the decision of the bankruptcy
9 court and remand for further proceedings. On remand, the
10 bankruptcy court can determine in the exercise of its discretion
11 whether it is appropriate to impose a remedial education
12 requirement and/or other sanctions on Debtors' former counsel.

13 The Debtors argue that we should remand with directions to
14 the bankruptcy court to enter an order granting the Motion to
15 Avoid Lien because the Debtors' "original Motion signed under
16 penalty of perjury and their supplemental declaration establish
17 the amount of the liens on the property and its fair market value
18 at the time of the petition...." Appellants' Opening Brief, pp.
19 11-12. The Motion to Avoid Lien was verified under penalty of
20 perjury and included an attached Declaration of the Debtors
21 stating that when "our case was filed our house was worth
22 approximately \$200,000.00." Motion to Avoid Lien, Ex E. Also
23 attached to the Motion to Avoid Lien was an appraisal report,
24 purportedly prepared by Javier Corral and dated April 21, 2005,
25 valuing the Debtors' residence property at \$270,000. Motion to
26 Avoid Lien, Ex. C. The Declaration of George Vazquez, an
27 appraiser retained by Debtors, was filed on February 23, 2006,
28

1 valuing the Debtors' residence property as of the chapter 7
2 petition date at \$266,000.00.

3 The Bank objected to all of the Debtors' valuation evidence
4 on lack of foundation and other grounds. At the March 21st
5 Hearing, the Bank's counsel admitted that the Bank had not
6 obtained its own retrospective appraisal of the subject property,
7 but focused on the alleged untimeliness and procedural defects in
8 opposing the Debtors' Motion to Avoid Lien.

9 The bankruptcy court noted that initially, when the Motion
10 to Avoid Lien was filed, it was not supported by the declaration
11 of an appraiser or other expert who could testify as to the value
12 of the residence property. The bankruptcy court also noted the
13 Bank's objections to the evidence of value submitted by the
14 Debtors. The bankruptcy court stated that it would sustain the
15 Bank's objection as to the appraisal report but would overrule
16 the objection "as to evidence submitted by the [Debtors]."
17 However, as admitted by the Debtors in their opening brief (see
18 Appellants' Opening Brief, p.11), the bankruptcy court denied the
19 Motion to Avoid Lien solely because the Debtors "failed to timely
20 set a hearing on the objection to the initial motion to avoid the
21 lien, period."

22 In these circumstances, we determine that, on remand, the
23 bankruptcy court should schedule an evidentiary hearing so that
24 the Debtors and the Bank can marshal and present their evidence
25 as to the value of the Debtors' residence as of the Debtors'
26 chapter 7 petition date to allow for a decision of the Motion to
27 Avoid Lien on its merits.

1 **VII. CONCLUSION**

2 The bankruptcy court erred in denying the Motion to Avoid
3 Lien based on the lateness and procedural failings of the Debtors
4 and their counsel in bringing the Motion to Avoid Lien for
5 hearing, in the absence of any evidence of prejudice to the Bank.
6 Accordingly, we REVERSE and REMAND for further proceedings
7 consistent with this memorandum.

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28