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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NOT FOR PUBLICATION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

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In re:)	BAP Nos.	EC-05-1476-MoSB
)		EC-05-1477-MoSB
HARVEY ZALL and SELMA JANET)		(Consolidated)
ZALL,)		
)	Bk. No.	05-25124-D-13L
Debtors.)		
_____)		
T & F CONSTRUCTION COMPANY,)		
INC.,)		
)		
Appellant,)		
)		
v.)		
)		
HARVEY ZALL; SELMA JANET ZALL,)		
)		
Appellees.)		
_____)		

MEMORANDUM¹

Argued and Submitted on July 21, 2006
at Sacramento, California

Filed - September 5, 2006

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

Honorable Robert S. Bardwil, Bankruptcy Judge, Presiding.

Before: MONTALI, SMITH and BRANDT, Bankruptcy Judges.

¹ This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except when relevant under the doctrines of law of the case, claim preclusion, or issue preclusion. See 9th Cir. BAP Rule 8013-1.

1 Appellant T & F Construction Co., Inc., ("Creditor") objected
2 to the claimed \$150,000 homestead exemption of appellees Harvey
3 Zall and Selma Janet Zall ("Debtors"). Creditor asserted that the
4 exemption amount is limited to the amount available (\$100,000)
5 under California law when its judgment lien attached. The
6 bankruptcy court overruled Creditor's objection. We hold that the
7 date Debtors filed their bankruptcy petition was the relevant date
8 for determination of the amount of the homestead exemption under
9 California law. Accordingly, we AFFIRM.

10 **I. FACTS**

11 Debtors own and live in a home in Sacramento, California (the
12 "Residence"). On September 27, 1993, Creditor obtained a judgment
13 against Debtors for approximately \$100,000 and recorded an
14 abstract of judgment against the Residence. On this date, the
15 amount available under the homestead exemption provisions of the
16 California Code of Civil Procedure ("CCP") § 740.730(a)(3) was
17 \$100,000. On April 29, 2005, Debtors filed their joint chapter
18 13² petition, valuing the Residence in the amount of \$300,000. By
19 this time, Debtors owed approximately \$250,000 on Creditor's
20 judgment. In Schedule C of their Schedules and Statement of
21 Financial Affairs ("Schedules"), Debtors claimed a \$125,000
22 homestead exemption in the Residence, pursuant to CCP

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26 ² Unless otherwise indicated, all chapter, section and
27 rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330,
28 as enacted and promulgated prior to the effective date of The
Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,
Pub. L. 109-8, Apr. 20, 2005, 119 Stat. 23.

1 § 704.730(a)(3).³ On August 23, 2005, Debtors amended their
2 Schedule C, claiming a homestead exemption of \$150,000 and again
3 relying on CCP § 704.740(a)(3).

4 On August 30, 2005, Creditor filed a timely objection to
5 Debtors' amended homestead exemption claim. Creditor again
6 contended that Debtors' homestead exemption is limited to the
7 \$100,000 available in 1993 when Creditor fixed its lien against
8 Debtors. The bankruptcy court overruled Creditor's objections to
9 both the original and amended exemption claims and sustained the
10 \$150,000 claimed homestead exemption.⁴ Creditor's notice of
11 appeal was timely.

12 **II. ISSUE**

13 Is the relevant date for the determination of the amount of
14 the California Debtors' homestead exemption the date on which
15 Creditor's judicial lien was fixed or the date on which Debtors
16 filed for bankruptcy?

17 **III. STANDARD OF REVIEW**

18 Questions regarding a debtor's right to claim exemptions are
19

20 ³ CCP § 704.730(a)(3) requires that the residence at issue
21 be a homestead and that at least one of the debtors be over the
22 age of 65. Creditor concedes that the Residence is a homestead
and that at least one of the Debtors is over the age of 65.

23 ⁴ Creditor's objection to the original exemption claim was
24 overruled as moot. Creditor filed notices of appeal of both the
25 order denying the objection to the original exemption as moot and
26 the order denying the objection to the amended exemption on
27 substantive grounds. Because both objections focused on the same
28 argument (i.e., that the exemption amount should be the statutory
amount available on the date Creditor recorded its abstract of
judgment), the appeals have been consolidated. Because, as
discussed below, we are affirming the order denying the objection
to the amended exemption on substantive grounds, we are likewise
affirming the denial of the original objection to the exemption as
moot.

1 questions of law to be reviewed de novo. Arnold v. Gill (In re
2 Arnold), 252 B.R. 778, 784 (9th Cir. BAP 2000). "The bankruptcy
3 court's application of California exemption law is a question of
4 statutory construction which is reviewed de novo." Cisneros v.
5 Kim (In re Kim), 257 B.R. 680, 684 (9th Cir. BAP 2000).

6 IV. JURISDICTION

7 The bankruptcy court's order allowing Debtors' claimed
8 homestead exemption is a final appealable order that we may
9 review. Sticka v. Casserino (In re Casserino), 290 B.R. 735, 738
10 (9th Cir. BAP 2003); 28 U.S.C. § 158(b).

11 V. DISCUSSION

12 In this case, Debtors claimed an "automatic" homestead
13 exemption pursuant to CCP § 704.720. To be eligible for the
14 "automatic" homestead exemption, at least one of the Debtors must
15 have resided continuously in the dwelling from the time Creditor's
16 lien attached until the forced judicial sale. CCP § 704.710(c);
17 Hastings v. Holmes (In re Hastings), 185 B.R. 811 (9th Cir. BAP
18 1995). Creditor does not dispute Debtors' entitlement to claim
19 that exemption; instead, it disputes the amount of the exemption
20 claimed by Debtors under the statute.

21 A. The Law and Practicality Dictate that the Measuring Date for
22 a Homestead Exemption is the Petition Date.

23 In California, "if a homestead is sold . . . the proceeds . .
24 . are exempt in the amount of the homestead exemption provided in
25 Section 704.730." CCP § 704.720. Debtors contend in their
26 amended Schedule C that they are eligible for an exemption of
27 \$150,000 exemption, the amount available under CCP
28 § 704.730(a) (3) at the time of the commencement of their Chapter

1 13 petition in April of 2005. Creditor asserts that Debtors are
2 only entitled to the \$100,000 exemption amount allowed under CCP
3 § 704.730(a)(3) at the time its judicial lien was fixed in 1993.
4 Because we are bound by prior BAP decisions on point (Ball v.
5 Payco-General Am. Credits, Inc. (In re Ball), 185 B.R. 595, 597
6 (9th Cir. BAP 1995)), resolution of this issue on appeal is
7 straight-forward. The decision in Nadel v. Mayer (In re Mayer),
8 167 B.R. 186 (9th Cir. BAP 1994) is on point and mandates that we
9 affirm the bankruptcy court's decision to use Debtors' petition
10 date to determine the amount of their exemption.

11 In In re Mayer, the debtor claimed a homestead exemption
12 under CCP § 704.730(a)(3) in the amount available for the year he
13 filed for bankruptcy. Id. at 187. The creditors objected,
14 asserting that the debtor was limited to the lesser exemption
15 amount that was applicable the year their judgment lien was fixed.
16 Id. The bankruptcy court so held, but this panel held that
17 "exemptions are determined as of the date the bankruptcy petition
18 was filed." Id. at 188. Further, the panel specifically held
19 that the creditor's judgment lien is irrelevant in determining the
20 debtor's exemption, because the debtor's bankruptcy petition
21 constituted a hypothetical levy by the trustee on the property,
22 id. at 189, and "it is this hypothetical levy that the court must
23 focus on." Id. The debtor was entitled to the homestead
24 exemption amount available under California law when he filed his
25 bankruptcy petition. Id.

26 The holding in In re Mayer is not only controlling, but also
27 sound. When a debtor files a bankruptcy petition, all legal and
28 equitable property interests become property owned by the

1 bankruptcy estate. 11 U.S.C. § 541. A debtor is entitled,
2 however, to exempt certain assets from the estate. 11 U.S.C.
3 § 522. In general, "exemption rights are determined as of the
4 petition date." Gaughan v. Smith (In re Smith), 324 B.R. 801, 806
5 (9th Cir. BAP 2006). See also Chiu v. Chiu (In re Chiu), 266 B.R.
6 743, 751 (9th Cir. BAP 2001); In re Kim, 257 B.R. at 685; In re
7 Mayer, 167 B.R. at 188; Owen v. Owen, 500 U.S. 305, 314 (1991).
8 Indeed, without support of legal authority, an "attempt to carve
9 out an exception to the well-established law that exemption rights
10 are determined on the petition date must be rejected." In re Kim,
11 257 at 685 (quoting Wolf v. Salven (In re Wolf), 248 B.R. 365, 368
12 (9th Cir. BAP 2000)).

13 Creditor contends that California exemption law in effect on
14 the petition date provides that parties should refer to prior
15 versions of the statutes to determine whether the exemption amount
16 of a judgment lien predates the current enactment. This procedure
17 is not only unworkable in the bankruptcy context, but it is also
18 inconsistent with the Bankruptcy Code. In re Kim, 257 B.R. at
19 687.

20 First, as a practical matter, if the exemption amount is
21 fixed as of the dates of multiple judgment liens, a debtor may
22 have varying amounts of exemptions in the same property. How
23 would a bankruptcy trustee, who is generally the party who objects
24 to a debtor's exemptions, be able to determine the appropriate
25 amount of the exemption if there are multiple judgment liens
26 against the property?

27 Secondly, and more importantly, limiting the exemption to the
28 amounts available on the dates that judgment liens attach is

1 inconsistent with section 522(f). Under section 522(f), Debtor
2 could simply avoid Creditor's lien as impairing his exemption and
3 the exemption amount would be that amount available on the
4 petition date.

5 The 1994 amendments to section 522 clarified the limitations
6 on state law exemption statutes. Congress amended section 522(f)
7 by developing a mathematical formula from which courts determine
8 whether or not a judicial lien impairs a debtor's exemption
9 rights. Even though this appeal did not arise from a section
10 522(f) motion to avoid the judgment lien, the bankruptcy court
11 analyzed subsection (f) to support its decision to sustain the
12 objection. We need not adopt this analysis, given the binding
13 nature of In re Mayer. Nonetheless, the bankruptcy court's
14 analysis is persuasive.

15 According to the statute, a "debtor may avoid the fixing of a
16 lien on an interest of the debtor in property to the extent that
17 such lien impairs an exemption to which the debtor would have been
18 entitled." 11 U.S.C. § 522(f)(3). Congress instructs courts to
19 consider "the amount of the exemption that the debtor could claim
20 if there were no liens on the property" when calculating the
21 impairment. 11 U.S.C. § 522(2)(A)(iii). Consequently, to
22 calculate the extent to which a lien impairs an exemption, the
23 court must add the lien, all other liens on the property, and the
24 exemption amount if there were no liens; then the court must
25 subtract from that sum the value of the debtor's interest in the
26 property absent any liens. Katz v. Pike (In re Pike), 243 B.R.
27 66, 71 (9th Cir. BAP 1999); 11 U.S.C. § 522(f)(2)(A). Although
28 this formula clearly conflicts with the provisions of CCP

1 § 703.050 and state law definitions of property rights, "those
2 rights are subject to federal bankruptcy law concerning conflicts
3 between exemptions and other interests in property." Moldo v.
4 Charnock (In re Charnock), 318 B.R. 720, 727 (9th Cir. BAP 2004).

5 In order to determine the amount of an exemption that Debtors
6 could claim if there were no liens on the property, the court must
7 look not to the time the lien was fixed but rather to the time the
8 trustee's hypothetical levy became effective, which is the date
9 Debtors filed their bankruptcy petition. "It is this hypothetical
10 levy the court must focus on in analyzing [Debtors'] entitlement
11 to a homestead exemption." In re Mayer, 167 B.R. at 189. The
12 focus on the hypothetical levy forces the court to "disregard some
13 element of reality" to ascertain whether the fixed lien is
14 depriving the Debtors of property rights that would be available
15 had the lien not existed. In re Hastings, 185 B.R. 811, 814 (9th
16 Cir. BAP 1995) (quoting Owen, 500 U.S. at 314). See also In re
17 Pike, 243 B.R. at 70 (the homestead exemption trumps the judgment
18 lien, and Creditor's lien status is irrelevant to the lien
19 avoidance proceeding).

20 B. The Cases Cited by Creditor are Inapplicable.

21 Creditor relies primarily on two cases to make its argument.
22 In In re Morgan, 157 B.R. 467 (Bankr. C.D. Cal. 1993), the
23 bankruptcy court relied on state court decisions and language in
24 CCP § 704.965 to hold that the debtor was only eligible for the
25 lesser, earlier declared homestead exemption amount. Id. at 469,
26 470. The second case, Bernhanu v. Metzger, 12 Cal. App. 4th 445
27 (Cal. Ct. App. 1992), does not address the application of the
28 section 522 exemption laws. In Bernhanu, the court limited the

1 debtor to the lower exemption amount that was in effect at the
2 date the judgment lien was fixed, relying also on CCP § 704.965.
3 Id. at 448.

4 Unlike the present case, neither In re Morgan nor Bernhanu
5 pertained to the automatic homestead exemption statute. Further,
6 both cases were decided prior to the 1994 revisions of the
7 Bankruptcy Code that altered section 522. Most importantly, since
8 these cases were decided, this panel has issued In re Mayer and
9 held that the date for the determination of the homestead
10 exemption amount is the date on which debtors file a bankruptcy
11 petition.

12 Creditor asserts that because California opted out of the
13 federal bankruptcy scheme as permitted under section 522(b)(2)(A),
14 California exemption rules alone should apply. Indeed, CCP
15 § 703.050 states that the exemption amount is determined "by
16 application of the exemption statutes in effect (1) at the time
17 the judgment creditor's lien on the property was created." The
18 policy, however, of allowing states to opt out of the federal
19 exemption scheme is not absolute. Rather, courts must apply state
20 exemption statutes "along with whatever other competing or
21 limiting policies the statute contains." Owen, 500 U.S. at 315.
22 Essentially, the state law exemption statutes must not conflict
23 with the general policies underlying the Bankruptcy Code, or
24 section 522 specifically. In re Charnock, 318 B.R. at 727. "To
25 the extent that the California exemption law attempts to establish
26 a procedure that overrides the well-settled bankruptcy law
27 regarding the date for determining an exemption, it is preempted."
28 In re Kim, 257 at 687.

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VI. CONCLUSION

Because In re Mayer controls us and is correct, we AFFIRM.