

AUG 04 2006

NOT FOR PUBLICATION

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

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

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In re:)	BAP Nos.	EC-05-1270-PaAB
)		EC-05-1378-PaAB
KATHRYN REYNOLDS,)		(Consolidated)
)		
Debtor.)	Bk. No.	04-30024
_____)		
KATHRYN REYNOLDS,)		
)		
Appellant,)		
v.)	MEMORANDUM¹	
)		
JESSICA SWEDELIUS,)		
)		
Appellee.)		
_____)		

Argued and Submitted on May 17, 2006,
at Sacramento, California

Filed - August 4, 2006

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

Honorable Christopher M. Klein, Bankruptcy Judge, Presiding.

Before: PAPPAS, ALBERT² and BRANDT, Bankruptcy Judges.

¹ This disposition is not appropriate for publication and may not be cited except when relevant under the doctrine of law of the case or the rules of res judicata, including issue and claim preclusion. See 9th Cir. BAP Rule 8013-1.

² The Honorable Theodor C. Albert, United States Bankruptcy Judge for the Central District of California, sitting by designation.

1 Kathryn Reynolds ("Reynolds") appeals from orders of the
2 bankruptcy court denying her Motion to Avoid Lien of Jessica
3 Swedelius ("Swedelius") and reconsideration of that motion. We
4 AFFIRM.

5 **FACTS**

6 Reynolds filed a petition for relief under chapter 7 of the
7 Bankruptcy Code³ on October 6, 2004. Reynolds was granted a
8 discharge on January 11, 2005.

9 Before bankruptcy, Swedelius had obtained a judgment against
10 Reynolds in state court for \$38,097.44, which judgment constituted
11 a lien on Swedelius' home (the "Judgment Lien"). On January 18,
12 2005,⁴ Reynolds filed a Motion to Avoid [the Judgment] Lien.

13 Swedelius filed an Opposition to the Motion to Avoid Lien on
14 February 15, 2005. The copy of this pleading included in the
15 record bears the caption "Electronically Filed February 15, 2005,"
16 and the first page includes the Clerk's electronic filing stamp
17

18
19 ³ Unless otherwise indicated, all "Code," "chapter" and
20 "section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-
21 1330 prior to its amendment by the Bankruptcy Abuse Prevention and
22 Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23
(2005). "Rule" references are to the Federal Rules of Bankruptcy
Procedure (also "Fed. R. Bankr. P."), which make applicable
certain Federal Rules of Civil Procedure (also "Fed. R. Civ. P.").

23 ⁴ The parties disagree on the filing date of the Motion to
24 Avoid Lien. Reynolds states that the Motion was filed on January
25 18, 2005; Swedelius alleges that it was filed on January 5, 2005.
26 A review of the docket of the bankruptcy case shows that Reynolds
27 actually filed nearly identical motions on both days. The Proof
28 of Service attached to the January 5, 2005, motion shows it was
served on "Jessica Swedelius c/o Tory Pankoff, Esq., 341 SKI Way
103, Incline Village, NV 89451." The Proof of Service attached to
the January 18, 2005, motion shows it was served on "Tory Pankoff,
Esq., 341 Ski Way, 103, Incline Village, NV 89451." Neither
motion was served on Swedelius at a residence or place of business
address.

1 with the notation:

2 Filed February 15, 2005
3 Clerk
4 U.S. Bankruptcy Court
Eastern District of California.

5 However, there is no corresponding entry in the docket of the
6 bankruptcy case for this Opposition.

7 The bankruptcy court conducted a hearing on the Motion to
8 Avoid Lien on February 22, 2005. According to the Civil Minute
9 Order entered by the court, there were no appearances by the
10 parties. The Order provides that: "Findings of Fact and
11 Conclusions of Law having been stated orally on the record and
12 good cause appearing[:] IT IS ORDERED that the motion is granted;
13 resolved without oral argument; lien avoided; no further relief
14 approved."⁵

15 On March 7, 2005, Swedelius filed a Motion for
16 Reconsideration of Order Granting Debtor's Motion to Avoid Lien
17 under 11 U.S.C. § 522(f) (the "Reconsideration Motion"). The
18 Reconsideration Motion suggests that the court committed errors of
19 fact and law by avoiding Swedelius' lien without allowing for the
20 introduction of evidence as to the value of Reynolds' property.
21 The Certificate of Service attached to the Reconsideration Motion
22 shows that Reynolds was served at her last known address, "P.O.
23 Box 3456, Truckee, CA 96160."

24 The court heard the Reconsideration Motion on April 26, 2005.
25 Reynolds was neither present nor represented by counsel. Counsel

26 _____
27 ⁵ This Order contradicts Reynolds' statement in her brief
28 that she "made a telephone appearance [at the February 22 hearing]
in which the late filing of the Opposition was discussed."

1 for Swedelius participated telephonically. At the beginning of
2 the hearing, Swedelius' attorney brought up "one important thing
3 that was not raised in the papers." He noted that Swedelius had
4 not been properly served with Reynolds' Motion to Avoid Lien
5 because the Motion was served on Swedelius' former counsel and not
6 on Swedelius. The bankruptcy court agreed with the suggestion
7 that such service was improper:

8 I agree with the service point. You are quite
9 correct. Service was [not] actually made on
10 Jessica Swedelius, and that is an excellent
11 reason to grant reconsideration and to set the
12 matter for evidentiary hearing wherein the
ultimate question is what was the value of the
property on the day that the bankruptcy case
was filed, which was October 6, 2004.

13 Hr'g Tr. 4:25 - 5:1-6 (April 26, 2005). The court went on to
14 state that "I am specifically going to grant the motion in part,
15 and I am going to, one, reconsider and, two, vacate the order
16 avoiding the lien, without prejudice." Hr'g Tr. 7:25 - 8:1-3
17 (April 26, 2005). The court ordered that a hearing be conducted
18 concerning the merits of Reynolds' Motion to Avoid Lien on June 7,
19 2005.⁶

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22 ⁶ Reynolds incorrectly refers to the June hearing as a
23 "continuance" of the hearing on the Reconsideration Motion in her
Opening Brief: "[I]nstead of addressing the Appellee's Motion for
24 Reconsideration as a continuance, requiring arguments on this last
minute evidence, why there was no appearance at the Motion to
25 Avoid Lien, or why Appellee could not have provided the 'evidence'
at the Motion to Avoid Lien, the court went straight into the
26 value of Appellant's house." As discussed above, the bankruptcy
court granted the Reconsideration Motion at the April 26 hearing,
27 and ordered that on June 7, 2005, there would be an "evidentiary
hearing wherein the ultimate question is what was the value of the
28 property on the day that the bankruptcy case was filed, which was
October 6, 2004."

1 At the June 7 hearing, both Reynolds and Swedelius were
2 represented by counsel. The bankruptcy court received evidence
3 and heard testimony from an appraiser and from Reynolds regarding
4 the value of the property. The court took the issues under
5 submission.

6 On June 9, 2005, the bankruptcy court issued written findings
7 of fact and conclusions of law. The court found that the value of
8 Reynolds' property on the petition date was \$440,000, that the sum
9 of consensual liens and Reynolds' exemption as of the petition
10 date was \$394,642 and, therefore, "It follows that on
11 reconsideration of this court's prior order avoiding the lien, the
12 lien is not eligible to be vacated and on reconsideration the
13 motion to avoid the judgment lien of Jessica Swedelius will be
14 denied."

15 Reynolds timely filed an appeal of the denial of her Motion
16 to Avoid Lien on June 17, 2005. On the same day, she filed a
17 Motion for Reconsideration of the denial of her Motion to Avoid
18 Lien (the "Reynolds Reconsideration Motion"). In a Memorandum
19 Opinion dated August 31, 2005, the court denied the Reynolds
20 Reconsideration Motion, concluding:

21 This court is not persuaded that it should
22 reconsider the matter at this time. It
23 exercised its discretion at the hearing on the
24 creditor's motion for reconsideration to
25 provide an opportunity for an evidentiary
26 hearing at a later date. That hearing was
27 held. The debtor appeared at that hearing and
28 was represented by seasoned bankruptcy
counsel, who was specifically employed for
that purpose and who appeared to this court to
be representing debtor's interests in a
professional and competent manner.

Reynolds filed a timely appeal of the denial of the Reynolds

1 Reconsideration Motion on September 12, 2005. The two appeals
2 were consolidated by Clerk's Order on October 21, 2005.

3 **JURISDICTION**

4 The bankruptcy court had jurisdiction of this action under 28
5 U.S.C. § 1334 and § 157(b) (2). Our jurisdiction is based upon 28
6 U.S.C. § 158(b) (1).

7 **ISSUES ON APPEAL**

8 As near as we can tell,⁷ Reynolds raises the following issues
9 of significance:

10 Whether the bankruptcy court abused its discretion in
11 granting Reynolds' Motion to Avoid Lien based on Swedelius'
12 allegedly flawed Motion for Reconsideration.

13 Whether the bankruptcy court abused its discretion in
14 granting Reynolds' Motion to Avoid Lien based on improper service
15 of the Motion to Avoid Lien.

16 Whether the bankruptcy court erred in granting Swedelius'
17 Reconsideration Motion in violation of Reynolds' due process
18 rights.

19 Whether the bankruptcy court erred in granting Swedelius'
20 Reconsideration Motion in violation of FED. R. BANKR. P. 4003(b).

21 Whether the bankruptcy court erred in placing the burden of
22 proof regarding Swedelius' Reconsideration Motion on Reynolds.

23

24

25 ⁷ Reynolds' Opening Brief does not conform with Fed. R.
26 Bankr. P. 8010(a) (1) in that, among other things, it does not
27 include a statement of the issues presented and the applicable
28 standard of review. Reynolds' Designation of Issues on Appeal
lists 15 issues, several of which are ambiguous and redundant, and
only some of which appear to be argued or supported in her Opening
or Reply Briefs. We have distilled Reynolds' list into the six
set forth above.

1 Bishop, 229 F.3d 877 (9th Cir. 2000). Reconsideration is also
2 available to prevent manifest injustice. Navajo Indian Nation v.
3 Confederated Tribes and Bands of the Yakima Indian Nation, 331
4 F.3d 1041, 1046 (9th Cir. 2003).

5 In granting Swedilius' Reconsideration Motion, the bankruptcy
6 court decided it had inadvertently committed two errors. Based
7 upon our review of the record, we conclude that the bankruptcy
8 court did not abuse its discretion in granting reconsideration in
9 this instance.

10 Reynolds argues that the bankruptcy court abused its
11 discretion by "reversing" the order granting Reynolds' Motion to
12 Avoid Lien based on Swedelius' late-filed opposition, and with no
13 evidence presented to establish its factual allegations. Reynolds
14 misconstrues the ruling of the bankruptcy court. The court did
15 not reverse its order granting Reynolds' Motion to Avoid Lien on
16 the basis of the allegedly late-filed Opposition. Instead, the
17 court granted reconsideration of that motion, and vacated its
18 prior order without prejudice,⁸ because it perceived "two flaws"
19 (errors) in its earlier decision: (1) the bankruptcy court was
20 unaware that an opposition had been filed when it decided the
21 motion and had it known of the existence of the filed opposition,
22 it would not have acted in a summary fashion to grant the Motion
23 to Avoid Lien; and (2) the court found that Reynolds had served
24 the motion only on Swedelius' former attorney, and not Swedelius,
25 as required by FED. R. BANKR. P. 9014(b) and 7004(b)(1), and that

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27 ⁸ A reversal is a decision on the merits and has issue and
28 claim preclusive effect. A vacatur without prejudice, together
with an order for a hearing to take further testimony, does not
have preclusive effect.

1 this service error excused any late filing of the opposition and
2 justified a reconsideration.

3 It is clear that an Opposition to Reynolds' Motion to Avoid
4 Lien was filed by Swedelius on February 15, 2005. Indeed, the
5 copy of the Opposition provided by Reynolds in her Excerpts of
6 Record at pp. 44-46 bears the electronic stamp of the Clerk of the
7 Court with the notation "Filed February 15, 2005." However, for
8 reasons unexplained in the record, this pleading was never
9 docketed in the bankruptcy case. Consequently, operating in an
10 electronic environment, the bankruptcy court would likely not have
11 been aware of the existence of the Opposition at the time it
12 granted the Motion to Avoid Lien.

13 When it was later advised that an Opposition had in fact been
14 filed prior to the February 22 hearing on Reynolds' motion, the
15 bankruptcy court was obliged, pursuant to FED. R. BANKR. P. 9014(a),
16 to afford Swedelius an opportunity to be heard concerning the
17 motion. The bankruptcy court properly acknowledged its error,
18 albeit inadvertent, in failing to consider the Opposition filed by
19 Swedelius before summarily granting Reynolds' Motion to Avoid
20 Lien.

21 Reynolds objected to the court's consideration of the
22 Opposition because, she alleged, it was late-filed and otherwise
23 violated the requirements of Local Bankruptcy Rule ("LBR") 9014-
24 1(f), which provides:

25 Opposition. Opposition, if any, to the
26 granting of the motion shall be in writing and
27 shall be served and filed with the Court by
28 the responding party at least fourteen (14)
 calendar days preceding the date or continued
 date of the hearing. Opposition shall be
 accompanied by evidence establishing its

1 factual allegations. Without good cause, no
2 party shall be heard in opposition to a motion
3 at oral argument if written opposition to the
4 motion has not been timely filed. Failure of
5 the responding party to timely file written
6 opposition may be deemed a waiver of any
7 opposition to the granting of the motion or
8 may result in the imposition of sanctions.

6 Reynolds insists that because Swedelius filed the Opposition
7 on February 15, 2005, only seven days before the February 22,
8 2005, hearing, Swedelius violated the LBR's requirement that the
9 Opposition be filed at least 14 days before the hearing, and that
10 the Opposition should not have been considered by the bankruptcy
11 court. Further, Reynolds argues that the Opposition failed to
12 include any evidence in support of Swedelius' allegations that the
13 residence was worth more than Reynolds claimed.⁹

14 LBR 9014-1(f) is obviously intended to promote the filing of
15 timely, substantive oppositions. However, the Rule presumes that
16 effective notice of the filing of a motion has been given to those
17 who may oppose it. And as discussed below, the bankruptcy court
18 correctly decided that service on Swedelius was not adequate.

19 _____
20 ⁹ In her Opening Brief, Reynolds attempts a third objection
21 to consideration of the Opposition based on the Local Rule:

21 "Without good cause, no party shall be heard in
22 Opposition to a motion at oral argument if written
23 opposition to the motion has not been timely filed."
24 Appellee did not even appear to try to offer an oral
25 argument for either its late filing or lack of evidence.
26 So even going back in time to the date of the Motion to
27 Avoid Lien, the Appellee did not appear, so no argument
28 could have been made, even if allowed by Local Rule
9014-1(f), to get around no new evidence or the late
filing.

27 This statement appears in isolation in Reynolds' brief, without
28 additional or explanatory comments. Apart from the points
discussed above, we simply can not understand how this argument
adds anything to this discussion.

1 Absent good service of a motion, the strict requirements of LBR
2 9014-1(f) do not apply in this situation.¹⁰

3 In addition, another LBR is implicated here. LBR 1001-1(f)
4 provides that: "The Court may make such orders supplementary or
5 contrary to the provisions of these Rules as it may deem
6 appropriate and in the interests of justice in any particular
7 proceeding." The bankruptcy court noted that because service of
8 Reynolds' motion was defective, as discussed below, this
9 "constituted an excuse for any late filing of the opposition."
10 Under LBR 1001-1(f), the bankruptcy court did not abuse its
11 discretion in refusing, in the interests of justice, to strictly
12 enforce its Rules and to consider the Swedelius Opposition.

13 Reynolds also argues that, contrary to the bankruptcy court's
14 stated position, the court was aware of the Opposition at the time
15 it granted the Motion to Avoid Lien. Reynolds claims that she
16 participated telephonically at the hearing of February 22, 2005,
17 and that she brought the late-filed Opposition to the bankruptcy
18 court's attention.

19 We reject Reynolds' argument. The Civil Minute Order for the
20 hearing held on February 22, 2005, indicates that there were no
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24 ¹⁰ The same Rule also provides that "Unless additional notice
25 is required by the Federal Rules of Bankruptcy Procedure or these
26 Local Rules, or the moving party elects to give the notice
27 permitted by LBR 9014-1(f)(2), the moving party shall file and
28 serve the motion at least twenty-eight (28) calendar days prior to
the hearing date." In other words, it seems clear that the
requirements for filing a timely, substantive opposition of the
Rule do not apply if service has not been properly effected on an
interested party within 28 days of the hearing date.

1 appearances¹¹ by the parties and that the motion was resolved
2 without oral argument. Based on the Civil Minute Order and the
3 bankruptcy court's statements in its Memorandum Opinion, we
4 decline to accept Reynolds' allegations that she was
5 telephonically present at the hearing on February 22, 2005, and
6 informed the court that there was an opposition to the motion.
7 Reynolds' position is simply not supported by the record.

8 The bankruptcy court correctly decided it was an error to
9 grant Reynolds' Motion to Avoid Lien when Swedelius had not been
10 properly served with that Motion. FED. R. BANKR. P. 4003(d)
11 provides that "A proceeding by the debtor to avoid a lien or other
12 transfer of property exempt under § 522(f) of the Code shall be by
13 motion in accordance with Rule 9014." FED. R. BANKR. P. 9014(b)
14 provides that a "motion shall be served in a manner provided for
15 service of a summons and complaint by Rule 7004. . . ." And FED.
16 R. BANKR. P. 7004(b)(1) requires that service be made "[u]pon an
17 individual . . . by mailing a copy of the summons and complaint to
18 the individual's dwelling house or usual place of abode or to the
19 place where the individual regularly conducts a business or
20 profession."

21 The Panel has emphasized the importance of compliance with
22 Rule 7004 for service of a debtor's motion to avoid a judgment
23 lien. Beneficial California, Inc. v. Villar (In re Villar), 317
24 B.R. 88 (9th Cir. BAP 2004). It is the debtor's burden to effect

25
26 ¹¹ The docket includes other entries evidencing that the
27 bankruptcy court does routinely enter telephonic appearances in
28 the civil minute order resulting from a hearing, as it did for
Swedelius' counsel who appeared telephonically at the hearing on
April 29, 2005.

1 proper service. Id. at 94. It is undisputed that Swedelius was
2 not served at her dwelling house, usual place of abode, or a place
3 where she regularly conducted business. Instead, Reynolds' motion
4 was twice served on Tory Pankoff, a former attorney of Swedelius.
5 Although attorneys can in some instances accept service of process
6 under Rule 7004, here Reynolds made no showing that Pankoff had
7 been expressly or implicitly authorized by Swedelius to accept
8 service of a § 522(f) motion in Reynolds' bankruptcy case. In re
9 Focus Media, Inc., 387 F.3d 1077 (9th Cir. 2004) (holding that a
10 former attorney must have explicit or implicit authority from the
11 client to accept service under Rule 7004(b)).

12 Reynolds argues that, even if Swedelius was not properly
13 served under the Rules, Swedelius waived any defense of improper
14 service by not expressly incorporating that defense in Swedelius'
15 Motion for Reconsideration. Reynolds contends that, based upon
16 FED. R. CIV. P. 12(h), " a defense . . . of insufficiency of
17 service of process is waived . . . if it is neither made by motion
18 under this rule nor included in a responsive pleading. . . ."

19 Rule 12 is made applicable in adversary proceedings in
20 bankruptcy by FED. R. BANKR. P. 7012(b). However, the Rule 12
21 pleading requirements are not among those that are made applicable
22 in contested matters, such as Reynolds' Motion to Avoid Lien.
23 FED. R. BANKR. P. 9014(c) (listing specific Part 7000 rules made
24 applicable in contested matters). Reynolds' argument that
25 Swedelius waived defective service of the motion based upon FED.
26 R. CIV. P. 12(h) is without merit.

27 In a similar vein, Reynolds' contends that the bankruptcy
28 court abused its discretion by relying upon insufficiency of

1 service because Swedelius had "actual notice" of the motion. This
2 argument is also unavailing. Actual knowledge will not obviate
3 the need for compliance with service requirements on the party
4 whose property rights are affected by the proceeding. Levin v.
5 Maya Constr. (In re Maya Constr. Co.), 78 F.3d 1395, 1399 (9th
6 Cir. 1996).

7 Finally, Reynolds argues that her due process rights were
8 violated because she was not given notice of Swedelius intent to
9 argue inadequate service of process in connection with the
10 Reconsideration Motion. Reynolds contends that, had she been
11 given notice of the argument, "Appellant would have had an
12 opportunity to review this argument and then show the court that
13 it had been waived long before as discussed above."¹²

14 Even if Reynolds was entitled to notice of Swedelius' intent
15 to assert defective service as a basis for reconsideration of the
16 order avoiding lien, the failure to provide such notice did not
17 prejudice Reynolds in this context. Simultaneously with granting
18 reconsideration and the vacatur of the order avoiding lien without
19 prejudice, the bankruptcy court ordered that an evidentiary
20 hearing be held "wherein the ultimate question is what was the
21 value of the property on the day that the bankruptcy case was

22
23 ¹² Recall that, though served with the notice of Swedelius'
24 Motion for Reconsideration, Reynolds has not adequately
25 established that she appeared, either in person or through
26 counsel, at the hearing on April 26, 2005. It is therefore
27 difficult for Reynolds to complain that her procedural rights in
28 connection with that motion have been abused. Moreover, because
this issue was not raised by Reynolds in the hearing in the
bankruptcy court, it should not be raised for the first time on
appeal. Vincent v. Trend Western Technical Corp., 828 F.2d 563
(9th Cir. 1987). In view of the paramount interest placed by the
courts on safeguarding constitutional rights, Reynolds' argument
is examined here.

1 filed, which was October 6, 2004." By its vacatur without
2 prejudice and order that an evidentiary hearing be conducted, the
3 bankruptcy court ensured that Reynolds was afforded an opportunity
4 to participate in any hearing affecting her property rights. The
5 bankruptcy court did not deny or permanently deprive Reynolds of
6 those rights.¹³

7 The bankruptcy court did not abuse its discretion in granting
8 the Reconsideration Motion. The bankruptcy court properly relied
9 upon its lack of awareness of the Swedelius Opposition to
10 Reynolds' Motion to Avoid Lien, as well as Reynolds' failure to
11 properly serve Swedelius with that Motion, as a basis for granting
12 reconsideration.

13 2. The bankruptcy court did not err in denying Reynolds' Motion
14 to Avoid Lien.

15 On June 7, 2005, the bankruptcy court held an evidentiary
16 hearing at which it considered the issue of the value of Reynolds'
17 residence as of the date the bankruptcy petition was filed,
18 October 6, 2004. The outcome of this issue was important because
19 the value found by the bankruptcy court in turn determines whether
20 Reynolds may avoid the Judgment Lien pursuant to § 522(f).¹⁴

21
22 ¹³ The Supreme Court has held that a judicial postponement of
23 a determination concerning property rights does not violate due
24 process concerns. As Justice Brandeis explained, "Where only
25 property rights are involved, mere postponement of the judicial
26 inquiry is not denial of 'due process' if the opportunity given
27 for the ultimate judicial determination of the liability is
28 adequate." Philips v. Comm'r, 283 U.S. 589, 596-97 (1931), quoted
in Bowles v. Willingham, 321 U.S. 503, 520 (1944).

26 ¹⁴ Section 522(f)(1)(A) provides that "the debtor may avoid
27 the fixing of a lien on an interest of the debtor in property to
28 the extent that such lien impairs an exemption to which the debtor
would have been entitled under subsection (b) of this section, if
this lien is (A) a judicial lien, other than a judicial lien [of
(continued...)]

1 The evidence received by the bankruptcy court consisted of
2 testimony of Brian D. Lazarus, a California licensed real estate
3 appraiser, coupled with his appraisal report. The court also
4 heard testimony from Reynolds, which included her opinion of the
5 value of the home, together with the various methods used to fix
6 that value as of the petition date.

7 On June 9, 2005, the bankruptcy court issued its Findings of
8 Fact and Conclusions of Law. The court found the value of
9 Reynolds' property as of the petition date was \$440,000. The
10 bankruptcy court further found that Swedelius had established a
11 judgment lien against the real property by recording an abstract
12 of judgment on April 14, 2004, in the amount of \$38,097.44. On
13 the basis of its findings, the court concluded:

14 The debtor was entitled to exempt \$50,000 in
15 her residence pursuant to § 522(b) by
16 incorporating California exemptions.
17 The value of consensual liens and the debtor's
18 exemption as of the date of filing of bankruptcy
19 was \$394,642. All value in excess of \$394,642 is
20 available to pay judgment lien claims. The
21 \$38,097.44 judgment lien in favor of Swedelius does
22 not, in light of the \$440,000 value of the debtor's
23 property, impair her exemption. It follows that on
24 reconsideration of this court's prior order
25 avoiding the lien, the lien is not eligible to be
26 vacated and on reconsideration the motion to avoid
27 the judgment lien of Jessica Swedelius will be
28 denied.

23 ¹⁴(...continued)

24 types not relevant to this appeal]." Section 522(f)(2)(A)
25 prescribes a mathematical formula to be applied by the bankruptcy
26 court in determining whether a judicial lien will impair an
27 exemption: "[A] lien shall be considered to impair an exemption to
28 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 debtor's interest in the property would have in
the absence of any liens."

1 Reynolds argues that the court committed the following errors
2 in denying the Motion to Avoid Lien: (1) the appraisal considered
3 by the court at the June 7 meeting was not prepared until June 1,
4 2005, and not received by Reynolds until June 4, 2005, only three
5 days before the June 7, 2005, hearing, and thus violated Reynolds'
6 due process rights; (2) the court incorrectly assigned the burden
7 of proof as to the value of the property to Reynolds; (3)
8 Swedelius violated FED. R. BANKR. P. 4003(b) by failing to timely
9 object to Reynolds' homestead exemption and is thus bound by the
10 values stated in Reynolds' schedules and statements; and (4) the
11 court failed to take into consideration the costs of sale and
12 commissions in determining whether Swedelius' lien impaired
13 Reynolds' homestead exemption.

14 Reynolds argues that, because she did not receive a copy of
15 the appraisal submitted at the June 7, 2005 hearing until three
16 days before it occurred, her due process rights were violated.
17 This argument was not raised in the bankruptcy court, and can not
18 now be raised on appeal. Vincent, 828 F.2d 563. In addition,
19 there is evidence in the record that Reynolds, through her
20 attorney, agreed at the hearing to go forward:

21 MR. SMITH [Swedelius' counsel]: I submitted that
22 appraisal. I understood from conversations from - with
23 opposing counsel that he had a copy of the appraisal. I
24 had several conversations with him prior to the hearing.
25 I asked if he would be asking to continue the hearing,
26 he said no, because I told him I'd be driving down here
27 with an appraiser to testify, which cost me a thousand
28 dollars just to have him come down here.

25 Also, first thing this morning when I came in, I
26 spoke with opposing counsel, and I said, "Are we going
27 forward today?" and he said yes. . . .

27 THE COURT: I propose to take testimony today. Whether
28 I'm going to close the evidentiary record is another
question.

1 MR. TZIKAS: That's fine, your Honor.

2 Just for the record, everything that counsel said
3 is true. The appraisal that he provided to the debtor
4 last month was the appraisal dated April 25th of '05. .
5 . . Now, we did have a conversation this morning. I
6 did indicate to him that I thought there was going to be
7 a continuation of the motion to reconsider and that
8 would be the focus of it. If the court found in favor
9 of the movant for the motion to reconsider, we would go
10 forward on the evidence. . . .

11 THE COURT: Well, I propose to go forward on the
12 evidence.

13 MR. TZIKAS: Okay. Thank you, your Honor.

14 Hr'g Tr. 8:23 - 9:7 (June 7, 2005) (emphasis added).

15 In this colloquy with the court, while Reynolds' counsel
16 implies that his client might be disadvantaged by proceeding on
17 the evidence, he confirmed that he was offered a continuance by
18 opposing counsel and declined it. He also stated that "[i]f the
19 court found in favor of the movant for the motion to reconsider [a
20 condition that, in fact, had already been decided], we would go
21 forward on the evidence." And when informed by the court that it
22 proposed to proceed with the evidentiary hearing, far from raising
23 any objection, Reynolds' attorney replied "That's fine, your
24 Honor" and "Okay. Thank you, your Honor." When these comments
25 are fairly considered, the Panel concludes that Reynolds, through
26 her counsel, agreed to go forward with the evidentiary hearing.

27 The bankruptcy court also did not incorrectly assign the
28 burden of proof as to value of the property to Reynolds. Reynolds
29 argues that the hearing on June 7, 2005, was a continuation of the
30 hearing on the motion for reconsideration, and thus, Swedelius was
31 the movant and obliged to prove her claim was not "subject to
32 discharge by a preponderance of the evidence," citing Grogan v.
33 Garner, 498 U.S. 279 (1991). Swedelius also insists that a

1 creditor bears the burden of showing the validity, extent and
2 priority of its lien, citing § 363(o).

3 These arguments are bewildering. The hearing on June 7,
4 2005, was not a continuation of the hearing on the Swedelius
5 Reconsideration Motion - a motion that was clearly and
6 unambiguously granted by the court at the hearing on April 26,
7 2005. The June 7 hearing was set by the court to consider
8 Reynolds' Motion to Avoid Lien under § 522(f). "If the matter is
9 contested, the debtor generally bears the burden of proof of
10 establishing that the requirements of section 522(f) have been
11 met." 2 EPSTEIN, NICKLES & WHITE, BANKRUPTCY, § 8-20 at 568. Premier
12 Capital, Inc. v. DeCarollis (In re DeCarollis), 259 B.R. 467, 471
13 (B.A.P. 1st Cir. 2001) (citing In re Kerbs, 207 B.R. 211, 214
14 (Bankr. D. Mont. 1997)); In re Mohring, 142 B.R. 399, 399 (Bankr.
15 E.D. Cal. 1992); In re Orfa Corp. Of Philadelphia, 129 B.R. 404
16 (Bankr. E.D. Pa. 1991); In re Lincoln, 30 B.R. 905 (Bankr. D.
17 Colo. 1983).

18 This was not an action to determine the dischargeability of
19 Reynolds' debt to Swedelius, so Reynolds' reliance upon the case
20 law concerning such proceedings, including Grogan v. Garner, is
21 inapposite. And the validity, extent or priority of Swedelius'
22 Judgment Lien was also never at issue in this case, nor does this
23 contested matter implicate the use, sale or lease of any property
24 under § 363 of the Code. The bankruptcy court properly assigned
25 the burden of proof on the elements of § 522(f) to Reynolds.

26 Reynolds' argument that Swedelius violated FED. R. CIV. P.
27 4003(b) by failing to timely object to Reynolds' homestead
28 exemption also misses the point. It is true that Swedelius did

1 not make a timely objection to Reynolds' claimed exemption.
2 Indeed, Swedelius acknowledged that Reynolds had a valid homestead
3 exemption under California law. Clearly, then, that Reynolds
4 could exempt the property was not contested in this case.
5 Instead, the issues before the bankruptcy court involved the value
6 of Reynolds' property on the petition date and, based upon that
7 value, whether the Swedelius Judgment Lien impaired Reynolds'
8 exemption.

9 Reynolds cites no authority for her argument that, because
10 Swedelius allegedly failed to object to the homestead exemption,
11 she is bound by the values stated in Reynolds' schedules and
12 statements. To the contrary, this Panel has held that a judgment
13 creditor is not barred from challenging a debtor's right to an
14 exemption in connection with a § 522(f) motion by its failure to
15 timely object to the exemption claim under Rule 4003(b). Morgan
16 v. F.D.I.C. (In re Morgan), 149 B.R. 147, 150-151 (9th Cir. BAP
17 1993). Given this case law, a judgment creditor may question the
18 value of the exempt homestead in a § 522(f) contest without having
19 first objected to the debtor's exemption under Rule 4003(b).

20 Finally, the bankruptcy court did not err in failing to
21 subtract projected costs of sale and commissions in determining
22 whether Swedelius' lien impaired Reynolds' homestead exemption.
23 While Reynolds argues that a hypothetical six percent sales
24 commission should be included in the total of liens, her argument
25 is inconsistent with our case law. In Milgard Tempering, Inc. V.
26 DaRosa (In re DaRosa), 318 B.R. 871, 879 (9th Cir. BAP 2004), the
27 Panel decided that "we will not adjust the mathematical formula of
28 § 522(f)(2) for hypothetical events."

1 In spite of Reynolds' many arguments to the contrary, we
2 conclude that the bankruptcy court did not err in denying
3 Reynolds' Motion to Avoid Lien.

4 3. The bankruptcy court did not abuse its discretion in denying
5 Reynolds' Reconsideration Motion.

6 Although Reynolds appealed the bankruptcy court's denial of
7 the Reynolds Reconsideration Motion, she has not addressed this
8 appeal in her briefs. Indeed, she did not even include her own
9 Motion for Reconsideration in her Excerpts of Record. Since
10 Reynolds has provided no arguments to show the bankruptcy court
11 abused its discretion in denying the Reynolds Reconsideration
12 Motion, she has waived any such arguments, and the Panel need not
13 review the bankruptcy court's decision. Law Offices of Neil
14 Vincent Wake v. Sedona Inst. (In re Sedona Inst.), 220 B.R.74, 76
15 (9th Cir. BAP 1998) (issue waived if not argued in opening brief).
16

17 **CONCLUSION**

18 For all the above reasons, we AFFIRM the orders of the
19 bankruptcy court.
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