NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	)	BAP Nos. EC-05-1270-PaAB
	)	EC-05-1378-PaAB
KATHRYN REYNOLDS,	)	(Consolidated)
	)	
Debtor.	)	Bk. No. 04-30024
	)	
KATHRYN REYNOLDS,	)	
	)	
Appellant,	)	
	)	
v.	)	**M E M O R A N D U M**[1]
	)	
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, ALBERT[2] and BRANDT, Bankruptcy Judges.

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[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.

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

FACTS

Reynolds filed a petition for relief under chapter 7 of the Bankruptcy Code[3] on October 6, 2004. Reynolds was granted a discharge on January 11, 2005.

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

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

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[3] Unless otherwise indicated, 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 (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.").

[4] The parties disagree on the filing date of the Motion to Avoid Lien. Reynolds states that the Motion was filed on January 18, 2005; Swedelius alleges that it was filed on January 5, 2005. A review of the docket of the bankruptcy case shows that Reynolds actually filed nearly identical motions on both days. The Proof 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.

with the notation:

> Filed February 15, 2005
> Clerk
> U.S. Bankruptcy Court
> Eastern District of California.

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

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

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

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

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

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

> I agree with the service point. You are quite correct. Service was [not] actually made on Jessica Swedelius, and that is an excellent reason to grant reconsideration and to set the 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.

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

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[6] Reynolds incorrectly refers to the June hearing as a "continuance" of the hearing on the Reconsideration Motion in her Opening Brief: "[I]nstead of addressing the Appellee's Motion for Reconsideration as a continuance, requiring arguments on this last minute evidence, why there was no appearance at the Motion to Avoid Lien, or why Appellee could not have provided the 'evidence' at the Motion to Avoid Lien, the court went straight into the value of Appellant's house." As discussed above, the bankruptcy court granted the Reconsideration Motion at the April 26 hearing, and ordered that on June 7, 2005, there would be an "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."

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

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

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

> This court is not persuaded that it should reconsider the matter at this time. It exercised its discretion at the hearing on the creditor's motion for reconsideration to provide an opportunity for an evidentiary hearing at a later date. That hearing was held. The debtor appeared at that hearing and 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

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

JURISDICTION

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

ISSUES ON APPEAL

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

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

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

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

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

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

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[7] Reynolds' Opening Brief does not conform with Fed. R. Bankr. P. 8010(a)(1) in that, among other things, it does not include a statement of the issues presented and the applicable 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.

Whether the bankruptcy court erred in denying Reynolds' Motion to Avoid Lien by not taking into account the costs of sale of the residential property.

STANDARD OF REVIEW

A bankruptcy court's denial of a motion for reconsideration is reviewed for an abuse of discretion. In re Kaypro, 218 F.3d 1070, 1073 (9th Cir. 2000); In re Weiner, 161 F.3d 1216, 1217 (9th Cir. 1998).

A trial court's decision regarding the sufficiency of service of process is reviewed for an abuse of discretion. Rio Prop., Inc. v. Rio Int'l Interlink, 284 F.3d 1014 (9th Cir. 2002).

Whether a judicial lien is avoidable under § 522(f) is a question of bankruptcy law that the Panel reviews de novo. Law Offices of Moore v. Stoneking (In re Stoneking), 225 B.R. 690, 691 (9th Cir. BAP 1998); Foss v. Foss (In re Foss), 200 B.R. 660, 661 (9th Cir. BAP 1996); Yerrington v. Yerrington (In re Yerrington), 144 B.R. 96, 98 (9th Cir. BAP 1992), aff'd, 19 F.3d 32 (9th Cir. 1994).

DISCUSSION

1. The bankruptcy court did not abuse its discretion in granting Swedelius' Reconsideration Motion.

Under FED. R. CIV. P. 59(e), made applicable in bankruptcy proceedings by FED. R. BANKR. P. 9023, a bankruptcy court may alter or amend, or in other words reconsider, an order. The Ninth Circuit has held that motions for reconsideration should not be granted unless the trial court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in controlling law. Kona Enterprises, Inc. v. Estate of

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

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

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

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

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

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

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

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

> Opposition. Opposition, if any, to the granting of the motion shall be in writing and shall be served and filed with the Court by 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

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

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

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

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[9] In her Opening Brief, Reynolds attempts a third objection to consideration of the Opposition based on the Local Rule:

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

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

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

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

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

We reject Reynolds' argument. The Civil Minute Order for the hearing held on February 22, 2005, indicates that there were no

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[10] The same Rule also provides that "Unless additional notice is required by the Federal Rules of Bankruptcy Procedure or these Local Rules, or the moving party elects to give the notice permitted by LBR 9014-1(f)(2), the moving party shall file and 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.

appearances[11] by the parties and that the motion was resolved without oral argument. Based on the Civil Minute Order and the bankruptcy court's statements in its Memorandum Opinion, we decline to accept Reynolds' allegations that she was telephonically present at the hearing on February 22, 2005, and informed the court that there was an opposition to the motion. Reynolds' position is simply not supported by the record.

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

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

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

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

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

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

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

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

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

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

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[12] Recall that, though served with the notice of Swedelius' Motion for Reconsideration, Reynolds has not adequately established that she appeared, either in person or through counsel, at the hearing on April 26, 2005. It is therefore difficult for Reynolds to complain that her procedural rights in 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.

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

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

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

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

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

[14] Section 522(f)(1)(A) provides that "the debtor may avoid the fixing of a lien on an interest of the debtor in property to 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...)

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

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

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

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

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

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

> MR. SMITH [Swedelius' counsel]: I submitted that appraisal. I understood from conversations from – with opposing counsel that he had a copy of the appraisal. I had several conversations with him prior to the hearing. I asked if he would be asking to continue the hearing, he said no, because I told him I'd be driving down here with an appraiser to testify, which cost me a thousand dollars just to have him come down here.
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> Also, first thing this morning when I came in, I spoke with opposing counsel, and I said, "Are we going forward today?" and he said yes. . . .
>
> THE COURT: I propose to take testimony today. Whether I'm going to close the evidentiary record is another question.

> MR. TZIKAS: That's fine, your Honor.
>
> Just for the record, everything that counsel said is true. The appraisal that he provided to the debtor last month was the appraisal dated April 25th of '05. . . . Now, we did have a conversation this morning. I did indicate to him that I thought there was going to be a continuation of the motion to reconsider and that would be the focus of it. If the court found in favor of the movant for the motion to reconsider, we would go forward on the evidence. . . .
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> THE COURT: Well, I propose to go forward on the evidence.
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> MR. TZIKAS: Okay. Thank you, your Honor.

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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