

JAN 29 2007

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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NOT FOR PUBLICATION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

In re:) BAP No. CC-06-1164-PaJK
)
 VICTOR VELASCO and) Bk. No. LA 97-59288-RN
 TERESA VELASCO,)
)
 Debtors.)
 _____)
)
 VICTOR VELASCO and)
 TERESA VELASCO,)
)
 Appellants,)
)
 v.) **MEMORANDUM**¹
)
 CORONA PARTNERS LIMITED)
 PARTNERSHIP,)
)
 Appellee.)
 _____)

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

Filed - January 29, 2007

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

Honorable Richard M. Neiter, Bankruptcy Judge, Presiding.

Before: PAPPAS, JAROSLOVSKY² and KLEIN, 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 The Honorable Alan Jaroslovsky, United States Bankruptcy Judge for the Northern District of California, sitting by designation.

1 Victor and Teresa Velasco, chapter 7 debtors ("Debtors"),
2 filed a motion to reopen their bankruptcy case pursuant to 11
3 U.S.C. § 350(b)³ in order to avoid a judgment lien impairing
4 their homestead exemption under § 522(f). Corona Partners
5 Limited Partnership ("Creditor"), the judgment lien creditor,
6 objected to the motion to reopen arguing that its lien could not
7 be avoided. The bankruptcy court denied Debtors' motion and they
8 appealed. We REVERSE.

9
10 **FACTS**

11 Debtors filed for relief under chapter 7 of the Bankruptcy
12 Code on December 29, 1997. Debtors listed the judgment debt
13 owing to Creditor as an unsecured nonpriority claim in their
14 schedules. Debtors valued their primary residence at \$130,000 in
15 their schedules, subject to a \$115,000 debt secured by a deed of
16 trust. Debtors claimed a \$15,000 exemption on their home
17 pursuant to Cal. Code Civ. Proc. § 703.140(b)(1). No objections
18 to the exemption claim were filed. Debtors received a discharge
19 which was entered on April 13, 1998, and the bankruptcy case was
20 closed on September 30, 1998.

21 Although listed as unsecured in Debtors' schedules, Creditor
22 had recorded an abstract of judgment in the amount of \$53,136.84
23 on June 17, 1996. Debtors allege that they first became aware of

24 _____
25 ³ Unless otherwise indicated, all chapter, section and rule
26 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and
27 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as
28 enacted and promulgated prior to the effective date (October 17,
2005) of most of the provisions of the Bankruptcy Abuse
Prevention and Consumer Protection Act of 2005, Pub. L. 109-8,
April 20, 2005, 119 Stat. 23.

1 this judgment lien when they opened escrow to sell their
2 residence.⁴ They promptly contacted their bankruptcy counsel and
3 attempted for approximately one year to resolve whether the debt
4 had been discharged in the chapter 7 case.

5 Debtors ultimately filed a "Motion to Re-Open Case to Avoid
6 Lien" on March 24, 2006. The motion requested that Debtors'
7 bankruptcy case be reopened so that Debtors could file a motion
8 to avoid Creditor's judgment lien on Debtors' home. Debtor
9 Victor Velasco's declaration was attached to the motion. In it,
10 he states that he was unaware of Creditor's lien at the time he
11 filed the bankruptcy petition. He further states that at the
12 time the case was filed, the home was valued at \$144,000, based
13 upon a current appraisal report estimating the home's value as of
14 the petition date, a copy of which was attached to his
15 declaration.⁵

16 Creditor opposed Debtors' motion. It contended that, if the
17 case was reopened, Debtors would be estopped from avoiding the
18 lien based upon the amount of time that had passed since the case
19 was closed. Therefore, Creditor argued, there was no need to
20 reopen the bankruptcy case.

21 A hearing on Debtors' motion was conducted by the bankruptcy
22 court on April 18, 2006. At that hearing, the bankruptcy judge
23 expressed concern about the possible prejudice Creditor may have
24 suffered during the nine years that elapsed before Debtors took

25
26 ⁴ The date this occurred is unclear from the record.

27 ⁵ Section 522(a)(2) defines "value" for purposes of
28 applying the impairment test for avoidance of judgment liens on
exempt property in § 522(f)(2), as "fair market value as of the
date of the filing of the petition"

1 any steps to avoid the lien. Creditor's counsel responded that
2 it had been prejudiced in two ways: first, by not receiving the
3 money owed on the judgment, and second, by incurring an estimated
4 \$700 to \$1,000 in attorney fees in an unsuccessful attempt to
5 collect the amounts due from the escrow account for the sale of
6 the home.⁶ During the hearing, and essentially at the court's
7 request, Creditor offered to resolve the issues by allowing
8 Debtors to retain \$15,000 from the house sale proceeds from the
9 amounts owed to Creditor to discharge the lien. Debtors rejected
10 the offer and indicated they intended to proceed with their
11 motion to reopen and avoid the lien. The following exchange
12 between the bankruptcy court and Debtors' counsel ensued:

13 THE COURT: If I were to grant the motion to reopen the
14 case, how would the creditor's claim be paid?

15 MS. FLEISCHER: You mean the thousand dollars?

16 THE COURT: No. The creditor's claim which is reflected
17 by the abstract of judgment.

18 MS. FLEISCHER: No, your Honor. We would do the motion
19 to avoid that lien because the debt was discharged in
20 the Chapter - - the original discharge of debt. It was
21 listed as a debt. It would be discharged at that time,
22 and the lien would be avoided. Therefore, there would
23 be no debt to the creditor.

24 THE COURT: I'm going to deny the motion to reopen.

25 Tr. Hr'g 10:22-11:9 (Apr. 18, 2006).

26 Debtor's counsel then asked the bankruptcy judge whether the
27 basis for the denial of the motion was laches. The judge
28

⁶ Creditor's counsel's comments regarding the costs incurred by his client is entitled to no evidentiary weight, as he admitted that he was only estimating the amount of attorney fees incurred. The bankruptcy court acknowledged that it did not consider counsel's statements at the hearing as evidence.

1 confirmed that was partially the reason, but also because of what
2 the court perceived to be Debtors' inequitable conduct such that
3 to grant the motion would be an abuse of discretion.

4 An order denying Debtors' motion was entered on May 3, 2006.
5 This timely appeal followed.

6 7 **JURISDICTION**

8 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
9 §§ 1334 and 157(b) (2) (A), (B), (K) and (O). We have jurisdiction
10 under 28 U.S.C. § 158(b).

11 12 **STANDARD OF REVIEW**

13 We review the bankruptcy court's decision whether to reopen
14 a case under § 350(b) for abuse of discretion. Staffer v.
15 Predovich (In re Staffer), 306 F.3d 967, 971 (9th Cir. 2002).
16 "A bankruptcy court necessarily abuses its discretion if it bases
17 its ruling on an erroneous view of the law. The panel also finds
18 an abuse of discretion if it has a definite and firm conviction
19 the court below committed a clear error of judgment in the
20 conclusion it reached." Lopez v. Specialty Rest. Corp. (In re
21 Lopez), 283 B.R. 22, 26 (9th Cir. BAP 2002) (quoting Palm v.
22 Klapperman (In re Cady), 266 B.R. 172, 178 (9th Cir. BAP 2001)).

23 24 **ISSUE**

25 Whether the bankruptcy court abused its discretion when it
26 denied, on the grounds of laches and inequitable conduct, Debtors'
27 motion to reopen their chapter 7 case to avoid a lien.

1 whether further administration appears to be
2 warranted; whether a trustee should be
3 appointed; and whether the circumstances of
4 reopening necessitate payment of another
5 filing fee. Extraneous issues should be
6 excluded.

7 Id. at 916-17.

8 This narrow scope of inquiry is evidenced by the fact that,
9 although Rule 5010 requires a motion in order to reopen a case,
10 neither that Rule nor § 350(b) requires that any notice of the
11 motion be given to other interested parties. Menk, 241 B.R. at
12 914. As a result, a motion to reopen a bankruptcy case may be
13 considered ex parte and without a hearing. Id. Presumably, had
14 the drafters of the Code and Rules contemplated that significant
15 legal or factual issues would be examined at the time the
16 bankruptcy court considered the motion to reopen, timely notice to
17 others would have been required.

18 “The clear majority of cases recognize that a previously
19 closed bankruptcy case may be reopened pursuant to 11 U.S.C.
20 § 350(b) in order to avoid a lien under § 522(f).” ITT Fin. Serv.
21 v. Ricks (In re Ricks), 89 B.R. 73, 75 n. 3 (9th Cir. BAP 1988).
22 The ultimate relief Debtors seek here is to avoid Creditor’s lien
23 on the grounds that it impairs their homestead exemption under
24 § 522(f). This type of relief begins by reopening the case, which
25 affords Debtors an opportunity to then ask the bankruptcy court to
26 avoid Creditor’s judgment lien. Put another way, lien avoidance
27 under § 522(f) is one type of relief which may be accorded to a
28 debtor, and presents proper grounds to reopen a case under
29 § 350(b).

1 Creditor contends that reopening is inappropriate because
2 laches bars Debtors' right to lien avoidance under these facts.
3 But the Ninth Circuit, in an analogous situation, held that a
4 bankruptcy case should be reopened, without regard to a creditor's
5 argument that the debtor engaged in unreasonable delay in seeking
6 relief. In Staffer, the court considered an appeal of a BAP
7 decision reversing the bankruptcy court's denial of the debtor's
8 motion to reopen a bankruptcy case made six years after the case
9 was closed. Reopening was sought so debtor could seek a
10 determination that the creditor's debt had been discharged.
11 After reviewing the panel's decision in Menk, the court observed:

12 The bankruptcy court collapsed the two
13 questions into one. Under its reasoning, if
14 the underlying action is barred by laches, a
15 motion to reopen should not be granted. The
16 BAP reached a contrary conclusion, citing
17 [Menk]. It held that the question of whether
18 Staffer could successfully assert the
19 affirmative defense of laches to [the
20 creditor's] nondischargeability action was an
21 extraneous issue at the motion-to-reopen
22 stage, and was not properly addressed prior to
23 the filing the [sic] complaint. We agree with
24 the BAP.

19 * * *

20 Because the bankruptcy court was presented
21 only with a motion to reopen and not with the
22 nondischargeability complaint itself, the BAP
23 was correct to hold that the question of the
24 applicability of laches to that complaint was
25 not properly before the court.

24 Staffer, 306 F.3d at 972. (citations omitted).⁷

26 ⁷ Both the court in Staffer, and the panel in Menk,
27 concluded that the bankruptcy court should not consider defenses
28 to a dischargeability complaint, such as laches, in considering a
29 motion to reopen. Staffer, 306 F.3d at 972; Menk, 241 B.R. at
30 913-916. However, both decisions also conclude that reopening

(continued...)

1 It is evident from the record that the bankruptcy court
2 relied upon the Debtors' perceived laches in denying the motion to
3 reopen in this case. During the hearing, the bankruptcy judge,
4 addressing Debtors' counsel, said:

5 [M]y understanding of the law is that, as
6 you've pointed out in your opposing papers,
7 five years has been determined by the Ninth
8 Circuit not to be too long, too much of a
9 delay to reopen a case, if the creditor has
10 not been prejudiced. There are no cases
11 about nine years. There is a case, however - I
12 don't think it's a Ninth Circuit case, but a
13 case which says that if ultimately the lien
14 can't be avoided, there's no reason for
15 reopening the case. Given the fact that
16 [Creditor's attorney] has just offered to
17 stipulate on behalf of his client that \$15,000
18 from the escrow could be paid to your client,
19 you can accept that, and this matter can be
20 resolved. Will you accept that?

21 Tr. Hr'g 9:10-22 (Apr. 18, 2006). Further, when asked by Debtors'
22 counsel, the bankruptcy court explained the basis for its ruling:

23 THE COURT: I'm going to deny the motion to reopen the
24 case.

25 MR. ROTHMAN: Thank you very much, your Honor.

26 MS. FLEISCHER: Your Honor, may I ask, is that based on
27 laches?

28 THE COURT: In part.

MS. FLEISCHER: Thank you, your Honor.

THE COURT: It's also based on the inequitable - what I
believe is inequitable conduct on behalf of the creditor

⁷(...continued)

the bankruptcy case is not a necessary jurisdictional
prerequisite to the commencement and prosecution of an adversary
proceeding. Staffer, 306 F.3d at 972-973; Menk, 241 B.R. at 905-
906. In contrast, here reopening was required since Rule 4003(d)
provides that "a proceeding by the debtor to avoid a lien . . .
under § 522(f) of the Code shall be by motion [in the bankruptcy
case] in accordance with Rule 9014."

1 - the Debtor. Excuse me. Not the creditor. And that
2 it would be an abuse of my discretion, under the
circumstances, to grant the motion.

3 Tr. Hr'g 11:8-19 (Apr. 18, 2006).

4 Fairly construing the bankruptcy court's comments yields two
5 possible reasons for its refusal to reopen the bankruptcy case.

6 First, the bankruptcy judge may have decided that, as a matter of
7 law, nine years constitutes too long a delay since the closing of
8 the bankruptcy case to allow it to be reopened. Second, the court
9 may have decided that Debtors had behaved inequitably, by
10 allegedly sitting on their knowledge of the existence of
11 Creditor's lien, and waiting nine years before they sought to
12 avoid it. However, both of these reasons focus on whether Debtors
13 should ultimately be entitled to avoid Creditor's lien, an issue
14 not yet before the court. Instead, as noted above, the bankruptcy
15 court should have considered only Debtors' motion to reopen, and
16 in doing so, its inquiry should have been limited to deciding
17 whether Debtors had demonstrated the requisite cause to reopen the
18 case.

19 Debtors showed the bankruptcy court that, at the time of the
20 filing of their petition, they owned a home; that it had been
21 claimed exempt; and that Creditor's judgment lien may impair that
22 exemption. Debtors' desire to file a motion to avoid Creditor's
23 judgment lien under these circumstances constituted the required
24 cause to reopen the bankruptcy case, since such an order was a
25 necessary condition to their ability to obtain relief in the form
26 of a lien avoidance order.

1 **CONCLUSION**

2 Like the courts in Staffer and Menk, we express no opinion
3 concerning whether the amount of time that passed after the
4 closing of Debtors' bankruptcy case, or whether other aspects of
5 Debtors' conduct, may constitute a proper basis to deny Debtor's
6 motion to avoid Creditor's lien when it is ultimately considered
7 by the bankruptcy court.⁸ For purposes of this appeal, it is
8 sufficient that we conclude that the bankruptcy court employed an
9 erroneous view of the law when it relied upon potential defenses
10 to lien avoidance as the basis for denying Debtors' motion to
11 reopen the bankruptcy case.

12 The decision of the bankruptcy court is REVERSED, and this
13 case is REMANDED to the bankruptcy court for further proceedings
14 consistent with this decision.

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17
18 ⁸ Staffer, 306 F.3d at 973 (noting that "the BAP correctly
19 left open the possibility that, upon the filing of [creditor's
20 § 523(a)] complaint, [debtor] might assert laches as a
21 defense."); Menk, 241 B.R. at 916. We note, though, that "[n]o
22 provisions of the Code or Rules . . . have established a time
23 limit for bringing an action to avoid a lien under 11 U.S.C.
24 § 522(f)(2)." Yazzie v. Postal Fin. Co.(In re Yazzie), 24 B.R.
25 576, 577 (9th Cir. BAP 1982). See also, In re Ricks, 89 B.R. at
26 75. An evidentiary hearing is likely required to determine
27 whether the application of laches is appropriate, because that
28 decision "requires a particularized showing of demonstrable
prejudicial delay" and "depends on a close evaluation of all the
particular facts in a case," and, therefore, is "seldom
susceptible of resolution by summary judgment." Beaty v.
Selinger (In re Beaty), 306 F.3d 914, 928 (9th Cir. 2002); cf.
Lone Star Sec. & Video, Inc. v. Gurrola (In re Gurrola), 328 B.R.
158, 176 (9th Cir. BAP 2005) ("no equitable exception to the
provisions of § 524(a) that void any judgment at any time
obtained").