NOT FOR PUBLICATION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.	)	**M E M O R A N D U M**[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, JAROSLOVSKY[2] and KLEIN, Bankruptcy Judges.

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[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.

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

FACTS

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

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

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[3] Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as 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.

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

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

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

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

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[4] The date this occurred is unclear from the record.

[5] Section 522(a)(2) defines "value" for purposes of 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 . . . ."

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

> THE COURT: If I were to grant the motion to reopen the case, how would the creditor's claim be paid?
>
> MS. FLEISCHER: You mean the thousand dollars?
>
> THE COURT: No. The creditor's claim which is reflected by the abstract of judgment.
>
> MS. FLEISCHER: No, your Honor. We would do the motion to avoid that lien because the debt was discharged in the Chapter - - the original discharge of debt. It was listed as a debt. It would be discharged at that time, and the lien would be avoided. Therefore, there would be no debt to the creditor.
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> THE COURT: I'm going to deny the motion to reopen.

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

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

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[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.

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

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

JURISDICTION

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

STANDARD OF REVIEW

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

ISSUE

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

DISCUSSION

Section 350(b) provides that a bankruptcy case "may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause." Under Rule 5010, a case "may be reopened on motion of the debtor or other party in interest pursuant to § 350(b) of the Code."

The act of reopening a bankruptcy case is ministerial in nature. Staffer, 306 F.3d at 972. As we have explained, reopening "functions primarily to enable the file to be managed by the clerk as an active matter" and "by itself, lacks independent legal significance and determines nothing with respect to the merits of the case." Menk v. Lapaglia (In re Menk), 241 B.R. 896, 913 (9th Cir. BAP 1999), cited with approval, Staffer, 306 F.3d at 972; see Lopez, 283 B.R. at 26-27; United States v. Germaine (In re Germaine), 152 B.R. 619, 624 (9th Cir. BAP 1993).

As noted in Menk, the reopening of a bankruptcy case is of little legal consequence. Such an order "has no impact on property of the debtor, no impact on property of the estate that was abandoned at the time of closing, and does not automatically reinstate the trustee." Id. at 914. Furthermore, "[t]o the extent that effects of closing are to be undone, specific orders in separate civil proceedings are necessary." Id. at 913.

While it may seem to represent a more streamlined approach in some circumstances, the bankruptcy court, in considering a motion to reopen, should not perform a "gate-keeping" function by delving into the underlying facts and issues to be explored after the case is reopened. As the panel in Menk observed:

> In short, the motion to reopen legitimately presents only a narrow range of issues:

> whether further administration appears to be warranted; whether a trustee should be appointed; and whether the circumstances of reopening necessitate payment of another filing fee. Extraneous issues should be excluded.

Id. at 916-17.

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

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

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

> The bankruptcy court collapsed the two questions into one. Under its reasoning, if the underlying action is barred by laches, a motion to reopen should not be granted. The BAP reached a contrary conclusion, citing [Menk]. It held that the question of whether Staffer could successfully assert the affirmative defense of laches to [the creditor's] nondischargeability action was an extraneous issue at the motion-to-reopen stage, and was not properly addressed prior to the filing the [sic] complaint. We agree with the BAP.
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> * * *
>
> Because the bankruptcy court was presented only with a motion to reopen and not with the nondischargability complaint itself, the BAP was correct to hold that the question of the applicability of laches to that complaint was not properly before the court.

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

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[7] Both the court in Staffer, and the panel in Menk, concluded that the bankruptcy court should not consider defenses to a dischargability complaint, such as laches, in considering a motion to reopen. Staffer, 306 F.3d at 972; Menk, 241 B.R. at 913-916. However, both decisions also conclude that reopening (continued...)

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

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

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

> THE COURT: I'm going to deny the motion to reopen the case.
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> MR. ROTHMAN: Thank you very much, your Honor.
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> MS. FLEISCHER: Your Honor, may I ask, is that based on laches?
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> THE COURT: In part.
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> 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

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[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."

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

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

Fairly construing the bankruptcy court's comments yields two possible reasons for its refusal to reopen the bankruptcy case. First, the bankruptcy judge may have decided that, as a matter of law, nine years constitutes too long a delay since the closing of the bankruptcy case to allow it to be reopened. Second, the court may have decided that Debtors had behaved inequitably, by allegedly sitting on their knowledge of the existence of Creditor's lien, and waiting nine years before they sought to avoid it. However, both of these reasons focus on whether Debtors should ultimately be entitled to avoid Creditor's lien, an issue not yet before the court. Instead, as noted above, the bankruptcy court should have considered only Debtors' motion to reopen, and in doing so, its inquiry should have been limited to deciding whether Debtors had demonstrated the requisite cause to reopen the case.

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

CONCLUSION

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

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

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[8] Staffer, 306 F.3d at 973 (noting that "the BAP correctly left open the possibility that, upon the filing of [creditor's § 523(a)] complaint, [debtor] might assert laches as a defense."); Menk, 241 B.R. at 916. We note, though, that "[n]o provisions of the Code or Rules . . . have established a time limit for bringing an action to avoid a lien under 11 U.S.C. § 522(f)(2)." Yazzie v. Postal Fin. Co.(In re Yazzie), 24 B.R. 576, 577 (9th Cir. BAP 1982). See also, In re Ricks, 89 B.R. at 75. An evidentiary hearing is likely required to determine whether the application of laches is appropriate, because that 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").