NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	)	BAP No. NC-05-1316-KRyB
	)	
MARGARET E. BOND,	)	Bk. No. 03-12296
	)	
Debtor.	)	
_____	)	
	)	
MARGARET E. BOND,	)	
	)	
Appellant,	)	
	)	
v.	)	**MEMORANDUM**[*]
	)	
CIT GROUP/SALES FINANCING, INC.; JEFFRY C. LOCKE, Chapter 7 Trustee; UNITED STATES TRUSTEE,	)	
	)	
Appellees.	)	
_____	)	

Argued and Submitted on March 24, 2006
at San Francisco, California

Filed – April 26, 2006

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

Honorable Alan Jaroslovsky, Bankruptcy Judge, Presiding.

_____

Before: KLEIN, RYAN[**] and BRANDT, Bankruptcy Judges.

---

[*]This disposition is not appropriate for publication and may not be cited except when pertinent 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.

[**]Hon. John E. Ryan, United States Bankruptcy Judge for the Central District of California, sitting by designation.

The instant appeal arises from a bankruptcy court order denying appellant's motion to avoid a judicial lien to the extent that it applied to a vacant lot that was not contiguous to the debtor's homestead. The court avoided the judicial lien against the two city lots on which the debtor's home was physically located, but did not avoid the lien against the third, noncontiguous vacant lot, concluding under the facts that it was not necessary for the debtor's full use and enjoyment of her homestead. We AFFIRM.

FACTS

Appellant debtor commenced a voluntary chapter 7 case on September 19, 2003. She listed real property located in Lucerne, California, and scheduled the property as having a value of $210,000. The property consisted of three separate city lots, two of which were located at 6298 E. Highway 20, with the third lot at 14th Street. The debtor's home straddles the two contiguous lots, on which lots are also located a garage and a commercial building. The third lot, which is vacant, is separated from the other two by an alley. Each of the lots has a separate assessor's parcel number.

The debtor scheduled the property as exempt in the amount of $125,000 pursuant to California Code of Civil Procedure § 704.730(a)(3). Encumbrances against the property, excluding judicial liens, totaled $86,000, leaving equity of $124,000.

The debtor filed a motion to avoid a judicial lien in favor of CIT Group/Sales Financing, Inc. ("CIT") in the amount of $23,776.57 pursuant to 11 U.S.C. § 522(f).

Although CIT filed an opposition to the debtor's motion, the opposition has not been made part of the appellate record.

The court held a hearing on November 19, 2004, and after further briefing, issued a memorandum decision, but not an order, on December 10, 2004.

The court's memorandum explained that all other issues being disposed of, the only remaining dispute centered around the nature of the property itself and whether the lien ought to be avoided as impairing the homestead exemption. The court explained that the vacant third lot was the most problematical. Assuming that it could be separately sold without violating any land use laws, the court reasoned that its inclusion as part of the homestead depended, under California law, only on its use. The fact that it was separated by an alley was not relevant.

The court required an evidentiary hearing because material issues of fact needed to be resolved, including whether the debtor had equity over and above her exemption on the day she filed her petition and whether she was entitled to the $125,000 exemption amount. While reserving the question of the burden of proof, the court noted that someone had to show whether the third lot was legally marketable by itself. If it was, then the debtor had to show that it was necessary for the use and enjoyment of her homestead.

CIT filed a trial brief and a declaration in support thereof. CIT argued that the debtor could not exempt the third lot and that the portion of the two contiguous lots occupied by the structure should be excluded from the exemption – i.e., the court should, in effect, re-draw the lot lines. CIT's trial

brief has not been made part of the record.

The debtor filed a declaration, wherein she asserted that she lived on the two lots on 6298 E. Highway 20 and used the third lot on 14th Street for storage purposes. She explained that she used the third lot to store various items:

- From February 1997 until September 1998 I stored my 35' RV (used to move from Petaluma to Lucerne).
- From August 1998 until November 1999 I stored a smaller RV and a travel [trailer] belonging to a couple who were helping me around the house and who built a fence for me.
- From June 1999 until June 2000 I used the lot to store a cabin cruiser and a boat trailer that belonged to a friend of mine.
- In 1998 and 1999 I used the lot to temporarily store a 3/4 ton pick up for Marvin Campbell (a friend) and as showplace for various travel vans and trailers that I purchased and sold from time to time to augment my Social Security grant.
- On occasion I also parked motor vehicles on the street next to my house when they were licensed.
- I used the 14th Ave. lot during the entire time I owned the property to store wood that remained there until Larry Elbert, the purchaser of my home, moved it to the E. Hwy 20 property.
- Because my garage was filled with furniture from my move from Petaluma to Lucerne, and with property I inherited from two close relatives, I did not have room to store any of the smaller vehicles in question.

Debtor's declaration, pgs. 1-2.

The court held a hearing on April 6, 2005, and three days later, entered a second memorandum, but not an order, on the debtor's motion to avoid lien. The court rejected CIT's argument that the court should re-draw the lot lines on the two parcels where the house was situated.[1] The court ruled that the debtor

---

[1]The court observed that although a further hearing was scheduled solely to determine if the third lot was necessary for the use and enjoyment of the homestead, CIT "with tenacity worthy of Simon Legree" made its pitch again and came up with a new

(continued...)

established that at the time she filed her case the value of her property did not exceed the encumbrances plus the homestead amount. As a consequence, the only necessary issue was whether the third lot across the alley, which they stipulated was separately marketable, was subject to the homestead exemption.

The court concluded that the debtor's declaration established that the lot was used almost exclusively for parking and storing. Moreover, most of the property that had been parked and stored on the vacant lot was not owned by the debtor.

Ultimately, the court held that the debtor did not establish that she needed the lot for the full enjoyment of her home or that she used it in any way to ameliorate the effects of her disability. Citing 37 Cal. Jur. 3d, Homesteads § 27 (1980), it held that the third lot was not necessary for use and enjoyment of the dwelling and could not be included in the homestead.

Even though a separate order had not been entered, on April 15, 2005, the debtor filed a motion to reconsider the second memorandum on her motion to avoid lien. The debtor argued that, although 37 Cal. Jur. 3d Homesteads § 27 supported the court's conclusion, the authority cited therein consisted of two old cases, Gregg v. Bostwick, 33 Cal. 220 (1867), and Guernsey v. Douglas, 171 Cal. 329 (1915), that were decided under what, the debtor urged, was a "radically different" version of the homestead statute. Hence, it was argued, the old cases were inapposite and obsolete.

---

[1](...continued)
argument: if the court would not re-draw the lot lines, then it should reduce the homestead by the 25 percent it was used for commercial purposes. The court rejected this argument.

On June 23, 2005, the court issued a memorandum, denying the motion for reconsideration. No separate order was entered. In the memorandum, the court began by noting a legislature usually does not write on a "clean slate" when it amends or changes law. Dewsnup v. Timm, 502 U.S. 410, 419 (1992). The court explained that Gregg and Guernsey are still viable precedents because cases interpreting prior versions of the law are still considered part of the law, unless revised statutory language, or at least legislative history, casts doubt upon them.

After noting that the debtor cited no case, secondary source, or legislative history to indicate that the older California homestead cases were no longer good law, the court denied the motion.

The court entered a separate order denying the debtor's motion for reconsideration on July 18, 2005, even though no separate order had been entered denying the motion to avoid lien.

A notice of appeal was filed on July 27, 2005.

JURISDICTION

The bankruptcy court had jurisdiction via 28 U.S.C. § 1334. We have jurisdiction under 28 U.S.C. § 158(a)(1).

ISSUE

Whether the court erred in finding that the debtor was not entitled to exempt the vacant lot as part of her homestead, thereby denying the debtor's motion to avoid lien against the vacant lot.

STANDARD OF REVIEW

The scope of a state law exemption involves construction of state law that we review de novo. Casserino v. Casserino (In re Casserino), 290 B.R. 735, 737 (9th Cir. BAP 2003). A trial court's findings of fact are reviewed for clear error. Peklar v. Ikerd (In re Peklar), 260 F.3d 1035, 1037 (9th Cir. 2001). Clear error exists when, after examining the evidence, the reviewing court is left with a definite and firm conviction that a mistake has been committed. Davis v. Davis (In re Davis), 323 B.R. 732, 734 (9th Cir. BAP 2005), citing, United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948).

DISCUSSION

We deal with two procedural matters before reaching the merits.

I

The first procedural problem is that there is not a separate order denying the motion to avoid lien and, thus, when the motion for reconsideration was filed, the court had not complied with the separate document requirement of Federal Rule of Civil Procedure 58, as incorporated by Federal Rule of Bankruptcy Procedure 9021. However, the June 23 memorandum preliminary to the court's July 18 order denying the motion for reconsideration, which order was on a separate document, makes plain that the court was having its last word on the lien avoidance matter. Thus, the separate order denying the motion for reconsideration also serves as the separate document needed to resolve the motion

to avoid lien. Garland v. Maloney (In re Garland), 295 B.R. 347, 352 (9th Cir. BAP 2003).

As a consequence, we construe the order on appeal as the court's order denying the debtor's motion to avoid the lien in favor of CIT, which order is final and was timely appealed.[2]

The second procedural problem is that, even though there were disputed material factual issues regarding the use of the noncontiguous third lot, the appellate record does not indicate that the court took testimony in the same manner as testimony in an adversary proceeding, as required by Federal Rule of Bankruptcy Procedure 9014(d). However, since no party has raised an issue regarding the erroneous manner of taking evidence, any issue in that regard is waived.

II

Turning to the merits, when a debtor elects to claim an exemption under state law pursuant to 11 U.S.C. § 522, a debtor must comply with the state law in effect at the time of the filing of the bankruptcy petition. England v. Golden (In re Golden), 789 F.2d 698, 700 (9th Cir. 1986). Accordingly, we apply California law in determining whether the debtor's homestead exemption covers the vacant lot.

The debtor argues that the court's findings that the vacant third lot was not necessary for the debtor's full use and enjoyment of her homestead were based on obsolete authority that

[2]In any event, more than 150 days have elapsed since the time that the relevant orders were entered, and, accordingly, they have become final by operation of Federal Rule of Civil Procedure 58(b)(2)(B).

is at odds with a plain reading of California Code of Civil Procedure § 704.710. As noted, the court relied on 37 Cal. Jur. 3d Homesteads § 27, which, in turn, cites decisions of the California Supreme Court from 1867 (Gregg) and 1915 (Guernsey) interpreting earlier versions of the homestead statute. This argument is based on a false premise.

We do not agree with the appellant that the substantive content of the basic definition of a California homestead, insofar as it applies to structures on land owned in fee simple, has materially changed in substance since the Nineteenth Century. While the definition has been restyled and has been expanded to include mobile homes, boats, condominiums, planned developments, stock cooperatives, and community apartment projects where people reside, the basic definition of a traditional residence has remained essentially intact since 1872.

The version of the definition of a homestead that was codified in 1872 as California Civil Code § 1237 provided:

> The homestead consists of a quantity of land, on which the claimant resides, selected as in this Title provided.

CAL. CIV. CODE § 1237 (West 2005), Historical Note.

Amendments of 1873-74 revised the definition to provide that a homestead consists of:

> the dwelling house in which the claimant resides, and the land on which the same is situated, selected as in this title provided.

Id.

The phrase "together with outbuildings" was inserted by virtue of a 1945 amendment, with a corresponding change – "is" to "are"– to the verb of being. Id. This was apparently a

housekeeping revision to conform the statute with decisional law. See, e.g., Payne v. Cummings, 80 P. 620 (Cal. 1905) (scope of appurtenances).

Amendments of 1970 and 1973 accommodated modern land-use devices such as condominiums but did not change the basic definitional formula of dwelling-house-outbuildings-and-land-on-which-situated. CAL. CIV. CODE § 1237 (West 2005), Historical Note.

The homestead statute was restyled, consolidated, and moved to the Code of Civil Procedure by amendments of 1982 and 1983 but retained, insofar as a "house" was concerned, the prior definition of dwelling:

> "Dwelling" means a place where a person resides and may include ... [a] house together with the outbuildings and the land upon which they are situated.

CAL. CIV. PROC. CODE § 704.710(a)(1) (West 2005).

The legislative history of the 1982 statute confirms that the substance of the law was not being changed:

> Subdivision (a) is intended to include all forms of property for which an exemption could be claimed under former law [.]

Id. Legislative Committee Comment–Senate 1982 Addition.

It follows from this history that the pertinent portion of the definition of a California homestead has not materially changed in the past century. Hence, cases decided under prior versions of the California homestead statute retain vitality.[3]

---

[3]We also reject the debtor's argument that under the plain reading of the statute the "land upon which it is situated" necessarily includes the vacant lot. The plain meaning of the statute enables the debtor to exempt the land upon which her house is situated, which means that she can exempt the two lots (continued...)

As Judge John Minor Wisdom once noted, the "patina of old cases does not affect their quality." Consol. Rail Corp. v. Metro-North Commuter R.R., 638 F. Supp. 350, 356 (Sp. Rail Reorg. Ct. 1986) (Wisdom, J.).

Accordingly, the court did not err by relying on Gregg and Guernsey cited in 37 Cal. Jur. 3d Homesteads § 27. Although the debtor argues that the plain reading of the statute does not contain a limitation that the lot must be "necessary for the use and enjoyment" of the debtor's dwelling in order to be included in her homestead, one cannot ignore the judicial gloss of more than a century of decisions regarding the concept of "use and enjoyment" in connection with the construction of the homestead exemption. County of San Mateo v. O'Donnell, 189 Cal. App. 2d 498, 502 (1961)(object of homestead law is to provide a home where the homesteader may reside and enjoy the comforts of a home); Morrison v. Barham, 184 Cal. App. 2d 267, 272-74 (1960)(the object of the homestead law is to protect the holder in the right to preserve the home; it gives one the right to the "undisturbed use, possession, and enjoyment of the property").

---

[3](...continued)
her house straddles. The court honored the exemption of these two lots and avoided the judicial lien to that extent.

Moreover, as appellee contends, the debtor's contention that the "land upon which they are situated" should extend to the third vacant lot requires an expansive reading of the plain words of the statute. We agree with the appellee that mere proximity of the third lot does not suffice to include it in the debtor's homestead. If the vacant lot were farther down the street, there would be no dispute. The usual practice of restricting the exemption to the lot containing the home is reasonable in most cases in order to prevent abuse. 5 HARRY D. MILLER & MARVIN B. STARR, CAL. REAL ESTATE § 13:11 (3d ed. 2000)("MILLER & STARR").

It is noteworthy that the discussion of homesteads in the Miller & Starr treatise on California real property is consistent with that in California Jurisprudence. MILLER & STARR § 13.10. The Miller & Starr treatise explains that, even in its popular sense, the word "homestead" refers to the home and residence of the family and means the actual dwelling house in which the declarant resides, together with actual and customary appurtenances, including outbuildings of every kind necessary or convenient for family use. Id.

There is no legal limitation on the amount of land or the number of lots that can be declared as homestead, the only test is whether the property is actually used as the family residence and whether the surrounding property claimed is necessary or convenient for the enjoyment of the family home. MILLER & STARR § 13.10 In other words, there is no formula for determining the propriety of the use of surrounding property claimed, but it cannot be protected by the homestead if is it neither necessary nor convenient for the enjoyment of the home. Id. The bankruptcy court's ruling that the third vacant lot was not necessary for the use and enjoyment of the debtor's home is consistent with these principles.

The debtor further argues that the court made a value judgment by reasoning that the property would be exempt if the debtor used the vacant lot as storage for garbage, or to hang laundry, or to picnic, but not for parking large vehicles. Perhaps so, but that merely reflects the practical reality of a rule of reason and how judges make decisions. Moreover, when adjoining property is necessary to maintain and/or is used in

connection with the home, it commonly will be entitled to an exemption. MILLER & STARR §§ 13:10 & 13:11, citing, Arendt v. Mace, 18 P. 376 (1888)(adjoining land used as garden and source of water for residence); Thatcher v. Van Bever, 34 P.2d 740 (1934)(garage and barn on adjoining lot that was fenced and used in connection with the residence). Here, the court merely gave similar examples of the use of adjoining property that might qualify for the homestead exemption, without deciding that question.

In effect, the court's determination was factual in nature. The court invited (or, more accurately, implored) the debtor to provide some evidence to enable it, as a factual matter, to conclude that the vacant lot was used in a manner that would support a conclusion that it was necessary to the debtor's use and enjoyment of her homestead. The evidence that she provided did not persuade the court as trier of fact. We cannot say that its conclusion was clearly erroneous.

Hence, the court did not err when it reluctantly concluded that the vacant lot was not part of the exempt homestead and, thus, denied the debtor's motion to avoid a judicial lien to the extent that it applied to the noncontiguous vacant lot.

CONCLUSION

For the foregoing reasons, we AFFIRM.