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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

ORDERED PUBLISHED

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

5	In re:)	BAP No.	SC-12-1218-JuMkPa
6	CONRAD J. KUIKEN, JR.,)	Bk. No.	11-17454
7	Debtor.)		
8	_____)		
9	DANIEL T. MCCOY,)		
10	Appellant,)		
11	v.)	OPINION	
12	CONRAD J. KUIKEN, JR.,)		
13	Appellee.)		
	_____)		

Submitted Without Oral Argument on November 15, 2012*

Filed - January 4, 2013

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

Honorable Margaret M. Mann, Bankruptcy Judge, Presiding

Appearances: _____
 James C. Mitchell, Esq. on brief for appellant
 Daniel T. McCoy.

Before: JURY, MARKELL, and PAPPAS Bankruptcy Judges.

* On October 30, 2012, appellant moved to submit this appeal without oral argument. The Panel unanimously determined that oral argument was not needed by order entered on October 31, 2012.

1 JURY, Bankruptcy Judge:
2

3 Judgment creditor Daniel T. McCoy appeals from the
4 bankruptcy court's order granting debtor Conrad J. Kuiken, Jr.'s
5 motion to avoid McCoy's judicial lien under § 522(f).¹ In a
6 case of first impression in this circuit, we hold that because
7 the debtor did not maintain a continuous interest in the
8 property subject to the lien from the time the lien fixed until
9 the petition date, he is not entitled to avoid the lien based on
10 his homestead exemption. Therefore, we REVERSE.

11 **I. FACTS²**

12 On August 18, 2003, debtor acquired fee title to real
13 property located in San Diego, California.

14 On June 4, 2009, McCoy obtained a judgment against debtor
15 in the San Diego Superior Court, Civil Case No. 37-2007-0052760.

16 On October 9, 2009, McCoy recorded with the San Diego
17 County Recorder's Office a \$16,838 judgment lien in the form of
18 an abstract of judgment.

19 On July 5, 2011, debtor executed a grant deed conveying fee
20 title to the property to Bayview Resources, LLC (Bayview), for
21 valuable consideration. The deed was duly recorded on July 15,
22

23
24 ¹ Unless otherwise indicated, all chapter and section
25 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
26 "Rule" references are to the Federal Rules of Bankruptcy
27 Procedure.

28 ² McCoy contends that the facts are undisputed. Debtor has
not participated in this appeal.

1 2011.

2 On September 28, 2011, Bayview executed a grant deed
3 conveying fee title to the property to debtor as a gift. The
4 deed was duly recorded on October 11, 2011.

5 On October 24, 2011, debtor filed his chapter 7 petition.
6 In Schedule A, debtor listed the property as owned by Bayview³
7 and showed the value of the property as \$530,000 encumbered with
8 a secured claim in the amount of \$532,969. In Schedule C,
9 debtor claimed the property exempt under Cal. Civ. Proc. Code
10 (CCP) § 704.730(a)(1)⁴ in the amount of \$13,869. No objections
11 to his claim of exemption were filed. In Schedule D, debtor
12 listed McCoy as a secured creditor with an October 9, 2009
13 judgment lien for \$16,838 in the form of an abstract of judgment
14 against the property.

15 On January 19, 2012, debtor filed a motion to avoid McCoy's
16 judicial lien under § 522(f). In the accompanying declaration,
17

18 ³ This listing was most likely an error as the record shows
19 Bayview transferred the property back to debtor prior to his
20 bankruptcy.

21 ⁴ CCP § 704.730 only specifies the amount of an exemption.
22 From the record provided, it appears that debtor relied on
23 California's automatic homestead exemption. The requirements to
24 qualify for an automatic homestead exemption are set forth in
25 CCP § 704.710(c):

26 Homestead means the principal dwelling (1) in which the
27 judgment debtor or the judgment debtor's spouse resided
28 on the date the judgment creditor's lien attached to
the dwelling, and (2) in which the judgment debtor or
the judgment debtor's spouse resided continuously
thereafter until the date of the court determination
that the dwelling is a homestead.

1 debtor declared that he resided in the property at the time of
2 filing his petition.

3 On February 6, 2012, McCoy objected to debtor's motion on
4 the grounds that (1) McCoy's judicial lien became a consensual
5 lien when debtor conveyed the property to a third party for
6 valuable consideration and reacquired it subject to the judicial
7 lien and (2) McCoy's judicial lien had priority under California
8 law over debtor's interest in the property and his homestead
9 exemption when debtor reacquired the property from Bayview.

10 On February 21, 2012, the bankruptcy court issued a
11 tentative ruling rejecting McCoy's arguments. The bankruptcy
12 court found no authority for the premise that a judicial lien is
13 transformed into a consensual lien due to the transfers of the
14 property. In addition, the court found that the parties agree
15 that debtor owned his house both when the lien attached and when
16 the motion to avoid the lien was brought. The court noted that
17 in Culver, LLC v. Kai-Ming Chiu (In re Chiu), 304 F.3d 905 (9th
18 Cir. 2002), the debtor owned his residence at the time the
19 judgment lien was fixed to it and could avoid the lien even
20 though he no longer owned the house at the time he filed the
21 motion to avoid the lien. The bankruptcy court found that
22 Chiu's reasoning applied "with equal force here."

23 After McCoy filed a supplemental opposition, the bankruptcy
24 court issued a second tentative ruling on March 21, 2012. The
25 bankruptcy court reiterated that at all times McCoy's judicial
26 lien remained a judicial lien upon the property. Citing Law
27 Offices of Moore & Moore v. Stoneking (In re Stoneking), 225
28 B.R. 690, 696 (9th Cir. BAP 1998), the court further found that

1 although debtor's property interest may have changed after
2 McCoy's lien fixed, it did not affect debtor's ability to avoid
3 the lien. Because the debtor's homestead exemption was
4 applicable as of the petition date, the court further found that
5 debtor was entitled to avoid McCoy's judicial lien at that time.

6
7 The bankruptcy court entered the order granting debtor's
8 motion to avoid McCoy's judicial lien on April 13, 2012. McCoy
9 timely appealed the order.⁵

10 II. JURISDICTION

11 The bankruptcy court had jurisdiction over this proceeding
12 under 28 U.S.C. §§ 1334 and 157(b)(2)(K). We have jurisdiction
13 under 28 U.S.C. § 158.

14 III. ISSUE

15 Whether the bankruptcy court erred in granting debtor's
16 motion to avoid McCoy's judicial lien under § 522(f)(1).

17 IV. STANDARD OF REVIEW

18 Where there are no material disputed facts, whether a
19 creditor's judicial lien is avoidable under § 522(f) is a
20 question of law reviewed de novo. In re Stoneking, 225 B.R. at
21 692.

22 V. DISCUSSION

23 Section 522(f)(1) provides, in pertinent part, that a
24

25 ⁵ 9th Cir. BAP Rule 8006-1 provides: "The excerpts of the
26 record shall include the transcripts necessary for adequate
27 review in light of the standard of review to be applied to the
28 issues before the Panel. . . ." McCoy did not include a
transcript in the record on appeal. Because our review is de
novo, we have determined the transcript is not necessary to our
review.

1 debtor:

2 [M]ay avoid the fixing of a lien on an interest of the
3 debtor in property to the extent that such lien
4 impairs an exemption to which the debtor would have
5 been entitled under subsection (b) of this section, if
6 such lien is

7 (A) a judicial lien. . . .

8 "[U]nder § 522(f)(1), a debtor may avoid a lien if three
9 conditions are met: (1) there was a fixing of a lien on an
10 interest of the debtor in property; (2) such lien impairs an
11 exemption to which the debtor would have been entitled; and
12 (3) such lien is a judicial lien." In re Chiu, 304 F.3d at 908
13 (quoting Catli v. Catli (In re Catli), 999 F.2d 1405, 1406 (9th
14 Cir.1993)). On appeal, McCoy contends that the first and third
15 conditions have not been met.⁶

16 McCoy does not dispute that debtor held an interest in the
17 property before McCoy's lien fixed. Nonetheless, McCoy contends
18 that debtor's conveyance of the property to Bayview resulted in
19 a termination of debtor's previous interest and then, when
20 debtor reacquired the property from Bayview, debtor obtained a
21 "new interest" in the property which came after the fixing of
22 McCoy's lien. According to McCoy, these facts fall squarely
23 within the holding of Farrey v. Sanderfoot, 500 U.S. 291 (1991)
24 which makes his lien unavoidable. As a result, McCoy argues
25 that the bankruptcy court erred in relying on the holdings in
26 Stoneking and Chiu for its decision.

27 McCoy is correct that the debtor's conveyance of the
28 property to Bayview terminated his existing interest in the

⁶ The second condition, that the debtor had an exemption
which was impaired, is not challenged.

1 property. Bayview is a limited liability company organized
2 under the laws of the State of California, of which debtor was a
3 member. A membership interest in a limited liability company is
4 personal property and is not a direct interest in real property
5 owned by the company. Cal. Corp. Code § 17300 ("A membership
6 interest and an economic interest in a limited liability company
7 constitute personal property of the member or assignee").

8 We also agree that the three most relevant published
9 opinions on this issue in the Ninth Circuit, Stoneking, Chiu,
10 and Weeks v. Pederson (In re Pederson), 230 B.R. 158 (9th Cir.
11 BAP 1999), discussed below, do not address a situation where the
12 debtor's interest in the property at the time the judicial lien
13 fixed was extinguished and replaced by a different interest
14 before the bankruptcy petition is filed. Farrey and a
15 bankruptcy case it cited with favor, Stephens v Walter E. Heller
16 W., Ltd. (In re Stephens), 15 B.R. 485 (Bankr. W.D. N.C. 1981),
17 with facts similar to ours, more directly address the ability of
18 a debtor to avoid the lien using § 522(f).

19 The issue in Farrey was whether § 522(f) allowed a debtor
20 to avoid the fixing of a lien on a homestead, where the lien was
21 granted to the debtor's former spouse under a divorce decree
22 that extinguished all previous interests the parties had in the
23 property. 500 U.S. at 292. After examining the language of
24 § 522(f)(1) and the purpose and history surrounding Congress'
25 enactment of § 522(f), the Supreme Court stated:

26 [I]t is settled that a debtor cannot use § 522(f)(1)
27 to avoid a lien on an interest acquired after the lien
28 attached. See, e.g., In re McCormick, [18 B.R. 911,
913-14 (Bkrtcy. Ct. WD Pa. 1982)]; In re Stephens, 15
B.R. 485 (Bkrtcy. Ct. WD NC 1981); In re Scott, 12

1 B.R. 613 (Bkrtcy. Ct. WD Okla.1981). As before, the
2 critical inquiry remains whether the debtor ever
3 possessed the interest to which the lien fixed, before
4 it fixed. If he or she did not, § 522(f)(1) does not
5 permit the debtor to avoid the fixing of the lien on
6 that interest.

5 500 U.S. at 299.

6 Under the "critical inquiry" analysis, the Supreme Court
7 found that under controlling nonbankruptcy law the divorce
8 decree (1) extinguished the previous interests of the parties;
9 (2) created a new fee simple interest in the homestead in favor
10 of the ex-husband; and (3) imposed a lien in favor of the ex-
11 wife on that homestead. Under those facts, the Court found that
12 the husband did not have an interest in the property before the
13 ex-wife's lien fixed and, as a result, the husband could not
14 avoid the ex-wife's lien under § 522(f)(1). In the end, the
15 Supreme Court stated: "We hold that § 522(f)(1) requires a
16 debtor to have possessed an interest to which a lien attached,
17 before it attached, to avoid the fixing of the lien on that
18 interest." Farrey, 500 U.S. at 301.

19 The facts in Stephens are remarkably similar to ours.
20 There, judgments were docketed against the debtor while he held
21 title to certain real property. 15 B.R. at 486. The debtor
22 subsequently conveyed the property to his brother. Four days
23 before the debtor filed for bankruptcy, his brother conveyed the
24 property back to him. Id. The bankruptcy court held that the
25 debtor could not avoid the judgment creditors' liens under
26 § 522(f). In so holding, the bankruptcy court reasoned that
27 (1) when the debtor conveyed the property to his brother, it was
28 subject to the creditor's judgment liens; (2) the transfer to

1 the debtor's brother divested the debtor of all interest in the
2 subject property; and (3) when the debtor re-obtained the
3 property, he did so subject to the judgment liens.

4 We examined the reach of Farrey's holding in In re
5 Stoneking, 225 B.R. 690. There, the judicial lien of a creditor
6 fixed on the community property of a husband and wife before the
7 state court awarded the property to the husband in a divorce
8 decree. After the husband filed for bankruptcy, the attorney
9 who held the judicial lien argued that under Farrey, the debtor
10 acquired his interest after the fixing of the lien, and
11 therefore could not avoid it. The bankruptcy court concluded
12 that Farrey was inapplicable under the circumstances and granted
13 the debtor's motion to avoid the lien. Id. at 692.

14 We affirmed, noting that the facts of the case were
15 distinguishable from those in Farrey. Unlike Farrey, where the
16 lien attached to a newly-created interest which the debtor did
17 not hold before the fixing of the lien because the divorce
18 decree extinguished his prior property interest, the judicial
19 lien in Stoneking fixed upon the debtor's community property
20 interest which, under controlling nonbankruptcy law, was later
21 transformed, not eliminated, when in the course of divorce
22 proceedings the court changed it from a community property
23 interest to a fee interest. Due to this distinction, the Panel
24 held that the debtor could avoid the lien under the "critical
25 inquiry" of Farrey: whether the debtor possessed the interest
26 to which the lien fixed, before it fixed. 225 B.R. at 693.

27 The Panel reasoned:

28 While a debtor may not avoid a lien that attached

1 before he held any interest in the property, it does
2 not necessarily follow that a debtor cannot avoid a
3 lien merely because his property interests were
4 augmented after attachment of the lien. If a debtor
5 could have avoided such a lien on community-held real
6 property pursuant to section 522(f)(1) before
7 acquiring sole ownership of the property, that debtor
8 should not lose the right to avoid that same lien
9 after acquiring sole ownership Applying
10 Farrey under such circumstances to preclude the
11 avoidance of a third-party lien "is inconsistent with
12 [section 522(f)'s] main purpose, is not fair, and is
13 contrary to common sense."

14 Id. at 695 (citation omitted). The Stoneking Panel simply did
15 not address a circumstance where the debtor was divested
16 entirely of the interest he held after the lien fixed.

17 The Ninth Circuit came to a similar conclusion in Chiu,
18 albeit on different facts from those in Stoneking. In Chiu,
19 there was no dispute that the debtors owned the subject property
20 before the lien fixed. Debtors did not avoid the lien during
21 the bankruptcy and subsequently sold the property, at which time
22 they were notified that the lien had to be paid. The debtors
23 reopened their case and filed a motion to avoid the lien,
24 claiming that it impaired their homestead exemption. The
25 bankruptcy court determined that the lien avoidance related back
26 to the date of the filing and granted the motion to avoid the
27 lien. The Panel affirmed on appeal. The Ninth Circuit
28 affirmed, holding that a debtor must possess an interest to
which the lien fixed before it fixed and when the bankruptcy
petition is filed, but need not possess an interest in the
property at the time of avoidance. 304 F.3d at 908-09. The
Ninth Circuit in Chiu did not face a situation where the
interest the debtors held on the petition date was not the same
interest they held when the lien fixed.

1 Under a different set of facts, our Panel followed Farrey
2 when it denied the debtor's lien avoidance in Pederson. When
3 creditor Weeks obtained a state court judgment against the
4 debtor in 1993 and recorded an abstract in Contra Costa County,
5 the debtor owned no real property. A year later the debtor
6 acquired title to real property in the county. Under California
7 law, the judgment lien created by the recording of the abstract
8 of judgment attached to her interest in the property when she
9 acquired it. Debtor filed a chapter 13 petition in 1997 and
10 moved to avoid the lien, which the bankruptcy court granted.
11 Relying on Farrey, the Panel reversed because the debtor did not
12 have the property interest to which the lien attached at some
13 time before the lien attached, holding that the critical inquiry
14 was whether the debtor ever possessed the interest to which the
15 lien fixed before it fixed. Pederson, 230 B.R. at 164. Again,
16 although instructive, Pederson described a situation where the
17 debtor never had any interest in the property before the lien
18 recorded, different from this case where debtor had a fee
19 interest when the lien fixed, voluntarily granted it away
20 entirely, then reacquired the fee interest before seeking
21 bankruptcy relief.

22 Thus, Stoneking, Chiu and Pederson are distinguishable, and
23 Farrey and Stephens control here, because the debtor's interest
24 in the property when he filed bankruptcy was a different and
25 discontinuous interest from the one he held when McCoy's lien
26 affixed. When the interest once held is entirely extinguished
27 by transfer, voluntary or as a matter of law, a judicial lien
28 which attached when a debtor had that interest cannot be avoided

1 when the debtor acquires a new interest. The interest held when
2 the lien fixed is gone and the debtor reacquires a different
3 interest subject to the judicial lien, just as McCoy argues.⁷

4 Beyond Stephens, our holding is consistent with the outcome
5 of several bankruptcy court decisions from other jurisdictions.
6 The trial court in In re Jackaman, 2000 WL 192973 (Bankr. E.D.
7 Pa. 2000), denied lien avoidance where the debtor had sole
8 ownership in real property when the judgment lien fixed but
9 conveyed his fee simple interest to himself and his spouse as
10 tenants in the entirety. The court reasoned that under
11 controlling nonbankruptcy law debtor's prior interest was
12 extinguished by the transfer and his new interest was
13 "different" and would not support avoidance. Relying on Farrey,
14 the court reasoned that § 522(f) only entitles the debtor to
15 avoid the fixing of a lien "on the same interest to which it
16 fixed." Id. at *6.

17 Similarly, the bankruptcy court in The Cradle Co. v. Banner
18 (In re Banner), 394 B.R. 292 (Bankr. D. Conn. 2008), denied lien
19 avoidance where the debtor owned property in joint tenancy with
20 her then-husband when the lien recorded. After a divorce, the
21 debtor and her ex-husband quitclaimed the property to her
22 boyfriend for financing purposes. Prior to the debtor's
23 bankruptcy petition, her boyfriend deeded a one-half interest in
24

25 ⁷ Although Stephens and some other bankruptcy court cases
26 which have decided this issue for the creditors have based their
27 reasoning in part on bad faith or fraudulent conduct of the
28 debtor in conveying the real property, our record does not
support a bad faith analysis, nor does our decision rely on any
such determination.

1 the property back to her and she attempted to use § 522(f) to
2 avoid the impairment on her homestead. Reasoning that the
3 debtor reacquired her interest in the property subject to the
4 judicial lien, the bankruptcy court found under controlling
5 nonbankruptcy law the new interest was not the "same" interest
6 held when the lien affixed and avoidance was not allowed. Id.
7 at 306-07. The court relied on Farrey and Jackaman to support
8 its decision.

9 Because we reverse on the reasoning above, we need not
10 address in any detail McCoy's argument that his judicial lien
11 became a consensual lien when Bayview took a fee title interest
12 in the property subject to McCoy's lien. Suffice it to say we
13 do not find the argument persuasive. Here, the origin of
14 McCoy's lien was through the legal process. A "judicial lien"
15 is defined as a "lien obtained by judgment, levy, sequestration,
16 or other legal or equitable process or proceeding." § 101(36).
17 Therefore, McCoy's lien meets the statutory definition of a
18 judicial lien. Finally, there is no evidence in the record to
19 support a voluntary and contractually binding agreement between
20 Bayview and McCoy regarding his lien. Rather, the record
21 suggests that Bayview took the property subject to the lien not
22 because of any agreement, but by operation of law. McCoy's lien
23 remained on the property until it was satisfied. CCP § 697.390.
24 Accordingly, because McCoy's lien is a judicial lien, the third
25 condition for the avoidance of McCoy's lien has been met.
26 However, as analyzed above, the first prong was not.

27 VI. CONCLUSION

28 In this case, debtor transferred and then reacquired his

1 interest in the real property after McCoy's lien fixed. Under
2 applicable nonbankruptcy law, this meant that the debtor had no
3 interest in the property in the interim. He thus acquired a
4 different interest - one to which a lien had already affixed -
5 when he later reacquired the property. As a result, debtor may
6 not avoid the lien under § 522(f) and we REVERSE.

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