

MAR 27 2017

SUSAN M. SPRAUL, CLERK
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NOT FOR PUBLICATION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.	NC-16-1071-KuBS
)		
RICHARD CHIU,)	Bk. No.	4:13-bk-43677
)		
Debtor.)		
_____)		
)		
MIKE ROSEN,)		
)		
Appellant,)		
)		
v.)	MEMORANDUM*	
)		
RICHARD CHIU,)		
)		
Appellee.)		
_____)		

Submitted Without Oral Argument
on January 19, 2017**

Filed - March 27, 2017

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

Honorable Roger L. Efremsky, Bankruptcy Judge, Presiding

Appearances: Lawrence D. Miller on brief for appellant Mike
Rosen; Ruth Elin Auerbach on brief for appellee
Richard Chiu.

*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 8024-1.

**Oral argument was set for January 19, 2017 in San
Francisco, California, but appellant Rosen did not appear. With
the assent of appellee Richard Chiu, the Panel took the matter
under submission without oral argument.

1 Before: KURTZ, BRAND and SPRAKER,*** Bankruptcy Judges.

2 **INTRODUCTION**

3 Creditor Mike Rosen appeals from an order under § 522(f)(1)¹
4 partially avoiding his judgment lien to the extent it impaired
5 chapter 7 debtor Richard Chiu's homestead exemption. According
6 to the bankruptcy court, there was insufficient equity (in excess
7 of Chiu's homestead exemption) to fully secure Rosen's lien.
8 Therefore, the bankruptcy court avoided all but \$57,468.00 of
9 Rosen's lien. The bankruptcy court also rejected Rosen's
10 argument that he should be allowed to retain the full amount of
11 his \$872,304.95 lien, at least for purposes of permitting the
12 lien to attach to any postpetition appreciation in the value of
13 the exempt property. The bankruptcy court held that the
14 Bankruptcy Reform Act of 1994, Pub.L. 103-394, 108 Stat. 4106,
15 amended § 522(f) to clarify that any postpetition appreciation in
16 the value of the exempt property should inure to the benefit of
17 the estate and/or the debtor and not to the benefit of the
18 judgment lien creditor.

19 We agree with the bankruptcy court's holding, so we AFFIRM.

20 **FACTS**

21 The relevant facts are undisputed. Chiu claimed a
22 \$100,000.00 homestead exemption in his residence on Winant Way in
23 Alameda, California. At the time of his bankruptcy filing in
24

25 ***Hon. Gary A. Spraker, Chief United States Bankruptcy Judge
for the District of Alaska, sitting by designation.

26 ¹Unless specified otherwise, all chapter and section
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
28 all "Rule" references are to the Federal Rules of Bankruptcy
Procedure, Rules 1001-9037.

1 June 2013, Chiu's residence had a fair market value of
2 \$750,000.00 and was encumbered by a \$592,532.00 first deed of
3 trust. As for nonconsensual liens, Rosen was the successor in
4 interest to a judgment lien in favor of Spondulix Company, Inc.
5 and against Chiu in the amount of \$872,304.95. A junior judgment
6 lien was held by First American Title Insurance Company's
7 successor in interest Patrick MacIntyre in the amount of
8 \$200,000.00.

9 Pursuant to § 522(f)(1), Chiu moved to avoid both judgment
10 liens because they impaired his homestead exemption. The parties
11 agreed to resolve the lien avoidance issue by motion rather than
12 adversary proceeding and further agreed that there was no factual
13 dispute for the court to decide affecting the application of
14 § 522(f)(1). In addition, no one timely objected to Chiu's
15 exemption claim, so the exemption claim was allowed in full.

16 After full briefing and multiple hearings, the bankruptcy
17 court concluded that Rosen's judgment lien could be avoided under
18 § 522(f)(1), except for \$57,468.00 of that lien, which amount did
19 not impair Chiu's homestead exemption under the mathematical
20 formula for determining impairment set forth in § 522(f)(2).
21 Even though the amount of the lien exceeding \$57,468.00 impaired
22 Chiu's homestead exemption under the plain language of
23 § 522(f)(2), Rosen argued that the full amount of his lien could
24 not be stripped down or avoided in a manner that would deprive
25 him of the right to have the full amount attach to any
26 postpetition appreciation in the value of Chiu's residence.

27 The bankruptcy court disagreed, citing to the text of the
28 statute and to the legislative history accompanying the 1994

1 Bankruptcy Code amendments, which added to § 522(f) the statutory
2 definition of impairment. The bankruptcy court held that
3 Congress added that definition, in part, to clarify that any
4 postpetition appreciation in the value of exempt property should
5 inure to the benefit of the estate and/or the debtor and not to
6 the benefit of a judgment lien creditor whose lien had been
7 partially or wholly avoided under § 522(f)(1).

8 The bankruptcy court entered an order avoiding all but
9 \$57,468.00 of Rosen's judgment lien, and Rosen timely appealed.

10 JURISDICTION

11 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
12 §§ 1334 and 157(b)(2)(K), and we have jurisdiction under
13 28 U.S.C. § 158.

14 ISSUE

15 Did the bankruptcy court correctly construe and apply
16 § 522(f) in holding that all but \$57,468.00 of Rosen's judgment
17 lien impaired Chiu's homestead exemption and thus should be
18 avoided?

19 STANDARDS OF REVIEW

20 The construction and application of § 522(f) are questions
21 of law which we review de novo. Culver, LLC v. Chiu
22 (In re Chiu), 266 B.R. 743, 747 (9th Cir. BAP 2001), aff'd,
23 304 F.3d 905 (9th Cir. 2002) (citing Katz v. Pike (In re Pike),
24 243 B.R. 66, 69 (9th Cir. BAP 1999)).

25 DISCUSSION

26 Under § 522(f)(1), the debtor may avoid a judgment lien
27 against his or her property "to the extent that such lien impairs
28 an exemption to which the debtor would have been entitled. . . ."

1 Prior to the 1994 Bankruptcy Code amendments, the Code did not
2 define what it meant by impairment, so that term was defined by
3 the courts with varying results. See Hanger v. Bank of Am. Nat'l
4 Trust & Sav. Ass'n (In re Hanger), 196 F.3d 1292 (9th Cir. 1999),
5 aff'g & adopting, 217 B.R. 592, 596 (9th Cir. BAP 1997). In the
6 Ninth Circuit, the definition of impairment for purposes of
7 § 522(f) was controlled by City National Bank v. Chabot
8 (In re Chabot), 992 F.2d 891 (9th Cir. 1993). In Chabot, the
9 Ninth Circuit specifically rejected the Chabots' broad
10 construction of the term "impair" which would have resulted in
11 the avoidance of any unsecured portion of the judgment creditor's
12 lien so as to ensure that any postpetition appreciation would
13 inure to the benefit of the debtor or the bankruptcy estate. Id.
14 at 894-95. Instead, Chabot held that the plain and common sense
15 meaning of the term "impair" necessarily precluded debtors from
16 avoiding judgment liens over and above the exemption amount. Id.
17 at 895.

18 Rosen argues that the 1994 Bankruptcy Code amendments to
19 § 522(f) did not overrule the portion of Chabot construing
20 impairment narrowly and that § 522(f)(2)'s impairment definition
21 should not be interpreted in a manner that prevents the full
22 amount of his lien from attaching to any postpetition
23 appreciation on Chiu's residence. We disagree. In Hanger, the
24 Hangers owned a home worth \$270,000.00 and claimed a \$75,000.00
25 exemption. In re Hanger, 217 B.R. at 593. The home was subject
26 to a first-priority consensual lien of \$158,000.00 and also was
27 subject to three judicial liens in the following order of
28 priority: (1) a \$3,817.00 judicial lien in favor of Pacific

1 Alternator; (2) a \$92,565.00 judicial lien in favor of Bank of
2 America; and (3) a \$32,843.00 judicial lien in favor of Wells
3 Fargo Bank. Id. The Hangers moved to avoid the judicial liens
4 to the extent they impaired their homestead exemption. Id. Over
5 Bank of America's objection, the bankruptcy court determined that
6 there was insufficient equity (over and above the Hangers'
7 exemption) to fully secure Bank of America's judicial lien and
8 that the 1994 Bankruptcy Code amendments dictated that a judicial
9 lien should be disallowed in its entirety if any portion of that
10 lien impaired the debtors' exemption. Id. at 594. Therefore,
11 because Bank of America's lien was partially unsecured and Wells
12 Fargo's lien was wholly unsecured, the bankruptcy court entered
13 orders avoiding both of these liens in their entirety.

14 On appeal, this Panel reversed. The Hanger Panel pointed
15 out that the impairment definition added in 1994 to § 522(f) sets
16 forth a mathematical formula for determining whether a judgment
17 lien impairs the debtor's exemption. Id. at 594-95. More
18 specifically, a judgment lien impairs the exemption to the extent
19 that the sum of that lien, all other liens on the exempt
20 property, and the amount of the applicable exemption, exceed the
21 value of the property. § 522(f)(2)(A). The Hanger court also
22 pointed out that the Wells Fargo lien, which was junior to Bank
23 of America's lien and wholly avoidable under § 522(f)(2)(A)'s
24 formula, should be omitted from the impairment calculation with
25 respect to Bank of America's lien, pursuant to § 522(f)(2)(B).
26 Id. at 595.

27 Omitting the Wells Fargo lien from the calculation, Hanger
28 determined that only \$59,382.00 of Bank of America's \$92,565.00

1 lien impaired the Hangers' exemption and that the remaining
2 amount of Bank of America's lien (\$33,183.00) was not avoidable
3 under § 522(f)(1). Id. at 595. According to Hanger, the
4 \$33,183.00 constituted equity (in excess of the amount of the
5 Hangers' exemption) that was available to secure Bank of
6 America's lien without impairing or adversely impacting the
7 exemption. Id. at 595-97.

8 In so holding, however, Hanger specified that, to the extent
9 equity (in excess of the amount of the Hangers' exemption) did
10 not exist at the time of the bankruptcy filing, the lien impaired
11 the exemption, could be avoided under § 522(f)(1), and any
12 postpetition appreciation would be preserved for the debtors or
13 the estate free and clear of the avoided lien. As Hanger
14 explained, when Congress drafted the 1994 amendments:

15 Congress was concerned because the Chabot holding meant
16 that any postpetition appreciation would go to the
17 benefit of the lienholder whose partial lien remained
18 on the property, even if the debtor had to use his
19 exempt interest to make the mortgage payments. The new
20 formula would protect the debtor's interest in any
appreciation because it would not allow a lien to
remain when there was no equity, but hypothetically
there would be equity in the absence of the liens.
Therefore, one need only apply the new formula to
obtain Congress' desired result.

21 Id. at 597 (citations omitted); see also id. at 596 (stating that
22 the 1994 amendment "is more favorable for debtors by allowing
23 them the full benefit of the exemption and the benefit of any
24 post-avoidance appreciation in the value of the property."); id.
25 at 597 (citing Hastings v. Holmes (In re Hastings), 185 B.R. 811,
26 814 n.3 (9th Cir. BAP 1995), and stating that the 1994 amendment
27 overruled Chabot and "entitles the debtor to avoid a judgment
28

1 lien in cases where equity has not yet accrued.").²

2 The Court of Appeals affirmed and adopted the Panel's
3 decision. Hanger v. Bank of Am. Nat'l Trust & Sav. Ass'n
4 (In re Hanger), 196 F.3d 1292 (9th Cir. 1999). By doing so, the
5 Panel's decision became binding Ninth Circuit precedent. See
6 Gardenhire v. I.R.S. (In re Gardenhire), 209 F.3d 1145, 1148
7 (9th Cir. 2000); IRS v. Osborne (In re Osborne), 76 F.3d 306, 310
8 (9th Cir. 1996). This Panel previously has recognized that
9 Hanger is the law of the circuit. All Points Cap. Corp. v. Meyer
10 (In re Meyer), 373 B.R. 84, 87 (9th Cir. BAP 2007).

11 None of the cases that Rosen relies upon dictate a different
12 result. Most of them are not on point and none of them trump
13 Hanger's pronouncement that, as a result of the 1994 amendments
14 to § 522(f), any unsecured portion of a judgment lien can be
15 avoided under the statute to ensure that any postpetition
16 appreciation inures to benefit of the estate or the debtor.

17 CONCLUSION

18 For the reasons set forth above, the bankruptcy court's
19 order avoiding all but \$57,468.00 of Rosen's judgment lien is
20 AFFIRMED.

23 ²These last two quotes from Hanger arguably suggest that
24 equity (in excess of the debtor's exemption) should be measured
25 at the time avoidance is sought. But the blocked quote, above,
26 correctly focuses on "postpetition appreciation" and not on
27 "post-avoidance appreciation." For purposes of applying
28 § 522(f), the property value and the lien amounts as they existed
on the bankruptcy petition date control. Mbaba v. Clark Fergus &
Assocs. (In re Mbaba), 2006 WL 6810948, at *5 (9th Cir. BAP
2006); In re Salanoa, 263 B.R. 120, 123 (Bankr. S.D. Cal. 2001).