

In re McCormach, Case No. 389-30079-H7

2-14-91 BAP Unpublished

Judge Hess ruled that a mortgage given by the debtor-husband pursuant to the terms of a property settlement agreement that was incorporated into a decree of dissolution of marriage was a consensual lien rather than a "judicial lien." Thus, Judge Hess ruled that the mortgage could not be avoided under §522(f).

The BAP reversed, relying on In re Pederson, 875 F.2d 781 (9th Cir. 1989). The fact that the decree required execution of the mortgage made the mortgage a non-consensual judicial lien, according to the BAP. Since the lien impaired the debtor's homestead exemption and attached to the debtor's interest in the home, he could use §522(f) to avoid it.

NOTE: A notice of appeal to the 9th circuit was filed on March 14, 1991.

NOT FOR PUBLICATION

U.S. BANKRUPTCY COURT
DISTRICT OF OREGON
FILED

FILED

MAR 11 1991

FEB 14 1991 *cd*

TERENCE H. DUNN, CLERK

NANCY B. DICKERSON, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

BY *UA* DEPUTY
mem - 41

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re
MORRIS ORVAL MCCORMMACH,
Debtor.

BAP No. OR-90-1341-MeRO
Bk. No. No. 389-30079-H7

MORRIS O. MCCORMMACH,
Appellant,
v.
CHRISTINE HEIDEN,
Appellee.

MEMORANDUM

Submitted Without Argument
September 13, 1990

Filed: FEB 14 1991

Appeal from the United States Bankruptcy Court
for the District of Oregon

Hon. Henry L. Hess, Jr., Chief Bankruptcy Judge, Presiding

Before: MEYERS, RUSSELL and OLLASON, Bankruptcy Judges

91-8(7)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

I

Invoking Section 522(f) of the Bankruptcy Code ("Code"), the Debtor sought to avoid a property settlement lien, held by his former wife, which impairs the Debtor's homestead exemption. The trial court denied the Debtor's motion, holding that the lien had been created by a consensual mortgage instrument rather than the judicial divorce decree. The Debtor appeals the denial of his motion.

We REVERSE.

II

FACTS

The facts are undisputed. In 1984, Morris O. McCormach and his former wife Christine Heiden stipulated to a divorce decree that provided for alimony payments, child support and a property settlement. As part of the property settlement McCormach was to receive title to homestead real estate and in return, he was to make payments to Heiden under the following terms:

[7]c. The sum of fifteen thousand dollars (\$15,000) cash on or before three (3) years from date. This obligation shall bear no interest but shall be secured by a second mortgage on the homestead property described in [an attached exhibit].

[7]d. The sum of fourteen thousand four hundred dollars (\$14,400) which shall be payable at the rate of three hundred dollars (\$300) per month beginning three (3) years from date and continuing each and every month thereafter until the entire \$14,400 is paid in full. The obligation shall bear no interest, but shall be secured by a second mortgage on the homestead property

1 One of the final paragraphs of the settlement declared:
2 "Within ten (10) days after the date hereof, each party shall
3 execute any and all instruments necessary to consummate and effect
4 any and all provisions hereof." (emphasis added). About a month
5 following the decree, the second mortgage called for in paragraph
6 7 was executed and duly recorded in favor of Heiden. Four years
7 later McCormach filed for protection under Chapter 7 of the Code.
8 The Heiden mortgage, which from the date of its recording
9 constituted a lien on McCormach's homestead property, indisputably
10 impaired McCormach's homestead exemption. Consequently, the
11 debtor brought a motion under Section 522(f) of the Code to avoid
12 Heiden's lien. The trial court held that the lien was not
13 avoidable since it was not a "judicial lien" as it was created by
14 the mortgage instrument rather than by the divorce decree and hence
15 was consensual.

17 III

18 STANDARD OF REVIEW

19 The issues in this appeal are purely legal and therefore are
20 reviewed de novo. In re Taylor, 861 F.2d 550, 552 (9th Cir. 1988).
21 Accord In re Sanderfoot, 899 F.2d 598, 600 (7th Cir. 1990), cert.
22 granted 111 S.Ct. 507 (U.S. Nov. 26, 1990). Where questions
23 involving Section 522(f) conflict with state lien laws, federal
24 bankruptcy law takes preeminence. In re Pederson, 78 B.R. 264, 266
25 (9th Cir. BAP 1987), aff'd 875 F.2d 781 (9th Cir. 1989). See also
26 In re Galvan, 110 B.R. 446, 451 (9th Cir. BAP 1990).

/ / /

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

IV

DISCUSSION

This appeal presents only one issue: where a stipulated divorce decree orders a debtor spouse to execute a mortgage that will secure payments to a nondebtor spouse under a property settlement agreement, does the lien which arises from the recorded mortgage constitute a "judicial lien" for purposes of lien avoidance under Section 522(f) of the Code.

A. The Elements of Section 522(f)

A "lien" is defined by Section 101(33) of the Code as a "charge against or interest in property to secure payment of a debt or performance of an obligation." Section 522(f) allows liens to be avoided under certain conditions. It reads in pertinent part: "[T]he debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled . . . if such lien is -- (1) a judicial lien" Hence to avoid a lien under Section 522(f) three requirements must be met: (1) the lien must be fixed against an interest of the debtor; (2) the lien must impair an exemption; and (3) the lien must be a "judicial lien." Sanderfoot, supra, 899 F.2d at 601; In re Hart, 50 B.R. 956, 960 (Nev. 1985). Each of these three elements is met in the instant case.

First, Heiden's lien is attached to an interest that McCormach has in his homestead property. Heiden's lien is not, in other words, attached to the nondebtor's preexisting marital

1 interest in the residence. Such a theory was advanced by the
2 Eighth Circuit to prevent the avoidance by a debtor spouse of a
3 property settlement lien. In re Boyd, 741 F.2d 1112, 1114-15 (8th
4 Cir. 1984). Accord In re Rittenhouse, 103 B.R. 250, 254-55 (D.
5 Kan. 1989).

6 The Boyd approach, however, was expressly rejected in the
7 leading Ninth Circuit case of In re Pederson, 875 F.2d 781 (9th
8 Cir. 1989). The court stated:

9 We decline to follow the Eighth Circuit's
10 lead, as we believe the analysis is flawed.
11 In Boyd, the husband's lien could not have
12 attached to his pre-existing interest in
13 the property because the state court
14 awarded the house to the wife as her
15 separate property before imposing the lien.
16 At the time the court promulgated its
17 divorce decree, any interest the husband
18 may have had in the wife's property
19 disappeared; since only the bankrupt wife
20 continued to have an interest in the
21 property, the lien of necessity attached
22 only to her interest in it.

23 875 F.2d at 783. The Seventh Circuit has recently adopted the
24 Pederson approach, rejecting Boyd. Sanderfoot supra, 899 F.2d at
25 602, 605. Within the Ninth Circuit, Pederson's rejection of the
26 Boyd "marital interest" theory remains valid. In re Godfrey, 102
B.R. 769, 773 (9th Cir. BAP 1989). This panel is bound by
decisions of the Ninth Circuit Court of Appeals. See In re Nelson,
59 B.R. 417, 419 (9th Cir. BAP 1985). See also In re Kachanizadeh,
108 B.R. 734, 737-38 (C.Cal. 1989). Accordingly, under In re
Pederson this first requirement for lien avoidance under Section
522(f) is met: the instant lien created by the mortgage attaches to
the debtor's interest rather than to his ex-wife's.

1 As indicated above, the second requirement for Section 522(f)
2 lien avoidance is uncontested: the parties agree that the debtor's
3 homestead exemption is impaired by Heiden's lien.

4 The final requirement is that the lien be a "judicial lien."
5 The term "judicial lien" is defined in Section 101(32) of the Code
6 as a "lien obtained by judgment, levy, sequestration, or other
7 legal or equitable process or proceeding." Heiden maintains, and
8 the trial court so held, that the instant lien was created not by
9 the divorce decree itself, but rather by the subsequently executed
10 mortgage instrument. Hence, under this theory, the lien would
11 constitute a consensual "security interest," defined in Section
12 101(45) of the Code as a "lien created by an agreement," rather
13 than a judicial lien.

14 The Pederson case states clearly, however, that the Ninth
15 Circuit does not consider liens created by settlement agreements to
16 be consensual:

17 Other courts have held that a lien created
18 in a settlement agreement is equivalent to
19 a consensual security interest, rather than
20 a judicial lien, for purposes of Section
21 522(f)(1). . . We reject these theories as
implausible and unsupported by the language
of the Code.

21 875 F.2d at 783, n.4.

22 The trial court attempted to distinguish the instant case from
23 Pederson by considering the mortgage instrument, rather than the
24 divorce decree, to be the operative document that created the lien.
25 In re McCormmach, 111 B.R. 330, 331 (Or. 1990). The trial court
26 rejected McCormmach's argument that "but for" the divorce decree,
the lien would not have arisen and therefore the lien was "obtained

6

17 V

18 CONCLUSION

19 Because Heiden's lien was obtained through a judicial
20 proceeding, it is an avoidable judicial lien rather than a
21 consensual security interest. This conclusion is mandated by the
22 facts and the controlling authority of the Pederson case.
23 Therefore, the decision of the trial court is **REVERSED**.