

11 USC § 522(f)(1)
ORS 23.240

In re Crosby 394-30314-S7

3/22/94, amended 5/3/94

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The debtor may not rely on § 522(f)(1) to avoid a judgment lien which has attached to her homestead. In Oregon, a judgment lien does not impair a homestead exemption. ORS 23.240.

The fact that the lien may impair the debtor's ability to enjoy the future growth in equity which exceeds the exemption does not constitute impairment. In re Chabot, 992 F.2d 891 (9th Cir. 1993).

The denial of the motion to avoid the lien under § 522(f)(1) is not intended to determine the extent to which the judgment lien is subject to avoidance under ORS 23.280 and 23.240(4) or 18.420 as it was amended in 1991.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re:) Bankruptcy Case No.
) 394-30314-S7
SHARON KAY CROSBY,)
) OPINION
Debtor.)

The debtor filed a motion pursuant to 11 U.S.C. § 522(f)(1) to avoid the judgment lien of the Estate of Hilda Embree Phelps. The lien had attached to property located at 17706 S.E. Washington in Gresham, Oregon, which is the debtor's home. She claims that the lien impairs her homestead exemption, and it should be avoided. After consideration of the arguments stated at a hearing on March 10, 1994 as supplemented by correspondence from the debtor on March 18, 1994, I find that the judgment lien does not impair the homestead exemption, and the debtor's motion should be denied. My reasons follow.

In the case of City National Bank v. Chabot (In re Chabot), 992 F.2d 891 (9th Cir. 1993), the Court of Appeals held that a judgment lien which has no impact on the debtor's

PAGE 1 - OPINION

ultimate ability to recover the full amount of her exemption does not impair the exemption. The fact that the lien may impair the debtor's ability to enjoy the future growth in equity which exceeds the exemption does not constitute impairment. The Court of Appeals explained its interpretation of § 522(f)(1):

We think a simpler view of section 522(f), which protects the amount of the exemption only, is dictated by the plain meaning of the statute....Here, the statute specifically says the lien may only be avoided "to the extent that" it impairs the exemption. Under the plain meaning of the statute, then, an exemption is not impaired unless its amount is diminished in value.

There is no basis for the proposition that the homestead exemption provides ownership benefits such as the right to appreciation, beyond the set amount.

Our holding is consistent with the recent Supreme Court case Dewsnup v. Timm, --- U.S. ---, 112 S.Ct. 773, 116 L.Ed.2d 903 (1992). 992 F.2d at 895.

The Estate's lien against the property does not impact her ability to realize the full amount of her homestead exemption because under Oregon law, a judgment creditor cannot cause an execution sale unless the sale will net the debtor the full amount of her exemption. See O.R.S. 23.240(6). If there is sufficient value to support an execution sale, the levying officer must first pay the debtor the full amount of her exemption before turning over any funds to the executing creditor.

Since Oregon law fully protects the debtor's right to

realize the entire amount of her exemption despite the existence of the judgment lien, there can be no impairment as defined by Chabot. The debtor urges this court to limit Chabot to its facts. In Chabot, there was equity above the homestead exemption and prior consensual liens for the judgment lien to attach to. In this case, the parties agree that the value of Mrs. Crosby's home is less than the amount of the consensual first lien and the homestead exemption.

Support for the debtor's argument could be found in Rigby v. Hall (In re Hall), 1 F.3d 853 (9th Cir. 1993) and an article by Michael D. Broaddus, Exemption by Declaration, Appreciation and Amendments, 1993-12 Norton Bankr. L. Adviser, December 1993 at 4-6. However, the Bankruptcy Appellate Panel addressed the discrepancy between the Hall case, and the cases of In re Hyman, 967 F.2d 1316 (9th Cir. 1992) and In re Reed, 940 F.2d 1317 (9th Cir. 1991). These cases were decided in the context of determining whether the estate or the debtor was entitled to the post-petition appreciation in the house when the trustee sold the property. The Appellate Panel found as irrelevant the debtor's attempt to distinguish the cases based on the fact that the value of the subject property in Hyman and Reed was greater than the amount of the liens and the homestead. Robertson v. Alsberg (In re Alsberg), 161 Bankr. 680, 684 n. 6 (Bankr. 9th Cir. 1993).

This court also declines to make such a distinction. Whether there is equity above the consensual liens and the homestead exemption is irrelevant to the issue of the extent to which the lien impairs the exemption.

The debtor argues that such a reading will render § 522(f)(1) meaningless. Although that may be the case in Oregon, it is not necessarily so in other states. Oregon looks to the time of the execution sale for application of the homestead exemption. Other states, such as California, focus on the time the judgment lien attaches to the property. In states such as California, there are circumstances when § 522(f)(1) will afford the debtor additional powers. See, In re Mayer, 156 Bankr. 54 (Bankr. S.D. Cal. 1993). This ruling is not intended as a determination of the extent to which the judgment lien is subject to avoidance under O.R.S. 23.280 and 23.240(4), or O.R.S. 18.420 as it was amended in 1991.

A separate order denying the debtor's motion was entered on March 28, 1994.

DONAL D. SULLIVAN
Bankruptcy Judge

cc: Steven C. Johnson
James N. Esterkin
U. S. Trustee
John H. Mitchell

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re:)	Bankruptcy Case No.
)	394-30314-S7
SHARON KAY CROSBY,)	
)	ORDER DENYING DEBTOR'S
Debtor.)	MOTION TO AVOID JUDGMENT
)	LIEN AGAINST HOMESTEAD

After a hearing on March 10, 1994, and for the reasons
stated separately in a memorandum opinion,

IT IS ORDERED that the debtor's motion under 11 U.S.C.
§ 522(f)(1) to avoid the judgment lien of the Estate of Hilda
Embree Phelps is denied.

DONAL D. SULLIVAN
Bankruptcy Judge

cc: Steven C. Johnson
James N. Esterkin
John H. Mitchell
U. S. Trustee

ORDER DENYING DEBTOR'S MOTION TO AVOID JUDGMENT LIEN