

11 U.S.C. § 522(f)(1)
Divorce
Homestead exemption
Judicial lien

In re Keefauver, Case No. 688-62118-H7

7/3/91

PSH

unpublished

Applying the Supreme Court's Sanderfoot decision, the court ruled that the debtor could not avoid her ex-husband's judicial lien on her homestead. Although the lien was peculiar in that its existence was contingent upon the debtor's sale of the property, it was nonetheless a judicial lien. The parties owned the home as tenants by the entirety prior to their divorce. Since that ownership interest ceased to exist upon their divorce, and the home was awarded to her by the same divorce decree that awarded him the lien, she could not avoid the fixing of the lien because it did not fix upon a pre-existing interest.

But for Sanderfoot, the debtor would have been entitled to avoid the lien (under the Ninth Circuit's Pederson decision) because it otherwise impaired her homestead exemption, despite the fact that she abandoned the property after filing bankruptcy. Whether she was entitled to the exemption was determined on the date she filed her petition, and on that date she was entitled to the exemption.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

IN RE)
)
REBECCA ANNE KEEFAUVER,) Case No. 688-62118-H7
)
)
_____ Debtor.) MEMORANDUM OPINION

Before the court is the debtor's motion to avoid the interest of her former husband, Mr. Groom, as impairing her homestead exemption under 11 U.S.C. § 522(f)(1).¹ Prior to their divorce the parties owned the property to which the motion refers together as tenants by the entirety. They were divorced in 1984. The dissolution decree entered by the state court awarded the couple's home to the debtor subject to the mortgage. It further stated in relevant part:

"If the real property is ever sold the Petitioner [debtor] is ordered to pay to the Respondent [Groom] the sum of \$12,000. Said sum shall not be a judgment against

¹ All statutory references are to the Bankruptcy Code, 11 U.S.C. § 101 et seq., unless otherwise indicated.

the Petitioner now, but said sum would ripen into a judgment upon the sale of the property."

Not having sold the property, the debtor filed bankruptcy in 1988. Upon filing she claimed a homestead exemption of \$15,000 in the property. During the pendency of her bankruptcy proceedings the debtor remarried and moved to another town. Upon learning these facts Mr. Groom amended his response to the motion to allege that the debtor has no exemption which his lien may impair as she abandoned her homestead.

Section 522(f)(1) allows the debtor to ". . . avoid the fixing of a [judicial] 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 to under [state law]. . . ." There are at least two conditions which must exist before the court may find that § 522(f)(1) is applicable to avoid a lien on a homestead. First the respondent must hold a judicial lien. Second, the judicial lien must impair an exemption to which the debtor would have been entitled to under state law but for the existence of the lien at issue. Owen v. Owen, 111 S.Ct. 1833, 1837-38 (1991).

In Chapter 7 the exemptions to which a debtor is entitled are determined at the time the petition is filed. The parties do not dispute that at the time of the filing the property was the debtor's actual abode. While true that outside of bankruptcy, under Oregon law, if a debtor absents herself from her homestead

without manifestation of an intent to return, the right to the exemption expires one year after removal, In re Yett, Case No. 381-04140-J7, slip op. (Bankr. D. Or. May 11, 1982) (J., Johnson -- unpublished), under federal bankruptcy law, the debtor's right to a homestead exemption is determined as of the date of the bankruptcy filing. Any acts which took place subsequent to that date in the form of an abandonment would not affect her right to the exemption.

The parties have given little attention to the issue of whether Mr. Groom has a "judicial lien" within the meaning of § 522(f)(1). However, in his first memorandum the debtor's attorney addresses it briefly. Therefore the court will assume that that issue remains outstanding. Section 101(32) defines a "judicial lien" as a "lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding." Likewise, "lien" is defined as a "charge against or interest in property to secure payment of a debt or performance of an obligation." § 101(33). Mr. Groom's interest in the subject property was created by a court order which arose out of a legal proceeding. The order created a "charge [for Groom's benefit] against" property awarded to the debtor to assure performance of the obligation the court placed on her to pay Groom. Despite the fact that both the debtor's obligation and Mr. Groom's charge are contingent upon the sale of the property, the language of the decree provides Mr. Groom with sufficient interest in the property presently to cloud the title making it impossible to sell under warranty deed to a third party

without payment to him of the \$12,000. For this reason, this court believes the language creates a "lien" against the property within the meaning of § 101(33). As this lien was created by judicial order, it is a judicial lien within the meaning of § 101(32).

The next question the court must address is whether the section permits the debtor to avoid Mr. Groom's lien, which he obtained through a divorce decree. This question was recently answered by the Supreme Court in the negative under the facts before it. Farrey v. Sanderfoot, 111 S.Ct. 1825 (1991). The Sanderfoot court has interpreted § 522(f)(1) as allowing avoidance of a lien only if the debtor had the property interest to which the lien attached at some point before the lien attached. As the court pointed out, whether the debtor possessed an interest to which the lien fixed, before it fixed, is a question of state law. In Sanderfoot the parties agreed that under Wisconsin law the divorce decree extinguished the parties' interest in the property held before the divorce as joint tenants. The decree created new interests in the property in each party: the debtor received ownership in fee simple; the non-debtor received a debt and a lien on the property. Under that scenario "the lien could not have fixed on [debtor's] pre-existing undivided half interest because the divorce decree extinguished it. Instead, the only interest that the lien encumbers is debtor's wholly new fee simple interest. The same decree that awarded [debtor] his fee simple interest

simultaneously granted the lien to [debtor's ex-spouse]." Id. at 1830.

In Oregon ownership of property as tenants by the entirety is dissolved upon cessation of the marriage by divorce. Hoyt v. American Traders, Inc., 301 Or. 599, 725 P.2d 336, 341 (1986) ("a decree of dissolution destroys the estate by the entirety and, absent any affirmative award of one spouse's interest to the other, leaves the spouses as tenants in common in the property, each with an undivided one-half interest."). Thus when the divorce decree awarded the debtor herein the homestead, it created in her a new fee simple interest in that property. Simultaneously, it created a cloud on the title to the property on behalf of the non-debtor which would prevent the property from being sold without payment to the non-debtor. This court believes that that cloud is a sufficient interest in the property to be recognized as a "judicial lien" within the meaning of the statute and to be treated as having arisen at the same time as the debtor's fee simple interest. Because the debtor did not have her interest in the property at any time before Mr. Groom's interest arose, the latter interest cannot be avoided.

An order will be entered accordingly denying debtor's motion to avoid Mr. Groom's lien on her homestead.

POLLY S. HIGDON
Bankruptcy Judge