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IT IS SO ORDERED.

Dated: April 15, 2024



Beth A. Buchanan

Beth A. Buchanan
United States Bankruptcy Judge

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

In Re

JOSEPH A. TEPE

Debtor(s)

**Case No. 23-10777
Chapter 7
Judge Buchanan**

**ORDER GRANTING IN PART AND DENYING IN PART
DEBTOR'S MOTION TO AVOID LIEN [Docket Number 13]**

[This opinion is not intended for publication]

This matter is before this Court on Debtor Joseph A. Tepe ("Debtor")'s *Motion to Avoid Lien with Thomas J. Brennan* [Docket Number 13] ("Motion"); Creditor Estate of Thomas J. Brennan's *Objection to Debtor's Motion to Avoid Judgment Lien and Objection to Claim of Exemption* [Docket Number 21]; Debtor's *Reply* [Docket Number 22] and Debtor's *Supplemental Brief* [Docket Number 27].

On August 3, 2023, a preliminary hearing was held at which the parties agreed that their dispute focused on an issue that is legal in nature and could be decided without a hearing on the parties' briefing and a Stipulation of Fact [Docket Number 30] that they subsequently filed. The matter is now ripe for determination.

I. Factual Background

The following facts are derived from the parties' Stipulation of Fact [Docket Number 30]:

The property in question is the residential property at 2865 Blackberry Trail (the "Property"). The Debtor acquired a ½ interest in the Property with Angela A. Grillo ("Ms. Grillo") on March 29, 2007, jointly with right of survivorship. At all times from March 29, 2007, to the present, the Debtor has resided at the Property.

On February 28, 2008, the Debtor and Ms. Grillo, both unmarried, executed a mortgage on the Property to Emery Federal Credit Union for \$279,700 and the present outstanding balance is \$210,169.29.

On March 15, 2013, Thomas J. Brennen ("Brennen") obtained a judgment against the Debtor for the principal sum of \$187,355. On May 28, 2013, Brennen recorded a certificate of judgment against the Debtor, CJ 13-09790, with the Hamilton County Ohio Clerk of Courts. This lien attached to the Property. This judgment lien was renewed on March 13, 2018.

The Debtor transferred his ½ interest in the property to Ms. Grillo on June 3, 2013. From June 3, 2013, the date of conveyance to Ms. Grillo, the Debtor retained an inchoate dower interest in the Property.¹

¹ Although not part of the parties' formal stipulations, the Debtor asserts in the Motion that Ms. Grillo was his spouse at the time of the transfer and Brennan does not dispute that assertion.

The value of the Property is now \$340,000 and the present value of the Debtor's dower interest at the time of the bankruptcy filing is \$26,181.

II. Question Presented

The Debtor claims that Brennan's lien against the Debtor's residential Property may be fully avoided pursuant to 11 U.S.C. § 522(f) as a judicial lien that impairs the Debtor's homestead exemption. Brennan disputes this claim arguing that the Debtor transferred his ownership interest in the Property to Ms. Grillo prior to the bankruptcy filing leaving the Debtor with an inchoate dower interest of limited value that, accordingly, limits the value of his homestead exemption and the lien's impairment of that exemption. The parties stipulated to the relevant facts leaving this Court with a legal question to determine: is the Debtor entitled to a homestead exemption based on his interest in the Property when Brennan's judgment lien attached prior to the Debtor's prepetition transfer of his interest to Ms. Grillo or, instead, based on his interest in the Property as of the petition filing date?

III. Legal Analysis

The Bankruptcy Code establishes grounds for avoiding certain types of liens that impair an exemption to which a debtor is entitled. Specifically, § 522(f) provides in relevant part:

(1) Notwithstanding any waiver of exemptions ... the 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 under subsection (b) of this section, if such lien is—

(A) A judicial lien[.]

11 U.S.C. § 522(f)(1)(A). In order to avoid a judgment lien under § 522(f)(1)(A), three conditions must be met: (1) the lien must be a judicial lien; (2) the lien must attach to a debtor's pre-existing interest in property; and (3) the lien must impair an exemption to which the debtor would otherwise

be entitled. *In re Moody*, 2021 Bankr. LEXIS 2708, at *5, 2021 WL 4483981, at *3 (Bankr. N.D. Ohio Sept. 30, 2021) (citing *Farrey v. Sanderfoot*, 500 U.S. 291, 295-96 (1991)). The Debtor bears the burden of establishing that each of these conditions exists. *Id.*

In this case, neither party disputes that Brennan's lien meets the first two conditions for avoidance. Specifically, Brennan's lien is a judicial lien and the lien attached to the Debtor's pre-existing interest in the Property. The parties' dispute relates to the third condition—whether Brennan's lien impairs an exemption to which the Debtor would otherwise be entitled; and more specifically whether the Debtor's post-attachment, prepetition transfer of his interest in the Property to his spouse impacts this determination.

The Debtor's position is that the transfer of his interest in the Property has no impact on the impairment analysis under § 522(f) because § 522(f) "is plainly retrospective." Under this retrospective approach, the Debtor argues that the determination of his exemption (and presumably his interest in the Property) is made at the time Brennan's lien attached to the Property. As long as he acquired his interest in the Property before the fixing of the lien, the Debtor maintains that Brennan's lien is entirely avoidable.

Brennan argues that the prepetition transfer of the Property impacts the nature of the Debtor's remaining interest in the Property. Namely, following the transfer, the Debtor held only an inchoate dower interest in the Property. Brennan maintains that the Debtor's homestead exemption is accordingly limited to the value of the Debtor's inchoate dower interest in the Property since that was the only interest the Debtor held in the Property as of the petition date. This Court agrees.

When a debtor files a bankruptcy petition, it operates to create a bankruptcy estate consisting of "all legal or equitable interests of the debtor in property as of the commencement of

the case.” 11 U.S.C. § 541(a)(1). This definition of property of the estate is “unquestionably broad” and brings into the estate all rights and interest in property that a debtor has as of the petition filing date. *In re Breece*, 487 B.R. 599 (Table), 2013 Bankr. LEXIS 203, at *25, 2013 WL 197399, at *8 (B.A.P. 6th Cir. Jan. 18, 2013); *see also In re Marcucci*, 655 B.R. 712, 719 (Bankr. S.D. Ohio 2023). However, § 541 does not expand a debtor’s interest in property just because the debtor has filed for bankruptcy protection. ““Thus, whatever rights a debtor has in property at the commencement of the case continue in bankruptcy – no more, no less.”” *Breece*, 2013 Bankr. LEXIS 203, at *25; 2013 WL 197399, at *8 (quoting *Moody v. Amoco Oil Co.*, 734 F.2d 1200, 1213 (7th Cir. 1984)).

The Bankruptcy Code allows a debtor to exempt certain property from the bankruptcy estate pursuant to 11 U.S.C. § 522(b). *Holland v. Star Bank, N.A. (In re Holland)*, 151 F.3d 547, 548 (6th Cir.1998); *Marcucci*, 655 B.R. at 719. Pursuant to this provision, a debtor may claim federal exemptions set forth in § 522(d) so long as the applicable state has not “opted-out” and enacted its own exemptions. 11 U.S.C. § 522(b). Ohio has elected to opt-out of the federal exemptions and create its own. Ohio Rev. Code § 2329.662.

The Debtor claims his homestead exemption in the Property based on the Ohio exemption statute which states in pertinent part:

(A) Every person who is domiciled in this state may hold property exempt from execution, garnishment, attachment, or sale to satisfy a judgment or order, as follows:

* * *

(b) . . . the person’s interest, not to exceed one hundred twenty-five thousand dollars,² in one parcel or item of real or personal property that the person or a dependent of the person uses as a residence.

² This amount is adjusted every three years to reflect increases in the consumer price index. *See* Ohio Rev. Code § 2329.66(B). The revised amount from April 1, 2022, through March 31, 2025 is \$161,375. Ohio Judicial Conference,

Ohio Rev. Code § 2329.66(A)(1). Significantly, it is the debtor's circumstances and property interests as they exist on the petition filing date that establish a debtor's entitlement to an exemption in bankruptcy. *See In re Wengerd*, 453 B.R. 243, 250 (B.A.P. 6th Cir. 2011) (“[I]t is a well-established principle that exemptions are determined on the bankruptcy filing date.” (citations omitted)); *In re Moody*, 2021 Bankr. LEXIS 2708, at *13-14, 2021 WL 4483981, at *5-6 (Bankr. N.D. Ohio Sept. 30, 2021) (“[A] debtor's entitlement to an exemption is determined by the circumstances on the date the petition is filed, for purposes of lien avoidance and otherwise.” (citations omitted)); *see also* Ohio Rev. Code § 2329.66(D) (establishing that, in bankruptcy proceedings, a person's “interest” in property is determined as of the date the bankruptcy petition is filed).

Notwithstanding this statutory and case law to the contrary, the Debtor nonetheless argues that the appropriate time to determine the Debtor's property interest and entitlement to a homestead exemption for lien avoidance purposes is not the petition filing date but, instead, the date on which Brennan's lien attached, prior to the Debtor transferring his one-half interest in the Property to Ms. Grillo. In support, the Debtor primarily relies on an opinion by the Court of Appeals for the Ninth Circuit which held that, to avoid a lien under § 522(f)(1), a debtor need not have an interest in the property at the time a motion to avoid lien is filed so long as the debtor had an interest in the property at the time the lien “fixed” or “attached” to the property. *Culver, LLC v. Chiu (In re Chiu)*, 304 F.3d 905, 908-909 (9th Cir. 2002).³

Exemptions from Execution, Garnishment, Attachment, or Sale: Ohio Revised Code Section 2329.66 (last visited April 4, 2024), <http://www.ohiojudges.org/Resources/publications>.

³ This Court notes that at least one case from this district does not agree with the Ninth Circuit's holding in *Chiu*. *See Riddell v. NCR Universal Credit Union (In re Riddell)*, 96 B.R. 816 (Bankr. S.D. Ohio 1989) (holding that a debtor

However, the Debtor takes the Ninth Circuit's determination in *Chiu* out of context. In *Chiu*, the debtors unquestionably owned the property at issue on the petition filing date and only transferred the property through a sale five years later. See *Culver, LLC v. Chiu (In re Chiu)*, 266 B.R. 743, 745 (B.A.P. 9th Cir. 2001) (noting that on the date the chapter 7 petition was filed, the debtors owned the residential property and claimed a homestead exemption in it) *aff'd* 304 F.3d 905. Consequently, the Ninth Circuit's holding was not focused on the proper date to determine property interests and exemptions for lien avoidance purposes but, instead, on whether a debtor must still have an interest in the property at the time a subsequent motion to avoid a lien is filed, an entirely different issue. Indeed, the lower Ninth Circuit Bankruptcy Appellate Panel's opinion that was affirmed by the Ninth Circuit in *Chiu* specifically recognized that ". . . the nature and extent of exemptions is determined as of the date that the bankruptcy petition is filed Because lien avoidance is part and parcel of the exemption scheme, the right to avoid a judicial lien must also be determined as of the petition date." *Chiu*, 266 B.R. at 751. Consequently, the Debtor's argument and reliance on *Chiu* is without merit.

As further support of a retrospective application of § 522(f), the Debtor urges this Court to consider the opinions rendered in *Unifund C.C.R. Partners v. Sheckard (In re Sheckard)*, 394 B.R. 56 (E.D. Pa. 2008), *In re Orr*, 304 B.R. 875 (Bankr. S.D. Ill. 2004), and *In re Vincent*, 260 B.R. 617 (Bankr. D. Conn. 2000). Like *Chiu*, each of these cases dealt with the issue of whether a debtor must have an interest in the property at the time a § 522(f) motion to avoid a lien is filed.⁴ None

must have an interest in property at the time a motion to avoid lien is filed). Because the Debtor had some interest in the Property both when the lien attached and when the Motion was filed, this Court need not address this divide.

⁴ *Sheckard*, 394 B.R. at 59 (whether debtor could avoid a judicial lien discovered upon sale of the debtor's home two years after bankruptcy case was closed where the debtor escrowed the amount of the judgment lien from the sale proceeds); *Orr*, 304 B.R. at 876 (whether debtor could avoid a judicial lien four years after the bankruptcy case was closed where the subsequent purchaser of the debtor's home discovered the judicial lien when the purchaser sought to

of these cases directly addresses the timing for determining the amount of a debtor's exemption (although *Sheckard* seemingly implies that the formula for determining impairment under § 522(f) is made as of the petition date). *Sheckard*, 394 B.R. at 64. Accordingly, these cases do not support the Debtor's argument for a "retrospective" determination of impairment based on the circumstances in existence at the time Brennan's lien attached to the Debtor's Property.⁵

Returning to the facts of this case, this Court looks to the Debtor's circumstances and property interests on the petition filing date to determine the homestead exemption to which he would otherwise be entitled for purposes of determining a lien avoidance. Because the Debtor transferred his one-half interest in the Property to Ms. Grillo on June 3, 2013, the parties agree that the Debtor was left with an inchoate dower interest in the Property as of the date the Debtor filed his bankruptcy petition. It is true that the Debtor used the Property as his residence on the petition filing date and, thus, may claim a homestead exemption in it under Ohio Rev. Code § 2329.66(A)(1)(b). *See In re Pope*, Bankruptcy Case Number 22-10545, Docket Number 87, pp. 8-9 (Bankr. S.D. Ohio April 3, 2023) (citing *In re Whitt*, 534 B.R. 320, 322 (Bankr. N.D. Ohio 2015) and *Drown v. JPMorgan Chase Bank (In re Barnhart)*, 447 B.R. 551, 559 (Bankr. S.D. Ohio 2011)). However, the value of that homestead exemption cannot exceed the value of the Debtor's interest in the Property which, in this case, is limited to an inchoate dower interest. *Id.* The parties stipulated that the Debtor's inchoate dower interest has a current value of \$26,181. Accordingly, the Debtor's homestead exemption is limited to \$26,181.

resell the home); *Vincent*, 260 B.R. at 619 (whether debtors could avoid a judicial lien on their residence where the property was sold by general warranty deed after the bankruptcy case was closed).

⁵ The Debtor himself undermines his retrospective argument by seeking to claim the Ohio homestead exemption in effect on the petition date (\$161,375) as opposed to the Ohio homestead exemption in effect when Brennan's lien attached (\$132,900). *See* Ohio Judicial Conference, *Exemptions from Execution, Garnishment, Attachment, or Sale: Ohio Revised Code Section 2329.66* (last visited April 4, 2024), <http://www.ohiojudges.org/Resources/publications>.

With respect to the statutory calculation of impairment, even without including the Emery Federal Credit Union mortgage, it is clear that Brennan's \$187,355 judicial lien added to the Debtor's permissible exemption of \$26,181 exceeds the Debtor's \$26,181 inchoate dower interest in the Property absent any liens. *See* 11 U.S.C. § 522(f)(2). Accordingly, Brennan's lien fully impairs the Debtor's exemption and, pursuant to 11 U.S.C. § 522(f)(1)(A), Brennan's lien is avoided as to the Debtor's \$26,181 inchoate dower interest in the Property.⁶

IV. Conclusion

This Court determines that: (1) the Debtor is entitled to a homestead exemption equal to the value of his inchoate dower interest in the Property totaling \$26,181; and (2) Brennan's judicial lien fully impairs that exemption. Accordingly, Brennan's lien is avoided as to the Debtor's \$26,181 inchoate dower interest in the Property.

SO ORDERED.

Distribution List:

Default List Plus

James L. Nieberding, Esq.

⁶ Brennan's remaining lien rights against that portion of the Property transferred to Ms. Grillo on June 3, 2013 prior to the bankruptcy filing is outside the scope of this § 522(f) avoidance action.