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District of New Mexico

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:
ALBERT JOSE MARTINEZ and
LINDA LUCILLE MARTINEZ,
Debtors. No. 7-99-15045 SA

MEMORANDUM OPINION ON DEBTORS' MOTIONS TO AVOID LIENS OF PAUL AND MARGARITE CECILE RAMIREZ AND JOHN D. McKINNEY

This matter came before the Court for preliminary hearing on the debtors' motions 1) to avoid lien of Paul and Margarite Cecile Ramirez, and 2) to avoid lien of John D. McKinney (collectively, the "three creditors" or "creditors"). Debtors appeared through their attorney Steve H. Mazer. The three creditors appeared through their attorney Michael K. Daniels. The parties stipulated that no facts were in dispute, and requested that the Court enter its decision on the pleadings. This is a core proceeding. 28 U.S.C. § 157(b)(2)(A) and (K).

Debtors filed this Chapter 7 proceeding on September 3, 1999. Debtors owned no real property on the date the case was filed. The three creditors were listed as unsecured creditors in debtors' Schedule F. The Statement of Financial Affairs shows that the three creditors were judgment creditors by virtue of two different state court proceedings[1]. Debtors filed the two

[1]Section 39-1-6 NMSA 1978 (1991 Repl.) provides:
Any money judgment rendered in the supreme court, court of appeals, district court or metropolitan court shall be docketed by the clerk of the court and a transcript

motions to avoid liens asserting that the three creditors hold judicial liens on property of the debtors, that debtors have no real property to which the transcripts may have attached, the judicial liens would impair any exemption to which the debtors are or may become entitled, and the liens are therefore subject to avoidance under 11 U.S.C. § 522(f)[2]. The three creditors filed objections. The Chapter 7 trustee filed a report of no distribution and abandonment of assets on October 28, 1999. Discharge was entered on December 8, 1999.

At the preliminary hearing on the motions, counsel for debtors argued that the liens should be avoided now, rather than in the future when debtors attempt to finance or acquire real estate. He also argued that allowing these documents to remain of record constitutes a collection tool against after acquired property, which would be a violation of the automatic stay pre-

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> or abstract of judgment may be issued by the clerk upon the request of the parties. The judgment shall be a lien on the real estate of the judgment debtor from the date of the filing of the transcript of the judgment in the office of the county clerk of the county in which the real estate is situate. ... Judgment shall be enforced for not more than fourteen years thereof.

[2]Section 522(f) of the Bankruptcy Code provides in part:
(1) ... 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 ... if such lien is -
(A) a judicial lien ...

discharge and a violation of the discharge injunction post-discharge. Counsel for creditors argued that there is no avoidance possible if there is no exemption impaired, and there can be no exemption in the absence of property to exempt.

To decide this matter, the Court will analyze these motions as asking for two different forms of relief: 1) as a motion to avoid a lien impairing some existing exemption, and 2) as a motion to provide some type of declaratory relief about a possible future exemption.

First, debtors are not entitled to any current exemption which may be impaired. Property cannot be exempted unless it first falls within the estate. Owen v. Owen, 500 U.S. 305, 308 (1991)(noting that 522(b) provides for exemptions "from property of the estate.") Debtors owned no real estate. And, any lien created by 39-1-6 NMSA attaches only to real estate, so no lien attached. Therefore, the debtors are not entitled to any exemption in real estate and no lien attached which could be avoided. The motion should be denied with respect to impairing a current exemption.[3]

[3] "When read in its entirety, the language [of Section 522(f)] infers three conditions which must exist for the section to apply. First, the debtor must have some property. Second, the debtor must be entitled to claim the property as exempt. Third, a lien must exist which impairs the entitled exemption. Each of these conditions must exist for the relief to be afforded." Clowney v. North Carolina National Bank (In re Clowney), 19 B.R. 349, 352 (Bankr. M.D. N.C. 1982); McCart v.

Regarding the second relief, the Court finds that there is no jurisdiction to fashion the relief requested. Federal courts' jurisdiction is limited to "cases and controversies". United States v. Colorado Supreme Court, 87 F.3d 1161, 1164 (10th Cir. 1996).

> The case or controversy limitation requires that the plaintiff have standing. A plaintiff has standing when (1) she has suffered an injury in fact, (2) there is a causal connection between the injury and the conduct complained of, and (3) it is likely that the injury will be redressed by a favorable decision. An injury in fact is an invasion of a legally protected interest that is concrete, particularized, and actual or imminent, not conjectural or hypothetical.

Id. (citations and internal quotations omitted.) See also Yellow Cab Cooperative Assn v. Metro Taxi, Inc. (In re Yellow Cab Cooperative Assn, 132 F.3d 591, 594 (10th Cir. 1997)("To have standing, a plaintiff must have suffered an actual injury.") In this case, debtors cannot demonstrate standing. They seek to avoid the transcripts of judgment as impairing any exemptions to which they may become entitled at some future time[4]. The Court finds this "injury" conjectural and hypothetical; debtors may never attempt to finance or acquire real estate in the county

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Jordana (In re Jordana), 232 B.R. 469, 473 (10th Cir. B.A.P. 1999).

[4]Exemptions, however, are determined as of the date of the petition. See In re Cassar, 137 B.R. 1022, 1023 (Bankr. D. Co. 1992). What debtors seek to protect is a future right to obtain property free of liens.

during the life of the transcript[5]. Therefore, the Court lacks jurisdiction to grant the relief requested and the motion should be denied as to future relief.

Other bankruptcy courts that have addressed this second issue have come up with similar results. ***Compare*** cases in which debtor owned no real estate: In re Norvell, 198 B.R. 697, 699 (Bankr. W.D. Ky. 1996)(describing issue as whether the court should enter a "comfort order" releasing void judgment liens[6]); In re Cassar, 137 B.R. 1022, 1023 (Bankr. D. Co. 1992)(denying motion because debtors had no property to exempt and, since there was no property, court could not make findings of impairment under §522); and Clowney v. North Carolina National Bank (In re Clowney), 19 B.R. 349, 354 (finding no lien, the Court stated that debtor's concern regarding the possible future impact of the judgments was "unfounded" and dismissed complaint), ***with*** cases where debtor acquired real estate post-discharge: In re Thomas, 102 B.R. 199, 202 (Bankr. E.D. Ca. M.D. Al. 1995)(debtor acquired real property post-discharge, judgment lien properly voided in

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[5]Furthermore, the debtors could acquire property in the future which might not be exempt, such as commercial real estate.

[6]In this case the Court found that as a general rule, orders releasing void judgment liens are unnecessary, because the discharge itself legally satisfies and releases any judgment lien based on a dischargeable obligation. 198 B.R. at 699. The Court left to bankruptcy practitioners and the real estate bar the task of devising a method to remove void liens from the real estate records. Id.

subsequent action); Ogburn v. Southtrust Bank (In re Ogburn), 212 B.R. 984, 987 (Bankr. M.D. Ala. 1995) (after discharge, debtor acquired a real property interest constituting a homestead, court voided lien in subsequent action); and In re Kitzinger, 1999 WL 977076 (N.D. Il. 1999)(debtor purchased real property two years after discharge, a levy issued against property for a prepetition debt, and creditor was sanctioned for violating discharge injunction), ***and also with*** cases where the subject real property was simply not subject to the judgment lien: McCart v. Jordana (In re Jordana), 232 B.R. 469, 474 (10th Cir. B.A.P. 1999)("Where the lien does not attach to the homestead, there is nothing to avoid."); In re Flowers, 1998 WL 191425 (Bankr. E.D. Pa. 1998)(Debtor owned entireties property with nondebtor wife, lien did not attach to entireties property so could not be avoided, but court found it "appropriate" to include in order a statement that creditor had no valid lien against any of debtor's property.) Although these cases do not discuss standing, the courts have refused to issue advisory opinions when the debtors did not actually own property that was, at least arguably, subject to a judgment lien.

The Court will briefly address debtors' other arguments. The automatic stay prohibits enforcement of a judgment against a debtor and against property of the estate. In re Suarez, 149 B.R. 193, 195 (Bankr. D. N.M. 1993). A transcript of judgment is

an in-rem collection device only. There are no allegations that the three creditors have taken any affirmative action regarding their transcripts since the filing of the bankruptcy. The Court cannot find that the mere existence of the transcripts constitutes any enforcement action against the debtors. Next, the transcripts act only upon real estate. There is no real estate in the bankruptcy estate. Therefore, the transcripts are not an enforcement action against property of the estate. The automatic stay is not implicated.

Debtors' argument that the transcripts of judgment violate the discharge injunction also fails. Section 524 absolves debtors from any legal obligation to pay discharged debts.[7] Clowney, 19 B.R. at 353. It also enjoins any future acts to collect any discharged debt from property of the debtors. Id. It therefore appears that the transcripts, in themselves, will not require the payment of any debt if the underlying judgments are voided. And, again, while the three creditors oppose the entry of an order at this point releasing the transcripts of judgment from the county real estate records, there are no allegations that the three creditors have taken any affirmative

[7]Creditor McKinney has a pending complaint to determine dischargeability of debt. This opinion should not be construed as any type of ruling on that case. Nor should it be construed as an advance ruling on the legal implications of the transcript of judgment in the event McKinney is successful in that suit.

action regarding their transcripts since the filing of the bankruptcy.[8] Therefore, the Court finds that the discharge injunction is not implicated on the facts presented and argued in this case.

This is not to say that debtors have not raised an issue of legitimate concern about how the Bankruptcy Code works. For example, there are no doubt a number of debtors who, completely consistent with Congressional intent in enacting the Code, hope to purchase a home within a few years of receiving their discharge, but will find unavoided albeit unenforceable real estate liens hindering that legislatively sanctioned goal. This decision is based largely on an analysis of Section 522(f), and concludes merely that Section 522(f) by itself cannot be the vehicle to provide the relief sought by debtors in these circumstances.[9] Nor, under these particular facts, does Section

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[8] Cf. Citizens Bank of Maryland v. Strumpf, ___ U.S. ___, ___, 116 S.Ct. 286, 290 (1995) (debtor's bank account is "nothing more or less than a promise to pay" and bank's merely refusing to immediately pay withdrawals from account does not constitute a violation of the automatic stay); but compare In re Yates, 47 B.R. 460, 462 (Bankr. D. Co. 1985) (query whether lien holder under an affirmative duty to execute documents necessary to clear title to real estate).

[9] Neither of the parties commented on what appears to be the quite disparate federal and state-law treatment accorded debtors who own homesteads and those who don't (probably for lack of relevance). For example, had debtors in this case owned even a minimal homestead claim, they could have easily avoided the liens which are not being avoided. And compare Section 522(d)(1) (allowing $16,150.00 in value for a current or permanent

524 allow debtors the relief they seek. The Court is not opining on any arguments that might be based on the secured/unsecured claim process of Section 506 or the equitable reservoir of power granted to the Court by Section 105, nor on any other arguments that might be raised based on the discharge provisions of Section 524(a)(3). Nor does this decision address the question of whether the language of the New Mexico exemption statute provides enough protection to the debtor's homestead exemption such that there is no need for bankruptcy law intervention.[10] See David Dorsey Distributing, Inc. v. Sanders (In re Sanders), 39 F.3d 258, 262 (10th Cir. 1994), but compare Coats v. Ogg (In re Coats), 232 B.R. 209, 211 (10th B.A.P. 1999).

Nevertheless, for the reasons set forth above, the Court finds that the motions to avoid liens are not well taken. Separate orders will be entered denying the motions. This memorandum opinion constitutes the Court's findings of fact and conclusions of law. Bankruptcy Rule 7052.

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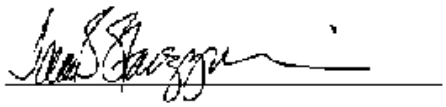
residence) with 522(d)(5) (allowing up to $8,075.00 for "non-homestead" exemption), and Section 42-10-9 NMSA 1978 (1999 Supp.)(allowing $30,000.00 homestead exemption) with 42-10-10 (allowing $2,000.00 in lieu of homestead).

[10] The homestead exemption is "exempt from attachment, execution or foreclosure by a judgment creditor." Section 42-10-9 NMSA.



Honorable James S. Starzynski
United States Bankruptcy Judge

I hereby certify that, on the date file stamped above, a true and correct copy of the foregoing was either electronically transmitted, faxed, mailed, or delivered to the listed counsel and parties.

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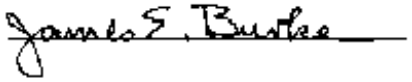

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