UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In re	:	Chapter 13
JOSEPH COSSMAN	:	
Debtor	:	Bankruptcy No. 04-13355F

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MEMORANDUM

....

The chapter 13 debtor, Joseph Cossman, has filed six motions to avoid judicial liens pursuant to 11 U.S.C. § 522(f). These liens are held by Joy Kussman, William and Elizabeth Bullard, Jack and Cynthia Rusnak, Michael Moroz, Lisa Toleno, and Tinari Container Service. Only three responses were filed--by Ms. Kussman, by Mr. and Mrs. Bullard, and by Mr. and Mrs. Rusnak–in which all oppose any relief.[1] Two of the respondents are acting pro se. An evidentiary hearing was held, with the debtor and all three respondents participating.

I.

Mr. Cossman formerly operated his own home remodeling business (apparently called "Classic Construction") and entered into contractual agreements with Ms. Kussman, Mr. and Mrs. Bullard, and Mr. and Mrs. Rusnak. Although paid by the

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[1]As for the motions against Tinari Container Service, Lisa Toleno, and Michael Moroz, the debtor has prevailed by default.

respondents, the debtor never completed his contract; moreover, the construction work he did perform was not done properly.

On April 25, 2003, Ms. Kussman obtained a state court judgment against the debtor in the amount of $3,574.50. Mr. and Mrs. Rusnak obtained their judgment on August 28, 2002 in the amount of $7,135.88. And Mr. and Mrs. Bullard obtained their judgment, in the amount of $8,106.59, on December 3, 2003. All three judgments were entered in Bucks County, Pennsylvania.

Prior to these judgments, on March 26, 2002, the debtor and his wife, Tessa L. Cossman, purchased the real property located at 147 E. Maple Avenue, Langhorne, Pennsylvania, for $185,000. Ex. D-1. The realty is owned by Mr. and Mrs. Cossman as tenants by the entireties. Id. This property is located in Bucks County, Pennsylvania. The debtor testified that he believes the property only has a current value of $160,000.[2]

The debtor's schedules, Ex. D-2, disclose a mortgage on the realty in the amount of $124,335.92. On Schedule C, the debtor claims as exempt under 11 U.S.C. § 522(b)(2)(B) his interest in the real estate owned by the entireties with his non-debtor spouse. Ex. D-2. In the instant motions, he asserts that the judicial liens held by the three respondents impairs his exemption.

II.

When the Bankruptcy Reform Act of 1978 was enacted, there were a number of provisions which had no ancestor in the predecessor Bankruptcy Act of 1898 (including

[2]He explained that the sellers of the property were relatives of his wife, and that the recorded purchase price does not reflect the repair credit given at purchase due to the poor condition of the property.

the Chandler Act). Among them were the lien avoidance provisions found in section 522(f).

Congress was concerned that certain creditors who held unsecured claims were able to transform those claims into secured claims prior to a bankruptcy filing simply by obtaining pre-bankruptcy judgments against the debtor. In most states, such judgments act as liens upon real estate. As liens are not discharged in bankruptcy, see Johnson v. Home State Bank, 501 U.S. 78 (1991); Long v. Bullard, 117 U.S. 617 (1886), effectively this transformation undermined the goal of the bankruptcy filing in providing a fresh start to the debtor. Therefore, Congress enacted section 522(f) in order to reconvert certain judgment lien claims back to unsecured claims that would fall within the scope of the bankruptcy discharge. See generally H.R. Rep. 95-595, 95th Cong. 1st Sess. 126-27 (1977).

As amended in 1994, section 522(f)(1) of the Bankruptcy Code provides as follows:

> Notwithstanding any waiver of exemptions but subject to paragraph (3),[3] 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, other than a judicial lien that secures a debt--
> >
> > (i) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law

[3]Subsection 522(f)(3) is inapplicable to this dispute.

> by a governmental unit, or property settlement agreement; and
>
> (ii) to the extent that such debt–
>
>> (I) is not assigned to another entity, voluntarily, by operation of law, or otherwise; and
>>
>> (II) includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance or support.

Thus, section 522(f)(1) does not adversely affect the claim of a creditor holding a judgment against the debtor. That claim has been fixed in amount by the state court judgment, and section 522(f)(1) does not permit that judgment amount to be challenged in bankruptcy court. Instead, subsection (f)(1) only invalidates the lien created by that judgment, and only to the extent the lien impairs an exemption to which the debtor would be entitled. As noted by one bankruptcy treatise:

> Described in its simplest terms, section 522(f) permits a debtor to wipe out the [lien] interest that a creditor has in particular property if the debtor's interest in that property would be exempt but for the existence of the creditor's [judicial] lien or interest.

L. King, 4 Collier on Bankruptcy, ¶ 522.11[1], at 522-77 (15th ed. rev. 2003).

Section 522(f)(1) refers only to judicial liens. The Bankruptcy Code establishes three categories of liens: statutory liens; consensual liens; and judicial liens. E.g., Graffen v. City of Philadelphia, 984 F.2d 91, 96 (3d Cir. 1992). Only judicial liens are subject to avoidance under section 522(f)(1). See, e.g., Matter of Henderson, 18 F.3d 1305, 1308 (5th Cir.), cert. denied sub nom. Belknap v. Henderson, 513 U.S. 1014 (1994); Graffen v. City of Philadelphia, 984 F.2d at 96.

A judicial lien is defined in the Bankruptcy Code as a "lien obtained by judgment, levy, sequestration or other legal or equitable process or proceeding." 11 U.S.C. § 101(36). This definition excludes "a consensual lien, such as a mortgage or an Article 9 security interest, or a statutory lien, such as a tax lien, attorney's lien, or mechanic's lien." Norton Bankruptcy Law and Practice 2d, § 46:23, 46-46 (1999) (footnotes omitted). Included within the scope of a judicial lien are liens that arise under state law by virtue of the entry of a judgment. E.g., Walters v. U.S. Nat'l Bank of Johnstown, 879 F.2d 95, 96 (3d Cir. 1989) (bank that held lien arising from judgment against the debtor held an "undisputed" judicial lien); see generally In re Thompson, 240 B.R. 776 (B.A.P. 10th Cir. 1999). Compare Graffen v. City of Philadelphia, 984 F.2d at 96 (lien for water and sewer rents was a statutory lien).

In general, Pennsylvania law provides that a lien is created by the entry of a judgment upon all real estate owned by the judgment defendant located in the county in which the judgment is recorded. See 42 Pa.C.S.A. § 4303(a); In re Upset Sale, Tax Claim Bureau of Berks County, 505 Pa. 327 (1984). Thus, the judgments obtained by the Bullards, the Rusnaks and Ms. Kussman in Bucks County state court would give rise to judicial liens upon all real property, if any, owned by Mr. Cossman in Bucks County.

As mentioned earlier, Mr. Cossman owned Bucks County real property jointly with his wife as tenants by the entireties. Under Pennsylvania law, entireties property is not owned by either spouse; rather, it is owned by the marital unit. See, e.g., Lindenfelser v. Lindenfelser, 396 Pa. 530, 534 (1959). In re Estate of Bullotta, 798 A.2d 771, 774 (Pa. Super. 2002). Thus, in Pennsylvania, a creditor of only one spouse cannot execute on property owned by both spouses as tenants by the entireties, because the marital

unit itself is not the obligor. See, e.g., Napotnik v. Equibank and Parkvale Sav. Ass'n, 679 F.2d 316, 319 (3d Cir. 1982); Klebach v. Mellon Bank, N.A., 388 Pa. Super. 203 (1989); Reliance Ins. Co. v. Schoolfield Constr. Co., 14 Pa. D. & C. 4th 490, 494 (Pa. Com. Pl. 1992).

Under section 522(b)(2)(B), Congress permits a debtor to claim as exempt in his bankruptcy case all entireties property owned by the debtor and non-debtor spouse from the claims of creditors who hold claims only against one spouse. Napotnik v. Equibank and Parkvale Sav. Ass'n; see also In re Cordova, 73 F.3d 38, 40 (4th Cir. 1996). This exemption, however, is not allowed against a creditor with a claim against both spouses. Napotnik v. Equibank and Parkvale Sav. Ass'n.

In light of the state law restriction against execution upon entireties property, does a judgment entered against one spouse create a judicial lien against entireties property in Pennsylvania? If so, and as this judgment lien is not presently enforceable, does it impair the entireties exemption permitted under section 522(b)(2)(B)?

III.

As to the first question, whether a creditor in bankruptcy holds a secured claim is determined in the first instance by reference to nonbankruptcy law, typically state law. E.g. Butner v. United States, 440 U.S. 48 (1979). I have previously analyzed Pennsylvania law and concluded that a judgment against Mr. Cossman creates an “inchoate” lien on real property owned by the debtor which will ripen into an enforceable lien if the debtor’s marriage ends (by divorce or death) and if he then becomes the owner of the

realty. See In re Hope, 77 B.R. 470 (Bankr. E.D. Pa. 1987); see also In re Bilinski, 1998 WL 721083 (E.D. Pa. 1998). This lien is inchoate because it is not presently enforceable. See Stop 35, Inc. v. Haines, 374 Pa.Super. 604 (1988).

My analysis of state law follows from Fleek v. Zillhaver, 117 Pa. 213 (1887), where the Pennsylvania Supreme Court resolved a lien priority dispute involving a judgment creditor and a mortgagee. The Fleek court held that a judgment creditor of one spouse obtained a lien on that spouse's right of survivorship that, when it ultimately ripened upon the death of the non-judgment spouse, took priority over a later jointly conveyed mortgage lien, although the mortgage was recorded prior to death of the spouse.

This Fleek holding has been described in the following manner:

> The Court held [in Fleek] that the judgment against the husband alone, which [was] incapable of enforcement during their joint lives was a lien on the expectancy of the husband, and that on the death of the wife that this judgment became a first lien against the husband and took priority over the mortgage.

Mitchell v. Wilmington Trust Co., 449 A.2d 1055, 1058 (Ch., New Cast. Co. Del. 1982), aff'd without op., 461 A.2d 696 (Del. Supr. 1983). Decisions rendered some years after the Fleek opinion have similarly construed the Pennsylvania Supreme Court's holding. E.g., A. Hupfel's Sons v. Getty, 299 F. 939, 939-40 (3d Cir. 1924):

> In Fleek ... the court ... held that the interests of husband and wife in ... [entireties] may be the subject of a lien .... A judgment against either husband or wife would create a lien against the expectancy of the judgment debtor in the estate ....

Accord In re Beihl, 197 F. 870 (E.D. Pa. 1912) (judgment represents a lien “upon the realization of the expectancy” of the judgment debtor spouse). These descriptions of the Fleek holding are persuasive interpretations of state law.

The general lien priority rule in Pennsylvania is "that a judgment creditor, or one who has become subrogated to his rights, has priority over a mortgagee who receives a mortgage after the attachment of the judgment or execution lien . . .." 11 Standard Pennsylvania Practice, § 70:54 at 397 (1982). Therefore, since the judgment creditor prevailed in Fleek, that creditor must have obtained a lien that attached to the property prior to the mortgage.

The Pennsylvania Supreme Court is the final arbiter of state law, and its Fleek decision has never been overruled. As a result, a Pennsylvania judgment creditor holding a claim against one spouse only possesses an inchoate lien upon the judgment debtor's right of survivorship in real property that the judgment debtor and the judgment debtor's spouse own as tenants by the entirety. See Wirtz v. Phillips, 251 F. Supp. 789, 799-800, 803, 809 n.17, & 810 (W.D. Pa. 1965); Matter of Bundy, 53 B.R. 582, 583 (Bankr. W.D. Pa. 1985) ("a creditor of one [spouse may] obtain a contingent lien by judgment against the debtor spouse valid against the entire interest in the property in the event of his survivorship"); In re Williamson, 11 B.R. 791, 795 (Bankr. W.D. Pa. 1981) ("A judgment lien against one spouse is inchoate in that it cannot be the source of legal process-execution against entireties property"); Weir v. Taylor, 45 D. & C. 2d 197 (C.P. Chest. Co. 1967) (judgment entered against wife was inchoate lien against entireties property which was executable, without the need for revival, upon the entry of a divorce decree).

As mentioned above, this lien is inchoate because it can only ripen into an executable lien if the entireties status is terminated--generally by death or divorce--and the judgment debtor spouse thereafter obtains an interest in the realty as tenant in common or

as fee simple holder. If the realty is transferred by the entireties tenants to a third party while the lien is inchoate, or if the dissolution of the entireties status does not yield an ownership interest in the realty by the judgment debtor, then the lien will become dissolved. See In re Hope; cf. Weir v. Taylor.

Thus, under Pennsylvania law, as judgment creditors of Mr. Cossman, the three respondents possess inchoate liens upon his right of survivorship in the real property that the debtor and Mrs. Cossman now own as tenants by the entirety. Furthermore, as holders of inchoate liens under state law, these creditors possess judicial liens within the meaning of section 522(f)(1).

Specifically, §101(37) of the Bankruptcy Code defines a "lien" as a "charge against or interest in property to secure payments of a debt or performance of an obligation[.]" 11 U.S.C. §101(37). As the legislative history regarding §101(37) unequivocally instructs, the term "lien . . . includes inchoate liens." H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 312 (1977); S. Rep. No. 95-989, 95th Cong., 2d Sess. 25 (1978), reprinted in 1978 U.S. Code Cong. & Admin. News 5787, 5810, & 6269. See, e.g., Matter of Village Properties, Ltd., 723 F.2d 441, 445 (5th Cir.) ("Congress intended that the definition of 'lien' be broad and include inchoate liens"), cert. denied, 466 U.S. 974 (1984). Moreover, these inchoate liens arose upon the entry of the three judgments and thus are judicial liens within the definition of section 101(36).

Accordingly, in answer to the first question posed above, the respondents do hold judicial liens within the scope of section 522(f)(1), which liens are subject to avoidance to the extent they impair Mr. Cossman's exemption claim.[4]

IV.

The existence of a judicial lien, however, does not mandate avoidance of that lien. As the statute makes clear, such a lien may only be avoided by a debtor if this lien "impairs an exemption to which the debtor would have been entitled." Thus, I must now turn to the second question posed earlier: Does an inchoate lien impair Mr. Cossman's entireties exemption claim?

The Bankruptcy Code defines the concept of "impairment of an exemption" in section 522(f)(2). This subsection states:

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[4]Had I concluded that the respondents did not hold any lien under state law, the instant motions would have been denied. Nonetheless, the respondents would not benefit from such a ruling because the bankruptcy stay and the discharge injunction found in section 524 would have precluded the creation of any liens post-bankruptcy based upon an unsecured pre-bankruptcy debt. As explained by the Fourth Circuit Court of Appeals when construing an exemption claim under Maryland's entireties property law:

> In summary, Smith's judgment debt could not ripen into a lien prior to Birney's bankruptcy petition because during that time Mrs. Birney was alive. It could not ripen into a lien between the filing of the bankruptcy petition and the discharge because 11 U.S.C. § 362(a)(5) imposed an automatic stay which prohibits any lien on a pre-petition debt from attaching. And finally, it could not ripen into a lien following Birney's discharge because the discharge extinguished his liability for the underlying debt. Smith, therefore, cannot reach the Cecil County property directly through Birney.

In re Birney, 200 F.3d 225, 228 (4th Cir. 1999).

> (2)(A) For the purposes of this subsection, a lien shall be considered to impair an exemption to the extent that the sum of--
>
> > (i) the lien;
> > (ii) all other liens on the property; and
> > (iii) the amount of the exemption that the debtor could claim if there were no liens on the property;
>
> exceeds the value that the debtor's interest in the property would have in the absence of any liens.
>
> (B) In the case of a property subject to more than 1 lien, a lien that has been avoided shall not be considered in making the calculation under subparagraph (A) with respect to other liens.
>
> (C) This paragraph shall not apply with respect to a judgment arising out of a mortgage foreclosure.

The legislative history provides examples of when a lien impairs an exemption claim. All of these examples, however, involve exemption claims for fixed dollar amounts. An entireties property claim under state law is not limited in amount; this exemption is concerned only with marital unit ownership of property and creditor claims against one spouse, and so has no monetary ceiling. Thus, the examples provided in the legislative history of section 522(f)(2) are not directly apposite when analyzing an exemption claim for entireties property under section 522(b)(2)(B).

Nonetheless, before section 522(f)(2) was enacted in 1994, the Third Circuit Court of Appeals had held that a judicial lien did not impair a debtor's federal homestead exemption when the amount of the consensual liens–mortgages–exceeded the value of the property. In other words, the Court of Appeals held that when the debtor had no equity in the property (because the amount due on the outstanding mortgages exceeded the property's value), the homestead exemption had no value and so could not be impaired by

any judgment lien. In re Simonson, 758 F.2d 103, 105-06 (3d Cir. 1985). This narrow definition of impairment was legislatively overruled by the 1994 amendments to section 522(f): specifically, subsection 522(f)(2). See, e.g., In re Kolich, 273 B.R. 199 (B.A.P. 8th Cir. 2002).

Similarly, in section 1124, Congress used the term "impairment" in connection with claims of creditors. Only an impaired class of creditors is entitled to vote for or against a chapter 11 plan. See, e.g., In re PPI Enterprises (U.S.), Inc., 324 F.3d 197, 202 (3d Cir. 2003). Again, section 1124 was amended in 1994, so that the definition of that term was expanded. "Congress intended to define impairment broadly, and, generally, any alteration of a creditor's legal rights constitutes impairment." In re Barakat, 99 F.3d 1520, 1527 (9th Cir. 1996).

Based upon these congressional actions, I conclude (along with other courts) that Congress intended that the concept of impairment of an exemption claim in section 522(f) be broadly construed. In re Herman, 120 B.R. 127, 131 (B.A.P. 9th Cir. 1990):

> The lesson of Galvan is that the concept of impairment for purposes of section 522(f) should not be construed restrictively. Rather impairment should be construed in a manner consistent with the fresh start purposes served by the applicable Code provisions. In this regard, in determining whether a lien impairs an exemption under section 522(f) we apply a practical approach to determining the impact that a judicial lien may have on the debtor's ability to use a given piece of exempt property to achieve his or her fresh start. Where the creditor's lien has no present economic value, i.e. the exemption plus the encumbrances with priority ahead of the judicial lien at issue equal or exceed the value of the property, the lien essentially is just a cloud upon the debtor's title and right to future enjoyment of the property and the lien impairs the exemption.

Although the inchoate liens held by the three respondents are not presently

enforceable, they may create a cloud on the title to Mr. Cossman's real estate that could affect his ability (and that of his wife) to refinance, mortgage or sell their property after the chapter 7 bankruptcy case has concluded. See, e.g., In re Calandriello, 107 B.R. 374, 375 (Bankr. M.D. Fla. 1989); In re Hope, 77 B.R. at 471. This cloud on the title impairs his entireties exemption and therefore renders the three judgment liens held by the respondents avoidable under section 522(f). See, e.g., Somerset Savings Bank v. Goldberg, 166 B.R. 776 (D. Mass. 1994); In re Mukhi, 246 B.R. 859 (Bankr. N.D. Ill. 2000); see also In re Calandriello; In re Bradlow, 119 B.R. 330 (Bankr. S.D. Fla. 1990); In re Staley, 95 B.R. 548 (Bankr. S.D. Ohio 1989).

Accordingly, an order shall be entered overruling the objections posed by the respondents and granting the debtor's motions to avoid their liens.[5]

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[5]Counsel for the Bullards complained at the hearing that the debtor's motion should be denied because he did not accurately disclose the value of the real estate on his bankruptcy schedules. From the evidence, I cannot so conclude. Moreover, a higher value for the realty than that disclosed by the debtor would not have altered the result of these contested matters. Thus any error would not warrant denial of these motions. Cf. Krajci v. Mt. Vernon Consumer Discount Co., 16 B.R. 462 (E.D. Pa. 1981) (purportedly improper conduct by the debtors was irrelevant to the issue of lien avoidance).

Nor would the non-dischargeability of the debt under section 523(a) justify denial of the motions. See, e.g., In re Allen, 217 B.R. 945 (Bankr. M.D. Fla. 1998).

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In re	:	Chapter 13
JOSEPH COSSMAN	:	
Debtor	:	Bankruptcy No. 04-13355F

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ORDER

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AND NOW, this 13th day of May 2004, for the reasons stated in the accompanying memorandum, it is hereby ordered that the motions of the debtor to avoid the judgment liens held by Joy Kussman, William and Elizabeth Bullard, and Jack and Cynthia Rusnak are granted and such liens are avoided pursuant to 11 U.S.C. § 522(f).

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BRUCE FOX
United States Bankruptcy Judge

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