UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

WILLIAM C. BIGELOW
KATHLEEN T. BIGELOW

CASE NO. 98-67832

Debtors

APPEARANCES:

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Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

In a motion filed with this Court on March 4, 1999, Chapter 7 debtors William C. and Kathleen T. Bigelow (collectively, the "Debtors") seek to avoid a judicial lien which has been recorded against their homestead by creditor Seneca Federal Savings and Loan Association (the "Bank") pursuant to § 522(f) of the United States Bankruptcy Code, 11 U.S.C. §§ 101-1330 ("Code"). This motion is opposed by the Bank. Following argument at the Court's regular motion calendar of May 4, 1999, the parties were given an opportunity to submit memoranda of law, and on June 1, 1999, this matter was submitted for decision.

JURISDICTIONAL STATEMENT

The Court has core jurisdiction over the parties and subject matter of this contested matter pursuant to 28 U.S.C. §§ 1334, 157(a), (b)(1), and (b)(2)(K).

STATEMENT OF FACTS

The facts relevant to this matter are not in dispute. The Debtors own a parcel of real property at 4753 Lawsher Drive, Syracuse, New York (the “Real Property”), which they occupy as a principal residence and which they list in their bankruptcy schedules as having a value of $159,000. The Real Property is encumbered by two consensual liens: a first mortgage in the amount of $242,530 held by Marine Midland Bank, and a second mortgage, also in the amount of $242,530, held by Mortgage Lenders Network.[1] The Bank’s judicial lien, which was recorded on November 12, 1998, is in the amount of $145,550.71. It is undisputed that the Debtors have no equity in the Real Property. Accordingly, they have elected to claim the cash exemption of § 283 of the New York Debtor and Creditor Law (“NYD&CL”) in lieu of the real property homestead exemption set out by § 5206 of the New York Civil Practice Law and Rule (“NYCPLR”).

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[1] The moving papers do not indicate whether this is a second mortgage or an assignment of the first mortgage. This issue is not, however, relevant to the Court’s decision on the present motion.

DISCUSSION

Under the terms of Code § 522(f), a judicial lien may be avoided by a bankruptcy debtor if it is shown that the lien "impairs" an applicable property exemption. In pertinent part, that section provides:

> (f)(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 . . .
> (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.

Code § 522(b), which is referenced in the subsection quoted above, provides that a debtor may claim exemptions in property to the extent permitted by the law of the jurisdiction in which the bankruptcy case is filed, or, alternately, according to the federal exemption scheme set out in Code § 522(d)(1) unless the applicable state law does not permit such an election. Because New York has opted out of the federal exemption scheme, and does not permit its domiciliaries to claim exemptions based on Code § 522(d)(1), *see* NYD&CL § 284, the Debtors in this case are entitled to claim only those exemptions which are set out in the NYCPLR and the NYD&CL.

Pursuant to NYCPLR § 5206(a), a debtor is entitled to exempt $10,000 of equity in his homestead. In addition, NYD&CL § 283 allows for a debtor to exempt a maximum of $2,500 in cash, but only where he "does not elect, claim, or otherwise avail himself of an exemption

described in section fifty-two hundred six of the civil practice law and rules." The New York homestead and cash exemptions are thus mutually exclusive, and having elected to claim the latter, the Debtors have given up their rights under the former. *See In re Flinn*, 95 B.R. 13, 15 (Bankr. N.D.N.Y. 1988).

The sole issue before the Court is thus whether the Debtors may avoid the Bank's judicial lien solely on the basis that it impairs their NYCPLR § 5206 homestead exemption, in spite of the fact that they are precluded by NYD&CL § 283 from actually claiming that exemption. The Court concludes that they may not. By its express terms, Code § 522(f)(1) allows a debtor to avoid a judicial lien only if the lien "impairs an exemption to which [the debtor] would have been entitled but for the lien itself." *Owen v. Owen*, 500 U.S. 305, 310-11, 111 S.Ct. 1833, 1836-37, 114 L.Ed.2d 350 (1991). As noted, the plain terms of applicable state law provide that the Debtors are not entitled to any exemption on account of their homestead. Thus, under the *Owen* analysis, the relief of Code § 522(f) is unavailable to the Debtors by reason of the fact that they have failed to identify any exemption right which is actually impaired by the Bank's lien.

This result is not changed by the "notwithstanding any waiver of exemptions" proviso of Code § 522(f)(1). Even if the Court were to accept the Trustee's argument that the Debtors' election of the cash exemption can be understood as a "waiver" of the alternative homestead exemption by operation of law, it is clear that Congress did not write the proviso with such a sweeping definition in mind. As the Supreme Court pointed out in *Owen*, the function of the "notwithstanding" clause is merely to harmonize Code § 522(f) with Code § 522(e), which provides that:

> A waiver of an exemption executed in favor of a creditor that holds an unsecured claim against the debtor is unenforceable in a case under this

> title with respect to such claim against property that the debtor may exempt under subsection (b).

See Owen, 300 U.S. at 312 (noting that "[t]he point of [Code] § 522(f) is not to exclude waivers... though that is done in passing, waivers are addressed directly in [Code] § 522(e)").

The word "waiver" is not separately defined in the Code. However, in light of the fact that nothing suggests that the meaning of the word "waiver" should be read any differently in Code § 522(f) than in Code § 522(e), the Trustee's proposed interpretation of the "notwithstanding" clause encounters several insurmountable textual difficulties. The first is the reference to waivers as having been "executed in favor of a creditor" in Code § 522(e), language which would appear to limit the Congressional definition of that word to express waivers that are granted to particular creditors. Secondly, because Code § 522(e) provides that all such waivers are prima facie invalid, the Trustee's proposed interpretation would seemingly overturn all state laws, such as NYD&CL § 283, which provide for exemptions in the alternative. Nothing in the Code or in its legislative history suggests that Congress ever intended such a sweeping result. Lastly, the Court notes that the Debtor's interpretation of the "notwithstanding" clause would frustrate the purpose of New York's alternative exemption scheme, as it would allow the Debtors to effectively enjoy the benefits of both the homestead and the cash exemptions simultaneously, in spite of the clear legislative directive that they not be permitted to do so. The Debtors have cited to no authority suggesting that this Court has the power to rewrite the exemption allowances of New York in such a manner, and the Court consequently cannot conclude that such a power exists.

Based on the foregoing, the Debtors' Motion to Avoid Fixing of Judicial Liens is hereby DENIED.

Dated at Utica, New York

this 2nd day of August 1999

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STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge