UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

In re

JASON A. & JAMI E. MARTINDALE, Case No. 98-14758

Debtors.

APPEARANCES:

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Hon. Robert E. Littlefield, Jr., U.S. Bankruptcy Judge

MEMORANDUM-DECISION AND ORDER

The current matters before the court are the motions of Jason A. and Jami E. Martindale ("Debtors") to reopen their chapter 7 case and to avoid the judgment lien of Vytautas P. and Maria L. Paliulis ("Creditors"). The court has jurisdiction over this core proceeding pursuant to 28 U.S.C. §§ 157(a), 157(b)(1), 157(b)(2)(B), 157(b)(2)(K) and 1334.

FACTS

1. The Debtors filed a chapter 7 bankruptcy petition on July 14, 1998 in the United States Bankruptcy Court for the Northern District of New York.

2. The Debtors received their order of discharge dated November 4, 1998.

3. At the time the Debtors filed their chapter 7 bankruptcy petition, they owned real property

located at 65 West River Road, Gansevoort, Saratoga County, New York ("the Property"), which they acquired by deed dated and recorded December 5, 1996.[1]

4. The Debtors listed the Property on Schedule A as having a value of $145,000.00.

5. The Debtors listed secured debt against the Property of $142,647.00 on Schedule D.

6. The Creditors obtained a judgment against the Debtors and docketed it in the Saratoga County Clerk's Office on or about April 21, 1998.

7. The transcript of judgment shows the Debtors' address as 52 West River Road.[2]

8. On or about August 13, 2002, the Debtors sold the Property to Paul H. and Jennifer R. Flanders.

9. On or about August 16, 2002, the deed evidencing the transfer of the Property was recorded in the Saratoga County Clerk's Office.

10. On August 21, 2002, the Debtors filed a motion to reopen their chapter 7.

11. On August 21, 2002, the Debtors also filed a motion to "Vacate Judgment as Encumbrance on Homestead Exemption."

ARGUMENTS

The Creditors argue that the Debtors lack standing to invoke 11 U.S.C. § 522(f) to avoid their judgment lien because they transferred title to the Property prior to bringing the current motions. The Creditors state that New York law compels this result. They further argue that they should not be prejudiced by the delay of the Debtors in asserting their rights under § 522(f).

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[1] This information was taken from the being clause of the deed conveying the Debtors' interest in the Property to Paul H. And Jennifer R. Flanders.

[2] The Debtors' Schedules A and C indicate the Debtors' address is 65 West River Road. The Reaffirmation Agreement between the Debtors and the second mortgage holder also shows 65 West River Road as the Debtors' address. Similarly, the Debtors' motion to reopen catalogs the Debtors' address as 65 West River Road. The Transcript of Judgment and the Debtors' motion to avoid lien, however, both show the Debtors' address as 52 West River Road. The court assumes that the bankruptcy petition and the second mortgage holder have the correct address, i.e. 65 West River Road.

The Debtors state that standing exists and cite to *In re Chiu*, 304 F.3d 905 (9th Cir. 2002).

DISCUSSION

11 U.S.C. § 522 is entitled "Exemptions" and states in part:

> (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, ...

There are three schools of thought on whether a debtor needs a current interest in real property to have the standing necessary to avoid the fixing of a judicial lien. The first theory is focused on § 522(f)'s use of the phrase "an interest of the debtor in property" and reasons that if the debtor doesn't own the property, he or she has no interest to protect. Thus, in order to have standing, the debtor must own the property at the time the motion is brought. *In re Sizemore*, 177 B.R. 530 (Bankr. E.D.Ky.1995); *In re Kudrna*, 173 B.R. 934 (Bankr. D.Idaho 1994); *In re Riddell*, 96 B.R. 816 (Bankr. S.D.Ohio 1989); *In re Carilli*, 65 B.R. 280 (Bankr. E.D.N.Y. 1986); *In re Montemurro*, 66 B.R. 124 (Bankr. E.D.N.Y.1984).

The second line of cases holds that the vital moment in time is not when the motion is brought but rather the time of fixing of the lien. *In re Chiu*, 304 F.3d 905 (9th Cir. 2002); *In re Vincent*, 260 B.R. 617 (Bankr. D.Conn. 2000).

The third premise is that the debtor needs to have an ownership interest as of the time of filing the bankruptcy petition. *In re Carroll*, 258 B.R. 316 (Bankr. S.D.Ga. 2001).

This court agrees with the second line of cases and Judge Dabrowski's analysis in the Vincent case, *supra*, in which he stated:

> The operation of Section 522(f) is not to avoid a "lien" *per se*, although that is its practical effect in most cases. Rather, by its terms, Section 522(f) provides for the avoidance of the "fixing" of certain liens. To "fix" means to "fasten a liability upon".

> *Farrey v. Sanderfoot*, 500 U.S. 291, 296, 111 S.Ct. 1825, 114 L.Ed. 2d 337 (1991) (citing Black's Law Dictionary). Thus, Section 522(f) operates retrospectively to annul the *event* of fastening the subject lien upon a property interest. *See id.* Accordingly, the fundamental question of ownership is whether the property encumbered by the subject lien was "property of the debtor" *at the time of the fixing* of that lien upon such property. *Vincent,* 260 B.R. at 620-21.

While the Creditors argue that New York statutory law and the case law construing the same control the standing issue as further support for their contention that the Debtors needed an ownership interest contemporaneous with the initiation of their § 522(f) motion, lien avoidance is governed by federal, not state law. *In re Chiu*, 266 B.R. at 747*; See also Norton Bankruptcy Law and Practice* 2d § 46:5(1997). As the Debtors owned the Property at the time of the fixing of the Creditors' lien, they have standing to maintain the instant § 522(f) motion.

However, there is one obstacle that neither side adequately addressed: prejudice to the Creditors and whether the Debtors are guilty of laches. As this court recently discussed in *In re Williams*, Case No. 93-13232 (August 26, 2003):

> Laches is defined as:
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> > The equitable doctrine by which a court denies relief to a claimant who has unreasonably delayed or been negligent in asserting the claim, when that delay or negligence has prejudiced the party against whom relief is sought. BLACK'S LAW DICTIONARY 879 (7th ed. 1999).
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> Additionally, the defendants must have suffered some amount of prejudice to successfully invoke laches, even if plaintiffs have a weak or no excuse for their delay. *In re Fairchild*, 285 B.R. 98, 101 (Bankr. D. Conn. 2002)(citation omitted). "As a matter of federal civil procedure, laches is an affirmative defense... When a plaintiff brings suit within the limitation period, a defendant claiming laches has the burden of proving both unreasonableness of the delay and the occurrence of prejudice." *In re Procaccianti*, 253 B.R. 590, 591 (Bankr. D.R.I. 2000) (citation omitted). Proving the prejudice will be pivotal, for a post-discharge lien avoidance action will be barred only if the debtor's delay has resulted in such prejudice as to warrant barring the lien avoidance relief. *Noble v. Yingling*, 37 B.R. 647, 650 (D. Del. 1984).
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> *In re Williams, supra,* at 4-5.

Although the Creditors state "The Debtors were dilatory in seeking lien avoidance, and their delay and failure to avail themselves of avoidance procedures should not be at the expense of Paliulis." (Creditors Objection to Motion to Vacate Judgment ... dated September 16, 2002), they make no argument about unreasonable delay and point to no specific instance of prejudice. As such, the court does not make any finding of laches.

Based upon the foregoing, it is

ORDERED, that the Debtors' motion to reopen their Chapter 7 case is granted; and it is further

ORDERED, that a Chapter 7 Trustee need not be appointed: and it is further

ORDERED, that the court will schedule an evidentiary hearing for the sole purpose of hearing valuation testimony regarding the Property to determine whether the Debtors' homestead exemption is impaired.

Dated:

Hon. Robert E. Littlefield, Jr.
U.S. Bankruptcy Judge