UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division

IN RE:	)	Case No. 02-31407
	)	Chapter 7
DAVID A. HODSON,	)	
	)	
Debtor.	)	
	)	

ORDER DENYING MOTION TO AVOID LIEN AND GRANTING MOTION FOR RELIEF FROM STAY

This matter was before this Court on October 31, 2002, upon the Debtor's Motion to Avoid Lien, and upon the Motion for Relief from Automatic Stay or, in the Alternative, for Adequate Protection (the "Motion for Relief from Stay"), of Four Oaks Bank & Trust Company ("the Bank"). Gordon C. Woodruff, attorney for Four Oaks Bank; David A. Hodson, the Debtor; and his counsel, R. Keith Johnson, were present at the hearing.

Based upon the facts presented, this Court finds and concludes as follows:

Findings of Fact/Prior Proceedings

1. On June 25, 2001, the Bank obtained a judgment against the Debtor in the Superior Court of Johnston County, North Carolina for $26,211.74, plus interest, and attorneys' fees of $3,931.76. The Bank transcribed the Judgment to Mecklenburg County, North Carolina on August 6, 2001.

2. At the time, the Debtor was the sole owner of a house and lot located in Mecklenburg County (16704 Yardarm Lane, Cornelius,

NC) (the "Premises"). Upon transcription, the Bank's judgment attached to, and became a lien upon, the Premises.

3. Shortly before the judgment was entered, on April 27, 2001, the Debtor signed a deed which purported to retitle the Premises from the Debtor's fee simple ownership to a tenancy by the entireties with his wife. That deed reflects no taxable consideration for the transfer and its timing makes the Debtor's motives subject to question.[1]

4. However, the deed was not recorded, through what the Debtor says was error. Nevertheless legally, the Debtor continued to own the property in his individual capacity and subject to the Bank's lien.

5. Ostensibly realizing this mistake, Hodson recorded a new deed on February 21, 2002. This transfer terminated his individual tenancy and created a tenancy by the entirety estate in the Premises.[2]

6. On May 6, 2002, the Debtor filed a voluntary Chapter 7 petition with this Court. His wife did not file.

---

[1] The Debtor says this was done in connection with a refinance of his mortgage. Since his wife was becoming an obligor on the mortgage debt, Hodson says they intended that she become an owner of the property as well.

[2] Since North Carolina is a "race" state, this was the transfer date, not the deed date.

7. On October 7, 2002, the Bank filed a motion for relief from stay under 11 U.S.C. 362 seeking to foreclose its lien on the Premises.

8. The Debtor in turn moved to avoid the Bank's judgment lien pursuant to 11 U.S.C. § 522(f), arguing that it impaired his exemptions. Motion of October 16, 2002. According to the Debtor, the Premises has a value of $470,000. In addition to the Bank's $34,000 (est'd) judgment lien, the Debtor owes approximately $5,000 in taxes and a mortgage of $455,000. At hearing, the Debtor argued that he was entitled under State law[3] to a $10,000 real estate exemption in the Premises.[4] The Bank objects to this motion.

Conclusions of Law

1. The issue to be decided today is one of first impression in this District. That is, given the holding of *Farrey v. Sanderfoot*, 500 U.S. 291, 111 S.Ct. 1825, 114 L.Ed.2d 337 (1991) may a debtor avoid a judicial lien in entireties property to secure an exemption, where the lien in question attached to the property while the debtor owned it in fee simple and before the tenants by the entireties estate was created?

---

[3] NCGS 1C-1601(a)(1) allows a debtor to exempt up to $10,000 in real property which he uses as a residence.

[4] This is a new exemption claim. In his Schedules, the Debtor only claimed the Premises as exempt because it was tenants by the entirety property and therefore not subject to the claims of individual creditors. Obviously, that exemption would not defeat a judgment lien which attached before the entirety property was created.

2. The Debtor argues that had the property not been retitled, but had remained in his individual name, he could have avoided the Bank's lien under Section 522(f) and thereby secured his exemption. Because even now, with it being entireties' property, the Debtor still owns an interest in the Premises. Thus, he believes the fact that the property was re titled is irrelevant to this matter. The Debtor believes the lien is still subject being avoided under Section 522(f). Unfortunately for him, this Court disagrees.

3. NCGS 1C-1601(A)(1) provides: " a debtor may exempt.... up to ten thousand dollars ($10,000) in value, in real property... that the debtor or his dependent uses as a residence...."

4. Under Code Section 522(f), 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 judicial lien....

5. The Debtor's avoidance argument is flawed because the deed which created the entireties estate also extinguished his individual tenancy in the property. When he acquired his current interest in the Premises (that of a tenant by the entireties), it was subject to the Bank's preexisting lien.

6. In *Farrey*, The Supreme Court ruled that a debtor cannot use Section 522(f) to avoid a judgment lien, unless his interest in

the property predates the affixing of the lien to that property. *See Id.* at 296. In that matter, through a divorce decree, a state domestic court had awarded the debtor ("Sanderfoot") sole title to the couple's (previously) jointly-owned residence, but subject to a newly created lien in favor of the ex-spouse ("Farrey"). That lien was intended to secure payments that the debtor was obligated to make to Farrey under the divorce decree. *See* 500 U.S. at 293. The Debtor failed to make those payments and instead filed Chapter 7. *See Id.* He then sought to use Section 522(f)(1)to avoid Farrey's lien, arguing that it impaired his homestead exemption. *See Id.* at 293-94.

7. The U.S. Supreme Court took exception to this tactic, agreeing with Farrey that Section 522(f)(1) allows a debtor to avoid a lien only when the lien attaches to the debtor's interest in property *after* the debtor obtained his property interest in the same. *See Id.* at 296. The *Farrey* Court explains:

> [t]he statute does not say that the debtor may undo a lien on an interest in property. Rather, the statute expressly states that the debtor may avoid 'the fixing' of a lien on the debtor's interest in property. The gerund 'fixing' refers to a temporal event. That event--the fastening of a liability--presupposes an object onto which the liability can fasten. The statute defines the pre-existing object as 'an interest of the debtor in property.' Therefore, unless the debtor had the property interest to which the lien attached at some point *before* the lien attached to that interest, he or she cannot avoid the fixing of the lien under the terms of § 522(f)(1).

8. The Supreme Court held that the divorce decree had extinguished the parties' prior interests in the property and replaced them with the Debtor's fee simple interest and simultaneously Farrey's lien on that interest. *See Id.* As such, the Debtor:

> ...took the interest and the lien together, as if he had purchased an already encumbered estate from a third party. Since Sanderfoot never possessed his new fee simple interest before the lien 'fixed,' § 522(f)(1) is not available to void the lien.

See Id. at 300-01.

9. The current case is factually only a step removed from *Farrey*, and the logic of that case applies, as demonstrated by a recent bankruptcy decision from the Eastern District of Pennsylvania, *In re Jackaman*, 2000 WL 192973 (Bankr.E.D.Pa. 2000). Factually, Jackaman is in fact "on all fours" with the current case.

10. In *Jackaman*, the Debtor attempted to avoid the judgment lien of a creditor, TM Group, using Section 522(f). *See Id.* at 1. At the time TM Group obtained its lien, the Debtor was the sole owner of the property. Its lien attached to the property. *See Id.* Later, the Debtor retitled the property from an individually held fee simple interest, to an interest shared with his wife as tenants by the entireties. Still later, Jackaman filed bankruptcy and attempted to avoid the lien under Section 522 claiming that it as impaired his exemptions.

11. Judge Sigmund's well-reasoned decision in *Jackaman* synthesizes the holding in *Farrey* and Pennsylvania real property law (as to the nature of tenancy by the entirety property). She concludes that Section 522(f) may not be used to avoid the lien in this situation.

12. *Jackaman* holds that the Debtor's transfer had the effect of (1) extinguishing his former fee-simple interest in the property, and (2) replacing it with a new property interest, one by tenancy by the entireties. This new interest, however, was subject to the lien of TM Group, because this lien had already affixed to the property. Because that lien was on the property when the entireties' estate was created, Judge Sigmund opined that under Farrey, the lien could not be avoided.

13. North Carolina property law pertaining to tenancy by the entirety property is in all relevant aspects identical to that of Pennsylvania.

14. In North Carolina, tenancy by the entirety is an "estate . . . predicated upon the fact that, in law, the husband and wife, though twain, are regarded as one--there being, in other words, a unity of person, which has been called the fifth unity of this estate, the others being of time, title, interest, and possession, which also belonged to an estate by joint tenancy." *See Moore v. Greenville Banking & Trust Co.*, 100 S.E. 269, 272, 178 N.C. 118, __ (1919).

15. When land is conveyed or devised to husband and wife, "[a]s between them there is but one owner and that is neither the one nor the other, but both together, in their peculiar relationship to each other, constituting the proprietorship of the whole and every part and parcel thereof." *See Strange v. Sink*, 27 N.C.App. 113, 117, 218 S.E.2d 196, 199 (1975).

16. Therefore in the current case, just as in *Jackaman*, when Hodgson acquired his current interest in the property (that of tenant by the entirety), his interest was subject to the bank's preexisting lien on the Premises. Because the Debtor's interest did not predate the Bank's lien, the lien cannot be avoided under *Farrey*. Thus, Hodson's motion should be denied.

17. Because this is a Chapter 7 liquidation case (no effective reorganization) and because there is no equity in the Premises for the benefit of creditors, the Bank's Motion for Relief from Stay should be granted.

It is therefore **ORDERED**:

1. The Debtor's Motion to Avoid Judicial Lien is DENIED.

2. The Motion for Relief from Stay of Four Oaks Bank is GRANTED to allow foreclosure on its lien on the Premises in

accordance with applicable nonbankruptcy law.

This the 24th day of December, 2002.

U.S. Bankruptcy Court