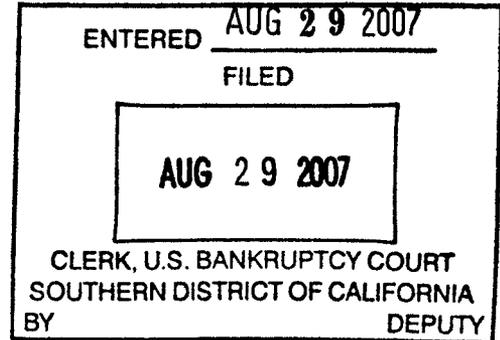


1 WRITTEN DECISION - NOT FOR PUBLICATION



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6 UNITED STATES BANKRUPTCY COURT  
7 SOUTHERN DISTRICT OF CALIFORNIA

11 In re ) Case No. 03-05580-B13  
 12 MARK WORTHAM, ) Adv. No. 06-90159-PB  
 13 Debtor. ) ORDER  
 14 \_\_\_\_\_ )  
 15 ANDREW L. NICKELS, )  
 16 Plaintiff, )  
 17 v. )  
 18 MARK WORTHAM, CASSIE L. BOX- )  
 19 WORTHAM, MORTGAGE ELECTRONIC )  
 20 REGISTRATION SYSTEMS, INC., )  
 a Delaware Corporation, )  
 21 solely as nominee for lender, )  
 COUNTRYWIDE HOME LOANS, INC., )  
 a New York Corporation, )  
 22 Defendants. )  
 23 \_\_\_\_\_ )

24 During the course of the underlying bankruptcy case, the  
25 debtor filed a motion to avoid the judgment lien of plaintiff

26 ///

1 Nickles, which was recorded and attached to debtor's residence.  
2 The Motion was unopposed, and was granted in due course.

3 Subsequently, Countrywide Home Loans made a loan to debtor  
4 and obtained a consensual lien on debtor's residence. Nickles  
5 applied to state court to renew his judgment, which was initially  
6 granted. Debtor, however, moved to vacate the renewal, relying  
7 on the order avoiding the lien, and the state court did so. It  
8 was during that process that Nickles first learned that his lien  
9 had been avoided in the bankruptcy case. At a hearing on a  
10 motion filed by Nickles, the Court recommended the filing of an  
11 adversary proceeding to vacate the order avoiding lien, among  
12 other things. Nickles did so, and seeks to have the relationship  
13 of his judgment lien to Countrywide's consensual lien determined,  
14 along with a claim that debtor has already received the benefit  
15 of his homestead exemption through the loan proceeds of the  
16 Countrywide loan.

17 In prior proceedings, this Court vacated the order avoiding  
18 Nickles' judgment lien, ruling that the order was void and of no  
19 effect because no jurisdiction over Nickles had been obtained.  
20 The Court also ruled that Nickles' judgment lien passed through  
21 the bankruptcy case. The Court had concerns, however, regarding  
22 its jurisdiction to resolve the remaining issues raised by  
23 Nickles because the Chapter 13 plan had been completed - indeed,  
24 it was paid off with the Countrywide loan proceeds. The Court  
25 invited further briefing on the issue, which has been received.

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1           On March 8, 2004 Debtor moved to avoid Nickles' judgment  
2     lien. He served the motion at the 555 E. Ocean address. On  
3     April 8, 2004, the Court granted the unopposed motion and entered  
4     the Avoidance Order. The Avoidance Order was also served at the  
5     555 E. Ocean address.

6           On June 24, 2004 Countrywide Home Loans (Countrywide) loaned  
7     \$220,000.00 to the Debtor. On the same date Countrywide recorded  
8     a deed of trust against the Property securing Debtor's promissory  
9     note (Countrywide Deed of Trust). Proceeds of the loan were used  
10    to pay off the loans secured by the then existing deeds of trust  
11    on the Property and to pay off the remainder owing on Debtor's  
12    Chapter 13 plan. Debtor got his discharge on September 17, 2004  
13    and the case was closed on September 20, 2004.

14          In May 2005 Nickles filed an "Application for and Renewal of  
15    Judgment" in the Vista Superior Court (Renewal). The Renewal was  
16    recorded on May 19, 2005 and notice thereof was sent to the  
17    Debtor. Upon discovery of the Renewal, Debtor filed a motion in  
18    state court to have the renewed judgment vacated on the ground  
19    that "the debt represented by the renewed judgment was discharged  
20    under the provisions of the Bankruptcy Code." Nickles, through  
21    counsel, opposed the motion on the ground that he would be  
22    seeking to reopen the bankruptcy case and to have the Avoidance  
23    Order set aside.

24          On December 12, 2005 Nickles moved to reopen the bankruptcy  
25    case and to vacate the order confirming the Chapter 13 plan and  
26    setting aside the Avoidance Order. Nickles moved on the ground

1 that he had no notice of the bankruptcy filing nor of the  
2 avoidance motion. The case was reopened and Nickles commenced  
3 this adversary proceeding seeking three separate claims for  
4 relief. First, to determine the validity, priority or extent of  
5 liens or other interests in the Property; second, for equitable  
6 relief setting aside the Avoidance Order and vacating Debtor's  
7 homestead; and third for declaratory judgment determining that  
8 Plaintiff's judgment lien survived the bankruptcy case and that  
9 Debtor was not entitled to a homestead exemption.

10 In the meantime, on January 18, 2006, the Vista Superior  
11 Court granted Debtor's motion, holding that the "renewal of  
12 judgment filed May 3, 2005 and the renewal of judgment recorded  
13 May 19, 2005 by Plaintiff ANDREW L. NICKLES against Defendant  
14 MARK WORTHAM is hereby expunged, and void and of no effect." The  
15 court provided no explanation of the grounds for its ruling.  
16 Nickles filed a motion for reconsideration based upon the  
17 reopening of the bankruptcy case to have the Avoidance Order set  
18 aside. In April 19, 2006 the Superior Court denied the motion  
19 for reconsideration without further comment, according to counsel  
20 for Debtor.

21 On May 14, 2007, this Court granted partial summary judgment  
22 in favor of Nickles. The Court ruled:

23 [S]ervice of the Motion to Avoid Lien . . .  
24 was not made in compliance with Rule 7004 of  
25 the Federal Rules of Bankruptcy Procedure,  
26 and further finds that ANDREW NICKLES did not  
have actual notice of the bankruptcy or the  
Motion to Avoid Lien, and because of the  
failure to serve in accordance with Rule 7004

1 and the violation of the Constitutional right  
2 to due process notice, the Order Avoiding  
3 Lien of April 9, 2004 . . . is void and of no  
4 effect. The Order is deemed vacated. The  
5 judgment lien of ANDREW L. NICKLES, reflected  
6 by way of the Abstract of Judgment recorded  
7 as Document No. 1997-0653604, as renewed,  
8 remains valid and enforceable against the  
9 subject property and passed through the  
10 bankruptcy unaffected.

7 Having explained its rulings, the Court opined that the remainder  
8 of the issues raised in Nickles' complaint should be addressed by  
9 the state court:

10 The difficulty I have with the rest of the  
11 issues is it's really a priority issue at  
12 that point in time, in terms of what happens  
13 to whom. And those are all peculiarly state  
14 law issues; they are not federal law issues.  
15 And in this case, it is compounded by the  
16 question of what happens to Mr. Nickles'  
17 abstract after a certain period of time,  
18 which the state court has played with, but  
19 without the benefit of this ruling. Given  
20 all of that, it's this Court's view that the  
21 state court ought to be the entity applying  
22 state law because its not bankruptcy law.

17 Counsel for Nickles contended that this Court had jurisdiction to  
18 resolve the remaining issues and that it ought to exercise such  
19 jurisdiction to not only set aside the Avoidance Order, but also  
20 to "undo whatever was done in reliance on that order."

21 Accordingly, the Court invited further briefing on its  
22 jurisdiction to resolve the remaining matters and whether it  
23 should exercise such jurisdiction or leave those matters to the  
24 state court. Nickles and Countrywide submitted supplemental  
25 briefs and the matter was taken under submission.

26 ///

1 DISCUSSION

2 The issue before the Court is whether it has jurisdiction to  
3 resolve the remaining issues - the extent and priority of  
4 Countrywide's mortgage lien relative to Nickles' judgment lien,  
5 and the extent to which Debtor is entitled to assert a homestead  
6 exemption - and, if so, whether the Court ought to exercise that  
7 jurisdiction.

8 The central issue of concern to the Court is that the  
9 Chapter 13 plan has been completed and the debtor has received  
10 his discharge, so the issue is whether the outcome of the instant  
11 proceeding could have any effect on the estate. See In re Valdez  
12 Fisheries Development Ass'n, Inc., 439 F.3d 545, 547 (9<sup>th</sup> Cir.  
13 2006). After lengthy consideration, the Court concludes that the  
14 outcome of this proceeding may well have an effect on the  
15 underlying bankruptcy because the debt owed to Nickles has not  
16 been dealt with. Debtor's position has been that once the  
17 judgment lien was avoided, then the debt became a dischargeable  
18 one, and was discharged. However, if the lien rode through the  
19 bankruptcy, the judgment remains a debt that is not discharged.  
20 Moreover, the real property, as property of the estate remains  
21 burdened with the judgment lien.

22 Of course, there is the presently unresolved "cart before  
23 the horse" problem involving the renewal of the state court  
24 judgment which, it appears, was vacated by the state court on  
25 motion of the debtor because of the order of this Court avoiding  
26 the judgment lien and the following argument that the judgment

1 was thereafter discharged when the debtor completed his plan.

2       The circumstances are further complicated by the fact that  
3 while debtor listed Nickles as a disputed creditor, debtor used  
4 the same Long Beach address as on the motion to avoid lien, and  
5 there is no evidence of record to show that Nickles ever knew of  
6 the pending bankruptcy, much less had an opportunity to file a  
7 proof of claim and participate in what turned out to be a 50%  
8 dividend to unsecured creditors (assuming the lien could properly  
9 be avoided).

10       Throughout the argument Nickles has contended that the Court  
11 has "core jurisdiction" under § 157(a). However, § 157 does not  
12 create federal jurisdiction. Federal jurisdiction over  
13 bankruptcy matters and matters related thereto was granted in  
14 § 1334 and merely referred to the bankruptcy courts under § 157.  
15 In short, if there is no jurisdiction under § 1334, § 157 cannot  
16 create it. The Court concludes that jurisdiction does exist  
17 under § 1334 for the reasons set out above.

18       Finding that jurisdiction does exist also suggests a  
19 possible outcome in the priority dispute between Nickles and  
20 Countrywide. The issue is whether Countrywide acquired some  
21 intervening rights which vested in reliance on the order avoiding  
22 lien. As already noted, the Court determined not only that the  
23 Avoidance Order ought to be vacated, but also that the Order was  
24 "void and of no effect," because the Court never had personal  
25 jurisdiction over Nickles. As a matter of law, the argument  
26 goes, no legal rights can vest based upon a void order. See In

1 re Orosco, 93 B.R. 203 (9<sup>th</sup> Cir. BAP 1988) and Wutzke v. Bill  
2 Reid Painting Service, Inc., (1984) 151 Cal.App.3d 36. Those  
3 courts recognized that under California law a forged reconveyance  
4 was "void *ab initio* and of no legal effect." 93 B.R. at 207;  
5 151 Cal.App.3d at 43 ("void *ab initio* and constitutes a  
6 nullity"). Those cases held that no rights could vest based upon  
7 void documents. The question then is whether there is any  
8 distinction in whether the document in question is void because  
9 the documents were forged as in Orosco and Wutzke, or whether  
10 they are void due to lack of jurisdiction, as in this case. In  
11 either situation, it may be argued, the document is void and of  
12 no effect - "a void judgment is a legal nullity. . . ." Watts v.  
13 Pinckney, 752 F.2d 406, 410 (9<sup>th</sup> Cir. 1985) (citation omitted)  
14 and no rights can arise based thereon.

15 The Court recognizes that Countrywide has not had a full  
16 opportunity to address the foregoing, and the Court has set the  
17 issue out as it has because it is suggested by the cases that  
18 discuss the Court's power to "reconsider, modify or vacate" its  
19 earlier orders. Now that the Court has concluded it does have  
20 jurisdiction to proceed in this matter, all parties will have the  
21 opportunity to fully address the effect of the vacating of the  
22 lien avoidance order on the relative priorities of Nickles and  
23 Countrywide.

24 Nickles adversary complaint also requests a declaratory  
25 judgment that his judgment lien is no longer subject to debtor's  
26 claim of a homestead exemption. It is certainly true, as Nickles

1 argues, that debtor has in effect received his homestead equity  
2 through the distribution he and the Chapter 13 Trustee received  
3 from escrow of the Countrywide loan. It is quite possible,  
4 however, that by the time debtor needs to invoke a homestead  
5 exemption it will not be impaired by Nickles' judgment lien. We  
6 simply do not know at this point. At present, there is no  
7 evidence that Debtor is now asserting a homestead exemption or  
8 that a foreclosure or other proceeding which would give rise to  
9 Debtor's assertion of a homestead is in progress or impending.  
10 The issue, if it exists at all, is simply not ripe.

11 The Court's jurisdiction is limited to current "cases or  
12 controversies":

13 The jurisdiction of federal courts established  
14 under Article III of the Constitution is limited  
15 to actual cases and controversies. Wisconsin's  
16 Environmental Decade, Inc. v. State Bar of  
17 Wisconsin, 747 F.2d 407, 410 (7<sup>th</sup> Cir.1984)  
18 (citing Poe v. Ullman, 367 U.S. 497, 502, 81 S.Ct.  
19 1752, 1755, 6 L.Ed.2d 989 (1961)). "The  
20 difference between an abstract question calling  
21 for an advisory opinion and a ripe 'case or  
22 controversy' is one of degree, not discernible by  
23 any precise test." *Id.* (citing Babbitt v. United  
24 Farm Workers National Union, 442 U.S. 289, 297, 99  
25 S.Ct. 2301, 2308, 60 L.Ed.2d 895 (1979)). Thus,  
26 the question is simplified to "whether [1] there  
is a substantial controversy, [2] between parties  
having adverse legal interests, [3] of sufficient  
immediacy and reality to warrant the issuance of a  
declaratory judgment." *Id.* (citing Babbitt, 442  
U.S. at 298, 99 S.Ct. at 2308).

23 Popa v. Peterson, 238 B.R. 395, 403 (N.D.Ill. 1999) (some  
24 citations omitted). In the case at hand there is no evidence  
25 that Debtor intends to assert a homestead exemption, so there is  
26

1 no substantial controversy. Second, even if there was, the  
2 controversy lacks sufficient immediacy or reality to be ripe.

3 Nickles appears to argue that this Court is "mandated" to  
4 determine the extent of Debtor's homestead exemption pursuant to  
5 California Code of Civil Procedure §§ 704.710 through 704.800.  
6 However, those provisions come into play only in the event of a  
7 proposed sale of the homestead to enforce a money judgment.  
8 There is no sale pending and no indication that anyone is  
9 currently attempting to sell the Property. Those provisions of  
10 the CCP are simply not implicated at this time.

11 The bottom line is that Nickles seeks an advisory opinion  
12 from the Court as to what Debtor would be entitled to should  
13 someone foreclose and Debtor assert a homestead. The Court does  
14 not have jurisdiction to give such an opinion. All the Court can  
15 do is to try to clearly set out all the circumstances that have  
16 occurred so that any future court confronted with the issue will  
17 be able to consider that Debtor was able to tap as much equity as  
18 he did with the Countrywide loan only because of the erroneously  
19 avoided judgment lien of Nickles. Nickles' argument is that  
20 debtor should not be able to, in effect, pull out further equity  
21 ahead of Nickles' judgment lien by resort to a homestead  
22 exemption.

23 Finally, this Court has ruled that Nickles' judgment lien  
24 "reflected by way of the Abstract of Judgment recorded as  
25 Document No. 1997-0653604, as renewed, remains valid and  
26 enforceable against the subject property and passed through the

1 bankruptcy unaffected." However, the fact remains that the Vista  
2 Superior Court granted Debtor's motion to vacate the Renewal and  
3 denied Nickles' motion for reconsideration. So far as this Court  
4 is aware, the Superior Court did not explain the basis for its  
5 rulings. The Court assumes, based upon the arguments presented  
6 to the Court, that it was based upon the status of the record in  
7 this Court at the time - that is, the Avoidance Order had not yet  
8 been vacated.

9       The Vista Superior Court should have the opportunity to  
10 review this Court's subsequent Orders and consider whether  
11 Nickles' judgment should be renewed as a matter of applicable  
12 state law.

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**CONCLUSION**

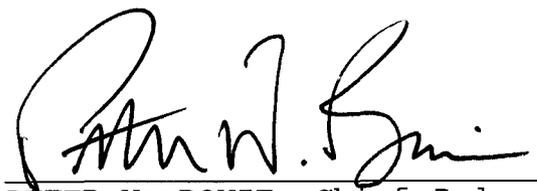
As set out above, the Court concludes it does have subject matter jurisdiction to resolve the relative priority claims of Nickles and Countrywide. The Court will notice a status conference to further that process.

The Court further concludes that Nickles' request for declaratory relief regarding priority against any future claim of a homestead exemption, while understandable, is not constitutionally ripe for adjudication.

Finally, the Vista Superior Court or other state court with jurisdiction is the venue for resolution of the status of Nickles' judgment renewal.

IT IS SO ORDERED.

DATED: AUG 29 2007



PETER W. BOWIE, Chief Judge  
United States Bankruptcy Court