



UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA
325 West "F" Street, San Diego, California 92101-6991

In re:

DEJAN BOSKOSKI,

Debtor.

BANKRUPTCY NO. 21-03358-CL7

Date of Hearing: December 6, 2021

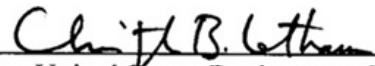
Time of Hearing: 10:00 a.m.

Name of Judge: Christopher B. Latham

MEMORANDUM OF CERTIFICATION OF DIRECT APPEAL TO THE NINTH CIRCUIT

IT IS HEREBY ORDERED as set forth on the continuation page(s) attached, numbered two (2) through twelve (12).

DATED: December 8, 2021



Judge, United States Bankruptcy Court

Introduction

Concurrently with the issuance of this memorandum, the court entered an order granting Debtor Dejan Boskoski's lien avoidance motion and certifying direct appeal to the Ninth Circuit Court of Appeals. For the reasons set forth in that order and in this memorandum – which is the document that Bankruptcy Rules 8006(b) and (e)(1) require – the court, on its own motion, **certifies** a direct appeal of the lien avoidance order to the Ninth Circuit Court of Appeals.

Bankruptcy Rule 8006(e)(1) mandates that when making a certification, the court provide the information required by Bankruptcy Rule 8006(f)(2)(A)–(D). This includes:

- (A) the facts necessary to understand the question presented;
- (B) the question itself;
- (C) the relief sought;
- (D) the reasons why the direct appeal should be allowed, including why a circumstance specified in 28 U.S.C. § 158(d)(2)(A)(i)–(iii) applies; and
- (E) a copy of the judgment, order, or decree and any related opinion or memorandum.

FED. R. BANKR. P. 8006(f)(2)(A)–(E).

A copy of the lien avoidance order is attached as **Exhibit A**. The remaining requirements are addressed in turn.

Facts Necessary to Understand the Question Presented

In 2012, Judgment Creditors Greek Village, LLC, Konstantinos Manassakis, and Aimilia Manassakis obtained a \$256,075.95 state court judgment against Debtor (ECF No. 43). In 2014, they recorded an abstract of that in the San Diego County real property records (the “Judgment Lien”), securing it against Debtor's real property at 7623 Primavera Way, Carlsbad, CA 92009 (the “Property”). *Id.*

In January 2021, the California legislature significantly increased the homestead exemption to \$600,000. *See* CAL. CIV. PROC. CODE (“CCP”) § 704.730 (2021). The new exemption scheme also includes a provision which states:

The determination of whether property is exempt of the amount of an exemption shall be made by application of the exemption statutes in effect (1) at the time the judgment creditor's lien on the property created

CCP § 703.050(a).

Debtor filed for Chapter 13 bankruptcy in August 2021 (ECF No. 16). He listed the Property, valuing it at \$1,085,750. *Id.* He claimed CCP § 704.730's \$600,000 homestead exemption. *Id.*

And he disclosed the Property's three encumbrances: (1) a \$492,456 first deed of trust held by Fay Servicing, LLC; (2) a \$57,301.90 second deed of trust held by MGC Mortgage; and (3) the \$477,926.82 Judgment Lien. *Id.*

In September 2021, Debtor converted his case to Chapter 7 (ECF No. 15). He then moved to avoid the Judgment Lien under 11 U.S.C. § 522(f) (ECF No. 43). The Trustee opposed, arguing that Debtor is entitled to exempt only the \$100,000 homestead amount in effect under California law when the subject lien was recorded (ECF No. 47). After hearing the matter, the court granted Debtor's motion (ECF No. 61). As well, it certified a direct appeal to the Ninth Circuit. *Id.*

Question Presented

What amount may Debtor claim exempt for purposes of 11 U.S.C. § 522(f) under that provision, CCP §§ 703.050(a), 704.730, and controlling law?

Relief Sought

The Trustee will seek reversal of the court's order avoiding the Judgment Lien. Debtor will seek affirmance of the order.

Reasons Why Direct Appeal Should Be Allowed

In certifying a direct appeal on its own motion, the court is directed to state whether any of the circumstances set forth in 28 U.S.C. § 158(d)(2)(A)(i)–(iii) exist. Those include:

- (i) the judgment, order, or decree involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States, or involves a matter of public importance;
- (ii) the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions; or
- (iii) an immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken.

28 U.S.C. § 158(d)(2).

Here, all three concerns are met. First, the order plainly involves a matter of public importance. A debtor's claim of exemptions and entitlement to strip a judgment creditor's lien is foundational to the Bankruptcy Code. California's recent homestead exemption increase amplifies that importance. And in the aggregate, a significant sum of money is at stake for debtors and creditors. As well, it may involve a question of law as to which there is no controlling authority. While it appears to the court that the Supreme Court's *Owen* decision governs the outcome of the present case, it is not directly on point – leading to the possibility of no controlling decision of the Ninth

Circuit or of the Supreme Court. Under either disjunctive phrase, § 158(d)(2)(i)'s concern is present.

Second, the order involves a question of law requiring resolution of conflicting decisions. Depending on how each is read, there may be an irreconcilable tension between the Ninth Circuit's *In re Jacobson* ruling and the Supreme Court's decision in *Owen*. There may also be a conflict between *In re Jacobson* and the BAP's decisions in *In re Mayer* and *In re Zall*. These are sufficient to find that § 158(d)(2)(ii)'s concerns are present also.

Third, an immediate appeal from the order will materially advance the progress of the case. From the parties' arguments at the hearing, an appeal is imminent. And the amount in controversy suggests the eventual progression of the matter to the Ninth Circuit. Until that appeal is concluded, a disputed encumbrance will overlie the real property involved. This in consequence prevents the estate from liquidating the subject property and the Debtor from refinancing or selling it. The high potential for protracted litigation through multiple levels of judicial review over a question of law (and not fact) runs afoul of a chief purpose of the Bankruptcy Code: the prompt administration of estates. See **FED. R. BANKR. P. 1001** (stating that the Rules "shall be construed to secure the just, speedy, and inexpensive determination of every case and proceeding."); *Katchen v. Landy*, **382 U.S. 323, 328** (1966) ("[T]his Court has long recognized that a chief purpose of the bankruptcy laws is to secure a prompt and effectual administration and settlement of estate of all bankrupts within a limited period."). So § 158(d)(2)(iii)'s concern is likewise present.

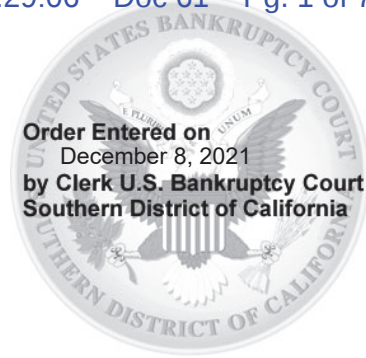
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In re DEJAN BOSKOSKI

Case No. 21-03358-CL7

EXHIBIT A

Lien Avoidance Order



UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA
325 West "F" Street, San Diego, California 92101-6991

In re:

DEJAN BOSKOSKI,

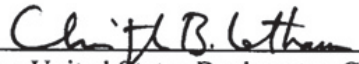
Debtor.

BANKRUPTCY NO. 21-03358-CL7
Date of Hearing: December 6, 2021
Time of Hearing: 10:00 a m.
Name of Judge: Christopher B. Latham

ORDER ON DEBTOR'S LIEN AVOIDANCE MOTION

IT IS HEREBY ORDERED as set forth on the continuation page(s) attached, numbered two (2) through seven (7).

DATED: December 8, 2021



Judge, United States Bankruptcy Court

The court has considered Debtor Dejan Boskoski's lien avoidance motion (ECF No. 43), the Chapter 7 Trustee's opposition, Debtor's reply, the parties' arguments at the hearing on the matter, and its own docket. For the following reasons, it will **grant** the motion.

Background

In 2012, Judgment Creditors Greek Village, LLC, Konstantinos Manassakis, and Aimilia Manassakis obtained a \$256,075.95 state court judgment against Debtor (ECF No. 43). In 2014, they recorded an abstract of that in the San Diego County real property records (the "Judgment Lien"), securing it against Debtor's real property at 7623 Primavera Way, Carlsbad, CA 92009 (the "Property"). *Id.*

In August 2021, Debtor filed for Chapter 13 bankruptcy (ECF No. 16). He listed the Property, valuing it at \$1,085,750. *Id.* He claimed California Civil Procedure Code ("CCP") § 704.730's \$600,000 homestead exemption. *Id.* And he disclosed the Property's three encumbrances: (1) a \$492,456 first deed of trust held by Fay Servicing, LLC; (2) a \$57,301.90 second deed of trust held by MGC Mortgage; and (3) the \$477,926.82 Judgment Lien. *Id.*

In September 2021, Debtor converted his case to Chapter 7 (ECF No. 15). He now moves to avoid the Judgment Lien under § 522(f) (ECF No. 43). The Trustee opposes (ECF No. 47).

Legal Standards, Discussion & Analysis

The Lien Avoidance Motion

The Exemption to Which Debtor Would Have Been Entitled

Section 522(f) provides: "[T]he debtor may avoid the fixing of a lien on an interest of the debtor in property to which the debtor would have been entitled . . . if such lien is . . . a judicial lien." *Id.* To do so, Debtor must establish: (1) there was a fixing of a lien on an interest of the debtor in property; (2) the lien impairs an exemption to which the debtor would have been entitled; and (3) it is a judicial lien. *Culver, LLC v. Chiu (In re Chiu)*, 304 F.3d 905, 908 (9th Cir. 2002) (quoting *Estate of Catli v. Catli (In re Catli)*, 999 F.2d 1405, 1406 (9th Cir. 1993)).

Neither party disputes that the first and third requirements are satisfied (ECF Nos. 43 & 47). The only § 522(f) issue, then, is whether the Judgment Lien "impairs an exemption to which the debtor would have been entitled." *In re Chiu*, 304 F.3d at 908.

The Trustee argues that condition is not met here (ECF No. 47). This, he says, is because Debtor improperly attempts to claim California's recently increased \$600,000 homestead exemption. *Id.* (citing CCP § 704.730). But, he avers, Debtor is only entitled to claim \$100,000 as limited by CCP § 703.050(a). *Id.* That section provides:

The determination of whether property is exempt of the amount of an exemption shall be made by application of the exemption statutes in effect (1) at the time the judgment creditor's lien on the property created

CCP § 703.050(a). Based on that and the Ninth Circuit's expression that "the *entire* state law applicable on the filing date is determinative of whether an exemption applies," the Trustee contends the Judgment Lien cannot be avoided. *Id.* (quoting *Jacobson v. Jacobson (In re Jacobson)*, 676 F.3d 1193, 1199 (9th Cir. 2012) (emphasis in original) (quotation omitted)).

The Trustee's position, however, is ultimately not supported by controlling law. In *Owen v. Owen*, the Supreme Court determined that § 522(f)(1)(A)'s "to which the debtor would have been entitled" language means "but for the lien at issue." 500 U.S. 305, 311 (1991). So to make the § 522(f) determination, the court must ask "not whether the lien impairs an exemption to which the debtor is in fact entitled, but whether it impairs an exemption to which he *would have been* entitled but for the lien itself." *Id.* at 310–11 (emphasis in original).

Under the plain language of CCP §§ 703.050(a) and 704.730, Debtor is in fact entitled to claim a \$100,000 exemption. But for the Judgment Lien, however, he would have been entitled to claim \$600,000. Only this latter amount is relevant to the present determination. That is because – excluding the lien at issue as required by *Owen*'s holding – CCP § 703.050(a)'s reference (and limitation) to the historical exemption becomes inapplicable. *See id.* Put differently, under § 522(f)'s conceived or hypothetical language, there would be no "exemption statutes in effect . . . at the time the judgment creditor's lien on the property was created" because the court must determine the exemption as if the lien had never been created. *See id.* And but for the Judgment Lien, Debtor would have been entitled to claim up to \$600,000 as having filed after CCP § 704.730's amount increased in January 2021. Because of that, the Trustee's argument fails.

Further in support of this result, the Ninth Circuit's Bankruptcy Appellate Panel ("BAP") has consistently applied *Owen*'s reading of § 522(f). *See In re Mayer*, 167 B.R. 186 (B.A.P. 9th Cir. 1994); *In re Zall*, Nos. EC-05-1476, EC-05-1477, 2006 WL 6811022 (B.A.P. 9th Cir. 2006). Nevertheless, the Trustee asks the court to depart from *In re Mayer* (ECF No. 47).¹ He contends the case is distinguishable and conflicts with the Ninth Circuit's later *In re Jacobson* decision, 676 F.3d at 1199. The court disagrees.

The Trustee asserts that *In re Mayer* is distinguishable because it dealt with an exemption objection rather than a lien avoidance motion. Curiously, he does not discuss why *In re Jacobson* is not

¹ The Trustee also asks the court to adopt the reasoning and conclusion of the Central District Bankruptcy Court's *In re Morgan* decision, 157 B.R. 467 (Bankr. C.D. Cal. 1993). (ECF No. 47). This request is inapt for at least three reasons. One, although *In re Morgan* cites to *Owen*, the two are directly at odds. *Compare id.* at 468–70 with *Owen*, 500 U.S. at 310–11. That is, *Owen* requires the § 522(f) analysis be performed under the hypothetical scenario that the lien to be avoided does not exist. But *In re Morgan*'s determination of the debtor's exemption amount expressly relies on the lien's existence. Two, the BAP cast doubt on *In re Morgan*'s continued vitality as being decided before the 1994 revisions of the Bankruptcy Code that altered § 522(f)'s language and in conflict with *In re Mayer*. *In re Zall*, 2006 WL 6811022, at *4. And three, *In re Morgan* is not binding on the court. For those reasons, the Trustee's reliance is misplaced.

distinguishable for the same reason; it too dealt only with an exemption objection. 676 F.3d at 1189–1200. Indeed, *In re Jacobson* is distinguishable. Although it (very) briefly discusses fundamental points of exemption application, its holding is limited to whether once exempt proceeds from the sale of a homestead lost their exemption status for failure to timely reinvest them in another homestead. *Id.* It did not address – or even mention – the issue of a statutory increase in exemption amount between attachment and bankruptcy. *See id.* So the court is left to wonder at its authoritative value, either mandatory or persuasive.

While *In re Mayer*'s facts are somewhat different, its holding is nonetheless sound (under *Owen*) and readily analogous to the case at bar. There, a creditor obtained and perfected a judgment lien against the debtor's property. 167 B.R. at 187–88. After recordation but before filing for bankruptcy, the debtor satisfied certain age, possession, and income requirements to declare the property a homestead and take advantage of an increased exemption. *Id.* at 187–89. The judgment creditor argued the debtor should have been limited to the lesser exemption available when the judgment lien attached. *Id.* at 187. The BAP disagreed, citing *Owen* to hold he was entitled to the higher exemption applicable after the judgment lien attached but before he filed for bankruptcy. *Id.* at 189. That is because under *Owen* the "judgment lien is not relevant in determining whether [the debtor] is entitled to the homestead exemption." *Id.*

A similar result follows here. In 2014, the Judgment Lien attached to Debtor's Property (ECF No. 43). In January 2021, the California legislature increased the homestead exemption to \$600,000. *See* CCP § 704.730 (2021). After, Debtor filed for relief (ECF No. 1). As in *In re Mayer*, under *Owen* the Judgment Lien is not relevant to determining the exemption Debtor "would have been entitled" on that date. *See* 11 U.S.C. § 522(f); *Owen*, 500 U.S. at 310–11; *In re Mayer*, 167 B.R. at 189. So, the Trustee's argument is ultimately unpersuasive.

As well, the court does not see that *In re Mayer* and *In re Jacobson* are in conflict. The Trustee's argument hinges on the latter's language that "it is the *entire* state law applicable on the filing date that is determinative of whether an exemption applies." *In re Jacobson*, 676 F.3d at 1199 (emphasis in original) (quotation omitted). True, the court accords effect to the entire state law. But it does so under the hypothetical scenario set forth in § 522(f), excluding the lien at issue. *See Owen*, 500 U.S. at 311. And under the entire state law – as it applies to the conceived situation excluding from consideration the Judgment Lien – Debtor would have been entitled to a \$600,000 homestead exemption on the filing date. Put differently, the court is not ignoring some portion of California's exemption statutes; rather those become inapplicable when determining Debtor's ability to avoid the lien under § 522(f)'s language and *Owen*.²

To sum, the amount of Debtor's exemption for purposes of § 522(f) is CCP § 704.730's \$600,000. The Trustee's contrary argument is unavailing.

² Further, to the extent *In re Jacobson* and *In re Mayer* conflict, the former is also at odds with *Owen*. And in any circumstance, the Supreme Court's *Owen* decision controls.

The Extent of Impairment

The court must still determine the extent the Judgment Lien impairs Debtor's exemption. Section 522(f)(2)(A) establishes a mathematical formula for that:

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.

11 U.S.C. § 522(f)(2)(A)(i)-(iii).

Applying that formula to the present facts yields:

Sum of:

The Judgment Creditors' lien:	\$ 477,926.82 ³
All other liens:	\$ 551,720.47
<u>The exemption:</u>	<u>\$ 600,000.00</u>
	\$ 1,629,647.20

The sum of \$1,629,647.20 exceeds the value of Debtor's interest in the Property in the absence of any liens: \$1,085,750. Therefore, the Judgment Lien impairs the exemption. The extent of impairment is \$543,897.20.⁴ Because the Judgment Lien (\$477,925.82) is less than that, it may be avoided in its entirety. The court will accordingly **grant** Debtor's motion.

The Trustee's Request for Stay Pending Appeal

At the hearing, the Trustee orally moved to stay this order pending appeal (ECF No. 59). The court, however, cannot evaluate the request on the present record. That is primarily because the Trustee has not yet filed his appeal, making the request premature. As well, it is prudent to allow Debtor the opportunity to respond to the argument raised for the first time at the hearing. The

³ There appears to be some disagreement about whether the Judgment Lien is valued on the recordation or petition date (compare ECF No. 43 with ECF No. 47). Lien avoidance rights are determined as of the petition date. *In re Chiu*, 266 B.R. 743, 751 (B.A.P. 9th Cir. 2001), *aff'd*, 304 F.3d 905 (9th Cir. 2002); see also *In re Chiu*, No. NC-16-1071, 2017 WL 1149076, at *3 n.2 (B.A.P. 9th Cir. March 27, 2017) ("For purposes of applying § 522(f), the property value and the lien amounts as they existed on the petition date control.") (emphasis supplied) (citations omitted). Neither party disputes that on the petition date the lien was worth \$477,926.82. Nor would the disagreement change the present outcome. Even applying the lien's value on the day the abstract was recorded, it is wholly avoidable. That is, the sum of the judgment lien (\$256,075.95), all other liens (\$551,720.47), and the Debtor's exemption (\$600,000) equals \$1,407,796.30. That exceeds the Debtor's interest in the Property (\$1,085,750) by \$322,046.30. The impairment is greater than the value of the lien and so – even under the alternate figure – it is avoidable in its entirety.

⁴ \$543,897.20 = \$1,629,647.20 – \$1,085,750.

court will therefore defer ruling on the request until the Trustee brings a written motion after filing his appeal.

Certification of Direct Appeal

At the hearing, the Trustee also moved to certify a direct appeal to the Ninth Circuit (ECF No. 59). Debtor's counsel was without authority to speak to the issue. *Id.* Nonetheless, the court independently finds the request apt and so will **certify** the appeal.

On its own motion, the court may certify a direct appeal of an order to the Court of Appeals where:

- (i) the judgment, order, or decree involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States, or involves a matter of public importance;
- (ii) the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions; or
- (iii) an immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken.

28 U.S.C. § 158(d)(2).

Here, all three concerns are met. First, the order plainly involves a matter of public importance. A debtor's claim of exemptions and entitlement to strip a judgment creditor's lien is foundational to the Bankruptcy Code. California's recent homestead exemption increase amplifies that importance. And in the aggregate, a significant sum of money is at stake for debtors and creditors. As well, it may involve a question of law as to which there is no controlling authority. While it appears to the court that the Supreme Court's *Owen* decision governs the outcome of the present case, it is not directly on point – leading to the possibility of no controlling decision of the Ninth Circuit or of the Supreme Court. Under either disjunctive phrase, § 158(d)(2)(i)'s concern is present.

Second, the order involves a question of law requiring resolution of conflicting decisions. Depending on how each is read, there may be an irreconcilable tension between the Ninth Circuit's *In re Jacobson* ruling and the Supreme Court's decision in *Owen*. There may also be a conflict between *In re Jacobson* and the BAP's decisions in *In re Mayer* and *In re Zall*. These are sufficient to find that § 158(d)(2)(ii)'s concerns are present also.

Third, an immediate appeal from the order will materially advance the progress of the case. From the parties' arguments at the hearing, an appeal is imminent. And the amount in controversy suggests the eventual progression of the matter to the Ninth Circuit. Until that appeal is concluded, a disputed encumbrance will overlie the real property involved. This in consequence prevents the estate from liquidating the subject property and the Debtor from refinancing or selling it. The high potential for protracted litigation through multiple levels of judicial review over a question of law

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Case No. 21-03358-CL7

(and not fact) runs afoul of a chief purpose of the Bankruptcy Code: the prompt administration of estates. See **FED. R. BANKR. P. 1001** (stating that the Rules “shall be construed to secure the just, speedy, and inexpensive determination of every case and proceeding.”); *Katchen v. Landy*, **382 U.S. 323, 328** (1966) (“[T]his Court has long recognized that a chief purpose of the bankruptcy laws is to secure a prompt and effectual administration and settlement of estate of all bankrupts within a limited period.”). So § 158(d)(2)(iii)’s concern is present too.

For those reasons, the court will **certify** a direct appeal. A separate certification memorandum to comply with Bankruptcy Rule 8006 will issue.

Conclusion

For the foregoing reasons, the court **grants** Debtor’s motion. It further defers ruling on a stay pending appeal until a written motion is filed. And it **certifies** the order for direct appeal to the Ninth Circuit.

IT IS SO ORDERED.