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SUSAN M SPRAUL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

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**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT**

In re:)	BAP No. EW-12-1486-PaJuTa
)	
KATHY ANN GREEN,)	Bankr. No. 04-07678
)	
Debtor.)	
_____)	
)	
KATHY ANN GREEN,)	
)	
Appellant,)	
)	
v.)	M E M O R A N D U M ¹
)	
HAPO COMMUNITY CREDIT UNION,)	
)	
Appellee.)	
_____)	

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Submitted Without Oral Argument
on July 25, 2013²

Filed - August 12, 2013

Appeal from the United States Bankruptcy Court
for the Eastern District of Washington

Honorable Patricia C. Williams, Bankruptcy Judge, Presiding

Appearances: Jeff L. Briggs, Esq. of Preszler and Associates,
 PLLC, on brief for Appellant Kathy Ann Green;
 John W. O'Leary, Esq. of Hames, Anderson, Whitlow &
 O'Leary on brief for Appellee HAPO Community Credit
 Union.

Before: PAPPAS, JURY, and TAYLOR, Bankruptcy Judges.

¹ This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

² After examination of the briefs and record, and after notice to the parties, the Panel unanimously determined that oral argument was not needed for this appeal in an order entered May 3, 2013. Fed. R. Bankr. P. 8012.

1 Chapter 13³ debtor Kathy Ann Green ("Debtor") appeals the
2 decision of the bankruptcy court denying her motion to avoid the
3 judicial lien of HAPO Community Credit Union ("Creditor") in a
4 reopened bankruptcy case. We REVERSE and REMAND.

5 **FACTS**

6 There are no disputed material facts.

7 On October 19, 2004, Debtor filed a chapter 13 petition,
8 schedules, and Statement of Financial Affairs (SOFA). On
9 Schedule A, Debtor listed a "personal residence"⁴ valued at
10 \$158,400 and encumbered by a mortgage in the amount of \$174,886.
11 Debtor claimed no homestead exemption on Schedule C, perhaps due
12 to the apparent lack of equity in the residence. On Schedule F,
13 Debtor listed Creditor as an unsecured judgment creditor based on
14 a deficiency owed to Creditor after the repossession and sale of a
15 motor home owned by Debtor and David L. Green, her spouse.⁵

16 Debtor was not aware that, on September 30, 2004, Creditor
17 recorded the \$20,072.98 state court judgment against Debtor. As a
18 result, under state law, Creditor obtained a judgment lien against
19 Debtor's real property. See WASH. REV. CODE § 4.56.190.

20 _____
21 ³ Unless otherwise indicated, all chapter, section and rule
22 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
23 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.
Civil Rule references are to the Federal Rules of Civil Procedure
1-86.

24 ⁴ Debtor provided no address for the "personal residence" on
25 Schedule A, or on Schedule D, the list of secured creditors; the
26 description of the property on Schedule A was "3 bed, 2 bath,
standard lot." Apparently, Debtor is the sole owner of this
property.

27 ⁵ Debtor and her husband were separated at the time Debtor
28 filed her bankruptcy petition and schedules. He is not a party to
this action.

1 Creditor filed no proof of claim in the bankruptcy case. On
2 January 31, 2005, Debtor's chapter 13 plan, which made no
3 provision for Creditor as a secured creditor, was confirmed by the
4 bankruptcy court. Debtor completed the plan payments and was
5 granted a discharge on October 25, 2007.⁶ The bankruptcy case was
6 closed on January 8, 2008.

7 Approximately four years later, in February 2012, when
8 attempting to refinance her home, Debtor learned of Creditor's
9 judicial lien. On March 9, 2012, Debtor filed a motion to reopen
10 her chapter 13 case, along with a motion to avoid Creditor's
11 judicial lien pursuant to § 522(f)(1)(A). On April 3, 2012, the
12 bankruptcy court granted Debtor's motion to reopen the case. The
13 order entered by the bankruptcy court stated the purpose for
14 reopening the case was to allow Debtor "to avoid a judicial lien
15 held by [Creditor]."

16 Debtor's motion to avoid the lien argued that Creditor's
17 previously unknown judicial lien was avoidable under § 522(f).
18 Creditor filed an objection to Debtor's motion and argued Debtor
19 lacked equity in her residence and, thus, could claim no
20 exemption. Debtor responded with a supplemental memorandum in
21 support of her motion and argued that equity is not a prerequisite
22 for a claim of a homestead exemption.

23
24 ⁶ Even though Debtor confirmed a chapter 13 plan, Creditor's
25 lien was unchallenged and thus it survived the confirmation of the
26 plan and even discharge. See Shook v. McDonald (In re Shook),
27 278 B.R. 815, 821 (9th Cir. BAP 2002) (stating in a chapter 13
28 case, "[w]e begin with the longstanding principle that a secured
creditor may bypass a debtor's bankruptcy proceedings and enforce
its lien in the usual way, because unchallenged liens pass through
bankruptcy unaffected.") (citing Long v. Bullard, 117 U.S. 617,
620-21 (1886); Dewsnup v. Timm, 502 U.S. 410, 418 (1992)).

1 After entry of the order reopening the case, on April 19,
2 2012, Debtor filed amended Schedules and an amended SOFA.
3 Schedule D was amended to list Creditor as a secured creditor
4 based on the judgment lien, and Schedule C was amended to claim a
5 homestead exemption in Debtor's residence real property pursuant
6 to § 522(d)(1). The value of the claimed exemption was listed as
7 "\$0.00" with the value of the residence listed, as it was in the
8 initial filing, at \$158,400.

9 The bankruptcy court held a hearing on Debtor's motion to
10 avoid Creditor's lien on August 28, 2012. After allowing the
11 parties to argue their positions, the court denied Debtor's
12 motion. The court memorialized its findings of fact and
13 conclusions of law in an order entered September 11, 2012, the
14 form of which was approved by the parties. In the findings of
15 fact, the bankruptcy court determined that the value of Debtor's
16 residence at the time of the filing of her bankruptcy petition was
17 \$158,400, as listed in Debtor's schedules, and determined that the
18 residence was encumbered by a mortgage in the amount of \$174,886.
19 In addition, as a finding of fact, the bankruptcy court determined
20 that Creditor received timely notice of Debtor's bankruptcy
21 filing. Based on those facts and others, the bankruptcy court
22 concluded:

23 Since there was no equity in the property on the date
24 the petition for bankruptcy was filed, [Debtor] cannot
25 now claim an exemption in her residence. Without an
26 actual claimed exemption, the lien cannot now be avoided
27 under 11 U.S.C. § 522(f). In addition, there is a need
for finality in bankruptcy cases. The length of time
between the date of filing the bankruptcy petition and
the date of lien avoidance prejudices the creditor

. . . .

28 Order Re: Motion to Avoid Judicial Lien, Conclusions of Law at

1 ¶ 1.

2 Although the order entered by the court stated that Creditor
3 was prejudiced, Creditor presented neither evidence nor argument
4 as to prejudice in its documents or during the hearing on the
5 Debtor's motion.⁷

6 Debtor filed a notice of appeal on September 20, 2012. On
7 the same day, Debtor also filed a motion for reconsideration.
8 Debtor's motion for reconsideration first argued that the
9 bankruptcy court had misinterpreted § 522(f) by requiring Debtor
10 to have equity in her homestead as a prerequisite to avoid
11 Creditor's judicial lien as impairing her homestead exemption.
12 Secondly, Debtor argued Creditor was not prejudiced by the timing
13 of the filing of Debtor's motion because Creditor had notice of
14 Debtor's chapter 13 case and of her intent to treat Creditor as an
15 unsecured creditor in the case, and Creditor did not then object.

16 At the October 4, 2012 hearing on the reconsideration motion,
17 the bankruptcy court decided to alter its prior order in part.
18 The court, agreeing with Debtor, concluded that a judicial lien
19 may impair a debtor's homestead exemption even when there is no
20 equity in the property, and that such a lien can be avoided under
21 § 522(f). However, the court declined to grant Debtor's motion
22 and avoid Creditor's judicial lien, reiterating that because
23 Debtor did not initially claim a homestead exemption in her
24 Schedule C, reopening the case and filing an amended Schedule C

25

26 ⁷ Creditor conceded this point in its reply in support of
27 its objection to Debtor's motion. "[Debtor] indicates that
28 [Creditor] made an argument for prejudice. [Creditor] did not make
an argument for prejudice based upon the seven years debtor took
to file her motion."

1 was "simply too late . . . a debtor cannot file an amended
2 Schedule C four and a half years after closure of the case, and
3 then base a motion to avoid [the] lien on that amended Schedule C
4 . . . the amended Schedule C was . . . ineffective" Hr'g
5 Tr. at 14:6-13, Oct. 4, 2012. Notably, the court made no mention,
6 again, of how Creditor had been prejudiced by this procedure. The
7 court entered an order granting in part and denying in part
8 Debtor's motion for reconsideration on October 10, 2012. Debtor
9 filed a timely notice of appeal.

10 JURISDICTION

11 The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334
12 and 157(b)(2)(K). We have jurisdiction under 28 U.S.C. § 158.

13 ISSUE

14 Whether the bankruptcy court erred in denying Debtor's motion
15 to avoid Creditor's judicial lien pursuant to § 522(f) in the
16 reopened bankruptcy case.

17 STANDARD OF REVIEW

18 In a case with no material disputed facts, whether a judicial
19 lien is avoidable under § 522(f) is a question of law reviewed de
20 novo. McCoy v. Kuiken (In re Kuiken), 484 B.R. 766, 769 (9th Cir.
21 BAP 2013) (citing Moore & Moore v. Stoneking (In re Stoneking),
22 225 B.R. 690, 695 (9th Cir. BAP 1998)).

23 Whether a debtor may claim an exemption is a question of law
24 reviewed de novo. Arnold v. Gill (In re Arnold), 252 B.R. 778,
25 784 (9th Cir. BAP 2000) (citing Coughlin v. Cataldo
26 (In re Cataldo), 224 B.R. 426, 428-29 (9th Cir. BAP 1998)). A
27 bankruptcy court has no discretion to disallow amended exemptions
28 unless there is a showing of bad faith on the part of the debtor

1 or of prejudice to third parties. In re Arnold, 252 B.R. at 784.
2 The bankruptcy court's determination of prejudice or bad faith is
3 reviewed for clear error. Id. Clear error is found if the record
4 is devoid of evidence to support a finding of fact or if the court
5 is "left with the definite and firm conviction that a mistake" has
6 been made. Green v. Savage (In re Greene), 583 F.3d 614, 618 (9th
7 Cir. 2009).

8 DISCUSSION

9 A. Judicial Lien Avoidance under § 522(f)(1).

10 Section 522(b) allows a debtor to exempt: "(1) property under
11 the federal exemptions contained in [s]ection 522(d), unless State
12 law does not so authorize, or (2) property [] under State or local
13 law, or other federal law." Higgins v. Household Fin. Corp.
14 (In re Higgins), 201 B.R. 965, 966 (9th Cir. BAP 1996). In
15 Washington, a debtor may select either the exemptions provided by
16 Washington law or the federal exemption scheme under § 522(d).
17 Sherman v. Carlson (In re Jeffries), 468 B.R. 373, 378 (9th Cir.
18 BAP 2012). Under § 522(d), "[t]he following property may be
19 exempted under subsection (b)(2) of this section: (1) The debtor's
20 aggregate interest, not to exceed [\$18,450]⁸ in value, in real
21 property or personal property that the debtor . . . uses as a
22 residence"

23 In pertinent part, § 522(f)(1) provides that a debtor "[m]ay

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25 ⁸ Though it has since increased, this was the amount of the
26 exemption provided by § 522(d)(1) in October 2004 when this case
27 was filed, which is the appropriate amount to apply here. See
28 Culver, LLC v. Chiu (In re Chiu), 266 B.R. 743, 751 (9th Cir. BAP
2001) aff'd, 304 F.3d 905 (9th Cir. 2002) (stating "[i]t is
well-established that the nature and extent of exemptions is
determined as of the date that the bankruptcy petition is filed.")
(citing White v. Stump, 266 U.S. 310, 313 (1924)).

1 avoid the fixing of a lien on an interest of the debtor in
2 property to the extent that such lien impairs an exemption to
3 which the debtor would have been entitled under subsection (b) of
4 this section, if such lien is – (A) a judicial lien” See
5 Owen v. Owen, 500 U.S. 305, 309 (1991); Farrey v. Sanderfoot,
6 500 U.S. 291, 295 (1991). Under § 101(36), a “judicial lien”
7 includes one “obtained by judgment” Yerrington v.
8 Yerrington (In re Yerrington), 144 B.R. 96, 98-99 (9th Cir. BAP
9 1992). Section 522(f)(2)(A) provides that, “[f]or the purposes of
10 this subsection, a lien shall be considered to impair an exemption
11 to the extent that the sum of – (i) the lien; (ii) all other liens
12 on the property; and (iii) the amount of the exemption that the
13 debtor could claim if there were no liens on the property [–]
14 exceeds the value that the debtor’s interest in the property would
15 have been in the absence of any liens.” This subsection of
16 § 522(f) was added by the Bankruptcy Reform Act of 1994, Pub. L.
17 No. 103-394, 108 Stat. 4106, Sec. 702. See In re Higgins,
18 201 B.R. at 967.

19 Rule 4003(d)⁹ instructs that a request by a debtor to avoid a
20 lien under § 522(f) “shall be made by motion in accordance with
21 Rule 9014” However, the Rules establish no time limit or
22 deadline for the filing of a lien avoidance motion.

23

24 ⁹ The full text of Rule 4003(d) provides:

25 A proceeding by the debtor to avoid a lien or other
26 transfer of property exempt under § 522(f) of the Code
shall be by motion in accordance with Rule 9014.
27 Notwithstanding the provisions of subdivision (b), a
creditor may object to a motion filed under § 522(f) by
28 challenging the validity of the exemption asserted to be
impaired by the lien.

1 Additionally, Rule 1009(a)¹⁰ allows a debtor to amend the
2 schedules and other filings, "as a matter of course at any time
3 before the case is closed." In re Arnold, 252 B.R. at 784.

4 Interpreting § 522(f)(1), the Ninth Circuit has stated that
5 "'a debtor may avoid a lien if three conditions are met: (1) there
6 was a fixing of a lien on an interest of the debtor in property;
7 (2) such lien impairs an exemption to which the debtor would have
8 been entitled; and (3) such lien is a judicial lien.'" Culver,
9 LLC v. Chiu (In re Chiu), 304 F.3d 905, 908 (9th Cir. 2002)
10 (quoting Estate of Catli v. Catli (In re Catli), 999 F.2d 1405,
11 1406 (9th Cir. 1993)); see also In re Kuiken, 484 B.R. at 769
12 (quoting this test). This Panel later summarized and restated the
13 statutory requirements to avoid a lien:

14 There are four basic elements of an avoidable lien under
15 § 522(f)(1)(A): "First there must be an exemption to
16 which the debtor 'would have been entitled under
17 subsection (b) of this section.' 11 U.S.C. § 522(f).
18 Second, the property must be listed on the debtor's
19 schedules and claimed exempt. Third, the lien must
20 impair that exemption. Fourth, the lien must be . . . a
21 judicial lien."

19 Goswami v. MTC Distrib. (In re Goswami), 304 B.R. 386, 390-91 (9th
20 Cir. BAP 2003) (quoting In re Mohring, 142 B.R. 389, 392 (Bankr.
21 E.D. Cal. 1992) aff'd, 24 F.3d 247 (9th Cir. 1994)). In making

22 ¹⁰ The full text of Rule 1009(a) provides:

23 General Right to Amend. A voluntary petition, list,
24 schedule, or statement may be amended by the debtor as a
25 matter of course at any time before the case is closed.
26 The debtor shall give notice of the amendment to the
27 trustee and to any entity affected thereby. On motion
28 of a party in interest, after notice and a hearing, the
court may order any voluntary petition, list, schedule,
or statement to be amended and the clerk shall give
notice of the amendment to entities designated by the
court.

1 its ruling, the bankruptcy court relied upon In re Goswami and the
2 test for lien avoidance explained in that decision. Because the
3 standards for lien avoidance under § 522(f) in the Ninth Circuit
4 case law do not materially differ from those stated by the Panel,
5 we also rely upon In re Goswami for our analysis in this appeal.

6 As is appropriate under In re Goswami, the court on
7 reconsideration determined that a lack of equity was not a bar to
8 lien avoidance. But on reconsideration, the court declined to
9 find error in its previous determination that prejudice existed as
10 a result of the four-and-one-half year delay in seeking lien
11 avoidance. As a result, the court concluded that Debtor failed to
12 meet the second requirement under In re Goswami.

13 Creditor does not dispute that, but for the passage of time,
14 Debtor would have been entitled to claim an exemption on her
15 residence under § 522(d)(1). And but for her failure to timely
16 claim the exemption, Creditor does not dispute that its judgment
17 lien would impair Debtor's homestead, and as a result, be subject
18 to avoidance.¹¹ Therefore, the sole issue to be resolved on appeal
19 is whether Debtor's amendment to Schedule C to claim the exemption
20 was effective to support a § 522(f) avoidance motion or, in other
21 words, whether Debtor has satisfied the second element of the test

22
23 ¹¹ Based upon the undisputed facts of this case, any claim by
24 Creditor to the contrary would fail as a matter of law. The
25 mathematical formula incorporated in §§ 522(f)(2)(A)(i) - (iii)
26 yields this result: \$20,072.98 (judicial lien) + \$174,886 (other
27 liens on the property) + \$18,450 (exemption Debtor could claim if
28 no liens were on the property) = \$213,408.98. This amount exceeds
the value of Debtor's interest in the property "in the absence of
liens," determined by the bankruptcy court to be \$158,400.
Therefore, based on the statutory calculation, Creditor's judicial
lien impairs Debtor's exemption on the residence, and it may be
avoided in its entirety if the other requirements of § 522(f)(1)
are met.

1 for judicial lien avoidance in In re Goswami.

2 B. Debtor's Amended Schedule C.

3 The facts in In re Goswami are nearly identical to those in
4 this appeal. In that case, the debtors filed a chapter 7 petition
5 in 1998. 304 B.R. at 389. On Schedule A, the debtors listed
6 their residential real property with a value of \$60,000, subject
7 to \$70,000 in liens. Id. Debtors claimed no homestead exemption
8 in this property. Id. One month before the bankruptcy filing, a
9 creditor had obtained a judgment lien in the debtor's real
10 property, although the debtors were unaware of this development.
11 Id. The judgment creditor had been listed as an unsecured
12 creditor on the debtors' Schedule F. Id. The trustee in the case
13 found no assets to administer and the case was closed. Id. Five
14 years after the bankruptcy case was closed, the debtors moved to
15 reopen the case, and the motion was granted by the bankruptcy
16 court. Id. The debtors filed amended Schedules, including an
17 amended Schedule C claiming the property exempt as their
18 homestead, together with a motion to avoid the judgment creditor's
19 lien under § 522(f)(1)(A). Id. The motion was unopposed, but the
20 bankruptcy court denied it because "[t]he [d]ebtors right to amend
21 their exemptions under subsection 522(b) terminated upon the
22 closure of the bankruptcy case. The relief which the [d]ebtors
23 seek is not available for a scheduled asset which was not properly
24 exempted before the case was closed." Id.

25 On appeal, the BAP reversed and remanded. Id. at 394. As
26 here, the second element of the test for avoidance of the judicial
27 lien under § 522(f) was at issue, that is, whether the property
28 was listed on the debtors' schedules and claimed as exempt. Id.

1 at 390. The Panel concluded the bankruptcy court erred and held
2 that, "[i]n the absence of prejudice, [§ 522(f)(1)] lien avoidance
3 actions are not barred either by entry of a discharge order or the
4 closing of the bankruptcy case." Id. at 392 (citing In re Ricks,
5 89 B.R. 73, 75 (9th Cir. BAP 1988)). However, the Panel
6 recognized, "there is no absolute right to amend schedules in
7 bankruptcy cases . . . 'judge-made exceptions' bar amendment if
8 the debtor has acted in bad faith or if prejudice would result."
9 Id. at 393 (quoting In re Arnold, 252 B.R. at 784). With no
10 finding by the bankruptcy court of bad faith or fraud, the Goswami
11 panel concluded that the debtors had met the second element of the
12 § 522(f) test and remanded to the bankruptcy court to determine
13 whether the other elements of the § 522(f) test had been met. Id.
14 at 394.

15 In In re Arnold, the Panel addressed the concept of prejudice
16 to creditors in the context of amendments to exemption claims.
17 252 B.R. at 787. There, we explained that, as was true in
18 In re Goswami, the mere passage of time will not prejudice a
19 creditor; indeed, not even "inordinate delay," without more,
20 amounts to prejudice. Id. Instead, in weighing the debtor's
21 right to amend a schedule to claim an exemption, "[p]rejudice to
22 creditors is clearly present where they suffer an actual economic
23 loss due to a debtor's delay in claiming his exemption." Id.
24 Moreover, even if a creditor is harmed by the debtor's delay,
25 "merely showing prejudice does not automatically trigger
26 disallowance of an amendment: the court must balance the prejudice
27 to the debtor of disallowing the exemption against the prejudice
28 to third parties in allowing the exemption." Id. at 785 (internal

1 quotation marks and citations omitted).

2 In this case, based on the record, no reason is apparent to
3 deny Debtor's amendment to her Schedule C in the reopened case to
4 claim an exemption on the residence for the purpose of avoiding
5 Creditor's lien under § 522(f)(1). While it is undisputed that
6 Debtor's effort to amend the exemption schedule and avoid
7 Creditor's lien occurred over four years after the case was
8 closed, no showing was made by Creditor that it had suffered any
9 economic loss or harm as the result of this delay, nor was there a
10 showing that Debtor had acted in bad faith. In the bankruptcy
11 court's findings of fact and conclusions of law, entered after the
12 initial hearing on Debtor's motion, the court stated, "[t]he
13 length of time between the date of filing the bankruptcy petition
14 and the date of lien avoidance prejudices the creditor"
15 However, as noted above, there was nothing presented to the court
16 to support such a finding, and we are inclined to believe that
17 this provision in the order resulted from the imprecise drafting
18 of the order by the parties. Indeed, the existence of any
19 prejudice to Creditor was not discussed at either the initial lien
20 avoidance motion hearing nor at the hearing on Debtor's motion for
21 reconsideration.

22 Because the bankruptcy court's determination that Creditor
23 had been prejudiced was made without any evidence to support it
24 and, as stated above, the Creditor never argued it was prejudiced,
25 this determination by the bankruptcy court was clearly erroneous.
26 We therefore, reverse the bankruptcy court's holding in that
27 regard.

28

1 erred when it found that Creditor was prejudiced by Debtor's delay
2 in claiming the exemption and acting to avoid Creditor's lien. In
3 the absence of any evidence of such prejudice, it was error for
4 the bankruptcy court to deny Debtor's motion. Moreover, because
5 the remaining requirements of a § 522(f)(1)(A) have been
6 satisfied, no issue remains to be resolved in order to avoid
7 Creditor's lien. We therefore REMAND this matter to the
8 bankruptcy court with instructions to enter an order granting
9 Debtor's motion and avoiding Creditor's judicial lien in its
10 entirety.

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