

The court incorporates by reference in this paragraph and adopts as the findings and analysis of this court the document set forth below. This document has been entered electronically in the record of the United States Bankruptcy Court for the Northern District of Ohio.



Dated: April 21 2005

Mary Ann Whipple
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:)	Case No. 04-39621
)	
Sylvester Jones, Jr.,)	Chapter 7
)	
Debtors.)	
)	JUDGE MARY ANN WHIPPLE

MEMORANDUM OF DECISION
GRANTING MOTION TO AVOID JUDICIAL LIEN

This case came before the court for hearing on Debtor Sylvester Jones’ Motion to Avoid Judicial Lien on Real Estate [Doc. # 3] and Creditor Diane Lamb’s (“Creditor”) objection [Doc. # 19]. Debtor, proceeding pro se, and counsel for Diane Lamb appeared in person.

This memorandum of decision constitutes the court’s findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52, made applicable to this contested matter by Fed. R. Bankr. P. 9014 and 7052. Based on the testimony and documentary evidence offered, as well as the arguments and briefs of counsel and Debtor, and for the following reasons, the court will grant Debtor’s motion.

FACTUAL BACKGROUND

Creditor has a perfected judgment lien that was recorded on November 20, 2002, against property located at 1445 Palmetto Avenue, Toledo, Ohio (“Palmetto Property”). Debtor’s mother acquired the property in 1997 and she deeded the property to Debtor in April, 2001. [Debtor’s Exs. 1 and 2]. Debtor thus owned the Palmetto Property when Creditor’s judgment lien was recorded. Debtor lived at that address from 1997 until some time in 2001, at which time he moved out and began using the property as rental property. Although Debtor’s Statement of Financial Affairs indicates that he collected rental income in the years 2002, 2003, and 2004, [see Petition, Statement of Fin’l Affairs, question # 2],¹ he provides the Palmetto Property address as his address on his petition. Debtor also stated “None” in response to the inquiry at question 15 of the Statement of Financial Affairs regarding any prior address at which Debtor lived during the two years before filing his petition.

Nevertheless, at the hearing, Debtor testified that he used the Palmetto Property as rental property only through April, 2004. Although he failed to list his prior address, he lived in his mother’s home during the time the property was rented. The court finds that Debtor was not using the Palmetto Property as his residence when Creditor’s judgment lien was recorded in November, 2002. Debtor testified that in May, 2004, he moved back into the Palmetto Property home and has since used the home as his residence. The court finds Debtor’s testimony regarding when he lived in the Palmetto Property home to be credible. His testimony is supported by numerous documents, including paycheck stubs, sent to him at the Palmetto Property address during the relevant time periods.

On November 17, 2004, Debtor filed his petition for relief under Chapter 7 of the Bankruptcy Code. The court finds that Debtor was using the Palmetto Property as his residence when he filed his bankruptcy petition. And on January 21, 2005, Debtor filed a Motion to Avoid Judicial Lien, claiming that Creditor’s judicial lien impairs exemptions to which he would be entitled under 11 U.S.C. § 522(b).

LAW AND ANALYSIS

Debtor bases his motion on 11 U.S.C. § 522(f). Section 522(f) of the Bankruptcy Code provides in relevant part as follows:

¹ The court takes judicial notice of the contents of its case docket and Debtors’ petition. Fed. R. Bankr. P. 9017; Fed. R. Evid. 201(b)(2); *In re Calder*, 907 F.2d 953, 955 n.2 (10th Cir. 1990).

(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

11 U.S.C. § 522(f)(1). A lien is considered to impair an exemption to the extent that the sum of the lien, all other liens on the property, and 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).

Creditor concedes that the first mortgage on the Palmetto Property plus the amount of the Ohio homestead exemption is alone more than the value of the property.² Debtor's Schedule A states that the value of the Palmetto property is \$35,000 and Schedule D lists a first mortgage in the amount of \$32,325. [Doc. # 1, Petition]. And Ohio provides for a \$5,000 exemption in real property that a debtor uses as a residence. Ohio Rev. Code § 2329.66(A)(1)(b). Thus, the judgment lien at issue clearly impairs the exemption if Debtor would have been entitled to the homestead exemption but for the lien.

Creditor presents two arguments in her attempt to defeat Debtor's motion. She first argues that Debtor may not avoid the judgment lien since, at the time the lien attached, the Palmetto Property was not Debtor's residence. As the court has determined above, Creditor's argument in this regard is supported by the facts. For legal support, Creditor relies on *In re Estad*, 295 B.R. 905 (D. Minn. 2003), for the proposition that debtors may not avoid a judicial lien that attached to property prior to the debtors occupying it as their residence. In *Estad*, the court held that a judgment lien could not be avoided because it did not impair an exemption to which the debtors were entitled. *Id.* at 907. The court's holding was based on its application of Minnesota law that the scope of its homestead exemption does not extend to an interest in property represented by a judgment lien that attached to the property before the exemption came into existence. *Id.* However, Creditor cites, and the court is aware of, no comparable authority under Ohio law.

In any event, the Supreme Court has flatly rejected a similar argument when presented with

² Because Ohio has opted out of the federal exemptions provided in § 522(d), *see* Ohio Rev. Code § 2329.662, the state exemptions are applicable in this case.

remarkably similar facts. *See Owen v. Owen*, 500 U.S. 305 (1991). In *Owen*, a creditor’s judicial lien attached to the debtor’s property before the property acquired its homestead status.³ The creditor argued that her judicial lien did not impair the debtor’s Florida homestead exemption within the meaning of § 522(f) because, under Florida law, the exemption was not assertable against liens that attached before the property acquired its homestead status. The creditor argued that to permit avoidance of the lien would not preserve the exemption but instead would expand it beyond the entitlement under state law. *Id.* at 308-9.

Writing for the majority, Justice Scalia initially acknowledged that the creditor’s argument seemed reasonable. In ultimately rejecting this argument, however, the Supreme Court first considered the “uniform practice of bankruptcy courts” with respect to built-in limitations on federal exemptions: “to determine the application of § 522(f), [bankruptcy courts] 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). Put another way, the courts “ask first whether avoiding the lien would entitle the debtor to an exemption, and if it would, then avoid and recover the lien. . . .” *Id.* at 312-13. The Court found this approach to be “more consonant with the test of § 522(f) – which establishes as the baseline, against which impairment is to be measured, not an exemption to which the debtor ‘*is* entitled,’ but one to which he ‘*would have been* entitled.” *Id.* at 311. Having found the bankruptcy courts’ general manner of applying § 522(f) to federal exemptions to be correct, the Court further found no justification for treating state exemptions any differently. *Id.* at 313. Florida, like Ohio, has opted out of the federal exemptions available under § 522(d).

Applying the test as explained in *Owen* to the facts of this case, and even assuming that Ohio law (like Minnesota law in *Estad* and Florida law in *Owen*) would preclude Debtor from claiming the homestead exemption with respect to the judgment lien, but for Creditor’s judgment lien, Debtor would be entitled to claim the homestead exemption in this case. Thus, Creditor’s first argument lacks legal support. Under *Owen*, Debtor is entitled to avoid the judgment lien, the entirety of which impairs Debtor’s exemption.

³ Although the debtor had purchased a condominium that became subject to the creditors judgment lien, at the time it was purchased, the condominium did not qualify as a homestead. It was not until one year later that Florida amended its homestead law and the property acquired its homestead status. *Owen*, 500 U.S. at 307.

Creditor also argues that there is no evidence that Debtor has really made the Palmetto Property his residence but, rather, that he claims the premises as his current living location in order to claim the homestead exemption. A debtor's exemption rights are determined as of the date the bankruptcy petition was filed. *In re Lude*, 291 B.R. 109, 110 (Bankr. S.D. Ohio 2003) (citing *Armstrong v. Peterson (In re Peterson)*, 897 F.2d 935 (8th Cir.1990)). Debtor's bankruptcy petition was filed on November 17, 2004. As explained above, the court found Debtor's testimony and supporting documentary evidence credible that he began residing at the Palmetto Property home in May, 2004, and continues to currently reside there.

The facts in this case are clearly distinguishable from the facts in *In re Pagan*, 66 B.R. 196 (Bankr. N.D. Ohio 1986), cited by Creditor. In *Pagan*, the debtor was living in a residence on the date he filed his petition but had a specific intention to, and did, vacate the premises promptly after filing. The court found that the property did not constitute a "homestead" to which the Ohio exemption applied since the debtor did not intend to hold the premises as a home in the future. *Id.* at 199-200. In this case, Debtor has continued to reside at the Palmetto Property. There is no evidence that he does not intend to hold the property as his home in the future, and that he did not so intend at the time he filed his petition.

A separate order in accordance with this memorandum of decision will be entered.