

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: March 28 2011

Mary Ann Whipple  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
WESTERN DIVISION

In Re:	)	Case No. 09-37257
	)	
Vincent E. Stewart and	)	Chapter 7
Angela M. Wynn-Stewart,	)	
	)	
Debtors.	)	JUDGE MARY ANN WHIPPLE

**MEMORANDUM OF DECISION**

This case is before the court on Debtors’ Motion to Avoid Lien Pursuant to 11 U.S.C. § 506(d) and § 522(f)(1)(A) (“Motion”) [Doc. # 149] and Genoa Banking Company’s objection [Doc. # 169]. The Motion is a contested matter governed by Rule 9014 of the Federal Rules of Bankruptcy Procedure.

Debtors seek to avoid a judgment lien held by Genoa Banking Company (“Genoa”) on property located at 3148 Deep Water Lane, Maumee, Ohio. Although the parties had previously indicated that they would stipulate to the facts necessary for the court’s determination of the Motion, a stipulation was not filed. Rather, on November 23, 2010, the court granted a Motion to Withdraw as Counsel filed by Debtors’ then current attorney and extended the time for submission of briefs and stipulated facts and documents. The court’s order also provided that if Debtors will not stipulate to facts relative to the record for the court’s determination of the Motion, Genoa shall develop and file the record as if it were being determined on summary judgment. [See Doc. # 237]. The parties have filed their briefs in support of their respective positions.<sup>1</sup> [See Doc. ## 241, 242 & 243]. Although the parties have not submitted a stipulated record, each

---

<sup>1</sup> Debtor Angela M. Wynn-Stewart is an attorney and has entered her appearance as counsel for Debtors. [Doc. # 239].  
09-37257-maw Doc 250 FILED 03/28/11 ENTERED 03/28/11 15:24:04 Page 1 of 7

has submitted documents which the court will treat as if submitted in support of cross motions for summary judgment.<sup>2</sup> [See Doc. # 242, p.1 (stating that Debtors “have filed a proposed record for the court to rule on the Motion”) & Doc. # 240, Genoa Banking Company’s Proposed Record For Court to Rule on Debtors’ Motion].

The district court has jurisdiction over this Chapter 7 case pursuant to 28 U.S.C. § 1334(a) as a case under Title 11. It has been referred to this court by the district court under its general order of reference. 28 U.S.C. § 157(a); General Order 84-1 of the United States District Court for the Northern District of Ohio. Proceedings involving the avoidance of liens are core proceedings that the court may hear and determine under 28 U.S.C. § 157(b)(1) and (b)(2)(A) and (K).

Having considered the record before the court and the briefs filed in support of the parties respective positions, the court will deny Debtors’ Motion to Avoid Lien.

### FACTS

The following facts are undisputed. Debtor Vincent Stewart acquired title to real property located at 3148 Deep Water Lane, Maumee, Ohio (“the Property”), on July 17, 2007, by general warranty deed. [Doc. # 240, Ex. 1]. Genoa obtained a judgment against both Debtors and filed a certificate of judgment with the Lucas County Clerk of Courts on December 5, 2007. [*Id.*, Ex. 4 & 5]. On January 11, 2008, Vincent Stewart transferred the Property by quit-claim deed to himself and Angela Wynn-Stewart, as husband and wife. [*Id.*, Ex. 2]. On April 8, 2008, Debtors transferred their interests in the Property by quit-claim deed to Deep Water Real Estate, LLC. [*Id.*, Ex. 3].

Debtors filed for relief under Chapter 7 of the Bankruptcy Code on October 19, 2009. They list the Property on their bankruptcy Schedule A - Real Property and identify the nature of their interest as “fee simple,” while stating that it is “In Name of Deep Water Real Estate, LLC.” On their schedules, Debtors value the Property at \$375,000, and their Schedule D shows a first mortgage on the Property in the amount of \$349,242. Although Debtors claim a homestead exemption in the Property in the amount of \$20,400 on their Schedule C - Property Claimed As Exempt, by order dated October 1, 2010, this court sustained Genoa’s objection to Debtors’ claimed exemption. [Doc. # 208]. The court found that Debtors lacked any basis under Ohio law to claim an exemptible interest in the Property. [Doc. # 207, Memorandum of

---

<sup>2</sup> Generally, to be considered by the court at the summary judgment stage, “documents must be authenticated by and attached to an affidavit that meets the requirements of Rule 56(e).” *Carmona v. Toledo*, 215 F.3d 124, 131 (1st Cir. 2000) (quoting *Oris v. Kirkwood*, 999 F.2d 86, 92 (4th Cir. 1993); *Hal Roach Studios, Inc. v. Richard Feiner and Co.*, 896 F.2d 1542, 1550 (9th Cir. 1990). Although virtually none of the documents submitted by the parties’ were properly authenticated, *see, e.g., United States v. Billheimer*, 197 F. Supp. 2d 1051, 1058 n.7 (S.D. Ohio 2002); *see also* Fed. R. Evid. 901-903, neither party has objected to the documents submitted by the other party, so the court will consider all such documents to the extent relevant to the issues that are dispositive of the Motion. *See Investors Credit Corp. v. Batie (In re Batie)*, 995 F.2d 85, 89 (6th Cir. 1993).

Decision]. Debtors filed a timely appeal of that order that remains pending in District Court.

## LAW AND ANALYSIS

### **I. Summary Judgment Standard**

Under Rule 56 of the Federal Rules of Civil Procedure, made applicable to this proceeding by Rules 9014(c) and 7056 of the Federal Rules of Bankruptcy Procedure, summary judgment is proper only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In reviewing a motion for summary judgment, however, all inferences “must be viewed in the light most favorable to the party opposing the motion.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-88 (1986). The party moving for summary judgment always bears the initial responsibility of informing the court of the basis for its motion, “and identifying those portions of ‘the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits if any’ which it believes demonstrate the absence of a genuine issue of material fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). With respect to issues on which the nonmoving party bears the burden of proof, the burden on the moving party may be discharged by pointing out to the court that there is an absence of evidence to support the nonmoving party’s case. *Id.* at 325. (*Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)). Where the moving party has met its initial burden, the adverse party “may not rest upon the mere allegations or denials of his pleading but . . . must set forth specific facts showing that there is a genuine issue for trial.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine issue for trial exists if the evidence is such that a reasonable factfinder could find in favor of the nonmoving party. *Id.*

In cases where the parties have filed cross-motions for summary judgment, the court must consider each motion separately on its merits, since each party, as a movant for summary judgment, bears the burden to establish both the nonexistence of genuine issues of material fact and that party’s entitlement to judgment as a matter of law. *Lansing Dairy v. Espy*, 39 F.3d 1339, 1347 (6<sup>th</sup> Cir. 1994); *Markowitz v. Campbell (In re Markowitz)*, 190 F.3d 455, 463 n.6 (6<sup>th</sup> Cir. 1999). The fact that both parties simultaneously argue that there are no genuine factual issues does not in itself establish that an evidentiary hearing is unnecessary, and the fact that one party has failed to sustain its burden under Rule 56 does not automatically entitle the opposing party to summary judgment. *See* 10A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice and Procedure: Civil 3d* § 2720 (1998).

### **II. 11 U.S.C. § 522(f)**

The Bankruptcy Code establishes grounds for avoiding judicial liens that impair an exemption to which a debtor is entitled. Specifically, § 522(f) provides as follows:

- (1) Notwithstanding any waiver of exemptions but subject to paragraph (3), 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 . . .

In *Farrey v. Sanderfoot*, 500 U.S. 291 (1991), the United States Supreme Court noted three conditions that must be met for avoiding a judgment lien under § 522(f). First, the lien must be a judicial lien. *Id.* at 295. Second, the debtor must be entitled to an exemption that the judicial lien impairs. *Id.* And third, the lien must have “attached to the debtor’s interest at some point after the debtor obtained the interest.” *Id.* at 296. It is a debtor’s burden to establish that each of these conditions exist. *In re Jerew*, 415 B.R. 303, 306 (Bankr. N.D. Ohio 2009).

In this case, there is no dispute that Genoa’s lien is a judicial lien that encumbers the Property. However, this court has previously determined that Debtors are not entitled to the claimed homestead exemption in the Property because they have no exemptible interest in the Property. Debtors nevertheless offer arguments not previously raised in support of their position that they do have such an interest. However, their appeal of the court’s order sustaining Genoa’s objection to their claimed exemption divests this court of jurisdiction over matters related to the appeal. *See Big Rivers Elec. Corp. v. Schilling (In re Big Rivers Elec. Corp.)*, 266 B.R. 100, 103 (W.D. Ky. 2000); *In re Hardy*, 30 B.R. 109, 111 (Bankr. S.D. Ohio 1983). Although a lack of entitlement to an exemption in the Property provides a sufficient basis to deny Debtors’ Motion to the extent brought under § 522(f), in light of their appeal of that issue, the court also addresses the third condition that must be met to avoid Genoa’s lien. *In re Hardy*, 30 B.R. at 111 (holding bankruptcy court has power to address issues raised that do not affect the question presented on appeal to the district court).

In *Sanderfoot*, the Supreme Court explained the third condition that must be satisfied in order to avoid a lien under § 522(f):

[T]he text, history, and purpose of § 522(f)(1) also indicate what the provision is not concerned with. It cannot be concerned with liens that fixed on an interest before the debtor acquired that interest. . . . Section 522(f)(1) does not state that any fixing of a lien may be avoided; instead, it permits avoidance of the “fixing of a lien on an interest of the debtor.” If the fixing took place before the debtor acquired that interest, the “fixing” by definition was not on the debtor’s interest. . . . There would be no fixing to avoid since the lien was already there. To permit lien avoidance in these circumstances, in fact, would be to allow judicial lienholders to be defrauded through the conveyance of an encumbered interest to a prospective debtor.

*Sanderfoot*, 500 U.S. at 298. Thus, the Supreme Court concluded that “a debtor cannot use § 522(f)(1) to avoid a lien on an interest acquired after the lien attached.” *Id.* at 299.

In this case, assuming that Debtors succeed on appeal in demonstrating an exemptible interest in the Property, in order for Debtors to avoid Genoa's lien under § 522(f), the court must still find that Genoa's lien encumbers interests that Debtors acquired before the lien attached. See *In re Jaber*, 406 B.R. 756 (Bankr. N.D. Ohio 2009) (finding that the debtor could claim a homestead exemption but could not avoid a judgment lien that had attached before she possessed the interest in property to which the lien attached).

In Ohio, a judgment lien attaches to all real estate owned by the judgment debtor within the county at the time the certificate of judgment is filed in the office of the clerk of court of common pleas of such county. Ohio Rev. Code § 2329.02. The lien remains attached to the real property until it is satisfied or released and continues uninterrupted so long as it is timely renewed. *In re Jaber*, 406 B.R. at 763 (citing *Feinstein v. Rogers*, 2 Ohio App. 3d 96, 98 (1981) and Ohio Rev. Code 2329.07). Genoa filed a certificate of judgment in the Lucas County Common Pleas Court evidencing a judgment it held against both Debtors on December 5, 2007. That filing created a lien that attached to the Property. On that date, title to the Property was held solely in the name of Vincent Stewart. Genoa's lien, therefore, encumbered his fee simple interest in the Property. Vincent Stewart then transferred the Property to himself and his wife on January 11, 2008, thereby granting Angela Wynn-Stewart an undivided one-half interest in the Property. However, because the judgment lien had attached to the Property before she possessed such interest, under *Sanderfoot*, she could not avoid the fixing of Genoa's lien on her interest, even if she now still possessed that one-half interest.

In any event, it is undisputed that, on April 8, 2008, Debtors both transferred their interests in the Property to Deep Water Real Estate, LLC ("the LLC"). Doing so extinguished all previous interests Debtors had in the property. In litigating their entitlement to a homestead exemption, Debtors advanced three theories under which they claimed an exemptible interest in the Property, notwithstanding the fact that the LLC holds legal title thereto. First, they asserted that as the sole members of the LLC, they have an interest in the Property. Second, Debtors asserted an interest under an oral lease with the LLC to occupy the Property. And third, invoking the alter-ego doctrine, Debtors asked the court to disregard the separate entity of the LLC such that the Property is deemed the fee simple property of Debtors as claimed on their Schedule A. To the extent that Debtors prevail on any of these three theories such that they are entitled to an exemption, because none of the alleged interests arose before Genoa's lien attached, the *Sanderfoot* holding applies. Neither their alleged interest in the Property as sole members of the LLC nor as tenants under a lease with the LLC existed before Genoa's lien attached. Likewise, asking a court to disregard the separate entity of the LLC by invoking the alter-ego doctrine is an equitable remedy that does not exist until the court enters an order to that effect. Cf. *XL/Datacomp, Inc. v. Wilson (In re Omegas Group)*, 16 F.3d 1443, 1451

(6<sup>th</sup> Cir. 1994) (stating that because a constructive trust is a remedy, “it does not exist until a plaintiff obtains a judicial decision finding him to be entitled to a judgment “impressing” defendant's property or assets with a constructive trust”); *Taylor Steel, Inc. v. Keeton*, 417 F.3d 598, 606 (6<sup>th</sup> Cir. 2005) (stating that under Ohio law, piercing the corporate veil is an equitable remedy); *Merit Mold & Tool Prod., Inc. v. James B. Foser Revocable Living Trust*, No. 10974, 1988 WL 129185, \*2, 1988 Ohio App. LEXIS 4737, \*5 (Ohio App. November 29, 1988) (stating that treating one entity as a mere alter ego of another is an extraordinary remedy). Because Debtors’ interests in the Property under any of the above theories were obtained, or would have been obtained, after the fixing of Genoa’s lien, they cannot be the basis for lien avoidance under § 522(f).

## II. 11 U.S.C. § 506(d)

In their Motion, Debtors also argue that they are entitled to avoid Genoa’s lien under the provisions of § 506(d), which provides that “[t]o the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void. . . .” The Sixth Circuit addressed the issue of whether § 506(d) confers avoidance powers on a Chapter 7 debtor in *Talbert v. City Mortgage Servs. (In re Talbert)*, 344 F.3d 555 (6<sup>th</sup> Cir. 2003).

In *Talbert*, the debtors’ residence was encumbered by both a first mortgage that exceeded the value of the property and a second mortgage. The debtors sought to avoid, or strip off, the second mortgage. The debtors in *Talbert* argued that the secured status of a claim is determined under § 506(a), and that pursuant to this provision, their junior lien was completely unsecured and, according to § 506(d), may be stripped off. *Id.* at 558. The court rejected this argument, relying on the statutory interpretation and analysis set forth in *Dewsnup v. Timm*, 502 U.S. 410 (1992).

In *Dewsnup*, the Supreme Court held that a Chapter 7 debtor could not “strip down” a lien that was undersecured. The court concluded that “allowed secured claim” in § 506(d) should not be defined by reference to § 506(a) but “should be read term-by-term to refer to any claim that is, first, allowed, and second, secured.” *Dewsnup*, 502 U.S. at 415. Thus, the Court held that “§ 506(d) does not allow petitioner to ‘strip down’ respondent’s lien, because respondents’ claim is secured by a lien and has been fully allowed pursuant to § 502.” *Id.* at 417.

Although *Dewsnup* involved a debtor’s attempt to *strip down* an undersecured loan, the Sixth Circuit found the Supreme Court’s reasoning equally applicable to a debtor’s attempt to *strip off* a totally unsecured loan. *Id.* at 561. It concluded that “[s]ection 506 was intended to facilitate valuation and disposition of property in the reorganization chapters of the code, not to confer an additional avoiding power on a Chapter 7 debtor” and that “[w]hen a debtor proceeds under Chapter 7, creditors are ‘entitled to their lien position

until foreclosure or other permissible final disposition is had.” *Id.* at 562 (quoting *Ryan v. Homecomings Fin. Network*, 253 F.3d 778, 783 (4th Cir. 2001)).

### **III. Additional Arguments**

Other arguments raised by Debtors in support of their Motion include that they dispute the amount owed to Genoa, although they do not dispute that some amount is owed, and that they were not properly advised by their former bankruptcy attorney with respect to the effect of their home being transferred to an LLC. Given the resolution of Debtors’ Motion as discussed above, the court finds these arguments are not relevant to the issue of Debtors’ ability to avoid Genoa’s judgment lien under the cited sections of the Bankruptcy Code.

### **CONCLUSION**

For all of the foregoing reasons, the court finds as a matter of law that Debtors are not entitled to avoid Genoa’s judgment lien. Debtors’ Motion will, therefore, be denied. The court will enter a separate order in accordance with this Memorandum of Decision.