

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF VIRGINIA  
Alexandria Division

In re: )  
)  
LESTER ENOCH WILLIAMS ) Case No. 00-11798-SSM  
KATHLEEN Y. WILLIAMS ) Chapter 7  
)  
Debtors )

**MEMORANDUM OPINION**

A hearing was held in open court on August 26, 2003, on the motion of the debtors in this reopened case to avoid the judgment liens of Burton Lumber Company and of Wachovia Bank. Debtor Lester Enoch Williams was present in person and was represented by his attorney of record. Neither Burton Lumber Company nor Wachovia Bank filed a response to the motion or was present at the hearing.

Background

Lester Enoch Williams and Kathleen Y. Williams filed a joint voluntary petition for relief under chapter 7 of the Bankruptcy Code in this court on April 24, 2000, and were granted a discharge on August 10, 2000.<sup>1</sup> The trustee having filed a report of no distribution in the interim, the case was then closed on August 15, 2000. On their schedules, the debtors listed an interest in three undeveloped lots in Chesapeake, Virginia, which they valued in the aggregate at \$15,000, all of which they claimed exempt under § 34-4, Code of Virginia. The

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<sup>1</sup> It appears that, as a result of an administrative error in the clerk's office, no creditors were ever mailed notice of the commencement of the case or of the debtors' discharge. Separate action will be taken by the clerk's office to correct this problem.

debtors each filed homestead deeds on June 2, 2000, in the Clerk's Office of the Circuit Court of the City of Chesapeake, Virginia, claiming \$4,950.00 of the equity in the property as exempt. Although both Burton Lumber Company and Wachovia Bank are listed as creditors, and although the Statement of Financial Affairs filed by the debtors acknowledged that Wachovia Bank had judgment liens "that are several years old," no steps were taken during the bankruptcy case to avoid any judgment liens.

Although the ownership of the lots is listed on the schedules as "joint," Mr. Williams testified at the hearing that he believed the lots were actually titled solely in his name. The \$15,000 value shown on the schedules, according to Mr. Williams, was based on the real estate tax assessment, although he was not convinced they were necessarily worth that much. He testified that the lots are located in an old, depressed area of Chesapeake; back on to marshland; are only 25 feet wide; and can only be built upon if put together. Approximately a year and a half ago, he put up a sign offering the three lots for sale, but the only offer he received at the time was \$8,000, which he did not accept. More recently, however, a developer has offered him \$30,000, which he has agreed to accept. The judgment liens of record against the lots are as follows in order of priority:

1. Judgment in favor of Burton Lumber Corporation dated May 18, 1990, and docketed on October 10, 1990, in Judgment Lien Book 83, Page 128, in the amount of \$30,686.57, with interest thereon at the rate of 18% per annum from May 30, 1989, and attorneys fees of \$7,671.64
2. Judgment in favor of Jefferson National Bank dated September 13, 1991, and docketed on September 26, 1991, in Judgment Lien Book 88, Page 119, in the amount of \$171,485.74.

3. Judgment in favor of Jefferson National Bank dated September 13, 1991, and docketed on September 26, 1991, in Judgment Lien Book 88, Page 119, in the amount of \$5,219.88.

Wachovia Bank is the successor to Jefferson National Bank. No evidence was presented as to any credits against the judgments.

On July 17, 2003, the debtors filed a motion to reopen their case for the purpose of avoiding the judgment liens. The motion to reopen was granted at a hearing held on August 5, 2003, and the hearing on the lien avoidance motion was carried over to August 26, 2003.

### Discussion

#### A.

In Virginia, the docketing of a money judgment creates a lien against any real estate owned by the judgment debtor in the city or county in which the judgment is docketed. Va. Code Ann. § 8.01-458. As a general proposition, valid prepetition liens survive bankruptcy and may be enforced *in rem* against the collateral after bankruptcy, even though the debtor's personal liability has been discharged. *See Johnson v. Home State Bank*, 501 U.S. 78, 111 S.Ct. 2150, 2153, 115 L.Ed.2d 66 (1991) ("[A] discharge extinguishes only 'the personal liability of the debtor.' Codifying the rule of *Long v. Bullard* ... the Code provides that a creditor's right to foreclose on the mortgage survives or passes through the bankruptcy."). However, the Bankruptcy Code allows certain kinds of liens to be avoided, or set aside. Relevant to the present discussion, a judgment lien may be avoided in an individual case to the extent that the lien "impairs" the debtor's exemption of the property to which the lien has attached. § 522(f)(1)(A), Bankruptcy Code. Prior to 1994, courts had reached conflicting

interpretations as to when a lien “impaired” an exemption. To resolve those conflicts, Congress amended the statute to provide a straight-forward mathematical test:

(2) (A) For the purposes of this subsection, 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.

§ 522(f)(2)(A), Bankruptcy Code, added by Bankruptcy Reform Act of 1994, Pub.L. 103-393, § 303 (Oct. 22, 1994).<sup>2</sup> For lien avoidance purposes, the property is valued as of the date the bankruptcy petition is filed. *In re Fitzhenry*, No. 96-11091, 1998 WL 1147929 at \*9 (Bankr. E.D. Va., September 2, 1998).<sup>3</sup> In determining the value of the debtor’s interest in the property for lien avoidance purposes, hypothetical costs of sale are not deducted. *See Coker v. Sovran Equity Mort. Corp. (In re Coker)*, 973 F.2d 258 (4th Cir. 1992). The remaining factual issues to be resolved, therefore, as a predicate to applying the statutory formula, are as

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<sup>2</sup> The statutory test is awkwardly stated, to say the least. A much easier way to express the same idea is that a judgment lien attaches only to whatever equity remains in the property above the debtor’s homestead exemption and the unavoidable liens. In other words, any portion of the judgment lien which exceeds the equity above the homestead exemption and the unavoidable liens is set aside. Mathematically, the result is the same as the statutory formula.

<sup>3</sup> Although *Fitzhenry* is unpublished, it is available on the court’s Internet web site at <<http://www.vaeb.uscourts.gov/opinions/ssm/fitzhenry.pdf>> .

follows: (1) the value of the debtors' interest in the property as of April 24, 2000; and (2) the amount of the exemption that the debtors could claim if there were no liens on the property.

1. The value of the debtors' interest in the property.

As noted, the schedules executed under penalty of perjury and filed by the debtors in this case valued the three lots at \$15,000 in the aggregate. According to the testimony, this reflected the price at which they were assessed for real estate tax purposes. There is no evidence that the debtors ever protested the tax assessment. Now, some three years later, Mr. Williams contends that the property was not really worth that much because building restrictions and the location of the lots made them undesirable, and he points to the fact that a year and a half ago, the best offer he received when he put up a sign offering the lots for sale was \$8,000. Clearly, however, even he did not believe that particular offer represented the fair market value of the lots, since he did not accept the offer. What is more, he now has a \$30,000 offer for the lots. That in itself represents more than a 30% annual increase over the \$15,000 tax assessed value when the bankruptcy was filed. While it is a matter of common knowledge that the current real estate market is exceptionally good, the court is not inclined to find, in light of the current offer, that the property was worth less than 50% of that amount only three years ago. Accordingly, having considered all the evidence, the court finds that the fair market value of the three lots, as of April 24, 2000, was \$15,000.

2. The amount of the exemption that the debtors could claim  
if there were no liens on the property.

On their schedules, the debtors claimed an exemption of \$15,000 for their property under the Virginia homestead exemption, Va. Code Ann. § 34-4 *et seq.* At the initial hearing

on this motion, counsel for the debtor suggested that this figure was controlling for the purpose of the present motion, since no objection had been filed to the claimed exemption. *See Taylor v. Freeland & Kronz*, 503 U.S. 638, 112 S.Ct. 1644, 118 L.Ed.2d 280 (1992). Putting aside the fact that in this particular case the respondent creditors, apparently as the result of an error in the clerk's office, were never given formal notice of the bankruptcy filing, this court has previously held that, although the rule in *Taylor* would prevent a trustee from administering the property even if the claimed exemption were invalid, it does not bar a creditor, in defending a lien avoidance motion, from challenging the exemption claimed on a debtor's schedules. *In re Fitzhenry* at \*12-15 (citing *In re Maylin*, 155 B.R. 605 (Bankr. D. Me. 1993); *In re Liston*, 206 B.R. 235 (Bankr. W.D. Okla. 1997); *In re Canalos*, 216 B.R. 159 (Bankr. D. Md. 1997)). In order to claim the benefit of the Virginia homestead exemption with respect to real estate, the debtor must record an instrument known as a homestead deed in the city or county in which the real estate is located within 5 days after the first date set for the meeting of creditors in the bankruptcy case. Va. Code Ann. § 34-6 and 34-17. The debtors did so, each claiming \$4,950.00 of the equity in the property as exempt. Thus, the amount of the exemption the debtors would be entitled to claim in the absence of the judgment liens would not exceed \$9,900 in any event.

However, there is another issue here. According to Mr. Williams' testimony, he is the sole owner of the lots. It is well settled that a debtor cannot claim an exemption in property owned by another person. *See In re Asghar*, No. 96-15195-SSM at 4-9 & n.7 (Bankr. E.D.

Va., Feb. 11, 1997) (collecting cases).<sup>4</sup> It necessarily follows that such a claimed exemption cannot be relied upon for lien avoidance purposes. *In re Canalos*, 216 B.R. at 164 (reducing exemption for lien avoidance purpose to amount that could validly be claimed under state law by debtor-husband, since debtor-wife had no ownership interest in the real estate as to which lien avoidance was sought). Accordingly, since only Mr. Williams had an ownership interest

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<sup>4</sup> Although the *Asghar* opinion is unpublished, it is available on the court's Internet web site at <<http://www.vaeb.uscourts.gov/opinions/ssm/asghar.pdf>>. The cases disallowing a debtor to claim an exemption in property he or she does not own are legion: *See, e.g., In re Duty*, 78 B.R. 111, 116-17 (Bankr. E.D. Va. 1987) (holding that a debtor had no interest in proceeds from a personal injury claim to exempt when the debtor had already assigned them to another person); *In re Smith*, 45 B.R.100 (Bankr. E.D. Va. 1984) (“[W]here the debtor does not own real or personal property, including money or debts due, then there is nothing for the debtor to exempt.”); *see also GMAC. v. Lefevre*, 38 B.R. 980, 983 (D. Vt. 1983) (finding that a spouse had no interest in spouse's truck, thus preventing the debtor from claiming it exempt); *In re Preston*, 96 B.R. 61, 63 (Bankr. W.D. Va. 1989) (holding that a spouse may not exempt a leasehold interest where she is not the actual owner of the leasehold); *In re Love*, 42 B.R. 317, 319 (Bankr. E.D.N.C. 1984) (in order to claim the North Carolina residential exemption, the debtor must own the residence); *In re Ferguson*, 15 B.R. 439, 441 (Bankr. D. Colo. 1981) (“It is basic to any right to an exemption, however, that the debtor have an ownership interest in the property before an exemption may be claimed.”); *In re Cunningham*, 5 B.R. 709, 711 (Bankr. D. Mass. 1980) (disallowing an exemption of one spouse in the residence when title to the residence was in the other spouse's name only). A different result does not follow simply because the debtors here are married and filed a joint petition. When a husband and wife file a joint petition, they have separate, legal estates in bankruptcy. It is true that the court may order the estates to be jointly administered. Fed.R.Bankr.P. 1015(b). Indeed, in this district joint administration is the rule when a joint petition is filed unless the trustee or other interested party files a timely objection. Local Bankruptcy Rule 1015-1. However, joint administration does not by itself effect a substantive consolidation of the husband's and wife's estates or permit one spouse to protect his or her property using the other spouse's exemptions. *See* § 302(b), Bankruptcy Code; Fed.R.Bankr.P. 1015(a); *In re Arnold*, 33 B.R. 765, 767 (Bankr. E.D.N.Y. 1983); *In re Heath*, 101 B.R. 469, 470-71 (Bankr. W.D. Va. 1987). Nor can a spouse exempt property titled in the name of the other spouse on the theory that in the event of a divorce he or she might have an equitable distribution claim to the asset in question. *In re Wilkinson*, 100 B.R. 315, 317 (Bankr. W.D. Va. 1989); *In re Hohenberg*, 174 B.R. 487, 493 (Bankr. W.D. Tenn. 1994).

in the lots on the date the bankruptcy petition was filed, the court determines that the amount of the exemption that could be claimed in the three lots in the absence of the judgment liens is limited to the amount claimed on his homestead deed, that is, \$4,950.

B.

For the purpose of applying the statutory impairment test, it is not necessary, where the judgment vastly exceeds the value of the property, to calculate the exact amount due on the judgments as of the filing date, since the practical effect of applying the statutory formula is that the judgments will be avoided to the extent they exceed the equity in the property over and above non-avoidable liens and any valid exemptions. In any event, the amount due on the Butler Lumber Corporation judgment as of the date the bankruptcy petition was filed would have been approximately as follows:

|   |                 |
|---|-----------------|
| Judgment principal                      | \$30,686.57     |
| Interest at 18% from 5/30/89 to 4/24/00 | 60,260.02       |
| Attorney's fees                         | <u>7,671.64</u> |
| Total                                   | \$91,618.23     |

Accordingly, the amount of the lien to be avoided may be calculated as follows:<sup>5</sup>

|                                      |                 |
|--------------------------------------|-----------------|
| Amount of judicial lien              | \$91,618.23     |
| Other liens on property <sup>6</sup> | 0.00            |
| Exemption                            | <u>4,950.00</u> |

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<sup>5</sup> An example of how to perform the calculation is shown in *Canalos*, 216 B.R. at 165.

<sup>6</sup> For the purpose of the calculation, the court does not include as “other” liens any liens – such as the Wachovia Bank judgment liens – which are being avoided in full.

|  |                  |
|--|------------------|
| Total                                  | \$96,568.23      |
| Debtor's interest (fair market value)  | <u>15,000.00</u> |
| Extent to which lien impairs exemption | \$81,568.23      |

Butler Lumber Company's judgment lien is therefore avoidable to the extent of \$81,568.23, effectively reducing the amount of its lien to \$10,050 (i.e., \$91,618.23 - \$81,568.23). Since the Jefferson National Bank/Wachovia Bank judgment liens are subordinate to those of Butler Lumber Company, it can readily be seen that application of the statutory formula results in those liens being avoided in their entirety.

Conclusion

For the reasons stated, a separate order will be entered (a) avoiding the judgment lien of Butler Lumber Company to the extent it exceeds \$10,050 and (b) avoiding the judgment liens in favor of Jefferson National Bank (now Wachovia Bank) in their entirety.

Date: August 28, 2003

Alexandria, Virginia

/s/ *Stephen S. Mitchell*  
 Stephen S. Mitchell  
 United States Bankruptcy Judge

Copies to:

Richard G. Hall, Esquire  
4208 Evergreen Lane, Suite 234  
Annandale, VA 22003  
Counsel for the debtors

Burton Lumber Company  
Attn: George H. Burton, III  
835 Wilson Road  
Chesapeake, VA 23324

Wachovia Corporation  
Attn: G. Kennedy Thompson, CEO  
301 South College Street  
Suite 4000  
One Wachovia Center  
Charlotte, NC 28288-0013

Wachovia Bank  
672 N. Battlefield Blvd.  
Chesapeake, VA 23320