UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Northern Division

In re:	)	Bankr. No. 99-10322
	)	
JESSE B. WEST,	)	Chapter 7
Soc. Sec. No. [redacted]-9100	)	
	)	
and	)	
	)	
LUELLA V. WEST,	)	
Soc. Sec. No. [redacted]-7685	)	
	)	
Debtors.	)	
LANGFORD STATE BANK	)	Adv. No. 00-1013
	)	
Plaintiff,	)	
	)	DECISION RE:
-vs-	)	(1) BANK'S COMPLAINT TO
	)	DETERMINE THE VALIDITY,
JESSE B. WEST, ET AL	)	PRIORITY, AND EXTENT OF LIEN;
	)	AND (2) DEBTORS' MOTION
Defendant.	)	TO AVOID LIENS

The matter before the Court is Langford State Bank's complaint to determine the validity, priority, and extent of its lien on Defendants-Debtors' home and Debtors' Motion to Avoid Liens (filed in the main case). These are core proceedings under 28 U.S.C. § 157(b)(2). This Decision and accompanying Order shall constitute the Court's findings and conclusions under Fed.R.Bankr.P. 7052. As set forth below, the Court concludes that the Bank's lien does not survive Debtors' bankruptcy.

SUMMARY OF FACTS.

Langford State Bank obtained a large judgment against Jesse B. West on April 2, 1987. Jesse West owned 160 acres and a house on the judgment date that served as his and his wife's homestead. Also, both of the Wests were then under age 70. The judgment was timely renewed by the Bank on September 12, 1996.

19.

Jesse and Luella West ("Debtors") filed a Chapter 7 petition on December 15, 1999. By that time, Jesse West was more than 70 years old. In the bankruptcy, Debtors valued the 160 acres and house at $90,000. They claimed it all exempt at $90,000. No objections to the claimed exemptions were timely filed.

The Bank has now brought before the Court the issue of whether its lien has attached to Debtors' homestead and, if so, to what extent. It argues that Debtors' petition constituted a voluntary sale of their homestead and that their homestead exemption is now limited to $30,000, regardless of the unlimited homestead given to those age 70 and over.

Debtors claim that the Bank's judgment never attached as a lien because the property was their homestead, and because the Bank never levied on the excess value of the realty over the $30,000 homestead allowance before Debtor Jesse West turned 70, when the homestead exemption became unlimited. Debtors rely on S.D.C.L. § 15-16-7, which states a judgment attaches as a lien to real property except the homestead. They argue that a lien attaches to a homestead only if there is first a levy and valuation by a court to see if there is equity above the homestead exemption limit to support the judgment lien as governed by S.D.C.L. ch. 21-19.

Consolidated with this action is Debtors' motion to avoid liens that was filed August 16, 2000. Under 11 U.S.C. § 522(f), Debtors want avoided as an impairment of their homestead exemption any judgment lien that the Bank may have.

DISCUSSION.

The Bank's complaint and Debtors' motion to void liens raise interesting homestead exemption issues on which state statutes are not abundantly clear and on which state case law is not always consistent. Though this Court believes that under South Dakota law a judgment lien attaches, when the judgment is entered, to any equity in the homestead above the allowed exemption amount and prior encumbrances of records, *In re Hughes*, 244 B.R. 805, 812 n.4 (Bankr. D.S.D. 1999); *see First National Bank of Beresford v. Anderson*, 332 N.W.2d 723 (S.D. 1983), that issue and related ones raised by the parties do not need to be addressed herein to resolve the status of the Bank's lien following this bankruptcy.

Regardless of whether or when the Bank's judgment lien formally attached to Debtors' homestead, or attached at least to the equity in excess of the allowable $30,000 homestead exemption when the judgment was entered, *see* S.D.C.L. § 15-16-9, the lien is subject to removal under 11 U.S.C. § 522(f). This is because the lien impaired Debtors' homestead exemption on the petition date, as demonstrated by the calculation required under § 522(f)(2)(A):

Bank's lien	$110,930.55
other encumbrances (SBA mortgage)	+ 22,175.32
maximum exemption available	+ 90,000.00
Total encumbrances & exemption	**$223,105.87**
Debtors' interest absent liens	- 90.000.00
Impairment	**$133,105.87**

Although the value of Debtors' allowed homestead exemption may have been only $30,000 when the Bank's judgment was entered, the

§ 522(f)(2)(A) calculation requires the Court to recognize the $90,000 (the full value of the homestead) exemption that Debtors could have claimed on the petition date, when Jesse West was at least 70 years old, had the lien not existed. S.D.C.L. § 43-45-3(2); *Owen v. Owen*, 111 S.Ct. 1833, 1836-38 (1991). For that same reason, the Court does not treat Debtors' petition as a voluntary sale and thus reduce Debtors' allowed homestead exemption claim to $30,000 under the Bank's "voluntary sale" argument. The legal fiction of a voluntary sale of the exempt property is not contemplated by the calculation in § 522(f)(2)(A).

The Court further concludes that the Bank's lien did not have to formally attach to the homestead to impair Debtors' exemption and thus be avoided under § 522(f). To hold otherwise would not give Debtors the full protection provided by § 522(f) simply because South Dakota law may delay the judgment lien from attaching to the homestead or to at least the exempt portion of the homestead absent execution on the judgment. Based on the definition of impairment under § 522(f) provided by the 1994 amendments to that section and related legislative history, it appears Congress intended that on the petition date

> the debtor puts all of his nonexempt property on the table. If there is value in the homestead property in excess of senior encumbrances and the exemption, the creditors get the benefit of that value. A judgment lien would be recognized to that limited extent and voided to the extent there is no value to support the lien. The debtor would exit bankruptcy free of any judgment liens except to the extent they are supported by equity in excess of the homestead [exemption], thereby assuring

> that the debtor will reap the benefit of any future increase in value (or increase in equity created by the paid down of any existing senior voluntary encumbrance).

In re Pepper, 210 B.R. 480, 484-85 (Bankr. D. Colo. 1997); *accord Holland v. Star Bank (In re Holland)*, 151 F.3d 547 (6th Cir. 1998); *In re Van Zant*, 210 B.R. 1011, 1015-16 (Bankr. S.D. Ill. 1997); *Massie v. Yamrose*, 169 B.R. 585, 587-88 (W.D. Va. 1994); *see Henderson v. Belknap (In re Henderson)*, 18 F.3d 1305, 1310-11 (5th Cir. 1994)(cites therein)(a lien on a debtor's homestead, although presently unenforceable under Texas law, could still be avoided under § 522(f) because the lien clouded the title to the property); *Coats v. Ogg (In re Coats)*, 232 B.R. 209 (B.A.P. 10th Cir. 1999); *In re Williams*, 225 B.R. 759 (Bankr. D. Nev. 1998); *In re Willoughby*, 212 B.R. 1011, 1016-17 (Bankr. M.D. Fla. 1997); *In re Kellar*, 204 B.R. 22, (Bankr. D. Ark. 1996)(judgment not yet attached to exempt homestead clouded title and could thus be avoided as an impairment); *In re Norvell*, 198 B.R. 697 (Bankr. W.D. Ky. 1996)(comfort order entered voiding judgment under §§ 105 and 522(f) although judgment was already void under § 524(a)(1)); *see also Portfolio, L.L.C. v. Weinstein (In re Weinstein), 164 F.3d 677 (1st Cir. 1999); In re Whitehead*, 226 B.R. 539 (Bankr. W.D.N.Y. 1998)(discussing effect of 1994 amendments to § 522(f)). *Contra Cannon v. Cannon*, 254 B.R. 773, 777-78 (S.D. Fla. 2000)(conclusion

relied on expansive protection of homestead offered by Florida law);[1] *In re Brumbaugh*, 250 B.R. 605 (Bankr. W.D. Ky. 2000).

Accordingly, the Court finds no statutory scenario under which the Bank's lien survives this bankruptcy. Answering what the value and extent of the Bank's lien may have been if Debtors had not sought relief under Chapter 7 would not change the ultimate result here and may have required a certification of the question to the South Dakota Supreme Court. Those interesting questions will have to await another case and another day.

Counsel for Debtors shall prepare an order in the main case granting Debtors' motion to avoid lien and shall prepare a separate order dismissing the adversary proceeding.

Dated this 26 day of December, 2000.

BY THE COURT:

Irvin N. Hoyt
Bankruptcy Judge

ATTEST:
Charles L. Nail, Jr., Clerk

By: Deputy Clerk

(SEAL)

I hereby certify that a copy of this document was mailed, hand delivered, or faxed this date to the parties on the attached service list.

DEC 26 2000

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court, District of South Dakota
By

NOTICE OF ENTRY
Under F.R.Bankr.P. 9022(a)
Entered

DEC 26 2000

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota

[1] The court in *Cannon* relied in part on *Shafner v. Aurora National Bank South (In re Shafner)*, 82 F.3d 426, 1996 WL 98809 (10th Cir. 1996). That decision, however, was based on § 522(f) before the 1994 amendments were made to define impairment.

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Total notices mailed: 2

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