IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
ENTERED
TAWANA C. MARSHALL, CLERK
THE DATE OF ENTRY IS
ON THE COURT'S DOCKET

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| IN RE: | § | |
| | § | |
| NEAL H. DURBAN and PEGGY A. DURBAN, d/b/a/ NEAL DURBAN TRUCKING, | § | |
| | § | |
| Debtors. | § | CASE NO. 04-46088-DML-7 |

## MEMORANDUM OPINION

Before the court are (1) Creditor's Objections to Schedule C (Property Claimed as Exempt) (the "Objection") filed August 2, 2004, by Vinson Oil Distributors, Inc. ("Creditor"); and (2) Motion to Void Judgment Lien Pursuant to U.S.C. § 522(f) (the "Motion") filed August 20, 2004, by Neal H. Durban ("Mr. Durban") and Peggy A. Durban ("Mrs. Durban"), d/b/a Neal Durban Trucking (collectively, "Debtors"). A hearing on both the Objection and the Motion was held on November 15, 2004, and the court considered witness testimony, evidentiary exhibits, and arguments of counsel.[1] At the conclusion of the hearing, the court invited the parties to submit supplemental briefs relevant to the issues raised at the hearing and took the matter under advisement. Debtors and Creditor filed post-trial briefs on November 19, 2004.

## BACKGROUND

Debtors operate a long-haul, over-the-road trucking business. In 1985 Debtors purchased 8.39 acres located in Bridgeport, Wise County, Texas (the "Bridgeport Property") and resided there for a number of years. In August 2000 Debtors moved to property located in Decatur, Wise

[1] At the hearing, the court granted Debtors' request to withdraw Debtors' Motion for Sanctions filed October 15, 2004.

County, Texas (the "Decatur Property") and recorded with the Wise County Clerk a "Voluntary Designation of Homestead" related to the Decatur Property. Debtors thereafter resided at the Decatur Property until on or about December 1, 2003, at which time Debtors moved back to the Bridgeport Property which was still owned by Debtors.

In February 2004 Creditor obtained a state court judgment against Debtors for unpaid truck fuel invoices; and on March 2, 2004, Creditor recorded an abstract of judgment in Wise County based on the state court judgment. The Decatur Property was sold at foreclosure on June 1, 2004, and a Substitute Trustee's Deed was filed in Wise County on June 14, 2004. On June 24, 2004, Debtors filed for chapter 7 relief under the Bankruptcy Code[2] and claimed the Bridgeport Property as exempt on Schedule C.

## DISCUSSION

### The Objection

Creditor objects to Debtors' Schedule C homestead exemption related to the Bridgeport Property.[3] "An exemption is an interest withdrawn from the estate (and hence from the creditors)

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[2] 11 U.S.C. §§ 101-1330 (2004) (hereafter the "Code").

[3] The court notes that the Objection apparently refers to Debtors' original Schedule C filed June 24, 2004, which claimed the Bridgeport Property as exempt under Texas law. However, Debtors' Amended Schedule C filed June 30, 2004, claimed "NONE" as exempt property and Debtors' most recent Amended Schedule C filed July 13, 2004, claimed only a Great Dane trailer and a utility trailer as exempt property. Neither the first Amended Schedule C nor the second Amended Schedule C claimed the Bridgeport Property as exempt. Although the court is cognizant that the first Amended Schedule C appears to render moot the original Schedule C, and neither the first Amended Schedule C nor the second Amended Schedule C thereafter claimed the Bridgeport Property as exempt, the parties at the hearing did not question the ongoing validity of Debtors' original Schedule C. Indeed, the parties' arguments at the hearing presumed a validly existing claimed exemption in connection with the Bridgeport Property. The court accepts the parties' acquiescence regarding the validity of Debtors' original Schedule C and concludes that to now insist that Debtors file yet another Amended Schedule C to claim the Bridgeport Property as exempt, *see* FED. R. BANKR. P. 1009 (allowing debtors to amend schedules as a matter of course at any time before the case is closed), would not be in the interest of judicial economy, would inconvenience the parties, and would unnecessarily prolong the resolution of this issue.

for the benefit of the debtor." *Owen v. Owen*, 500 U.S. 305, 308 (1991). Code section 522 determines what property a debtor may exempt. *See* Code § 522. In Texas, a debtor may select between a specific list of federal exemptions, *see id.* § 522(d), or applicable state exemptions. *See id.* § 522(b)(1). Debtors' Schedule C shows that Debtors selected the Texas exemption scheme and claimed the Bridgeport Property as exempt pursuant to the Texas Constitution[4] and the Texas Property Code.[5] "The proper date for determining whether an exemption exists is, in the usual case, the date of filing of the bankruptcy petition." *Owen*, 500 U.S. at 314 n.6

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[4] In relevant part, the Texas Constitution provides:

> The homestead of a family, or of a single adult person, shall be, and is hereby protected from forced sale, for the payment of all debts except for:
>
> (1) the purchase money thereof, or a part of such purchase money;
>
> (2) the taxes due thereon . . . .

TEX. CONST. art. XVI, § 50 (2004).

[5] In relevant part, the Texas Property Code provides:

> (a) A homestead and one or more lots used for a place of burial of the dead are exempt from seizure for the claims of creditors except for encumbrances properly fixed on homestead property.
>
> (b) Encumbrances may be properly fixed on homestead property for:
>
> (1) purchase money;
>
> (2) taxes on the property . . . .

TEX. PROP. CODE ANN. § 41.001(a)-(b) (2004); and

> (a) If used for the purposes of an urban home or as both an urban home and a place to exercise a calling or business, the homestead of a family or a single, adult person, not otherwise entitled to a homestead, shall consist of not more than 10 acres of land which may be in one or more contiguous lots, together with any improvements thereon . . . .

*Id.* § 41.002(a).

(following the language of Code section 522(b)(2)(A)). "In any hearing under this rule, the objecting party has the burden of proving that the exemptions are not properly claimed." *See* FED. R. BANKR. P. 4003(c). *See also Perry v. Dearing (In re Perry)*, 45 F.3d 303, 311 (5th Cir. 2003); *Rubarts v. First Gibraltar Bank, FSB (In re Rubarts)*, 896 F.2d 107, 110 (5th Cir. 1990). Thus, Creditor has the burden of proving that Debtors' exemptions are not properly claimed.

Here, Creditor argues that its recorded abstract of judgment attached as a lien against the Bridgeport Property prior to any homestead exemption claimed by Debtors. Creditor insists that Debtors' failure to cancel or revoke the Voluntary Designation of Homestead related to the Decatur Property and failure to subsequently establish, designate, claim, or become eligible to claim the Bridgeport Property as homestead property pursuant to the Texas Property Code or the Texas Tax Code prior to attachment of Creditor's lien now bars Debtors from retroactively claiming the Bridgeport Property as exempt on Schedule C.

Debtors respond that at the time their chapter 7 petition was filed (1) the Decatur Property had been sold at foreclosure; (2) Debtors had no remaining ownership interest in the Decatur Property; (3) the only real property that Debtors owned was the Bridgeport Property which had been acquired by Debtors in 1985; (4) Debtors were residing at the Bridgeport Property as their principal residence and homestead; and (5) the Bridgeport Property consisted of less than ten acres and qualified for exemption under Texas law. Thus, Debtors argue the homestead exemption claimed on Schedule C was proper and Creditor's Objection to Debtors' exemption should not be sustained. The court agrees.

Mr. Durban testified at the hearing that, threatened with foreclosure on the Decatur Property, Debtors moved back to the Bridgeport Property on or about December 1, 2003, and that

Debtors have resided at the Bridgeport Property from that time to the present. Although Mr. Durban testified that Debtors are on the road in connection with their trucking business all but approximately eighteen hours per month, Mr. Durban also testified that from on or about December 1, 2003, Debtors intended the Bridgeport Property to be, and the Bridgeport Property in fact was, Debtors' principal place of residence and homestead.[6]

Given the limited number of hours per month Debtors used and occupied the Bridgeport Property, the court finds Creditor's belief that the Bridgeport Property appeared unoccupied by Debtors to be wholly understandable but unpersuasive. The parties do not dispute that Debtors have since 1985 continuously owned the Bridgeport Property or that the Bridgeport Property is designed or adapted for human residence. *See* note 6, (1)(A)-(B). Moreover, Mr. Durban's testimony at the hearing that the Bridgeport Property was in fact used and occupied by Debtors as their principal place of residence and homestead, *see* note 6, (1)(C)-(D), clearly supports a

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[6] The Texas Tax Code defines "residence homestead" as follows:

> (1) "Residence homestead" means a structure (including a mobile home) or a separately secured and occupied portion of a structure (together with the land, not to exceed 20 acres, and improvements used in the residential occupancy of the structure, if the structure and the land and improvements have identical ownership) that:
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> (A) is owned by one or more individuals, either directly or through a beneficial interest in a qualifying trust;
>
> (B) is designed or adapted for human residence;
>
> (C) is used as a residence; and
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> (D) is occupied as his principal residence by an owner or, for property owned through a beneficial interest in a qualifying trust, by a trustor of the trust who qualifies for the exemption.

TEX. TAX CODE ANN. § 11.13(j)(1) (2004).

finding that Debtors' Bridgeport Property qualifies as a "residence homestead" under the Texas Tax Code. Mr. Durban also testified that from on or about December 1, 2003, Debtors *actually resided* at the Bridgeport Property and *intended* to maintain the Bridgeport Property as their homestead, thus satisfying both the "overt acts" and "intention" elements necessary to establish the Bridgeport Property as homestead property under Texas law.[7]

Creditor argues, however, that Debtors must have formally applied for exemption of the residence homestead under the Texas Tax Code to claim entitlement to the exemption.[8] Because Creditor's search of the Wise County Tax Appraisal District records showed that Debtors had neither cancelled or revoked Debtors' previous homestead designation nor applied for an exemption under the Texas Tax Code, Creditor argues that Debtors are disallowed from now retroactively claiming the exemption. The court notes, however, that a Texas Court of Appeals recently considered a similar argument and determined that "[t]o hold that the mere failure to actually file a claim form would deprive the owner of the right to claim his homestead would be to negate the legislative intent." *Nichols v. Lincoln Trust Co.*, 8 S.W.3d 346, 350 (Tex.

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[7] To establish a homestead in Texas, "the claimant must show a combination of both overt acts of homestead usage and the intention on the part of the owner to claim the land as a homestead." *Segaline v. Bank of Am., N.A.*, No. EP-02-CA-185-DB, 2003 U.S. Dist. LEXIS 8349, at *10 (W.D. Tex. Apr. 18, 2003) (citing *Sanchez v. Telles*, 960 S.W.2d 762, 770 (Tex. App.–El Paso 1997, pet. denied). *See also Huggins v. Pierce*, No. A-98-CA-798 AWA, 200 U.S. Dist. LEXIS 20615, at *12 (W.D. Tex. June 21, 2000) (same).

[8] In relevant part, the Texas Tax Code provides:

> (a) To receive an exemption, a person claiming the exemption . . . must apply for the exemption. To apply for an exemption, a person must file an exemption application form with the chief appraiser for each appraisal district in which the property subject to the claimed exemption has situs.

TEX. TAX CODE ANN. § 11.43(a).

App.–Amarillo 1999, no pet.).[9] Finally, the Texas Tax Code provides that a claimed exemption does not apply if the property changes ownership.[10] Here, the parties do not dispute that Debtors no longer owned the Decatur Property after the foreclosure sale on June 1, 2004, and the filing of the Substitute Trustee's Deed on June 14, 2004. It is thus apparent that any exemption under the Texas Tax Code formerly associated with the Decatur Property was no longer applicable and did not conflict with Debtors' Schedule C claim of exemption as to the Bridgeport Property on June 24, 2004, the date of filing of Debtors' petition for relief.[11]

Because homesteads are "favorites of the law," the court "must give a liberal construction to the constitutional and statutory provisions that protect homestead exemptions." *Bradley v. Pac. Southwest Bank, FSB (In re Bradley)*, 960 F.2d 502, 507 (5th Cir. 1992). *See also In re Perry*, 345 F.3d at 316 (same). "Indeed, we [the Fifth Circuit] must uphold and enforce the Texas homestead laws even though in so doing we might unwittingly 'assist a dishonest debtor in wrongfully defeating his creditor.'" *In re Bradley*, 960 F.2d at 507. The court therefore finds that the Bridgeport Property is Debtors' principal place of residence and urban homestead under

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[9] Although the *Nichols* case was determined in the context of a trustor's, *see id.* § 11.13(j)(1)(D), request to extend its rights of redemption pursuant to a residence homestead exemption, the court finds *Nichols'* underlying reasoning applicable to the case at hand.

[10] "An exemption provided by Section 11.13 . . . applies to the property until it changes ownership or the person's qualification for the exemption changes." TEX. TAX CODE ANN. § 11.43(c).

[11] In any event, it appears to the court that Debtors remain eligible to file an application for homestead exemption pursuant to the following provision of the Texas Tax Code:

> (a) The chief appraiser shall accept and approve or deny an application for a residence homestead exemption after the deadline for filing it has passed if it is filed not later than one year after the delinquency date for the taxes on the homestead.

*Id.* § 11.431(a).

Texas law and that Creditor has not carried its burden to show that Debtors improperly claimed the Bridgeport Property as exempt property on Schedule C. Therefore, the Objection should be, and hereby is, **DENIED**.

**The Motion**

Debtors argue that Creditor's non-purchase money judicial lien improperly impairs Debtors' claimed homestead exemption and ask this court to avoid Creditor's lien pursuant to Code section 522(f).[12] Creditor asserts that because its lien attached to the Bridgeport Property nearly four months prior to Debtors' chapter 7 petition for relief Debtors cannot now retroactively claim a homestead exemption related to the Bridgeport Property in order to avoid Creditor's lien.

Section 522(f) does not on its face, however, require that a lien attach to property at a time when the property is exempt in order for it to be voidable. The reading of the provision that Creditor proposes would require that the court import into the statute such a requirement. It is inappropriate for the court to ignore the plain meaning of a provision of the Code by adding a requirement for the provision's operation that was not included by Congress. *See Toibb v. Radloff*, 501 U.S. 157, 162 (1991) (concluding that where resolution of a question of law turns on a statute, courts must look first to the statutory language); *Thompson v. Goetzmann*, 377 F.3d

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[12] Code section 522(f) provides in relevant part:

> (f)(1) Notwithstanding any waiver of exemptions . . . the debtor may avoid the fixing of a lien on an interest of the debtor in property to th extent that such lien impairs an exemption to which the debtor would have been entitled . . . if such lien is–
>
> (A) a judicial lien . . . .

Code § 522(f)(1)(A).

489, 498 n.19 (5th Cir. 2003) (determining that the canons of statutory construction dictate that a court "should not render as meaningless the language of the statute"). Rather, where, as here, the meaning of the statute is plain, the court should adopt that meaning unless it would lead to an absurd result. *See Lamie v. United States Trustee*, 540 U.S. 525, ____, 124 S. Ct. 1023, 1030 (2004) (concluding that when the language of a statute is plain and does not lead to an absurd result, the sole function of the court is to enforce the statute according to its terms). While the court does agree with Creditor that the result in the case at bar can be seen as odd, it is not absurd. Indeed, other courts have read section 522(f) as do Debtors. *See Tower Loan of Miss., Inc. v. Maddox (In re Maddox)*, 15 F.3d 1347, 1351-52 (5th Cir. 1994) (explaining that a reading of section 522(f) to mean that a lien must attach to an *exemptible* interest of the debtor "makes an impermissible leap of logic" because the statute merely states "an interest of the debtor *in property*," not an interest of debtor in exempt property) (emphasis in original) (citing *Farrey v. Sanderfoot*, 500 U.S. 291, 296 (1991).[13]

As to Creditor's argument that its lien is a "statutory" rather than "judicial," Creditor's reliance on state law is misplaced. Both "statutory lien"[14] and "judicial lien"[15] are defined by the

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[13] The court emphasizes the significance of the distinction between exempt property being determined "on the date of the filing of the petition," *see* Code § 522(b)(2)(A), *not* when a lien becomes "fixed." *See Owen*, 500 U.S. at 314. *See also Patriot Portfolio, LLC v. Weinstein (In re Weinstein)*, 164 F.3d 677, 684 (1st Cir. 1999) (opinion by Senior Circuit Judge Reavley, sitting by designation) ("[T]he Supreme Court's . . . analysis turned on whether the debtor had acquired an ownership interest in the property before the lien attached, and not whether the debtor had acquired the homestead exemption before the lien attached."). Creditor's argument that its lien became fixed prior to the date of the filing of the petition and Debtors' claim of exemption is of no consequence to the ultimate determination of avoidability in compliance with current law.

[14] "Statutory lien" is defined as a

> lien arising solely by force of a statute on specified circumstances or conditions, or lien of distress for rent, whether or not statutory, but does not include security interest

Code. Creditor's lien clearly falls within the Code's definition of judicial lien, *see* Code § 101(36), and the definition of statutory lien specifically excepts from its scope judicial liens. *See* Code § 101(53). The court must look to these definitions in construing section 522(f); state law simply does not affect whether or not Creditor's lien is a judicial lien. *See also In re Maddox*, 15 F.3d at 1356 (holding that the particular liens that may be avoided on property eligible for exemption under state law "are determined by reference to federal law").

Creditor directs the court's attention to *Bessent v. United States (Farmers Home Admin.) (In re Bessent)*, 831 F.2d 82 (5th Cir. 1987), for the general proposition that the applicability of section 522(f) is precluded by the built-in limitations of the Texas exemption scheme which specifically excludes encumbered property from qualifying as exempt. Creditor's Post-Trial Brief urges that "whatever one's view may be, no case has been located which specifically overrules [*In re Bessent*] and it is respectfully urged that in at least the 5th Circuit we are obligated to follow it's [sic] holding until being specifically overruled." The court would agree if that were in fact the case, but the Fifth Circuit did specifically overrule *In re Bessent*. *See In re Maddox*, 15 F.3d at 1348-51, 1356 (explaining that section 522(f)'s inoperability *vis-à-vis* the built-in limitations of the Texas exemption statute was first set out in *McManus v. Avco Fin. Servs. of La., Inc. (In re McManus)*, 681 F.2d 353 (5th Cir. 1982), and subsequently applied by

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> or judicial lien, whether or not such interest or lien is provided by or is dependent on a statute and whether or not such interest or lien is made fully effective by statute.

Code § 101(53).

[15] "'Judicial lien' means lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding."

*Id.*. § 101(36).

the Court in *Allen v. Hale County State Bank (In re Allen)*, 725 F.2d 290 (5th Cir. 1984), and *In re Bessent*; acknowledging that "*McManus* and our subsequent opinions grounded in it [*Allen* and *Bessent*] have been overruled by *Owen*"; and holding that "although states remain free to define the property eligible for exemptions under § 522(b), the particular liens that may be avoided on that property are determined by reference to federal law; specifically, § 522(f) of the Bankruptcy Code").

The Supreme Court in *Owen* interpreted section 522(f)(1) to require bankruptcy courts to ask (1) whether the debtor had an interest in the property before the lien attached; and (2) whether avoidance of the lien would entitle the debtor to a state or federal exemption for which the debtor *would have been entitled* but for the lien itself. *Owen*, 500 U.S. at 310-11 (emphasis in original). *See also In re Maddox*, 15 F.3d at 1351-52 (same); *In re Weinstein*, 164 F.3d at 680 (same). Here, the parties do not dispute that Debtors purchased the Bridgeport Property in 1985 and that Debtors had an interest in the Bridgeport Property before Creditor's lien attached. Accordingly, the court holds that the first *Owen* element has been satisfied.

With regard to the second *Owen* element, *i.e,* whether the judicial lien impairs an exemption to which Debtors would otherwise have been entitled, the court holds that it, too, has been satisfied. In Texas, homesteads are exempt "except for encumbrances properly fixed" on the property. *See* TEX. PROP. CODE ANN. § 41.001(a). "Encumbrances properly fixed" on Debtors' homestead property for purposes relevant to the instant case include "purchase money" liens. *See id.* § 41.001(b). The parties do not dispute that Creditor's lien against the Bridgeport Property is *not* a purchase money lien. Therefore, the court finds that Creditor's lien is not an

encumbrance properly fixed on the Bridgeport Property and, but for Creditor's lien, Debtors would have been entitled to claim the Bridgeport Property as exempt.

Accordingly, because Debtors (1) had an interest in the Bridgeport Property prior to the fixing of Creditor's judicial lien and (2) would have otherwise been entitled to a homestead exemption under Texas law but for the lien, the court finds that Creditor's lien must be avoided[16] and the Motion should be, and hereby is, **GRANTED**.

## CONCLUSION

Consistent with the court's reasoning set forth herein, **IT IS HEREBY ORDERED** that

(1) the Objection be, and hereby is, **DENIED**;

(2) the Motion be, and hereby is, **GRANTED**; and

(3) the Motion for Sanctions, withdrawn by Debtors at the hearing, be, and hereby is, **DENIED** as moot.

**SO ORDERED** this 20th day of December 2004.

DENNIS MICHAEL LYNN
UNITED STATES BANKRUPTCY JUDGE

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[16] *See Owen*, 500 U.S. at 312-13 (agreeing that "if avoiding the lien would entitle the debtor to an exemption, then avoid . . . the lien . . .").