

U.S. BANKRUPTCY COURT
District of South Carolina

Case Number: 08-06016

ORDER AVOIDING JUDICIAL LIENS

The relief set forth on the following pages, for a total of 6 pages including this page,
is hereby ORDERED.

FILED BY THE COURT
11/26/2008



Entered: 12/01/2008

US Bankruptcy Court Judge
District of South Carolina

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA**

IN RE:

C/A No. 08-06016-DD

Cheryl Dukes McGee,

Chapter 7

Debtor.

ORDER AVOIDING JUDICIAL LIENS

THIS MATTER is before the Court on Cheryl Dukes McGee's ("Debtor") Motion to Avoid the Judicial Lien ("Motion") of Coldwell Banker, now succeeded in interests by Cadlerock, LLC ("Creditor"). Debtor's Motion, pursuant to 11 U.S.C. § 522(f)(1)(A)¹, seeks the avoidance of Creditor's lien on the ground that it impairs Debtor's homestead exemption in her interest in the residence she owns at 228 Archdale Drive, Aiken, South Carolina. Creditor objected to Debtor's Motion and a hearing was held on November 12, 2008. After considering the pleadings in the matter and the arguments of counsel at the hearing on the Motion, the Court makes the following Findings of Fact and Conclusions of Law pursuant to Fed. R. Civ. P. 52, made applicable in bankruptcy proceedings by Fed. R. Bankr. P. 7052 and 9014.²

FINDINGS OF FACT

1. Debtor owns a lot improved by a house located at 228 Archdale Drive, Aiken, South Carolina. Debtor uses this property as her residence.
2. The fair market value of the property, as reflected in Debtors' Schedules, is \$143,000.
3. Coldwell Banker, now succeeded in interests by Cadlerock, LLC, obtained judgment in New Jersey against the Debtor on November 4, 2005 in the amount

¹ Further reference to the Bankruptcy Code, 11 U.S.C. § 101 *et seq.*, will be by section number only.

² To the extent any Findings of Fact constitute Conclusions of Law, they are adopted as such. Further, to the extent any Conclusions of Law constitute Findings of Fact, they are so adopted.

of \$108,579.20. This judgment was domesticated in South Carolina on November 17, 2006.

4. Debtor refinanced the mortgage on her home and granted a lien in the amount of \$173,000 to Beneficial on November 27, 2006.
5. The evidence presented established that the Debtor began the process of refinancing her mortgage prior to the domestication of the New Jersey judgment. The public records concerning Debtor's property were examined prior to the domestication of the judgment. Thereafter, but before the recording of the Beneficial mortgage, the judgment was domesticated and filed of record in South Carolina.
6. Debtor is a real estate agent. According to Debtor's Schedule I, she has worked as an independent contractor with Meybohm Realtors for three years. Debtor's Schedule D reports that Creditor's judgment lien arises from a business related debt.
7. Creditor filed a timely objection to the Motion and asserts that its judgment lien should be treated as a fully secured claim and should not be avoided.

CONCLUSIONS OF LAW

Creditor argues that the judicial lien may not be avoided because (1) as a result of Debtor's refinancing her mortgage Cadlerock has a first lien on the real estate, with priority over all other judgments and mortgages, and (2) Debtor is not entitled to the equitable relief she seeks as a result of her "unclean hands." Section 522(f)(1)(A) provides that "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.”

The parties do not dispute that the lien is a “judicial lien” within the scope of § 522(f)(1)(A) and they further agree that Creditor’s lien is a first priority encumbrance on Debtor’s residence. In keeping with precedent within this district, the Court must determine whether the lien in question impairs an exemption to which the Debtor would otherwise be entitled under § 522(b) and S.C. Code Ann. § 15-41-30.³ See *In re Freeman*, 259 B.R. 104, 107 (Bankr. D.S.C. 2001).

Through the Bankruptcy Reform Act of 1994, Congress attempted to clarify § 522(f)(1) by providing a mathematical formula to gauge impairment of exemptions. Section 522(f)(2) provides:

(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.

The fact that a judicial lien is a first lien is of no consequence in the calculation. *In re Freeman*, 259 B.R. at 112. The *Freeman* analysis is in keeping with the legislative history indicating the effect of the amendment to §522(f)(2) was to overrule *In re Simonson*, 758 F.2d 103 (3d Cir. 1985), in which the Third Circuit Court of Appeals held that a judicial lien could not be avoided in a case in which it was senior to a nonavoidable

³ S.C. Code Ann. § 15-41-30 provides:

The following real and personal property of a debtor domiciled in this State is exempt from attachment, levy, and sale under any mesne or final process issued by any court or bankruptcy proceeding:

(1) the debtor’s aggregate interest, not to exceed fifty thousand dollars in value, in real property or personal property that the debtor or a dependent of the debtor uses as a residence

mortgage and the mortgages on the property exceeded the value of the property. *Id.* at 108 (citing, H.R. Rep. No. 835, 103rd Cong., 2d Sess. 52-54 (1994), reprinted in 1994 U.S.C.C.A.N. 3340, 3361-63).

The Court adopts Judge Waites' interpretation of § 522(f)(2) outlined in *Freeman*.

Application of § 522(f)(2) leads to the following result:

Name of Creditor	a) Amount of Judicial Lien	b) Total Amt. + of all other Liens	c) Amount + of exemption = Claimed	d) Enter Amount	e) Value of Debtor's interest in property	f) Amt. of Judicial Lien to be Avoided (To the extent d > e)	g) Amt. of Judicial Lien Not Avoided
Coldwell Banker	108,579.20	\$173,000.00	\$50,000.00	\$331,579.20	\$143,000.00	\$108,579.00	\$0

This result is consistent with Congressional and the plain meaning of § 522(f)(2).

Creditor argues that Debtor has unclean hands and should be precluded from receiving the benefit of avoidance of the lien. Creditor argued that Debtor, a real estate agent, knew of the existence of the New Jersey judgment and of the possibility that it could follow her to South Carolina. Creditor claims that Debtor had a duty to inform Beneficial of the judgment. This disclosure, Creditor asks the Court to surmise, would have protected it. A party will have unclean hands where the party behaves “unfairly in a matter that is the subject of the litigation to the prejudice of the opposing party.

Anderson v. Buonforte, 617 S.E.2d 750, 755-56 (S.C. App. 2005) (citing *Ingram v. Kasey's Assocs.*, 531 S.E.2d 287, 292 (2000)). Creditor provided no evidence or testimony and therefore failed to persuade the Court of unclean hands on the part of Debtor.

From the arguments discussed above, it is ORDERED that Creditor's judicial lien in the amount of \$108,579.20 is avoided in full pursuant to § 522(f)(1)(A) and (f)(2).

AND IT IS SO ORDERED.

Columbia, South Carolina
November 25, 2008