

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEW MEXICO

In re:  
RAYMOND L. VIGIL,  
Debtor.

No. 13-10-13978 SA

**ORDER DENYING MOTION TO AVOID JUDICIAL LIEN**

This matter came before the Court for a preliminary hearing on the Debtor's Motion to Avoid Judicial Lien with BAC Home Loans Servicing ("BAC")<sup>1</sup>. Debtor was self-represented. BAC was represented by attorney Karen Bradley. The Court finds that the Motion should be denied. Debtor seeks to avoid BAC's lien on his exempt homestead.

Debtor seeks to use 11 U.S.C. §522(f) to avoid the lien.

That section states:

- (f) (1) [T]he 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, ... ; or
  - (B) a nonpossessory, nonpurchase-money security interest in any--
    - (i) household furnishings, household goods, wearing apparel, appliances, books, animals, crops, musical instruments, or jewelry that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor;
    - (ii) implements, professional books, or tools, of the trade of the debtor or the trade of a dependent of the debtor; or
    - (iii) professionally prescribed health aids for the debtor or a dependent of the debtor.

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<sup>1</sup>Creditor entered its appearance as "BAC Home Loans Servicing, L.P. fka Countrywide Home Loans Servicing, L.P."

Subsection (f)(1)(B) does not apply in this case, because it pertains only to liens in a debtor's personal property, not real property. Thus, the only issue is whether BAC's interest in Debtor's home is a "judicial lien" that is subject to avoidance by the debtor under § 522(f)(1)(A). If BAC's interest is anything other than a "judicial lien," § 522(f)(1)(A) does not apply.

The word "lien" is defined in the Bankruptcy Code as a "charge against or interest in property to secure payment of a debt or performance of an obligation[.]" 11 U.S.C. § 101(37). A "judicial lien" is defined as a "lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding[.]" Id. at § 101(36). A "security interest" is a "lien created by an agreement[.]" Id. at § 101(51). The latter consensual lien is very different from a "judicial lien," and it is not subject to avoidance under § 522(f)(1)(A). See, e.g., Nichols v. BJ Fox Enterprises, Inc. (In re Nichols), 265 B.R. 831, 834 (10<sup>th</sup> Cir. BAP 2001).

At the hearing, Debtor stated that he granted a first mortgage to Countrywide. It is now held by BAC, which filed a state court foreclosure suit when Debtor fell behind. The attachment to Debtor's motion shows that the state court granted a summary judgment of foreclosure, and set a sale for August 10,

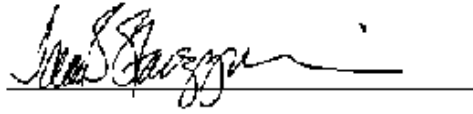
2010. Debtor filed this Chapter 13 case on August 6, 2010, before the sale.

BAC's interest in Debtor's homestead to secure payment of the Debtor's mortgage to Countrywide was not obtained by judgment, levy, sequestration, or other legal or equitable process, but rather arose as a result of the agreement between the Debtor and Countrywide. Accordingly, as defined by § 101(51), BAC's lien is a "security interest," and § 522(f)(1)(A) does not apply.

Furthermore, BAC's security interest was not transformed into a judicial lien as a result of the state court's foreclosure decree. Thompson v. Unruh (In re Thompson), 240 B.R. 776, 781 (10th Cir. BAP 1999)("It is the origin of the creditor's interest rather than the means of enforcement that determines the nature of the lien." Just because a creditor resorts to the judicial process to enforce the lien, it does not mean the lien is a judicial lien.)(citing In re Sanders, 61 B.R. 381, 383 (Bankr. D. Kansas 1986)).

Therefore, the Court finds that BAC does not have a "judicial lien" and Debtor may not use 11 U.S.C. § 522(f)(1) to avoid it.

IT IS ORDERED that Debtor's Motion to Avoid Judicial lien is denied.



Honorable James S. Starzynski  
United States Bankruptcy Judge

Date Entered on Docket: September 10, 2010

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