

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
THOMASVILLE DIVISION

IN RE: :
: :
JAMES RUSSELL SMITH, and : CASE NO. 05-60736 JTL
: CHAPTER 7
KIMBERLY HELEN SMITH :
: :
Debtors. :
:

MEMORANDUM OPINION

This matter is before the Court on motion of Debtors to avoid the judicial lien of Carolyn J. Smith (hereinafter, "Creditor Smith"). Creditor Smith's lien attached to Debtors' property described as house and 8.34 acres located at 663 Whitfield Road, Moultrie, Georgia. On December 21, 2005, the Court held a hearing on Debtors' motion to avoid lien and the response of Creditor Smith.

At the conclusion of the hearing, the Court took under advisement the issue of whether Creditor Smith's judgment lien impaired Debtors' homestead exemption so as to authorize avoidance of the judicial lien under § 522(f)(1) of the United States Bankruptcy Code (hereinafter, the "Code"). After considering the briefs submitted by the respective parties, arguments of counsel, and the pertinent statutory and case law, the Court, for the reasons given below, holds that should Debtors later amend their schedules to exempt a portion of the value of the property to which the judicial lien in question attached and

that exemption is allowed, the judicial lien of Creditor Smith will be avoided in its entirety in accordance with § 522(f) of the Code.

PROCEDURAL HISTORY

Debtors James Russell Smith and Kimberly Helen Smith filed for bankruptcy protection under Chapter 7 of the Code on August 1, 2005. On October 6, 2005, Debtors filed their Motion to Avoid Judicial Lien of Carolyn J. Smith. Creditor Smith responded to Debtors' motion on October 18, 2005. On October 19, 2005, Creditor Smith filed a motion for relief from automatic stay and a notice of hearing setting the same motion down for hearing on December 21, 2005 in Thomasville. On November 11, 2005, Creditor Smith filed a notice of hearing setting Debtors' Motion to Avoid Lien and Creditor Smith's objection for hearing also on December 21, 2005 in Thomasville.

On December 21, 2005, the Court held a hearing on the two matters. The Court granted Creditor Smith's Motion for Relief from Automatic Stay and an order granting relief from automatic stay as to real property located at "653 Whitefield Road, Moultrie, Georgia" was signed on December 26, 2005.¹ The Court

¹ According to Debtors' petition, Debtor husband's street address is "663 Whitefield Road, Moultrie, Georgia" and Debtor wife's street address is "663 Whitfield Road, Moultrie, Georgia." Schedule A filed with Debtors' petition lists the only real property claimed by Debtors as located at "663 Whitfield Road, Moultrie, Georgia." Further, Debtors' amended Schedule D filed on October 6, 2005 lists Carolyn J. Smith as the holder of a secured claim pertaining to property at "663 Whitfield Road, Moultrie, Georgia." The street number "653" was used in Creditor Smith's Motion for Relief from

took Debtors' Motion to Avoid Judicial Lien and Creditor Smith's objection under advisement asking the parties to file briefs on the matter. Both Debtors and Creditor Smith filed briefs with the Court.

FINDINGS OF FACT

Debtors, in Schedule A, claim joint ownership in real property located at 663 Whitfield Road, Moultrie, Georgia.² This real property is composed of a house and 8.34 acres of land. The claimed current market value of Debtors' interest in the property without deductions for secured claims or exemptions is \$187,455.³ Debtors' real property is encumbered by the following liens in order of stipulated priority: (1) a first mortgage held by Colony Bank in the scheduled amount of \$35,000.00; (2) the judicial lien of Creditor Smith in the scheduled amount of \$27,394.36; and (3) a second mortgage held by Citifinancial in the scheduled amount of \$155,521.85.⁴

On March 3, 2005, Creditor Smith recorded a judicial lien against Debtors' real property located at 663 Whitfield Road,

Automatic Stay and in the order granting that motion. The Court will assume that a scrivener's error was made either by Debtors in preparing their petition and schedules, or, most likely, by Creditor Smith in the preparation of her motion for relief and the related order. The Court will consider the error harmless as Debtors have claimed no other real property in their schedules and as the error in no way affects the issue before the Court today.

² See Debtors' Bankruptcy Petition, Schedule A (Aug. 1, 2005).

³ *Id.*; no additional evidence as to value of the property was submitted by Creditor Smith.

⁴ The nature, priority, and amount of each secured claim was stipulated by the parties at the hearing.

Moultrie, Georgia.⁵ Creditor Smith's security interest in Debtors' real property arose by virtue of a writ of fieri facias issued on that same date in the State Court of Colquitt County, Georgia and against Debtor husband James Russell Smith only.

According to Debtors' amended Schedule C filed October 6, 2005, Debtors have not scheduled a claim of exemption in the abovementioned real property.

DISCUSSION AND CONCLUSIONS OF LAW

I. History, Background, and Rule of Law

The issue before the Court is whether the judicial lien of Creditor Smith may be avoided in its entirety where the judicial lien is subordinate to a consensual, non-avoidable first mortgage lien, is senior to a consensual, non-avoidable second mortgage lien, and there remains no equity in the property. Section 522(f)(1)(A) of the Code grants courts the authority to avoid judicial liens where those liens *impair* an exemption of the debtor. Because Debtors' case was filed after October 22, 1994 but before October 17, 2005⁶, the provisions enacted by the Bankruptcy Reform Act of 1994 (hereinafter, the "Reform Act")

⁵ See Debtors' Motion to Avoid Judicial Lien (Oct. 6, 2005); Creditor Smith's Response to Debtors' Motion to Avoid Judicial Lien (Oct. 18, 2005).

⁶ Effective date of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (hereinafter, "BAPCPA"). BAPCPA did not, however, alter the pertinent parts of the provisions applicable to the issues before the Court today.

are applicable. Section 522(f)(1)(A) provides in pertinent part as follows:

Notwithstanding any waiver of exemptions but subject to paragraph (3), 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 lien⁷

When considering whether a lien may be avoided, the Court must: first, ascertain the nature of the lien sought to be avoided; second, identify the property to which that lien attaches; and third, determine whether the lien "*impairs* an exemption to which the debtor would have been entitled."⁸ Congress aided courts in the application of § 522(f) by codifying an arithmetic formula for determining whether a lien "shall be considered to impair an exemption." Section 522 (f)(2) provides as follows:

(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.

⁷ 11 U.S.C. § 522(f)(1)(A) (2005) (emphasis added).

⁸ *Id.*

(B) In the case of a property subject to more than 1 lien, a lien that has been avoided shall not be considered in making the calculation under subparagraph (A) with respect to other liens.⁹

Prior to the addition of this provision by the Reform Act in 1994, there was disagreement among the courts as to how § 522(f)(1) should be applied. The courts were split among those adopting a more strict reading of the Section¹⁰ and those that adopted a more broad reading, including this Court.¹¹ The issue before the addition of § 522(f)(2) was:

Does section 522(f) entitle the Debtor to avoid all of [the creditor's] lien, or only that portion that actually interferes with (i.e., is equal to) his . . . exemption? Stated another way: Does section 522(f) contemplate a "carve out" of that portion of a lien necessary to accommodate a debtor's exemption and subordination of the remainder of the lien, or does it contemplate complete avoidance of the lien?¹²

This Court addressed this pre-Reform Act issue in the case of *Ward v. Federal Deposit Insurance Corp. (In re Ward)*.¹³ In *Ward*, the debtor claimed no equity in certain properties claimed as exempt over and above the consensual liens on the property and

⁹ 11 U.S.C. § 522(f)(2) (2005).

¹⁰ The more strict, plain-meaning approach was referred to as the "carve-out" approach and was adopted in such cases as *Wrenn v. American Cast Iron Pipe Co. (In re Wrenn)*, 40 F.3d 1162 (11th Cir. 1994) and *Hunter v. Dean Witter Financial Services, Inc. (In re Hunter)*, 1994 WL 16005197 (Bankr. S.D. Ga. Oct. 31, 1994).

¹¹ See *Ward v. Federal Deposit Insurance Corp. (In re Ward)*, 1995 WL 444250 (Bankr. M.D. Ga. Nov. 21, 1994) (Laney, J.).

¹² *In re Thomsen*, 181 B.R. 1013 (Bankr. M.D. Ga. 1995) (Walker, J.) (citing *Hunter v. Dean Witter Financial Services, Inc. (In re Hunter)*, 1994 WL 16005197 (Bankr. S.D. Ga. October 31, 1994)).

the allowable exemption. The judgment creditor held a judicial lien on debtor's property totaling over \$450,000. This Court reasoned that the "concept of impairment should not be construed restrictively but in a manner consistent with the 'fresh start' purpose of the Bankruptcy Code"¹⁴ and held that the judicial lien was avoided in its entirety so as to allow the debtor to benefit from the post-petition appreciation in value of the exempt properties and any post-petition build up of equity that could be paid upon a future sale of the properties.¹⁵ This Court recognized in *Ward* that a judicial lien lacking supportive equity would place a "cloud" on a debtor's title or interest as well as on a debtor's right to use and enjoy exempt property in the future. This result would be in direct conflict with the exemption laws intended to effectuate the "fresh start" purpose of the Bankruptcy Code.¹⁶

Shortly after *Ward*, the Eleventh Circuit Court of Appeals chose not to adopt this more broad application of § 522(f) and, instead, in the pre-Reform Act case of *Wrenn v. American Cast Iron Pipe Co.*,¹⁷ adopted the reasoning and rule of the Ninth Circuit set out in *In re Chabot*.¹⁸ The Eleventh Circuit held in *Wrenn* that the plain meaning of the language in § 522 limited

¹³ 1994 WL 16005197.

¹⁴ *Id.* at *9.

¹⁵ *Id.* at *1.

¹⁶ *Id.* at *9.

¹⁷ 40 F.3d 1162 (11th Cir. 1994) (decided Dec. 22, 1994).

¹⁸ 992 F.2d 891 (9th Cir. 1993).

lien avoidance to the value of any allowed exemptions. In other words, the liens could only be partially avoided so as to "carve out" that portion necessary to preserve the exemption of the debtor.

As mentioned before, however, Congress intended to simplify lien avoidance determination with the addition of § 522(f)(2) in 1994. Not only did Congress adopt the simple arithmetic formula for determining impairment, but Congress also clearly stated in its report on § 522(f) that the addition was intended to counter several court decisions that had reached results not intended by Congress when it drafted the Code.¹⁹ According to the legislative history of § 522(f)(2), the arithmetic formula was intended by Congress to be an adoption of the formula set out by the Bankruptcy Court of the Eastern District of Pennsylvania in the case of *In re Brantz*,²⁰ which was favorably cited by the United States Supreme Court in the case of *Owen v. Owen*.²¹

One of the decisions Congress indicated it intended to overrule with the addition of § 522(f)(2) was *In re Simonson*,²² decided by the Third Circuit Court of Appeals in 1985. In *Simonson*, the debtors' residence was valued at approximately \$58,000. The property was encumbered by the following liens²³ (in

¹⁹ See 140 Cong. Rec. H10752-01, H10769 (daily ed. Oct. 4, 1994).

²⁰ 106 B.R. 62 (Bankr. E.D. Pa. 1989).

²¹ 500 U.S. 305 (1991).

²² *Simonson v. First Bank of Greater Pittston (In re Simonson)*, 758 F.2d 103 (3rd Cir. 1985).

²³ Approximate amounts given for simplification.

order of priority): (1) first mortgage--\$25,000; (2) judicial lien #1--\$13,000; (3) judicial lien #2--\$1,000; and (4) second mortgage--\$41,000.²⁴ The debtors argued that the first mortgage would be unavoidable and should be paid, but that the two judicial liens should be avoided and the second and third priority positions preserved for the benefit of the debtors' exemption. Such treatment would leave approximately \$20,000 in value subject to the second mortgage. The debtor's argument rested heavily on § 522(i) of the Code, which permits the debtor to "recover in the manner prescribed by, and subject to the limitations of, § 550 of [the Code], . . . and may exempt any property so recovered under [§ 522(b)]."²⁵ Section 522(i)(2) permits the preservation of the avoided lien for the benefit of the debtor's exemption "to the extent that the debtor may exempt such property under subsection (g)."²⁶

The Third Circuit interpreted § 522(i)(2) to mean that preservation of avoided liens is available only where the property would be exempt in the absence of the avoided lien. In *Simonson*, no equity existed in the property above the unavoidable liens, which the majority concluded prevented any claim of exemption by the debtor. This reasoning led to the majority's conclusion that the debtor's exemption was not *impaired* by the

²⁴ *Simonson*, 758 F.2d at 105 (Becker, J., dissenting).

²⁵ 11 U.S.C. § 522(i) (2005).

²⁶ 11 U.S.C. § 522(i)(2) (2005).

judicial liens.²⁷

The Third Circuit was not persuaded by the debtors' arguments and held that considering the "unquestionably valid" first and second unavoidable mortgages, the debtors had no equity in their property, therefore, the liens were unavoidable because there was no interest of the debtors that could be *impaired* by the two judicial liens. The legislative history to § 522(f) states clearly that the Third Circuit reached the wrong result and that the position of the dissent in *Simonson* "is adopted."²⁸

The dissent in *Simonson* notes that the majority's conclusion was based on a plausible reading of the opaque § 522(f), but that a conclusion more consistent with the congressional policy underlying the provision existed.²⁹ The dissent stated that the intent of Congress in enacting the § 522(f) lien avoidance provision was to "provide debtors in a Chapter 7 proceeding with a 'fresh start,' including some equity in a residence, upon the conclusion of the bankruptcy proceedings."³⁰ The dissent concluded that "a judicial lien 'impairs' an exemption with respect to overencumbered property to the extent that the judicial lien, according to its *amount and priority position*,

²⁷ *Simonson*, 758 F.2d at 106 (Becker, J., dissenting). See 4 COLLIER ON BANKRUPTCY ¶ 522.11, at 522-83 (Alan N. Resnick & Henry J. Sommer eds., 15th ed., rev. 2006).

²⁸ See 140 Cong. Rec. H10752-01, H10769 (daily ed. Oct. 4, 1994).

²⁹ *Simonson*, 758 F.2d at 107 (Becker, J., dissenting).

³⁰ *Id.* at 107 (Becker, J., dissenting).

attaches to a portion of the value of the property."³¹ The dissent reasoned that the majority failed to recognize the difference between a debtor's "interest in property" and a debtor's "equity in property."³² The dissent posited that it is best to consider "interest of the debtor in property" for purposes of § 522(f) to encompass more than simply the equity in the property.

By enacting § 522(f), Congress created an exception to the general rule that where property is overencumbered, the estate at the commencement of the case will contain no value; therefore, the debtor will not be able to acquire any portion of the property for the benefit of his exemption.³³ Section 522(f) also creates an exception to the general rule that unsecured creditors bear the burden of debtor exemptions.³⁴ In essence, § 522(f) allows the debtor to create equity in exempt property by avoiding certain judicial liens.

The dissent in *Simonson*, also addressed the debtor's ability to preserve the position of avoided judicial liens for the future benefit of the debtor's exemption.³⁵ The dissent stated that a debtor's right to preserve the avoided liens for the benefit of an exemption stems from § 522(i), which provides:

(i)(1) If the debtor avoids a transfer or

³¹ *Id.*

³² *Id.* at 108 (Becker, J., dissenting).

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 111 (Becker, J., dissenting).

recovers a set-off under subsection (f) or (h) of [section 522], the debtor may recover in the manner prescribed by, and subject to the limitations of, section 550 of this title, the same as if the trustee had avoided such transfer, and may exempt any property so recovered under subsection (b) of this section.

(2) Notwithstanding section 551 of this title, a transfer avoided under . . . subsection (f) of this section . . . *may be preserved for the benefit of the debtor to the extent that the debtor may exempt such property under . . . paragraph (1) of this subsection.*³⁶

The dissent in *Simonson* concluded that a debtor could recover an avoided transfer under § 522(i)(1) and that § 522(i)(2) permitted a debtor to preserve the avoided transfer to the benefit of his exemption.³⁷ The dissent stated, "section 522(i)(2) permits the interest of the debtor's exemption to 'stand in the shoes' of the avoided judicial liens."³⁸ Such a holding would, in the dissent's view, prevent a "junior encumbrancer from receiving a windfall merely because the debtor chose to avoid the superior judicial lien."³⁹

II. Application

As stated above, a three step analysis is involved in determining whether a judicial lien should be avoided under § 522(f): first, ascertain the nature of the lien sought to be

³⁶ 11 U.S.C. § 522(i) (2005) (emphasis added).

³⁷ *Simonson*, 758 F.2d at 112 (Becker, J., dissenting).

³⁸ *Id.*

avoided; second, identify the property to which that lien attaches; and third, determine whether the lien "*impairs* an exemption to which the debtor would have been entitled."⁴⁰ The discussion above develops and explains what constitutes impairment of an exemption.

Section 522(f)(1) provides that *judicial liens* may be avoided where the general requirements of § 522(f) are satisfied. Section 101(36) defines the term "judicial lien" as a "lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding."⁴¹ The parties have stipulated that Creditor Smith's lien arose by way of a judgment against Debtor husband James Russell Smith. Creditor Smith's lien is, therefore, a judgment lien for purposes of § 522(f)(1). Section 522(f)(1)(A)(i) excludes application of the Section to judicial liens securing alimony, maintenance, or support obligations and § 522(f)(2)(C) excludes judicial liens arising out of a mortgage foreclosure. There is no evidence that the judicial lien of Creditor Smith either secures any alimony, maintenance, or support obligation, or arises out of a mortgage foreclosure. Therefore, § 522(f)(1) is available to consider whether the judicial lien of Creditor Smith is avoidable.

Regarding the property to which the judicial lien attached, it was stipulated by the parties that the lien of Creditor Smith

³⁹ *Id.*

⁴⁰ 11 U.S.C. § 522(f)(1)(A) (2005) (emphasis added).

attached to the real property located at 663 Whitfield Road, Moultrie, Georgia via writ of fieri facias issued March 3, 2005. The writ of fieri facias was issued in the State Court of Colquitt County, Georgia and against Debtor husband James Russell Smith only. Debtors claim in their schedules, and counsel for Debtors stated at the hearing, that the property is jointly owned.

The issue now is whether Creditor Smith's judicial lien "impairs an exemption to which the debtor would have been entitled."⁴² The nature and extent of a debtor's entitlement to an exemption in their real property is purely a question of Georgia law.⁴³ Once a debtor's exemption is established, the issue of impairment and avoidance becomes a question of federal law.⁴⁴ Section 44-13-100 of the Official Code of Georgia Annotated (hereinafter, the "O.C.G.A.") provides Georgia's "Exemptions for purposes of bankruptcy and intestate insolvent estates." O.C.G.A. §§ 44-13-100(a)(1) and (a)(6) provide:

(a) In lieu of the exemption provided in Code Section 44-13-1, any debtor who is a natural person may exempt, pursuant to this article, for purposes of bankruptcy, the following property:

(1) The debtor's aggregate interest, not to exceed \$ 10,000.00 in value, in real property or personal property that the debtor or a dependent of the debtor uses

⁴¹ 11 U.S.C. § 101(36) (2005).

⁴² 11 U.S.C. § 522(f)(1) (2005).

⁴³ *Hunter*, 1994 WL 16005197 at *13.

⁴⁴ *Id.*

as a residence, in a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence, or in a burial plot for the debtor or a dependent of the debtor. In the event title to property used for the exemption provided under this paragraph is in one of two spouses who is a debtor, the amount of the exemption hereunder shall be \$ 20,000.00; . . .

(6) The debtor's aggregate interest, not to exceed \$ 600.00 in value plus any unused amount of the exemption, not to exceed \$ 5,000.00, provided under paragraph (1) of this subsection, in any property; . . . ⁴⁵

Debtors' amended Schedule C, filed October 6, 2005, does not claim an exemption in the real property under either O.C.G.A. § 44-13-100(a)(1) or (a)(6). It would be improper for the Court to attempt to calculate the exemption Debtors may be entitled to receive. Debtors, if they wish to exempt a portion of the value of the real property listed in their schedules, should follow the proper procedure for amending their schedules and notice all appropriate parties giving an opportunity for objection. The Court assumes that Debtors did not claim an exemption in the real property because they claimed no *equity* in the real property. Because Debtors claimed no exemption in their real property, the Court's inquiry must be: If Debtors were entitled to an exemption in their real property, would the judicial lien of Creditor Smith be avoidable under § 522(f)?

⁴⁵ O.C.G.A. § 44-13-100(a)(1), (6) (2002).

Although the Court is forced to deal with a hypothetical exemption, the arithmetic formula set forth in § 522(f)(2)(A) can still be applied. That Section provides that a debtor's exemption is *impaired* IF THE SUM of (i) the lien under consideration (i.e., Creditor Smith's judicial lien); (ii) all other liens on the property (i.e., the first and second mortgages); and (iii) the amount of the exemption Debtors could claim if there were no liens on the property – EXCEEDS the value of Debtor's interest in the property in the absence of any liens.⁴⁶ The lien under consideration is the judicial lien of Creditor Smith valued at \$27,394.36. The other liens on the property are the first mortgage of Colony Bank in the amount of \$35,000.00 and the second mortgage of Citifinancial in the amount of \$155,521.85. The total of the judicial lien and the two consensual, unavoidable mortgages is \$217,916.21.⁴⁷ This figure must now be compared with "the value that the debtor's interest in the property would have in the absence of any liens."⁴⁸

Debtors valued their real property at \$187,455.00⁴⁹; at the hearing, Creditor Smith offered no evidence to the contrary. In her brief in opposition, however, Creditor Smith requested an opportunity to present evidence on the value of Debtors' property "in the event [] Debtors attempt to reopen their bankruptcy case

⁴⁶ 11 U.S.C. § 522(f)(2)(A) (2005).

⁴⁷ $\$27,394.36 + \$35,000.00 + \$155,521.85 = \$217,916.21$.

⁴⁸ 11 U.S.C. § 522(f)(2)(A)(iii) (2005).

⁴⁹ Debtors' Bankruptcy Petition, Schedule A (Aug. 1, 2005).

to assert [a] claimed exemption" ⁵⁰ The appropriate time for Creditor Smith to have offered evidence of value was at the December 21, 2005 hearing where value, obviously implicated by § 522(f), was at issue. Evidenced by the statement in her brief that "The fair market value of the real property is an important issue to begin the analysis set out by the cases cited herein," ⁵¹ Creditor Smith herself recognized that the value of Debtors' real property was at issue in determining whether her lien should be avoided under § 522(f). Accordingly, the Court hereby denies Creditor Smith's request to reopen evidence on the issue of valuation of Debtors' real property and will consider only that evidence of value presented at the hearing, i.e., Debtors' scheduled value, for purposes of determining whether Creditor Smith's judicial lien is avoidable.

This is a joint case with both the husband and wife participating as Debtors. Debtors valued their real property at \$187,455.00 in their schedules and claimed that the property was jointly owned. The judgment giving rise to Creditor Smith's judicial lien was against Debtor husband James Russell Smith only. At the hearing, it was stated by counsel for Debtors that Debtors owned the real property jointly. In Creditor Smith's brief in opposition, however, she stated that "the property is owned solely by [] [D]ebtor James Russell Smith with [] co-

⁵⁰ Creditor Smith's Brief in Opposition of Debtors' Motion to Avoid Judicial Lien, at 3 (Jan. 9, 2006).

[D]ebtor Kimberly Helen Smith having no legal interest in said property."⁵² This fact is of no consequence to today's inquiry as regards "the value that the debtor's interest in the property would have in the absence of any liens."⁵³ No matter whether the property is jointly owned by Debtors or whether one of Debtors owns the property individually, the value of the property for purposes of determining whether a lien is avoided under § 522(f) in a *joint* case would be the same. The same is true regardless of which of the two Debtors the judgment giving rise to the judicial lien was against. Notwithstanding, which Debtor has legal title to the property may be at issue in determining the amount of an exemption available, if any is claimed in the future. Debtors' interest in the property for purposes of applying § 522(f)(2)(A) is \$187,455.

In this case, the sum of Creditor Smith's judicial lien and the two mortgages on the property exceeds Debtors' interest in the property, absent any liens, by \$30,461.21. The sum of the liens exceeds Debtors' interest in the real property even without the addition of the possible, albeit unclaimed, exemption in the real property. It is apparent, therefore, that in accordance with the arithmetic formula of § 522(f)(2)(A), an exemption in the real property, if later claimed by Debtors and deemed allowed, would in fact be impaired by the judicial lien of

⁵¹ *Id.*

⁵² *Id.* at 1-2.

Creditor Smith. Where a qualifying judicial lien impairs an exemption of a debtor, then the judicial lien is avoidable in its entirety under § 522(f)(1). It is certainly the case in this situation that no non-exempt, unsecured value remains in the real property to allow Creditor Smith's lien to survive. Because of the second priority of Creditor Smith's judicial lien, Debtors' "exemption actually will benefit from the avoiding of the judicial lien."⁵⁴

In her brief, Creditor Smith argues that the cases of *Lehman v. VisionSpan, Inc. (In re Lehman)*⁵⁵ and *In re Taras*⁵⁶ provide how § 522(f)(2)(A) should be applied. In *Lehman*, the Eleventh Circuit Court of Appeals endorsed an interpretation of § 522(f)(2)(A) that departed from the literal reading of the Section and substituted the "total value of the real property" in place of the "value of the debtor's interest" as the Section calls for in the calculus it sets forth. The Eleventh Circuit affirmed this interpretation by the bankruptcy court to prevent the debtor husband in his *individual* case from sheltering his equity in the *jointly owned* real property at issue. Had the court applied § 522(f)(2)(A) literally and used the value of the debtor's one-half undivided interest in the formula, the judicial lien at issue would have been fully avoided and the debtor would

⁵³ 11 U.S.C. § 522(f)(2)(A)(iii) (2005).

⁵⁴ *Simonson*, 758 F.2d at 111 (Becker, J., dissenting).

⁵⁵ 205 F.3d 1255 (11th Cir. 2000).

⁵⁶ 304 B.R. 912 (Bankr. N.D. Ga. 2004).

have retained his entire equity of \$30,000. The Eleventh Circuit held that this would be an absurd result and applied § 522(f)(2)(A) as the bankruptcy court below had applied it.

The case at bar is distinguishable from *Lehman* in two critical respects. First, this is a joint case; therefore, the "value that the debtor's interest in the property would have had in the absence of any liens" would be the combined interest of both Debtors in this case. As mentioned above, it is unclear from the evidence before the Court and the pleadings, whether only Debtor husband owns the property or whether the property is jointly owned. Either way, the value of the interest, as stated above, would be the same. This would be the case even if § 522(f)(2)(A) was applied as it was in *Lehman*.

The second distinction is that there is no equity in the property that could be shielded by a mis-application of § 522(f)(2)(A). When the two unavoidable mortgages on the property are compared with the value of the property, there is no equity to be claimed, by either Debtor. Applying § 522(f)(2)(A) literally, as this Court has done above, would not, therefore, yield an absurd result in this case.

The second case cited by Creditor Smith, *In re Taras*, involves three liens, similar to the instant case, but like *In re Lehman*, jointly owned real property is at issue in an individual

debtor's case. The court in *Taras* concluded that *Lehman* and the Eighth Circuit Court of Appeals case of *Kolich v. Antioch (In re Kolich)*⁵⁷ both applied in part.⁵⁸ The court subtracted the first priority mortgage from the value of the property and then divided by two, like in *Lehman*, to arrive at the debtor's one-half undivided interest. The court then applied § 522(f)(2)(A), adding the second priority judicial lien, the debtor's half of a third priority IRS lien, and the debtor's maximum exemption in the real property. The result exceeded the debtor's undivided one-half interest in the real property by \$169,591. The court, therefore, avoided the judicial lien in its entirety holding that it impaired the exemption to which the debtor was entitled in the absence of any liens.⁵⁹

Again, like in *Lehman*, the case at bar differs from *Taras* in that this is a joint case. The value of the property for purposes of § 522(f)(2)(A) is the entire value of the property, regardless of whether Debtor husband owns the property individually or whether Debtors jointly own the property. Section 522(f)(2)(A) should, therefore, be applied literally as outlined above.

CONCLUSION

In accordance with the foregoing discussion, the Court holds

⁵⁷ 328 F.3d 406 (8th Cir. 2003).

⁵⁸ *Taras*, 304 B.R. at 915.

that the judicial lien of Creditor Smith will impair any exemptions later claimed by Debtors, if any, and is, therefore, avoidable in its entirety in accordance with § 522(f)(1) of the Code should any exemptions in Debtors' real property be claimed and allowed. Further, the Court holds that should Debtors later claim exemptions in their real property so as to trigger the avoidance of Creditor Smith's judicial lien, the avoided judicial lien in its second priority status, shall be preserved for the benefit of Debtors' exemption in accordance with § 522(i) and consistent with the dissenting opinion in *In re Simonson*.

DATED this 16th day of May, 2006.

/s/ John T. Laney, III
JOHN T. LANEY, III
UNITED STATES BANKRUPTCY JUDGE
MIDDLE DISTRICT OF GEORGIA

⁵⁹ *Id.*