

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI**

IN RE:

CASE NO. 05-55817

**HARRY DESAI
a/k/a HARESH DESAI**

CHAPTER 7

OPINION

The matter before the court is the debtor's motion to avoid the judicial lien of Dr. Ban Vu and Ngoc B. Nguyen. The debtor requests that the judgment be determined wholly unsecured and dischargeable and that the creditor be ordered to cancel the judgment of record. Having considered the matter, the court concludes that the motion should be granted.

I. FACTUAL BACKGROUND

An agreed judgment was entered in the United States District Court for the Southern District of Mississippi in favor of Dr. Ban Vu and Ngoc B. Nguyen and against Harry Desai in December 2004, in the amount of \$320,000.00, with post-judgment interest at the rate of 8% per annum.

On October 15, 2005, Hareesh Desai a/k/a Harry Desai, filed a petition for relief under Chapter 7 of the United States Code in the United States Bankruptcy Court for the Southern District of Mississippi. The debtor listed the district court judgment for \$320,000.00 owed to Dr. Ban Vu and Ngoc B. Nguyen in his bankruptcy schedules. Additionally, Dr. Ban Vu filed a proof of claim to which no objection has been filed.

The debtor filed his motion to avoid the judicial lien pursuant to 11 U.S.C. § 506 and §

522. The debtor contends that there is no equity to which the judgment lien can attach, and requests that the judgment be determined wholly unsecured and dischargeable, and the creditor ordered to cancel the judgment in the Judgment Rolls of the Circuit Clerk of Harrison County, Mississippi, or any other county or forum.

Briefs were submitted by the parties on the issues. The debtor's brief indicates that he is seeking to avoid the judicial lien to the extent it impairs his homestead exemption and that the issue for the court's determination is the appropriate manner of calculation to be utilized in determining whether the exemption is impaired. Therefore, the court's determination herein is made pursuant to 11 U.S.C. § 522(f). Procedural matters regarding whether an adversary proceeding is required, or whether relief pursuant to § 506 is appropriate are not in issue at this point and are not discussed by the court herein.

II. CONCLUSIONS OF LAW

The matter before the court is a core proceeding pursuant to 28 U.S.C. § 157. The court has jurisdiction over the parties and subject matter pursuant to 28 U.S.C. § 157 and § 1334.

The debtor seeks to avoid the judicial lien of Dr. Ban Vu¹ to the extent that it impairs his homestead exemption. Section 522 of the Bankruptcy Code provides, in part, the following:

11 USC § 522. Exemptions

(f)(1) 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

¹ The debtor's motion requests that the judgment of Dr. Ban Vu and Ngoc B. Nguyen be avoided. The responsive pleadings and the subsequent briefs are filed by Dr. Ban Vu only. Accordingly, the court refers to the position and arguments of Dr. Ban Vu.

entitled under subsection (b) of this section, if such lien is—

(A) a judicial lien . . .

(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.

(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.

(C) This paragraph shall not apply with respect to a judgment arising out of a mortgage foreclosure.

11 U.S.C. § 522(f)(1), (2).

Under this formula,² the court finds that the sum of:

\$320,000.00 (the lien)³

\$445,000.00 (all other liens on the property - the mortgage lien)

\$37,500.00 (the exemption the debtor could claim)⁴

equals \$802,500.00. That sum (\$802,500.00) exceeds the value of the debtor’s interest in the

² The numbers used here may be ultimately modified by the parties if necessary to account for appropriate balances and values. *But see, In re Wilding*, 475 F. 3d 428 (1st Cir. 2007)(the petition date is the operative date for determining the various § 522(f) calculations).

³ The judgment lien was in the amount \$320,000.00 with post-judgment interest. The brief of Dr. Ban Vu lists the amount as \$354,000.00. The court utilizes the amount listed in the judgment here and notes that the court’s conclusion would be the same regardless of which figure is used.

⁴ One-half of the \$75,000.00 homestead exemption provided under Miss. Code Ann. § 85-3-21 (1972), as amended, amounts to \$37,500.00. Even if the full \$75,000.00 homestead exemption amount were used in the formula, the result as to lien avoidance would not change. This ruling does not prevent joint owners from a consensual apportionment of the homestead exemption.

property (\$300,000.00 or one half of the full value of \$600,000.00)⁵, by \$502,000.00.⁶ Because the impairment to the debtor's exemption as calculated under the statute exceeds the value of the judicial lien, the entire lien should be avoided.

Based on this analysis, the court concludes that the debtor's motion to avoid the lien of Dr. Ban Vu and Ngoc B. Nguyen should be granted and the judicial lien avoided. An order will be entered consistent with these findings and conclusions pursuant to Federal Rule of Bankruptcy Procedure 9021 and Federal Rule of Civil Procedure 58. This opinion shall constitute findings and conclusions pursuant to Federal Rule of Bankruptcy Procedure 7052 and Federal Rule of Civil Procedure 52.

DATED this the 29th day of March, 2007.

/s/ Edward R. Gaines
EDWARD R. GAINES
UNITED STATES BANKRUPTCY JUDGE

⁵ See, *In re White*, 337 B.R. 686 (Bankr. N.D.Cal. 2005); (*Zeigler Engineering Sales, Inc. v. Cozad (In re Cozad)*, 208 B.R. 495 (10th Cir. BAP 1997).

⁶ If the debtor's interest were computed as \$314,750.00 (or one half of the value of \$629,500.00 as the other figure found in the debtor's schedules), the \$502,500.00 figure would be decreased to \$487,750.

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