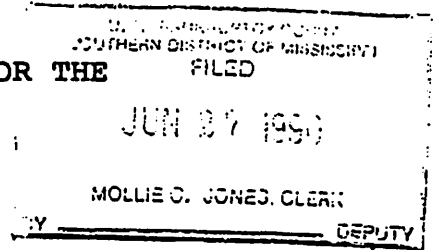


IN THE UNITED STATES BANKRUPTCY COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI
MERIDIAN DIVISION



IN THE MATTER OF:

NED LOUVIER McCORMICK

CASE NO. 8802053MC

RICHARD G. HANLEY

PLAINTIFF

vs.

ADV. NO. 880175MC

NED LOUVIER McCORMICK AND
LESLIE DAWN McCORMICK

DEFENDANTS

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Edward Ellington, Bankruptcy Judge

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A petition seeking an Order for Relief under 11 U.S.C. Chapter 7 was filed by Ned Louvier McCormick.

This adversary proceeding was commenced by the filing of a "Petition to Lift Automatic Stay, To Declare Value of Real Property Owned by the Debtor and To Enforce a Judgment Lien on the Excess

Value Over Any Lawful Exemption" by Richard G. Hanley and the United States of America.

After reviewing the pleadings and numerous briefs submitted to the Court, this Court finds that \$6,825.00 of Hanley's lien is nonavoidable under 11 U. S. C. § 522(f).

FINDINGS OF FACT

Ned Louvier McCormick (Debtor) filed for relief under Chapter 7 of the Bankruptcy Code on July 18, 1988. Robert G. Nichols was appointed the Chapter 7 Trustee.

This adversary proceeding was originally filed on behalf of Richard G. Hanley and the United States of America. On December 7, 1988, an order was entered dismissing the United States of America from this adversary proceeding. This order stated that the United States of America released any claim it had against Ned Louvier McCormick and Leslie Dawn McCormick in exchange for the Debtor and Leslie Dawn McCormick releasing any claim they might have against the United States of America.

In his schedule of debts, the Debtor listed a \$77,643.10 unsecured debt to Richard G. Hanley. This debt evolved from a judgment obtained by Hanley on February 1, 1971, in the original amount of \$35,000.00. Hanley had obtained this judgment in the United States District Court for the Southern District of Mississippi due to the damages he had received as the result of an automobile accident involving the Debtor. The judgment was

enrolled on February 1, 1971, on the Judgment Roll of Lauderdale County against the Debtor and his mother, Elizabeth Odom McCormick.

On March 27, 1977, the judgment was renewed and enrolled for the amount of \$47,425.00. On March 6, 1984, the judgment was again renewed and enrolled for the updated amount of \$72,808.41. On the date the Debtor filed his Chapter 7 petition, Hanley alleges that the judgment totaled \$98,254.42.

In early February 1988, Elizabeth Odom McCormick, Penne Ward and Vicki Grace quit-claimed their interests in Debtor's residence, 3400 Grandview Drive, and the adjacent vacant lot to the Debtor and his wife, Leslie Dawn McCormick. The Debtor now owns a 62.50% interest in the house (Lot 8) and a 56.25% interest in the vacant lot (Lot 9). The Debtor's wife, Leslie Dawn McCormick, owns a 37.50% interest in the house (Lot 8) and a 43.75% interest in the vacant lot (Lot 9). On the house (Lot 8), 75.00% is subject to Hanley's lien. On the vacant lot (Lot 9), 87.50% is subject to Hanley's lien.

On February 17, 1989, this Court held a hearing on the exclusive issue of valuation of the Debtor's homestead and the adjacent vacant lot. Based on the testimony presented to the Court, the Court set the value of the Debtor's homestead at \$37,000.00 and the adjacent vacant lot at \$1,800.00 (total of \$38,800.00).

The ultimate issue to be determined by the Court is to what extent may the Debtor avoid Hanley's judicial lien under 11 U.S.C. § 522(f).

CONCLUSIONS OF LAW

Before reaching the ultimate issue of § 522(f) lien avoidance, several other issues must first be resolved by the Court. The first issue to be resolved is what is the date of enrollment of the judicial lien involved in this case. Is it the date the judgment was first enrolled on February 1, 1971, or is it the date when the judgment was most recently renewed on March 6, 1984?

A

Miss. Code Ann. § 11-7-191 (1972) pertains to the lien of enrolled judgments. It states:

A judgment so enrolled shall be a lien upon and bind all the property of the defendant within the county where so enrolled, from the rendition thereof, and shall have priority according to the order of such enrollment, in favor of the judgment creditor...against the judgment debtor and all persons claiming the property under him after the rendition of the judgment. A judgment shall not be a lien on any property of the defendant thereto unless the same be enrolled....

Miss. Code Ann. §§ 15-1-43 and 15-1-47 (1972) establish the time limits for a valid enrolled judgment and the procedure for renewal of the judgment. Miss. Code Ann. § 15-1-43 states:

All actions founded on any judgment or decree rendered by any court of record in this state, shall be brought within seven years next after rendition of such judgment or decree, and not after....

Miss. Code Ann. § 15-1-47 states:

A judgment or decree rendered in any court held in this state shall not be a lien on the

property of the defendant therein for a longer period than seven years from the rendition thereof, unless an action be brought thereon before the expiration of such time....

The Debtor argues that each renewal of the judgment extinguished the previous judgment and established a totally new judgment. Consequently, the date that the renewed judgment was enrolled was now the date to look at to establish the priority of the lien. Hanley argues that the renewal of the judgment does not cause the judgment to lose its original date of priority established when the judgment was first enrolled on the judgment rolls.

Two cases which address this issue are Street v. Smith, 37 So. 837 (Miss. 1905) and Kimbrough v. Wright, 97 So. 2d 362 (Miss. 1957). In Street, the Mississippi Supreme Court stated that "(t)he lien of a judgment can be extended by the filing of another suit upon the judgment before the expiration of seven years from the date of the rendition thereof, and in no other manner." Street, 37 So. at 838. The Mississippi Supreme Court further addressed this matter in Kimbrough v. Wright, 97 So.2d 362 (Miss. 1957).

In Kimbrough v. Wright, 97 So. 2d 362 (Miss. 1957), Wright obtained a judgment against Kimbrough. Less than seven (7) years after the entry of the judgment, Wright filed a suit based upon the original judgment. Less than seven (7) years after the first renewal, Wright again filed suit to renew the judgment. Kimbrough argued that the original judgment expired because seven (7) years and 5 months elapsed between the entry of the original judgment and the first renewal, and that seven (7) years and 4 days elapsed

between the time that the first and second renewal judgments were entered. The Court found that the filing of the suit to extend the judgment another seven (7) years must be done before seven (7) years from the date which the pending judgment was enrolled. The pertinent event which must occur before the expiration of the seven (7) year deadline is the filing of the suit to extend, not the entry of the order extending the pending judgment another seven (7) years. Citing Street v. Smith, the Mississippi Supreme Court stated that "the effective method to extend the judgment lien is by filing another suit upon the judgment before the expiration of 7 years from the date of the rendition thereof." (emphasis added) Kimbrough, 97 So. 2d at 363. The failure to file a suit to extend the judgment before the expiration of seven (7) years from the rendition of the judgment results in the lapsing of the pending judgment. Therefore, the crucial fact to be determined is whether the suit(s) to extend the judgment was filed before the expiration of the seven (7) year deadline. If it was not, then the pending judgment loses its priority and expires.

In the matter before the Court, Hanley obtained his original judgment and had it properly enrolled on February 1, 1971. In compliance with Miss. Code Ann. § 15-1-43 and Miss. Code Ann. § 15-1-47 (1972), Hanley duly renewed his original February 1, 1971, judgment on March 27, 1977 and March 6, 1984. By twice filing another suit to extend the original judgment he had obtained on February 1, 1971, Hanley effectively extended his original judgment lien, and thereby retained his priority position. Kimbrough, 97

So. 2d at 363; Street, 37 So. 2d at 838. Both suits to extend the pending judgment were filed before the expiration of the seven (7) year statutory deadline established by Miss. Code Ann. §§ 15-1-43 and 15-1-47. Therefore, Hanley has a valid judgment lien which was established against the Debtor's property on February 1, 1971, and was properly extended on March 27, 1977 and March 6, 1984, pursuant to Miss. Code Ann. §§ 15-1-43 and 15-1-47 (1972).

B

The next issue to be addressed is what amount may the Debtor claim as his personal exemption in his homestead under Miss. Code Ann. § 85-3-21 (Supp. 1989).

Effective July 1, 1987, the Mississippi State Legislature "opted-out" of 11 U. S. C. § 522(b) exemptions. A Debtor in Mississippi may only claim his or her exemptions allowed under Mississippi law. Miss. Code Ann. § 85-3-1(2) (Supp. 1989) states:

In accordance with the provisions of Section 522(b) of the Bankruptcy Reform Act of 1978, as amended (11 U.S.C.A. 522(b) [11 USCS § 522(b)]), residents of the State of Mississippi shall not be entitled to the federal exemptions provided in Section 522(d) of the Bankruptcy Reform Act of 1978, as amended (11 U.S.C.A. 522 (d) [11 USCS § 522(d)]). Nothing in this subsection shall affect the exemptions given to individuals of Mississippi by the Constitution and statutes of the State of Mississippi.

On July 18, 1988, when the Debtor filed his petition, he was only entitled to the exemptions available under Mississippi state law. It must now be determined what was the state law on July 18, 1988.

Hanley does not dispute that the Debtor is entitled to claim a homestead exemption under Mississippi law. What the parties do disagree over is the amount of the exemption the Debtor is to be allowed. Hanley argues that under Mississippi law (statutory and case law), the Court must look to the date Hanley enrolled his judgment on February 1, 1971, to determine the amount of the Debtor's allowed exemption. The Debtor argues that the Court must look to the date which the Debtor filed his petition July 18, 1988, to determine the amount of his exemption. The version of the Mississippi homestead exemption statute in effect on February 1, 1971, was Miss. Code Ann. § 85-3-21 (1972). It stated:

Every citizen of this state, male or female, being a householder and having a family, shall be entitled to hold exempt from seizure or sale, under execution or attachment, the land and buildings owned and occupied as a residence by him, or her, but the quantity of land shall not exceed one hundred and sixty acres, nor the value thereof, inclusive of improvements,...the sum of fifteen thousand dollars (\$15,000.00)....(emphasis added).

The version of the Mississippi homestead exemption statute in effect on the date the Debtor filed his petition, July 18, 1988, was Miss. Code Ann. § 85-3-21 (Supp. 1989). It stated:

Every citizen of this state, male or female, being a householder shall be entitled to hold exempt from seizure or sale, under execution or attachment, the land and buildings owned and occupied as a residence by him, or her, but the quantity of land shall not exceed one hundred sixty (160) acres, nor the value thereof, inclusive of improvements,...the sum of thirty thousand dollars (\$30,000.00).... (emphasis added).

In support of his position, Hanley cites several cases which

hold that an exemption may not be applied retroactively so as to impair existing contracts. See: Gunn v. Berry, 82 U.S. 212 (1873); Lessley v. Phipps, 49 Miss 790 (Miss. 1874); Johnson v. Fletcher, 54 Miss 628 (Miss. 1877); Builders Supply of Hattiesburg v. Pine Belt Savings and Loan Association, 369 So.2d 743 (Miss. 1979).

In Builders Supply of Hattiesburg v. Pine Belt Savings and Loan Association, 369 So. 2d 743 (Miss. 1979), all of the judgments were obtained and enrolled before July 1, 1970, the effective date of the amendment to the Mississippi homestead exemption statute which increased the exemption from \$5,000.00 to \$15,000.00. The court did not allow the \$15,000.00 exemption stating:

It is firmly settled that any law which materially increases the amount of exempt property withdrawn from liability from the debts of the owner of the property impairs the obligation of existing contracts and is, as to existing creditors, unconstitutional because an exemption may not be applied retroactively. Odom v. Leuhr, 226 Miss. 661, 85 So. 2d 218 (1956); Johnson v. Fletcher, 54 Miss. 628 (1877); Lessley v. Phipps, 49 Miss. 790 (1874). (emphasis added).

Builders Supply, 369 So. 2d at 745.

Builders Supply can be distinguished from the case at bar. Builders Supply (and the other cases relied upon by Hanley) deal with a contractual relationship entered into by a debtor and a creditor. This Court agrees that if the Debtor had entered into a contractual relationship with Hanley, then the Debtor would only be able to claim the exemption in effect at the time the contract was entered into with Hanley. However, that is not the situation

between the Debtor and Hanley.

Hanley's judgment is based purely upon a tort action. The case at bar is similar to the Mississippi case of Odom v. Luehr, 85 So. 2d 218 (Miss. 1956). In Odom, Luehr obtained a judgment against Odom for the unlawful cutting of timber. Subsequent to the filing of the suit, the Mississippi homestead exemption was raised from \$3000.00 to \$5000.00. Luehr objected to Odom's claim of the \$5000.00 homestead exemption. The court distinguished a judgment based on a tort from a judgment based on one arising out of a contract. In allowing Odom to claim the higher exemption, the court stated:

The question involved here is not a cause of action arising out of a contract, but one of tort. We are of the opinion that a tort action does not come within the constitutional provisions of Section 16 of the Mississippi Constitution of 1890, or Article I, Section 10, of the Federal Constitution.

Odom, 85 So. 2d at 220. See also: First National Bank of Mobile, 701 F. 2d 902 (11th Cir. 1983); Framsher v. Zahn (In re Zahn), 605 F. 2d 323 (7th Cir. 1979); In re Waldman, 81 B. R. 313 (Bankr. E. E. Pa. 1987); In re Punke, 68 B. R. 936 (Bankr. N. D. Iowa 1987); In re Owen, 64 B. R. 258 (Bankr. M. D. Fla. 1986); In re Hockinson, 60 B. R. 250 (Bankr. N. D. Ill. 1986).

This Court finds Odom to be the controlling Mississippi law in effect at the time the Debtor filed his petition. The Mississippi Supreme Court has clearly ruled that there is a distinction between a judgment based upon a tort and a judgment based upon a contract. A tort action does not involve any

agreement between the parties as to each party's rights and remedies. Consequently, the allowance of the larger homestead exemption does not deprive the tort judgment creditor of any of the tortfeasor's estate which he or she had previously been granted by the tortfeasor. When the creditor is a tort judgment creditor, there is no unconstitutional impairment of any contractual rights between the parties as a result of the allowance of the higher exemption because there was never a "bargained for exchange" between the parties, and consequently, the creditor does not have any rights against the tortfeasor which can be unconstitutionally impaired. Therefore, this Court finds that the Debtor is entitled to the \$30,000.00 homestead exemption allowed under Miss. Code Ann. § 85-3-21 (Supp. 1989) because Hanley as a tort judgment creditor lacks the requisite contractual agreement with the Debtor which would disallow the higher exemption as an unconstitutional impairment of his contractual rights.

C

It must now be determined what amount, if any, of Hanley's lien may be avoided by the Debtor under § 522(f). 11 U. S. C. § 522(f) states:

Notwithstanding any waiver of exemptions, 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--

(1) a judicial lien....

Debtors seeking to employ the lien avoidance provisions of

Section 522(f) are limited to avoiding a lien only "to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b)." Therefore, it must be determined whether the debtor is legally entitled to an exemption under § 522(b). Subsection (b) of section 522 provides that a debtor must look to state law to determine what he or she is allowed to claim as exemptions--federal, state or a combination. McManus v. Avco Financial Services of Louisiana, Inc. (In re McManus), 681 F. 2d 353, 355 (5th Cir. 1982). In the case at bar, this Court has determined that the Debtor is entitled to a \$30,000.00 homestead exemption under Mississippi law. It must now be determined to what extent, if any, the Debtor's exemption is impaired by Hanley's judgment.

In Matter of Williamson, 804 F. 2d 1355, 1362 (5th Cir. 1986) and Matter of Williamson, 844 F. 2d 1166, 1173 (5th Cir. 1988), the Fifth Circuit Court of Appeals adopted the formula created by Bankruptcy Judge J. Douglas Williams, II in In re Duncan, 43 B. R. 833, 838 (Bankr. D. Ala. 1984).

The court in Duncan stated the procedure to be followed to determine what portion of the judicial lien may be avoided under § 522(f):

First, it must be determined if the debtors have an exemption...which is impaired. Second, it must be determined the extent to which the judicial lien creates that impairment. The analysis begins with the value of the property claimed as exempt as of the filing date of the petition. (citations omitted).

Duncan, 43 B. R. at 836.

The Duncan formula as adopted by the Fifth Circuit Court applies to the case at bar as follows:

DUNCAN FORMULA

- 1) Rank all liens in order of priority (and equity, if any) to the extent of the value of the property. (Any liens or portion of a lien in excess of the value of the property will be an unsecured claim under § 506.)
- 2) Subtract the gross amount of the homestead exemption provided by law from the value of the property.
- 3) From the remainder left from step two, subtract each lien, one at a time, beginning with the most senior lien, as ranked in step one, until the judicial lien is reached. Then subtract the judicial lien. To the extent that all or any portion of a judicial lien exceeds the remainder derived from step two (i.e., is not part of the remainder), it is voidable as it impairs the exemption.

1)	Hanley's lien.....	\$98,254.42
2)	Fair Market Value of property.....	\$38,800.00
	Homestead exemption.....	<u>-30,000.00</u>
	Remainder.....	\$ 8,800.00
3)	Remainder from step 2.....	\$ 8,800.00
	Less Hanley's lien.....	<u>-98,254.42</u>
	Total Amount Avoided.....	(\$89,454.42)

HOUSE

Fair Market Value.....	\$37,000.00
Homestead exemption.....	<u>\$30,000.00</u>
Remainder.....	\$ 7,000.00
Remainder.....	\$ 7,000.00
% subject to lien.....	<u>X .75</u>
Amount of lien.....	\$ 5,250.00

VACANT LOT

Fair Market Value.....	\$ 1,800.00
Homestead Exemption.....	<u>\$ 0</u>
Remainder.....	\$ 1,800.00
Remainder.....	\$ 1,800.00
% subject to lien.....	<u>X .875</u>
Amount of lien.....	\$ 1,575.00

TOTAL AMOUNT OF LIEN NONAVOIDABLE.....\$ 6,825.00
 TOTAL AMOUNT OF AVOIDED LIEN.....\$89,454.42

CONCLUSION

Therefore, this Court finds that after applying the Duncan formula to the case at bar, Hanley's lien is avoided pursuant to § 522(f) to the extent it impairs the Debtor's \$30,000.00 homestead exemption, i.e., \$89,454.42.

A separate judgment consistent with this opinion as required by Bankruptcy Rule 9021 will be entered this date adjudicating the following:

1) That the Debtor is entitled to claim \$30,000.00 as homestead exemption under Mississippi law.

2) That \$89,454.42 of Hanley's judicial lien is avoided pursuant to 11 U. S. C. § 522(f) as it impairs the Debtor's homestead exemption.

3) That Hanley's Petition to lift the automatic stay pursuant to 11 U. S. C. § 362 should be granted in part. The Debtor shall have thirty (30) days from the entry of the judgment to tender to Hanley the amount of the unavoids portion of Hanley's judicial lien, i.e.: Six Thousand Eight Hundred Twenty-Five and no/100ths Dollars (\$6,825.00) or the automatic stay shall lift to permit Hanley to proceed to collect the unavoids portion of his judicial lien.

This the 27 day of June , 1990.


UNITED STATES BANKRUPTCY JUDGE

U.S. BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI
FILED
JUN 27 1990
MOLLIE C. JONES, CLERK
DEPUTY

IN THE UNITED STATES BANKRUPTCY COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI
MERIDIAN DIVISION

IN THE MATTER OF:

NED LOUVIER McCORMICK

CASE NO. 8802053MC

RICHARD G. HANLEY

PLAINTIFF

vs.

ADV. NO. 880175MC

NED LOUVIER McCORMICK AND
LESLIE DAWN McCORMICK

DEFENDANTS

JUDGMENT

Consistent with the opinion dated contemporaneously herewith:

IT IS ORDERED AND ADJUDGED that the Debtor is entitled to claim \$30,000.00 as homestead exemption under Mississippi law.

IT IS FURTHER ORDERED AND ADJUDGED that \$89,454.42 of Hanley's judicial lien is avoided pursuant to 11 U. S. C. § 522(f) as it impairs the Debtor's homestead exemption.

IT IS FURTHER ORDERED AND ADJUDGED that Hanley's Motion to lift the automatic stay pursuant to 11 U. S. C. § 362 is hereby granted in part. The Debtor shall have thirty (30) days from the entry of this judgment to tender to Hanley the amount of the unavowed portion of Hanley's judicial lien, i.e.: Six Thousand Eight Hundred Twenty-Five and no/100ths Dollars (\$6,825.00) or the automatic stay shall lift to permit Hanley to proceed to collect the unavowed portion of his judicial lien.

SO ORDERED this the 27 day of JUNE, 1990.

Edward Ellington
UNITED STATES BANKRUPTCY JUDGE