UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

In re

CASE NO. 8:05-bk-8716-KRM
Chapter 7

DARREN B. LEZDEY,

Debtor.
_____/

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING, IN PART, DEBTOR'S MOTION TO AVOID JUDICIAL LIEN

The Debtor's Motion to Avoid Judicial Lien (Doc. No. 61 - the "Motion") and the objection (Doc. No. 83) filed by Allan Wachter, M.D., Seth Chemicals, Inc., and Nathan M. Technologies Limited Partnership (collectively "Wachter") were tried on November 6, 2006.

The Debtor and his brother, Jarett Lezdey, are subject to Wachter's $17.9 million Arizona state court judgment, which was recorded in June 2002 in Pinellas County, where both brothers reside. The Debtor seeks to avoid Wachter's lien on his homestead, pursuant to Section 522(f) of the Bankruptcy Code.

On the same day in early November 2004, the brothers executed and recorded quit claim deeds for their respective homesteads, which they owned jointly with right of survivorship: the house where Jarett resides was conveyed by both brothers to Jarett as intended;[1] the house where the Debtor lives was also conveyed to *Jarett.* Wachter asserts that, upon the recording of that deed, Wachter's judgment lien attached to the entirety of the property. The Debtor claims that the stated grantee in the deed was a "mistake" which was corrected by another deed recorded 27 days later and listing the Debtor as the grantee.

After hearing the testimony of witnesses and reviewing documentary evidence and post-trial memoranda, the Court makes the following findings of fact and conclusions of law, and decides that the original quit claim deed of the Debtor's residence mistakenly listed Jarett as the grantee and conveyed no beneficial interest to Jarett. Thus, Wachter's judgment lien does impair the debtor's continuing exempt interest in his homestead and will be avoided to that extent.

FINDINGS OF FACT

1. The Debtor, Darren Lezdey, obtained an interest in certain residential real property located at 148 Marcdale Blvd., Indian Rocks Beach, Florida ("148 Marcdale") by a Warranty Deed, dated May 14, 1998, from Sunset Bay Developers, Inc., to Darren B. Lezdey and Jarett Lezdey, as "joint tenants with rights of survivorship." The deed was recorded in the public records of Pinellas County, Florida, on May 20, 1998.

2. The Debtor's only brother, Jarrett Lezdey, obtained an interest in another real property, at 140 Marcdale Blvd., Indian Rocks Beach, Florida ("140 Marcdale"), which he has claimed as his homestead. Originally, the title to 140 Marcdale was also held by both brothers, jointly with rights of survivorship.

3. On February 22, 2002, Wachter obtained a final judgment in the total amount of $17,869,949, plus interest (the "Judgment"), against the Debtor, Jarett Lezdey, and others.[2]

4. The Judgment was domesticated in Florida and recorded in Pinellas County on June 13, 2002.

5. On or about November 1, 2004, the Lezdey brothers executed two quit-claim deeds: one (the "140 Marcdale Deed") purported to convey Jarett's stated homestead, at 140 Marcdale Blvd., to Jarett, as grantee; the other (the "148 Marcdale Deed") purported to convey the Debtor's stated homestead at 148 Marcdale Blvd., also to Jarett, as grantee. These deeds were recorded in Pinellas County on November 3, 2004.

[1] Jarett Lezdey is a chapter 7 debtor before this Court in *Case No. 8:05-bk-08711-KRM*. The Court has entered an order in that case (Doc. No. 169) determining that Wachter's lien on Jarett Lezdey's homestead could be avoided to the extent of Jarett's interest, but not as to the Debtor's non-homestead interest in that property.

[2] *Wachter v. Lezdey, et al.*, Case No. 99-09334, in the Superior Court for Maricopa County, Arizona. The Judgment awarded compensatory damages in the amount of $11,629,966, punitive damages in the amount of $5,814,983, and attorneys' fees in the amount of $425,000.

6. Any interest that Jarett Lezdey may have acquired in 148 Marcdale after execution of the 148 Marcdale Deed would not be an exempt homestead interest under Article X, Section 4 of the Florida Constitution.

7. At trial, Jan Amos, secretary to the Debtor's father, lawyer John Lezdey, testified that she had been asked to type both the 140 Marcdale Deed and the 148 Marcdale Deed. She did so, typing "Jarett Lezdey" as grantee in both instruments. Either the Debtor or Jarett later brought to her attention that she had made a mistake: she was told that the "grantee" on the 148 Marcdale Deed should have been the Debtor, not Jarett.

8. Jarett Lezdey testified that he was not expecting to receive any interest in 148 Marcdale; rather, Ms. Amos made a mistake in typing his name as "grantee" in the 148 Marcdale Deed. The mistake was not discovered until later in the month, after the 148 Marcdale Deed had been recorded.

9. The Debtor testified that he did not intend to transfer his interest in 148 Marcdale to his brother. The Debtor testified that he received no consideration for the 148 Marcdale Deed. The Debtor testified that a mistake had been made in which the typist mistakenly inserted Jarett's name in both of the deeds that had been prepared on the same day – the 140 Marcdale Deed, for the property in which Jarett lived, and the 148 Marcdale Deed, for the property where the Debtor lived.

10. After the mistake was discovered, the Debtor and his brother apparently undertook an investigation to determine how to correct the mistake. Ultimately, and apparently with the assistance of a Pinellas County clerk, the Debtor and Jarett Lezdey executed a corrective quit claim deed (the "Corrective 148 Marcdale Deed") that was recorded in the Pinellas County Public Records on November 30, 2004.

11. The Corrective 148 Marcdale Deed purports to correct the 148 Marcdale Deed by making the Debtor the "grantee." The following language is handwritten on the side of this instrument: "*This document is a re-recording in order to correct the 'second party, Grantee' section that states 'Jarett Lezdey' changed to 'Darren Lezdey.' Refer to OFF REC BK 13924 pg. 1469-1470.*"

12. The Debtor resided at 148 Marcdale from acquisition of the property in 1998 through and after his bankruptcy filing in 2005; the Debtor did not surrender possession of 148 Marcdale on or after November 3, 2004, when the 148 Marcdale Deed was recorded; his brother did not take possession of 148 Marcdale at that time; no consideration was exchanged in connection with the 148 Marcdale Deed; the mistake was promptly corrected after it was discovered; and the 148 Marcdale Deed is virtually identical (except for the legal description) to the quitclaim deed, recorded on the same day, by which 140 Marcdale was conveyed to Jarett. At all material times, the Debtor considered 148 Marcdale to be his permanent residence and homestead.

13. The Court draws the inference that the "grantee" stated in the 148 Marcdale Deed -- prepared on the same day as the 140 Marcdale Deed, from Darren and Jarett Lezdey to Jarett Lezdey -- was the result of an unintended mistake by Ms. Amos.

14. Wachter did not extend any credit to the Debtor or to Jarett Lezey in the period between November 3, 2004, when the 148 Marcdale Deed was recorded, and November 30, 2004, when the Corrected 148 Marcdale Deed was recorded. No credit was extended by Wachter in reliance on the Debtor's interest in 148 Marcdale. Wachter's judgment was recorded more than a year prior to the recording of these deeds. The evidence reveals no reliance or change of position of any kind by Wachter in connection with the 148 Marcdale Deed or the state of record title created thereby.

15. The evidence demonstrates, and the Court is persuaded, that the 148 Marcdale Deed was executed and recorded as the result of mistake. The evidence also demonstrates that the Debtor did not intend to transfer any beneficial interest in 148 Marcdale to his brother. Instead, the Debtor and his brother intended to transfer 148 Marcdale only to the Debtor.

CONCLUSIONS OF LAW

1. A judgment lien in Florida is only effective as to the beneficial interest of the judgment debtor. *Miller v. Berry*, 82 So. 764 (Fla. 1919).

2. In this case, Jarett Lezdey is the "judgment debtor." Immediately prior to the recording of the 148 Marcdale Deed, on November 3, 2004, Wachter held a judgment lien on Jarett's interest in that property, which would not have been exempt. What additional lien rights, if any, did

Wachter acquire in 148 Marcdale as a judgment creditor of Jarett Lezdey by virtue of the mistaken, but recorded conveyance to Jarett?

3. In *Miller***,** a party anticipating domestic troubles transferred property to his friend, Miller, who had several judgments against him.[3] The Florida Supreme Court analyzed the rights of Miller's judgment creditors as follows:

> Unless it can be said that the land actually became the property of Miller, or that the title was allowed to appear in him of record under such circumstances as to estop complainant from asserting title against Miller's judgment creditors, they have no rights in the premises.
>
> As to the first alternative, it is conceded that Miller never owned the property, nor had any beneficial interest whatever therein and the law makes a judgment lien effective only as to the actual beneficial interest of the judgment debtor. [Citations omitted]
>
> As to the second alternative, it seems clear that no estoppel operates to preclude complainant from showing the true facts. All the judgments against Miller existed before he acquired the deed in question. Credit was not extended, nor any judgment recovered upon the faith of the record title in Miller. In fact the position of the judgment creditors
>
> has been in no way affected by the transaction in question.

Id.

4. Florida law has consistently followed the general rule set forth in *Miller*. In *First National Bank of Arcadia v. Savarese*, 134 So. 501 (Fla. 1931), the Florida Supreme Court considered a case where the beneficial owner of real property sought to reform a deed which mistakenly placed title to the property in the name of her husband, who was a judgment debtor. The court focused on the intention of the parties and the husband's lack of beneficial interest in the property. A creditor had secured its judgment against the husband six months *after* the recordation of the mistaken deed; but, the court ordered reformation of the deed in contravention of the rights of the husband's judgment creditor:

> Thus a distinction is generally drawn between a judgment creditor who extended credit and acquired judgment on the faith of the title to certain property being at the time of the extension of credit in the judgment debtor and a judgment creditor who extended credit without any such reliance.

Id. at 504.

5. Wachter has argued that *Savarese* is not helpful to the Debtor because the Debtor was somehow involved in creating the mistake. But, the Debtor here is no different than Mrs. Savarese: the grantors did not intend for the subject property to be transferred to anyone but themselves. The Debtor did not comprehend the mistake when the 148 Marcdale Deed was first signed or recorded; but, he and his brother corrected the mistake in less than 30 days. Mrs. Savarese did not discover the mistake in conveyance of her property for more than six months, after the judgment creditor attempted an execution sale of the property.

6. *Savarese* has also been followed. In *Growth Properties of Florida v. Brown (In re May)*, 19 B.R. 655 (N.D. Fla. 1982), the District Court followed *Savarese* in a case also involving a mistake: a deed may be reformed against a judicial lien creditor, even one without notice,[4] who fails to rely on the record. *Id.* at 657.

7. In both *May* and *Savarese*, the courts cited to the Florida Supreme Court's decision in *Hunter v. State Bank of Florida*, 61 So. 497 (Fla.

[3] Wachter has argued that the rule announced in *Miller* and other cases only applies in cases with innocent parties that are not involved in the subject transfer. *Miller* specifically holds otherwise.

[4] Wachter relies on cases where the judgment creditor was on "inquiry notice." Such cases are inapplicable where, as here, the judgment is recorded *before* the deed in question. Inquiry notice is only relevant in a case where the judgment is recorded *after* the subject deed but there is something in the record to place the judgment creditor on inquiry notice.

1913). In *Hunter*, the court noted that reliance by the judgment creditor is the principal element:

> The mere record of the conveyance executed long after the date of the judgment could not by any possibility operate as an estoppel against the grantor, mortgagor, or the mortgagee.

Id. at 499.

8. Here, Jarett did not obtain any beneficial interest in 148 Marcdale as a result of the 148 Marcdale Deed. Wachter's judgment was recorded long before the 148 Marcdale Deed was recorded. Credit was not extended and the judgment was not recovered upon the faith of the record title in Jarett's name for 27 days. Wachter's position was not adversely affected by the mistake in record title. Although there was no alleged mistake in *Miller*, the result is the same: in neither case did the grantors intend to transfer a beneficial interest to the grantee shown on the recorded deed. As in *Hunter*, the 148 Marcdale Deed cannot operate as an estoppel against the Debtor. The paramount factors are the intent of the parties and lack of reliance to support estoppel.[5]

9. Wachter cites the case of *Smith v. Pattishall*, 176 So. 568 (Fla. 1937). But, the facts in *Smith* are materially different from this case. In *Smith*, the alleged mistake was the failure to transfer all of the property out of the reach of the grantor's creditors; not the transfer of the property by mistake to the wrong party. In *Smith*, the judgment was recorded *after* the alleged mistake, but before it was corrected. In this case, the judgment pre-dated the mistake. The District Court in *May* expressly distinguished *Smith*. This Court does likewise.

10. Many of the cases cited by the parties have discussed the remedies of "resulting trust" and "constructive trust." No finding of a resulting trust or a constructive trust is necessary in this case.[6] The mistake that occurred here was corrected within 30 days and well before the Debtor filed this bankruptcy case. The stated grantee in the 148 Marcdale Deed was contrary to the intent of the parties. The result in this case is controlled by the parties' intent and Wachter's lack of reliance.

11. The result in this case is also supported by the fact that 148 Marcdale is and has always been the Debtor's primary residence and homestead. The homestead exemption provided for under the Florida Constitution has been interpreted as applying to *any* interest in land. *In re Ballato*, 318 B.R. 205 (Bankr. M.D. Fla. 2004), *citing Bessemer Properties v. Gamble*, 27 So.2d 832 (Fla. 1946)(applying homestead exemption to beneficial interest). Record title is not required to claim homestead. *Beall v. Pinckney*, 150 F.2d 467 (5th Cir. 1945). The 148 Marcdale Deed did not change the Debtor's beneficial interest in 148 Marcdale. The Debtor had not abandoned his homestead.[7] The evidence demonstrates that the Debtor never relinquished possession of the property and never formed the intent to discontinue using the property as his homestead. The homestead exemption is absolute and permanent unless abandoned. *Id*. at 470.

12. Motions to avoid judicial liens are governed by Section 522(f) of the Bankruptcy Code. Congress enacted Section 522(f) with the broad purpose of protecting the debtor's exempt property. *Farrey v. Sanderfoot*, 111 S. Ct. 1825, 1829 (1991). Under the statute, two elements must be satisfied for the debtor to avoid a judicial lien: (a) the lien must have fixed on an interest of the debtor in property; and (b) the lien must impair an exemption to which the debtor would have been entitled. *In re Cooper*, 202 B.R. 319 (Bankr. M.D. Fla. 1995) *aff'd* 197 B.R. 698 (M.D. Fla. 1996).

13. When Wachter's judgment lien was recorded in Pinellas County, 148 Marcdale was owned by the Debtor and his brother. Thus, Wachter's judgment lien fixed at that time on both the non-exempt interest of Jarett Lezdey and the exempt homestead interest of the Debtor. As a matter of fact and law, the 148 Marcdale Deed did not change the Debtor's interest in the property. Wachter's judgment lien impairs an exemption to which the Debtor would have been entitled but for the lien since the property was his homestead when he filed his bankruptcy petition. Accordingly, Section 522(f) applies in this case and permits the Debtor to avoid Wachter's judgment lien with respect to the Debtor's interest in 148 Marcdale.

Accordingly, it is -

[5] The burden of proving estoppel rests upon Wachter. *Savarese*, 134 So. at 504.

[6] In any event, such a finding is not supported by the record.

[7] Abandonment of the homestead right under Florida law cannot be found unless the Debtor (a) relinquished possession of the property; and (b) formed the intent to discontinue using the property as a homestead. *Ballato* at 210.

ORDERED as follows:

1. The Motion is granted in part and denied in part as set forth below.

2. Wachter's judicial lien is avoided with respect to the Debtor's interest in 148 Marcdale.

3. Wachter's judicial lien is not avoided with respect to Jarett Lezdey's original interest in 148 Marcdale, which the Debtor acquired in November 2004, subject to Wachter's lien.

4. Except as otherwise set forth herein, this order is without prejudice to any ruling or order the Court may make in connection with Wachter's Objection to the Debtor's Claims of Exemption (Doc. 50).

5. The Court makes no determination at this time regarding the extent of the Debtor's interest in 148 Marcdale.

DONE AND ORDERED at Tampa on this 30th day of January, 2007.

/s/ K. Rodney May
K. RODNEY MAY
United States Bankruptcy Judge

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