

ORDERED.

Dated: July 15, 2022



Caryl E. Delano  
Chief United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF FLORIDA  
FORT MYERS DIVISION  
[www.flmb.uscourts.gov](http://www.flmb.uscourts.gov)

In re:

Case No. 2:21-bk-00123-FMD  
Chapter 13

Gregory Brian Myers,

Debtor.

**ORDER DENYING DEBTOR'S MOTION  
TO RECONSIDER, ALTER OR AMEND ORDER  
DENYING MOTION TO AVOID JUDICIAL LIEN**

THIS CASE came before the Court without a hearing to consider *Debtor's Motion to Reconsider, Alter or Amend Order Denying Motion to Avoid Judicial Lien* (the "Motion to Reconsider").<sup>1</sup> For the reasons explained in this order, the Court denies the Motion to Reconsider.

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<sup>1</sup> Doc. No. 215.

## I. RELEVANT FACTS

The facts are not in dispute. In 2015, Debtor filed a Chapter 11 bankruptcy case in Maryland (the “Maryland Case”), and U.S. Bank National Association, as Trustee (the “Bank”) filed a motion for relief from the automatic stay.

In November 2016, the court in the Maryland Case entered a *Consent Order on Motion for Relief from Automatic Stay* (the “Maryland Consent Order”).<sup>2</sup> The Maryland Consent Order, which was signed by counsel for both Debtor and the Bank, recited that “the parties have reached an agreement as set forth below,” and provided, *inter alia*, for the following: (a) appeals filed by Debtor and his non-filing spouse (the “Appeals”) from the Bank’s judgment in connection with the Bank’s foreclosure of the property at 700 N. Gulf Shore Boulevard, Naples, Florida (the “Naples Property”) would proceed in Florida’s Second District Court of Appeals; (b) Debtor was directed to deposit \$5,000.00 per month into the Registry of the Maryland Court as adequate protection payments until the Appeals were finally resolved (the “Adequate Protection Payments”); (c) it was “understood and agreed” that if the Appeals were resolved in the Bank’s favor, the Bank would be entitled to receive the total amount of the Adequate Protection Payments, to be credited against any amount claimed by the Bank against Debtor and/or his spouse; (d) it was “understood and agreed” that if the Appeals were

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<sup>2</sup> Doc. No. 160, pp. 3-8.

resolved in favor of Debtor and his spouse, they would be entitled to receive the total amount of the Adequate Protection Payments; and (e) the Clerk of the Maryland Court was to retain the Adequate Protection Payments “until further order of this [the Maryland] Court.”

Thereafter, the Maryland Case was converted from a Chapter 11 case to a Chapter 7 case. On January 28, 2021, while the Maryland Case was still pending, Debtor filed the current Chapter 13 case in the Middle District of Florida. In his bankruptcy schedules, Debtor listed the Adequate Protection Payments on deposit in the Maryland Court Registry as an asset, and under 11 U.S.C. § 522(b)(3)(B), he claimed the funds as exempt as tenants by the entireties property.<sup>3</sup>

Several months later, Debtor filed an *Amended Verified Motion to Avoid Judicial Lien of U.S. Bank* (the “Lien Avoidance Motion”).<sup>4</sup> Debtor alleged (a) Adequate Protection Payments in the amount of \$70,000.00 were paid into the Maryland Court Registry under the Maryland Consent Order; (b) the Adequate Protection Payments are exempt because no party objected to his claim of exemption; and (c) the Maryland Consent Order constitutes a judicial lien under the Bankruptcy Code. Therefore, Debtor asked the Court to avoid the Bank’s judicial lien on the Adequate Protection Payments under § 522(f)(1)(A).

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<sup>3</sup> Doc. No. 29, p. 15. Unless otherwise stated, statutory references are to the United States Bankruptcy Code, 11 U.S.C. § 101, *et seq.*

<sup>4</sup> Doc. No. 131.

The Bank thereafter filed a response to the Lien Avoidance Motion (the “Response”).<sup>5</sup> In the Response, among other contentions, the Bank asserted that Debtor agreed to the terms of the Maryland Consent Order, an agreement to settle a legal dispute is an enforceable contract, and courts construe consent decrees as contracts under applicable contracts law.<sup>6</sup>

On June 9, 2022, the Court held a hearing on the Lien Avoidance Motion, the Bank’s Response, and Debtor’s reply.<sup>7</sup> Having considered the arguments of Debtor’s attorney and the Bank’s attorney, together with the characteristics of a judicial lien under § 101(36) and case law in the Eleventh Circuit, the Court determined that the Maryland Consent Order did not create a judicial lien that is subject to avoidance under § 522(f)(1)(A). Thereafter, the Court entered its *Order Denying Motion to Avoid Judicial Lien* (the “Order”) “for the reason stated and recorded in open court.”<sup>8</sup>

Debtor timely filed the Motion to Reconsider.<sup>9</sup> Debtor contends that the Court erred in denying the Lien Avoidance Motion because (a) the Bank had conceded that the Maryland Consent Order is a judicial lien; (b) the lien had fixed on Debtor’s interest in property; and (c) the lien impaired Debtor’s entireties

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<sup>5</sup> Doc. No. 182.

<sup>6</sup> Doc. No. 182, ¶ 27 (quoting *Jeff D. v. Andrus*, 899 F.2d 753, 759 (9th Cir. 1989), and *Salimi v. BMW Financial Services NA, LLC*, 2017 WL 4570367, at \*7 (N.D. Cal. Sept. 29, 2017)).

<sup>7</sup> Doc. Nos. 199, 207.

<sup>8</sup> Doc. No. 210.

<sup>9</sup> Doc. No. 215. Although Debtor is represented by counsel, he filed the Motion to Reconsider himself, without the signature of his attorney.

exemption in the Adequate Protection Payments. Therefore, Debtor asserts that he satisfied the required elements for lien avoidance under § 522(f)(1)(A) and that the lien created by the Maryland Consent Order should be avoided.

## II. DISCUSSION

Under § 522(f)(1)(A), a debtor may avoid the fixing of a lien on his interest in property to the extent that the lien impairs an exemption to which he would have been entitled, “if such lien is a judicial lien.”<sup>10</sup> Here, the Court concluded that the Maryland Consent Order did not create a judicial lien on the Adequate Protection Payments.

Debtor filed the Motion to Reconsider under Fed. R. Civ. P. 59(e), as made applicable to this contested matter by Fed. R. Bankr. P. 9023. Reconsideration of an order under Rule 59(e) is an extraordinary remedy to be granted sparingly because of the interest in the finality of orders and the conservation of judicial resources. In the Eleventh Circuit, the only grounds for granting a motion for reconsideration under Rule 59(e) are newly discovered evidence or manifest errors of law or fact.<sup>11</sup>

Asserting that the Order “constitutes clear error of law and is manifestly unjust,”<sup>12</sup> Debtor primarily contends that the Court erred because the Bank

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<sup>10</sup> 11 U.S.C. § 522(f)(1)(A).

<sup>11</sup> *Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir. 2007) (quoting *In re Kellogg*, 197 F.3d 1116, 1119 (11th Cir. 1999)).

<sup>12</sup> Doc. No. 215, ¶ 7.

“conceded” in its Response that the Maryland Consent Order created a judicial lien. Therefore, Debtor contends, any further discussion of this “threshold” requirement for lien avoidance under § 522(f)(1)(A) is irrelevant.<sup>13</sup>

But Debtor’s contention is not accurate. In its Response, the Bank asserted that the Maryland Consent Order was a contract, that the Court should enforce the Maryland Consent Order as a contract, and that Debtor did not otherwise establish the elements necessary to avoid a judicial lien under § 522(f)(1)(A).<sup>14</sup> In the context of discussing the elements required to avoid a judicial lien under § 522(f)(1)(A), the Bank stated “[h]ere, the judicial lien does not impair an exemption to which Debtor would have been entitled.” But the Bank did not expressly concede that the Maryland Consent Order is a judicial lien.

And regardless of the Bank’s alleged admission, as the Court explained at the June 9, 2022 hearing, under the principles established in *In re Washington*,<sup>15</sup> the Maryland Consent Order did not create a judicial lien as a matter of law. In *Washington*, the Eleventh Circuit Court of Appeals stated that courts generally describe a judicial lien as

“an interest which encumbers a specific piece of property granted to a judgment creditor who was previously free to attach any property of the debtor’s to satisfy his interest but who *did not have*

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<sup>13</sup> Doc. No. 215, ¶ 10.

<sup>14</sup> Doc. No. 182, pp. 8-9.

<sup>15</sup> 242 F.3d 1320 (11th Cir. 2001).

*an interest in a specific piece of property before occurrence of some judicial action.”*<sup>16</sup>

In *In re Advantage One Mortgage Corporation*,<sup>17</sup> the bankruptcy court elaborated on the Eleventh Circuit’s description, explaining that the primary characteristic of a judicial lien is that it only “attaches to property *after entry of judgment* and the recording, filing, or service of additional documents.”<sup>18</sup> The court stated:

[A] judicial lien may be most precisely understood to be that variety of a lien where the specific asset to be encumbered is not necessarily identified prior to judicial determination and action. When a creditor seeks to collect on property of a debtor, but has merely a claim against the debtor – not against a specific asset – the creation of such a lien, coupled with its fixing against a finite property, constitutes a judicial lien.<sup>19</sup>

In other words, a judicial lien is “inchoate” and is not affixed to any specific, identifiable property interest until *after* a judgment is entered and recorded.

But here, the Bank’s interest in the Adequate Protection Payments is not some “inchoate” interest that was not previously affixed to any specific, identifiable property. Rather, under the Maryland Consent Order, Debtor paid

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<sup>16</sup> *In re Washington*, 242 F.3d at 1323 (quoting *In re Fischer*, 129 B.R. 285, 286 (Bankr. M.D. Fla. 1991) (quoting *In re Boyd*, 31 B.R. 591, 594 (D. Minn. 1983) (emphasis added in *Washington*)).

<sup>17</sup> 2008 WL 5170553 (Bankr. S.D. Fla. Nov. 4, 2008).

<sup>18</sup> *In re Advantage One Mortgage Corporation*, 2008 WL 5170553, at \*4 (emphasis added). In *Advantage One*, the issue was whether the lien arising from a writ of garnishment under Florida law was a statutory lien or a judicial lien.

<sup>19</sup> *Id.* at \*4.

the Adequate Protection Payments into the Maryland Court Registry as adequate protection payments for the Bank's interest in the Naples Property.<sup>20</sup>

In other words, the Bank asserted a claim against Debtor's specific, identifiable property—the Naples Property—*before* the occurrence of any judicial action in the Maryland Case. And in the context of the Bank's motion for relief from the automatic stay, Debtor agreed to pay the Adequate Protection Payments into the Maryland Court Registry as adequate protection for the Bank's interest in the Naples Property. In addition, the parties agreed that the prevailing party in the Appeals was entitled to receive the total amount of the Adequate Protection Payments deposited into the Maryland Court Registry.

To summarize, the Bank's interest in the Adequate Protection Payments arose from the parties' agreement to protect the Bank's existing claim to the Naples Property, not from a judgment or other judicial action, and the Maryland Consent Order did not "create" a judicial lien against the Adequate Protection Payments.

Debtor bears the burden of proof on a motion to avoid a judicial lien under § 522(f)(1)(A).<sup>21</sup> Because Debtor failed to establish the existence of a judicial lien,

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<sup>20</sup> Periodic adequate protection payments are provided under § 361 and § 362 to protect "an interest of an entity in property."

<sup>21</sup> *In re Myers*, 631 B.R. 392, 394 (Bankr. D.S.C. 2021) ("Debtor has the burden of proof regarding each element of § 522.").



Debtor failed to satisfy his burden of proof and may not avoid the Bank's interest in the Adequate Protection Payments under § 522(f)(1)(A).

The Court concludes that its denial of Debtor's Lien Avoidance Motion was not erroneous.

Accordingly, it is

**ORDERED** that *Debtor's Motion to Reconsider, Alter or Amend Order Denying Motion to Avoid Judicial Lien* (Doc. No. 215) is **DENIED**.

Attorney John J. Lamoureux is directed to serve a copy of this Order on interested parties who are not CM/ECF users and to file a proof of service within three days of the date of this Order.