

ORDERED.

Dated: April 21, 2023



Caryl E. Delano
Chief United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION
www.flmb.uscourts.gov

In re:

Case No. 2:22-bk-00551-FMD
Chapter 7

Carlos Ismael Bravo
and Monica Adriana Velasquez Moeller,

Debtors.

**ORDER GRANTING DEBTORS' MOTION FOR SUMMARY JUDGMENT
ON RENEWED VERIFIED MOTION TO AVOID JUDICIAL LIEN
OF LOMANGINO ENTERPRISES, INC. ON EXEMPT PROPERTY**

In 2017, the debtors in this Chapter 7 case purchased vacant real property and began living in a trailer on the property. The issue before the Court is whether the real property qualifies as the debtors' homestead under Florida's Constitution such that the debtors may avoid a judicial lien on the real property under 11 U.S.C. § 522(f). The relevant facts are not in dispute and, for the reasons explained in this order, the Court finds that the real property is the debtors' exempt homestead property and the judicial lien may be avoided.

I. BACKGROUND

On December 15, 2017, Debtors purchased vacant real property located at 11661 Shawnee Road, Fort Myers, Florida (the “Property”).¹ On or about the date of purchase, Debtors moved a Palomino Puma Trailer (the “Trailer”) onto the Property and began residing there.

On December 16, 2019, Lomangino Enterprises, Inc. (“Creditor”) obtained a Final Judgment against Debtors in the Circuit Court for Lee County, Florida, in the total amount of \$26,581.64. On December 23, 2019, Creditor recorded the Final Judgment in the public records of Lee County.²

On May 19, 2022, Debtors filed a Chapter 7 bankruptcy petition. On their schedule of exemptions, Debtors listed the Property as their exempt homestead under Fla. Const. Art. 10, § 4(a)(1), and listed the Trailer as exempt under Fla. Stat. § 222.05.³ On their schedule of liabilities, Debtors listed Creditor as a creditor holding an unsecured debt in the judgment amount.⁴ Creditor received notice of Debtors’ bankruptcy case.⁵

¹ Doc. No. 67-2.

² Doc. No. 53-1.

³ Doc. No. 1, p. 17. Under Fla. Stat. § 222.05, a “person owning and occupying any dwelling house, including a mobile home used as a residence, or modular home, on land not his or her own which he or she may lawfully possess, by lease or otherwise, and claiming such house, mobile home, or modular home as his or her homestead, shall be entitled to the exemption of such house, mobile home, or modular home from levy and sale as aforesaid.”.

⁴ Doc. No. 1, p. 24.

⁵ Doc. Nos. 5 and 6.

No party in interest filed an objection to Debtors' claimed exemptions within the time permitted by Fed. R. Bankr. P. 4003(b), and the exemptions were allowed. Debtors received their Chapter 7 discharge, and on August 23, 2022, the case was closed as a "no asset" case.⁶

Thereafter, Debtors filed a motion to reopen the Chapter 7 case for the purpose of filing motions to avoid the judicial liens of Creditor and two other entities.⁷ The case was reopened,⁸ and Debtors subsequently filed a verified motion to avoid Creditor's judicial lien on their homestead real property (the "Lien Avoidance Motion").⁹ In the Lien Avoidance Motion, Debtors assert that no interested party objected to their claimed exemptions and, therefore, their homestead Property is exempt as a matter of law. Because Creditor's judicial lien impairs their homestead exemption, Debtors ask the Court to avoid the lien on their homestead real property under 11 U.S.C. § 522(f).

In its response to the Lien Avoidance Motion, Creditor acknowledges that Debtors live on the Property in the Trailer. However, Creditor asserts that Debtors did not prove their entitlement to a homestead exemption because (a) Debtors did not show that the Trailer is no longer mobile, (b) the Lee County Property Appraiser's

⁶ Doc. Nos. 10 and 11.

⁷ Doc. No. 13.

⁸ Doc. No. 14.

⁹ Doc. No. 44.

records do not reflect the Property as homestead property, and (c) Debtors did not show that they have a permit for the Trailer.¹⁰

On February 23, 2023, the Court held a hearing on the Lien Avoidance Motion and entered a scheduling order for Debtors to file a motion for summary judgment.¹¹

On March 20, 2023, Debtors filed their Motion for Summary Judgment (the “Summary Judgment Motion”) and on March 31, 2023, Creditor filed its response.¹²

In their affidavits in support of their Summary Judgment Motion,¹³ Debtors attest that:

- (a) they intended to live on the Property when they purchased it in 2017;
- (b) they have not lived anywhere else since December 15, 2017, and do not intend to live anywhere else;
- (c) the Trailer sits on a concrete slab and has not been moved since December 15, 2017;
- (d) the Property has electricity service and water, and Debtors pay the utility bills when due;
- (e) Debtors obtained a Residential Permit for the Property that expires in May 2023; and

¹⁰ Doc. No. 53.

¹¹ Doc. No. 64.

¹² Doc. Nos. 67, 68.

¹³ Doc. No. 67-4.

(f) Debtors are pursuing the possible construction of a traditional home on the Property.¹⁴

Debtors also submitted documents showing that Wells Fargo has sent banking information to the Property, that Mr. Bravo listed the Property as his address on his driver's license, and that Debtors used the Property as their address on their 2019 federal income tax return.¹⁵

In its response to the Summary Judgment Motion, Creditor contends that the Property does not qualify as exempt homestead because:

- (a) the Trailer has wheels and is not strapped down;
- (b) Debtors previously were notified that the Trailer violated Lee County Code Enforcement provisions;
- (c) Debtors' residential permit is only a temporary permit intended for use during the construction of a home; and
- (d) Debtors do not have the financial ability to build a home, with the result that the residential permit is necessarily temporary.¹⁶

¹⁴ Doc. Nos. 67-3, 67-4, 67-5.

¹⁵ Doc. No. 67-3.

¹⁶ Doc. No. 68.

II. DISCUSSION

Under § 522(f)(1)(A), a debtor may avoid a judicial 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 applicable state or federal law.¹⁷ The section has the “broad purpose of protecting the debtor’s exempt property.”¹⁸ For a debtor to avoid a lien under § 522(f)(1)(A), he must prove two elements: (a) that the judicial lien attached or “fixed” to property that he already owned, and (b) that the lien impairs an exemption to which he would have been entitled, hypothetically, under state law.¹⁹

Debtors contend that Creditor did not object to Debtors’ claimed homestead exemption by the deadline established under Fed. R. Bankr. P. 4003(b). But under Fed. R. Bankr. P. 4003(d), “a creditor may object to a request under § 522(f) by challenging the validity of the exemption asserted to be impaired by the lien,” even if the creditor did not object to the exemption within the time permitted by Fed. R. Bankr. P. 4003(b). Therefore, Creditor may object to Debtors’ claimed homestead exemption as a defense to Debtors’ Lien Avoidance Motion.

¹⁷ 11 U.S.C. § 522(f)(1)(A).

¹⁸ *In re Saad*, 642 B.R. 329, 333 (Bankr. M.D. Fla. 2022) (quoting *In re Pettengill*, 635 B.R. 842, 844 (Bankr. S.D. Fla. 2021) (quoting *Farrey v. Sanderfoot*, 500 U.S. 291, 297, 111 S. Ct. 1825, 114 L. Ed. 2d 337 (1991))).

¹⁹ *In re Saad*, 642 B.R. at 333 (citing *In re Badalamenti*, 632 B.R. 862, 866 (Bankr. M.D. Fla. 2021)) (citations omitted).

To avoid a judicial lien under § 522(f)(1)(A), the debtor normally bears the burden of proving that the lien impairs an exemption to which he would have been entitled under state law. However, “when the grounds for an objection to lien avoidance rest upon a challenge to the debtor’s claimed homestead exemption, Bankruptcy Rule 4003(c) shifts that burden to the [objector]’ to prove that the exemption is not properly claimed.”²⁰

In their Summary Judgment Motion, Debtors assert that there is no genuine dispute as to their claim of exemption and that they are entitled to judgment as a matter of law on their Lien Avoidance Motion.²¹ As the moving parties on summary judgment on an issue in which Creditor bears the burden of proof, Debtors may either show that there is no evidence to support Creditor’s objection or may come forward with affirmative evidence that Creditor will be unable to prove its objection at trial.²²

A. Creditor’s judicial lien fixed on Debtors’ Property.

To satisfy the first element under § 522(f)(1)(A), the debtor must have owned the property before the judgment was recorded.²³ Under Fla. Stat. § 55.10, a judgment

²⁰ *In re Golding*, 622 B.R. 8, 15 (Bankr. D. Conn. 2020) (quoting *In re Carpenter*, 559 B.R. 551, 555 (Bankr. D.R.I. 2016)); *In re Mootosammy*, 387 B.R. 291, 295 (Bankr. M.D. Fla. 2008).

²¹ Fed. R. Civ. P. 56(a), made applicable to this contested matter by Fed. R. Bankr. P. 9014(c).

²² *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1115-16 (11th Cir. 1993); *In re Fields*, 2018 WL 1616840, at *2 (Bankr. M.D. Fla. Mar. 30, 2018).

²³ *In re Saad*, 642 B.R. at 333-34 (citing *In re Badalamenti*, 632 B.R. at 867).

becomes a lien on real property in any county when a certified copy of the judgment is recorded in the public records of the county where the property is located.²⁴ Here, Debtors purchased the Property in 2017, and Creditor recorded its Final Judgment in the public records of Lee County in 2019. Therefore, Creditor's judicial lien fixed on the Property that Debtors already owned, and Debtors satisfied the first element to avoid Creditor's judicial lien under § 522(f)(1)(A).

B. Creditor's judicial lien impairs Debtors' homestead exemption.

Under the Florida Constitution, a natural person's homestead is exempt from forced sale to the extent of one-half acre of contiguous land if located within a municipality.²⁵ To qualify for the homestead exemption, an individual must have an ownership interest in the residence, must actually use and occupy the residence, and must intend to live there permanently. Once these requirements are met, there is little that a homeowner can do to lose the homestead protection.²⁶

Here, the record establishes that Debtors own the Property, that they have lived on the Property continuously since 2017, that they consider the Property to be their home, and that they intend to live on the Property permanently.

²⁴ Fla. Stat. § 55.10.

²⁵ Fla. Const. Art. X, § 4.

²⁶ *Bank of America, N.A. v. Elnicki*, 2020 WL 6870740, at *5 (M.D. Fla. Sept. 22, 2020) (citations omitted).

In its opposition to the Summary Judgment Motion, Creditor cites two cases to support its position that the Property does not qualify for the homestead exemption: a bankruptcy court's ruling in *In re Yettaw*²⁷ and a district court's ruling in *In re Kellogg*.²⁸ But *Yettaw* and *Kellogg* do not address the Florida Constitution's homestead exemption. Instead, they discuss claimed exemptions for dwellings under Fla. Stat. § 222.05.

Under Fla. Stat. § 222.05, a person may claim an exemption for “any dwelling house, including a mobile home used as a residence, or modular home, *on land not his or her own*.”²⁹ In *Yettaw* and *Kellogg*, the courts applied a six-factor test – centering on the habitability and mobility of non-traditional homes – to determine whether the mobile homes at issue qualified as the debtors' homestead.

But here, Debtors claim the Property as their homestead real property and the issue is whether Debtors live on the Property and intend to remain there permanently such that the Property qualifies as their exempt homestead under Florida's Constitution.

In *In re McClain*,³⁰ the bankruptcy court addressed similar facts: the debtor lived in a motor home on real property that he claimed as his exempt homestead.

²⁷ 316 B.R. 560 (Bankr. M.D. Fla. 2004).

²⁸ 2021 WL 3633590 (M.D. Fla. Aug. 17, 2021).

²⁹ Fla. Stat. § 222.05 (emphasis added).

³⁰ 281 B.R. 769 (Bankr. M.D. Fla. 2002).

The court overruled a creditor's objection to the exemption, stating that "so long as a debtor actually lived on real property being claimed as exempt, a non-exempt tree-house or tent would establish the requisite degree of permanency."³¹

And the Eleventh Circuit Court of Appeals' holding in *In re Gamboa*³² is directly on point. In *Gamboa*, the debtor purchased vacant land in Miami-Dade County and later moved into a trailer that he had relocated to the land. The debtor had electricity and water at the trailer, received his mail at the trailer, and had no other residence. The County had notified the debtor that his residence on agricultural land violated a local ordinance, and the debtor had applied for a permit to build a house on the land one month before he filed a Chapter 13 bankruptcy case. He listed the land and trailer as his exempt homestead on his bankruptcy schedules.³³

Two creditors objected to the debtor's claimed exemption, asserting in part that the trailer was not a permanent legal dwelling sufficient to qualify for a homestead. The bankruptcy court overruled the creditors' objection, finding that (1) the debtor was living on the land on the petition date with the requisite permanent intent; (2) the debtor was not required to live in a permitted and completed house; and (3) the debtor's financial ability to build a house on the land was irrelevant to the

³¹ *In re McClain*, 281 B.R. at 773.

³² 778 F. App'x 829 (11th Cir. 2019).

³³ *Id.* at 829-830.

only two facts that mattered on the issue: his residence on the land and his intent to reside on the land permanently.³⁴

On appeal to the Eleventh Circuit Court of Appeals, the creditors argued that the debtor's trailer was only a temporary structure and not a permanent home, so that his land could not qualify for homestead protection. The Eleventh Circuit affirmed the lower court's rulings and allowed the debtor's claim of exemption. The court stated:

[I]t is undisputed that [the debtor] has resided on his 14-acre parcel in his trailer since November 2013, which is sufficient to satisfy *Drucker's* actual occupancy requirement. Nothing in *Drucker* or any other decision cited by the creditors requires [the debtor's] trailer to be "permitted" or "built and permanently placed on the premises in accordance with applicable law and building code requirements" for [the debtor's] residence inside it to qualify as actual occupancy.³⁵

Here, Creditor contends that the Trailer is moveable and violates the Lee County Code, that Debtors only have a temporary residential permit for the Property, and that Debtors lack the financial ability to build a home. But these are essentially the same arguments that the Eleventh Circuit considered and rejected in *Gamboa*. For the reasons explained in *Gamboa*, the Court finds that Creditor's arguments lack merit.

³⁴ *Id.* at 832-834.

³⁵ *Id.* at 835 (referring to *Drucker v. Rosenstein*, 19 Fla. 191 (Fla. 1882), which requires a debtor to actually reside on the property, but does not require the residence to be in a permanent structure.).

Finally, Creditor contends that the Lee County Property Appraiser's records do not reflect the Property as homestead property. However, the constitutional homestead exemption from forced sale is different from the homestead exemption for tax purposes, and the existence of a homestead exemption from forced sale "is not dependent on claiming *or failing to claim* the property as a tax-exempt homestead."³⁶ Under the circumstances of this case, the Court finds that the Property Appraiser's records are irrelevant to Debtors' intent to permanently live on the Property and affords them no evidentiary weight.

III. CONCLUSION

The record clearly establishes that (a) Debtors own the Property; (b) Debtors have lived in the Trailer on the Property continuously since 2017 and have not lived anywhere else; and (c) Debtors intend to live on the Property permanently. The Court finds that Debtors met their burden on summary judgment to show that the Property is their exempt homestead and that Creditor failed to meet its burden in opposing summary judgment.

Therefore, the Court finds that the Property is Debtors' homestead and that their homestead exemption is allowed in their bankruptcy case. Because Creditor's judicial lien attached to the Property when Creditor recorded its Final Judgment in 2019, the judicial lien may be avoided under 11 U.S.C. § 522(f)(1)(A).

³⁶ *In re Badalamenti*, 632 B.R. at 864, n. 4 (emphasis added) (citations omitted).

Accordingly, it is

ORDERED:

1. Debtors' *Motion for Summary Judgment* (Doc. No. 67) is **GRANTED**.
2. Debtors' counsel shall submit an order granting Debtors' *Renewed Verified Motion to Avoid Judicial Lien of Lomangino Enterprises, Inc., on Exempt Property* (Doc. No. 44).

The Clerk's office is directed to serve a copy of this Order on interested parties via CM/ECF.