NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL FOR THE FIRST CIRCUIT

BAP NO. MB 14-039

Bankruptcy Case No. 13-12232-WCH

JOHN LUDVIGSEN,
Debtor,

JOHN LUDVIGSEN,
Appellant,

v.

ANDREW M. OSBORNE,
Appellee.

Appeal from the United States Bankruptcy Court
for the District of Massachusetts
(Hon. William C. Hillman, U.S. Bankruptcy Judge)

Before
Deasy, Kornreich, and Finkle,
United States Bankruptcy Appellate Panel Judges.

Stephen Matthews, Esq., on brief for Appellant.
David J. Fonte, Esq., on brief for Appellee.

January 16, 2015

Deasy, U.S. Bankruptcy Appellate Panel Judge.

John Ludvigsen (the "Debtor") appeals from the bankruptcy court's April 9, 2014 order denying his motion seeking to reopen his chapter 7 case pursuant to § 350(b)[1] to avoid judicial liens, and the May 7, 2014 order denying reconsideration. For the reasons set forth below, the Panel **REVERSES** and **REMANDS** the matter to the bankruptcy court for proceedings consistent with this opinion.

BACKGROUND

The Debtor filed a chapter 7 case on April 18, 2013. On his Schedule A- Real Property, the Debtor listed his residence at 294 Cedar Street, Dedham, Massachusetts with a current value of $267,000.00. On his Schedule C- Property Claimed as Exempt, the Debtor claimed an exemption in his residence pursuant to Mass. Gen. Laws ch. 188, § 1, but listed the value of the claimed exemption as $0.00.[2] In his Schedule D- Creditors Holding Secured Claims, he listed eight creditors as the holders of judgment liens against his residence, including the appellee, Andrew M. Osborne ("Osborne"), as the holder of a judicial lien in the amount of $133,751.00.

On June 14, 2013, the Debtor filed six Motions To Avoid Judicial Liens, which the bankruptcy court denied the same day without prejudice for failure to comply with certain procedural requirements. Thereafter, on July 16, 2013, the Debtor filed seven new Motions to Avoid Judicial Liens. In the motions, the Debtor identified eight judicial liens against his

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[1] Unless expressly stated otherwise, all references to "Bankruptcy Code" or to specific statutory sections shall be to the Bankruptcy Reform Act of 1978, as amended, 11 U.S.C. §§ 101, et seq. All references to "Bankruptcy Rule" shall be to the Federal Rules of Bankruptcy Procedure.

[2] The Debtor asserts that he did not provide a monetary value for his claimed homestead exemption because at the time of the bankruptcy filing, he had no equity in his residence given the secured claims against the property and, therefore, there was no equity to exempt.

residence, for a total amount of $710,928.41, and sought to avoid seven of those liens, including Osborne's, on the grounds that the liens impaired his homestead exemption of $500,000.00. The same day, the bankruptcy court denied the motions "without prejudice as the Debtor has claimed an exemption in the amount of $0 on Schedule C and as the calculations do not reflect that the Debtor is seeking avoidance of other judicial liens. See 11 U.S.C. Section 522(f)(2)(B)." Also on July 16, 2013, the bankruptcy court entered an order discharging the Debtor, and it closed the case on July 31, 2013.

On March 7, 2014, the Debtor filed a motion (the "Motion to Reopen") asking the bankruptcy court to reopen the case to allow him to file additional motions seeking to avoid the judicial liens "as the same are avoidable and is [sic] not available to cure the defects with the prior filings of Motion to Avoid Judicial Liens." Osborne objected to the Motion to Reopen, arguing that there was no reason to reopen the case as the Debtor had not made the requisite showing under § 522(f)(1) that the liens impaired one of the Debtor's exemptions and that he would prevail in his attempt to avoid the liens, and because the Debtor waited almost eight months to file the Motion to Reopen. In his response, the Debtor acknowledged that he needed to seek court approval to file an amended Schedule C that correctly stated the value of his claimed exemption, and that he was prepared to file a motion for leave to file an amended Schedule C if the bankruptcy court reopened his case. The Debtor also pointed out that he did claim a homestead exemption on his Schedule C and that his counsel's failure to list a value for the claimed exemption was a mistake. As to the delay in filing the Motion to Reopen, the Debtor pointed out that neither the Bankruptcy Code nor the Federal Rules of Bankruptcy Procedure provide a time in which a motion to reopen must be brought, and that motions to reopen are not subject to the one-year limitation in Fed. R. Civ. P. 60 where a party seeks relief

from judgment. He also noted that although his counsel should have moved to keep the case open before it closed, or moved earlier to reopen his case after the court denied his second set of motions to avoid judicial liens, he should not bear the responsibility of his counsel's delay in seeking to reopen the case, especially where the creditor has not shown that he was prejudiced by the delay.

After a hearing on April 9, 2014, the bankruptcy court denied the Motion to Reopen. The entire exchange before the bankruptcy court was as follows:

> THE COURT: Go ahead on the motion to reopen.
>
> MR. MATTHEWS: Thank you, Your Honor. Stephen Matthews for Mr. Ludvigsen, age 78.
>
> The case closed, Your Honor, on July 31, 2013. An Order of Discharge had entered on July 16, 2013. Prior to the closing debtor by counsel had made two attempts to seek to avoid six judicial liens against the property. The second set of judicial liens [was] denied by the Court the same day his Order of Discharge entered, Your Honor. Each set was denied without prejudice. [Debtor], through counsel, knew of the liens, took steps to avoid the liens and, regrettably, didn't get the liens allowed [sic].
>
> Counsel should have been more proactive in keeping the case open as well as in moving earlier to reopen the case and, regrettably, that didn't –
>
> THE COURT: And claiming an exemption of more than zero?
>
> MR. MATTHEWS: Your Honor, I, I reported the exemption and I documented the homestead declaration that he had filed. At the time that I prepared the paperwork, Your Honor, his house was underwater and there was no equity in the home to prepare [sic].
>
> THE COURT: But that isn't the way it works.
>
> MR. MATTHEWS: I appreciate that, Your Honor. I should have corrected that mistake as well, Your Honor.
>
> THE COURT: I've never understood why people don't claim [$] 500,000 in every case. You can't lose anything if you do that.

> I can't reopen your case. You haven't claimed an exemption. You don't seem to be able to play by the rules and unfortunately, the client has to suffer if attorneys don't play by the rules.
>
> MR. MATTHEWS: Your Honor, the – with – with –
>
> THE COURT: Motion –
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> MR. MATTHEWS: I –
>
> THE COURT: to reopen is denied.

The Debtor moved for reconsideration, arguing that the bankruptcy court incorrectly based its ruling on his counsel's mistake in failing to list a value for the claimed exemption which precluded his avoidance of the liens. According to the Debtor, he had identified the mistake, was prepared to correct it by filing an amended Schedule C if the court reopened the case, and that it is well established that a debtor may seek to amend his schedules after his case is reopened for the purpose of avoiding judicial liens. In addition, the Debtor argued that a value for the claimed exemption "may not be required for a Debtor to assert that the judicial lien impairs his claimed exemption," citing Botkin v. Dupont Cmty. Credit Union, 650 F.3d 396, 400 (4th Cir. 2011), and In re Scannell, 453 B.R. 36, 40 (Bankr. D.N.H. 2011).

At the hearing on the Debtor's motion for reconsideration held May 7, 2014, the Debtor restated his argument that other jurisdictions (including the Fourth Circuit in Botkin and the New Hampshire bankruptcy court in Scannell) have held that a debtor need not claim an exemption on Schedule C as a precondition to avoiding a lien that the debtor contends impairs the exemption. The Debtor noted, however, a conflicting holding in In re Church, No. 08-16202, 2009 Bankr. LEXIS 3589 (Bankr. D. Mass. Nov. 3, 2009), in which the Massachusetts bankruptcy court denied a motion to avoid a judicial lien on the ground that the debtor had not claimed any exemption on his schedule. The bankruptcy court responded as follows:

> THE COURT: Well, you claimed zero. Is that different than not claiming it [(an exemption)] at all?
>
> MR. MATTHEWS: I submit it is, Your Honor. I did indicate in my schedule that the debtor was seeking that particular exemption. At that particular time, Your Honor, his house was underwater. There was no equity available to him. It was an inadvertent oversight, I admit, Your Honor, but he did assert that he was entitled to that exemption to the extent that there was equity available for that exemption, Your Honor. But –
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> THE COURT: Given the option of following the Fourth Circuit [(in Botkin)] or Judge Feeney [(in Church]), I'll opt for Judge Feeney [(in Church]). I think she's right.
>
> Your motion to reconsider is denied.

Thereafter, the bankruptcy court entered an order denying the motion to reconsider. This appeal followed.

JURISDICTION

The Panel may consider appeals from final orders. 28 U.S.C. § 158(a)(1). A bankruptcy court order denying a debtor's motion to reopen his bankruptcy case is a final order. See Cadle Co. v. Andersen (In re Andersen), BAP No. MB 10-015, 2011 Bankr. LEXIS 317, at *7-8 (B.A.P. 1st Cir. Jan. 20, 2011) (citing Riazuddin v. Schindler Elevator Corp. (In re Riazuddin), 363 B.R. 177, 182 (B.A.P. 10th Cir. 2007); Crofford v. Conseco Fin. Serv. Corp. (In re Crofford), 301 B.R. 880, 882 (B.A.P. 8th Cir. 2003)). Moreover, an order denying reconsideration is final if the underlying order is final, and together they end the litigation on the merits. See United States v. Monahan (In re Monahan), 497 B.R. 642, 646 (B.A.P. 1st Cir. 2013) (citation omitted); Garcia Matos v. Oliveras Rivera (In re Garcia Matos), 478 B.R. 506, 511 (B.A.P. 1st Cir. 2012) (citations omitted). As the orders on appeal meet these criteria, the Panel has jurisdiction to hear this appeal.

STANDARD OF REVIEW

Appellate courts apply the clearly erroneous standard to findings of fact and de novo review to conclusions of law. See Lessard v. Wilton-Lyndeborough Coop. Sch. Dist., 592 F.3d 267, 269 (1st Cir. 2010). Section 350(b) gives the bankruptcy court broad discretion in deciding whether to reopen a case, and the decision to grant or deny a motion to reopen shall not be overturned unless the court abused its discretion. See Mass. Dep't of Rev. v. Crocker (In re Crocker), 362 B.R. 49, 53 (B.A.P. 1st Cir. 2007); see also In re Andersen, 2011 Bankr. LEXIS 317, at *8. The denial of a motion to reconsider also is reviewed for abuse of discretion. Ungar v. Palestine Liberation Org., 599 F.3d 79, 83 (1st Cir. 2010) (citation omitted). An abuse of discretion "occurs when a court, in making a discretionary decision, relies upon an improper factor, neglects a factor entitled to substantial weight, or considers the correct mix of factors but makes a clear error of judgment in weighing them." Bacardí Int'l Ltd. v. V. Suárez & Co., 719 F.3d 1, 9 (1st Cir. 2013) (internal quotations and citation omitted).

DISCUSSION

I. Applicable Law

Bankruptcy Rule 5010 provides, in relevant part, that "[a] case may be reopened on motion of the debtor or other party in interest pursuant to § 350(b) of the Code." Fed. R. Bankr. P. 5010. In turn, § 350(b) provides that "[a] case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause." 11 U.S.C. § 350(b).

"It is well settled that the decision to reopen a case is within the sound discretion of the bankruptcy court." In re Crocker, 362 B.R. at 53 (citations omitted)). "This discretion depends upon the circumstances of the individual case and accords with the equitable nature of all

bankruptcy proceedings." Id. (internal quotations and citation omitted); see also In re Dalezios, 507 B.R. 54, 58 (Bankr. D. Mass. 2014) ("The decision to reopen should be made on a case-by-case basis based on the particular circumstances and equities of a case, and should be left to the sole discretion of bankruptcy court."). A court properly exercises its discretion to reopen a bankruptcy case when it does so in order to permit a dispute to be decided "on the substantive merits rather than technical defects." In re Rutherford, 427 B.R. 656, 659 (Bankr. S.D. Ohio 2010) (internal quotations and citation omitted).

"[T]he reopening of a case is a ministerial act which allows the file to be retrieved so the court can receive a new request for relief; the reopening, by itself, has no independent legal significance and determines nothing with respect to the merits of the relief to be requested." In re Andersen, 2011 Bankr. LEXIS 317, at *14 (citations omitted). "[A]lthough the required reopening of a closed bankruptcy case serves no substantive purpose, by refusing to reopen a case, a court may effectively decline consideration of a proffered claim by way of its discretionary refusal to revisit a case's substantive issues." Leach v. Buckingham (In re Leach), 194 B.R. 812, 815 (E.D. Mich. 1996). Thus, a bankruptcy court considering a motion to reopen should consider whether the moving party would be entitled to pursue the cause of action for which it seeks the reopening. If the movant cannot prevail on the merits of the action to be pursued as a matter of law, reopening the case would serve no purpose and the motion to reopen should be denied.[3] See In re Gagne, No. 02-10966, 2010 Bankr. LEXIS 4706, at *2 (Bankr. D.

[3] For example, bankruptcy courts have declined to reopen cases in situations where the creditor was barred from pursing a cause of action under § 727(d). See, e.g., In re Strojny, No. 08-17328-JNF, 2011 Bankr. LEXIS 5177 (Bankr. D. Mass. Dec. 29, 2011) (refusing to reopen case to allow creditor to file dischargeability complaint because creditor failed to timely file complaint before case was closed and therefore could not prevail on dischargeability action).

Me. Dec. 16, 2010) (citing In re Hunter, 283 B.R. 353, 356 (Bankr. M.D. Fla. 2002)); In re Weber, 283 B.R. 630, 633 (Bankr. D. Mass. 2002) ("Although sequential logic would suggest that the Court first determine whether to reopen the case, there is no reason to reopen the case" if the movant cannot prevail on the cause of action to be pursued).

II. Analysis

The Debtor argues that the bankruptcy court abused its discretion in declining to reopen the case so that he could seek to avoid the judicial liens against his residence pursuant to § 522(f). Section 522 lien avoidance has been recognized as sufficient cause for reopening a case under § 350(b) because lien avoidance affords relief to the debtor. See, e.g., Wilding v. CitiFinancial Consumer Fin. Servs., Inc. (In re Wilding), 475 F.3d 428, 431 (1st Cir. 2007) (permitting debtor to reopen chapter 7 case to avoid judicial lien); Patriot Portfolio, LLC. v. Weinstein (In re Weinstein), 164 F.3d 677, 686 n.7 (1st Cir. 1999); In re Dator, No. 98-15046-JNF, 2006 Bankr. LEXIS 1596, at *4 (Bankr. D. Mass. July 21, 2006); In re Procaccianti, 253 B.R. 590, 591 (Bankr. D.R.I. 2000).

In denying the Motion to Reopen, the bankruptcy court focused on the Debtor's claimed value of $0.00 on his homestead exemption, stating that it could not reopen the case because the Debtor had not claimed an exemption. Implicit in this ruling is that, because the Debtor provided a value of $0.00 for his homestead exemption, he could not avoid the judicial liens on his residence as a matter of law and, therefore, reopening the case would serve no purpose. In its ruling, however, the bankruptcy court failed to consider a critical factor under the legal method it decided to apply to the merits of the relief sought by the Debtor.

A. The Need to Claim Any Available Exemption At All

The Debtor argued for the application of one of two analytical rationales used by bankruptcy courts to determine the merits of avoiding liens under § 522(f). Some courts have held that debtors are not limited to the exemptions they actually claimed on Schedule C for lien avoidance purposes under § 522(f), and that there is no precondition that debtors even claim an exemption in order to avoid a lien which the debtor contends impairs an exemption.[4] Other courts have concluded that a debtor must actually have claimed the property as exempt before the debtor may avoid a lien as impairing an exemption.[5] The bankruptcy court summarily adopted the second view in denying both the Motion to Reopen and the motion for reconsideration.

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[4] See, e.g., Botkin, supra (indicating no need to even claim an exemption); In re Scannell, supra (same); In re Morais, No. 09-42079-JBR, 2009 Bankr. LEXIS 3014, at *4 (Bankr. D. Mass. Sept. 18, 2009) (stating the statute does not require a debtor to have actually claimed an exemption in the property); In re Nichol, No. 08 B 19054, 2009 Bankr. LEXIS 370, at *3 (Bankr. N.D. Ill. Feb. 6, 2009) (failing to claim the property as exempt on the debtor's schedules is irrelevant to the application of § 522(f)); In re Powell, 399 B.R. 190, 195 (Bankr. W.D. Tex. 2008) (stating the debtor is not limited to the claimed exemptions on Schedule C for purposes of § 522(f)); In re Moreno, 352 B.R. 455, 460 (Bankr. N.D. Ill. 2006) (claiming the actual exemption is unnecessary); In re Montgomery, 80 B.R. 385, 389 (Bankr. W.D. Tex. 1987) (stating § 522(f) directs the court to consider not what has been deemed exempt but rather what would be exempt under § 522(b)); Yamamoto v. City Bank of Honolulu (In re Yamamoto), 21 B.R. 58, 59 (Bankr. D. Haw. 1982) (stating actual exemption is unnecessary).

[5] See, e.g., In re Wallace, 453 B.R. 78, 82 (Bankr. W.D.N.Y. 2011) (holding a debtor must actually claim a homestead exemption on Schedule C in order to utilize the avoidance provisions of § 522(f)); In re Church, supra (indicating that where a debtor has not claimed an exemption in the property which is subject to the judicial lien, there is nothing for § 522(f) to protect); In re Berryhill, 254 B.R. 242, 244 (Bankr. N.D. Ind. 2000) (stating debtors may not avoid judicial liens upon property without actually claiming an exemption in that property).

The alternative employed by the bankruptcy court requires a debtor to actually claim an exemption. Implicit in the bankruptcy court's rulings is a determination that the Debtor in this case claimed no exemption at all because the amount listed in Schedule C was $0.00. However, the line of cases relied upon in the Church decision, and adopted by the bankruptcy court in this case, recognize that Schedule C may be amended to satisfy the requirement to actually claim an exemption. In re Church, 2009 Bankr. LEXIS 3589, at *2. If the bankruptcy court had reopened the case, the Debtor would have been able to seek leave to amend his Schedule C to include a value for his claimed homestead exemption. See, e.g., Goswami v. MTC Distrib. (In re Goswami), 304 B.R. 386 (B.A.P. 9th Cir. 2003) (holding that debtors were permitted to amend their exemption schedule after their case was reopened for the purpose of avoiding a judicial lien).

B. Amendment of Schedule C

In his motion to reconsider, the Debtor stated that he was prepared to file an amended Schedule C if the bankruptcy court reopened his case. As there is no time limit for amending schedules or filing lien avoidance motions—if the Debtor had been permitted to reopen his case—he may have filed an amended Schedule C, and the bankruptcy court could have considered the merits of such an amendment and a new lien avoidance motion to determine whether the other prerequisites to lien avoidance were satisfied.[6]

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[6] A debtor may, as a matter of course, amend a voluntary petition or schedules at any time before the case is closed. Fed. R. Bankr. P. 1009(a); see also United States v. Colón Ledée, 772 F.3d 21 (1st Cir. 2014). This right to amend includes the right to amend the debtor's claimed exemptions. "[F]or the purposes of filing amendments, there is no difference between an open case and a reopened case, and [a debtor in a reopened case does] not need the court's permission to amend." Towers v. Boyd (In re Boyd), 243 B.R. 756, 766 (N.D. Cal. 2000). Generally, "[t]he bankruptcy court has no discretion to disallow amended exemptions, unless the amendment has been made in bad faith or prejudices third parties." Arnold v. Gill (In re Arnold), 252 B.R. 778, 784 (B.A.P. 9th Cir. 2000) (citing Martinson v.

Prior to the closing of the case, the initial lien avoidance motions were denied "without prejudice." That denial does not appear to preclude the Debtor from correcting any mistakes and refiling the motions to avoid. Although the Debtor did not move to reopen for almost eight months, the bankruptcy court in considering the Motion to Reopen did not address the doctrine of laches, and Osborne did not argue or demonstrate that he was prejudiced by the delay as required under the doctrine.[7] Thus, the bankruptcy court effectively declined to consider the merits of any lien avoidance motion that the Debtor could have filed after an amendment to Schedule C by way of its discretionary refusal to reopen the case.

This is not to say that the Debtor would have prevailed on the merits of a lien avoidance motion; just that the bankruptcy court should have reopened the case to permit the Debtor to amend his Schedule C (if he so chose) and/or file new lien avoidance motions. Whether or not the Debtor would be allowed to amend Schedule C under the circumstances of this case is a material factor under the rationale adopted by the bankruptcy court and could only be considered by the bankruptcy court if the case is reopened and the Debtor seeks to amend Schedule C.

Michael (In re Michael), 163 F.3d 526, 529 (9th Cir. 1998)); see also In re Melber, 315 B.R. 181, 190 (Bankr. D. Mass. 2004).

[7] Neither § 350(b) nor Bankruptcy Rule 5010 limits the time to make a motion to reopen. But the doctrine of laches may be grounds for denying a motion to reopen. See In re Gagne, 2010 Bankr. LEXIS 4706, at *2; In re Dator, 2006 Bankr. LEXIS 1596, at *6-7. "'Laches is an equitable defense which allows a court to dismiss an action when there exists inexcusable delay in instituting an action and prejudice to the non-moving party as a result of the delay.'" Id. (quoting In re Levy, 256 B.R. 563, 565-66 (Bankr. D.N.J. 2000) (citations omitted)). "Passage of time alone . . . does not necessarily constitute prejudice to a creditor sufficient to bar the reopening of a case." Id. at *5 (quoting In re Frasier, 294 B.R. 362, 367 (Bankr. D. Colo. 2003)).

CONCLUSION

We conclude, therefore, that the bankruptcy court abused its discretion in declining to reopen the case to enable the Debtor to pursue such actions. See In re Andersen, 2011 Bankr. LEXIS 317, at *14 (holding that bankruptcy court abused its discretion in denying creditor's request to reopen the case to file a § 727(d)(1) complaint, but noting Panel was making no determination as to the merits of a potential revocation of discharge action or whether such action might be time barred under the Bankruptcy Code). For the reasons set forth above, the Panel **REVERSES** and **REMANDS** to the bankruptcy court for proceedings consistent with this opinion.