

**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF FLORIDA**

**In re Carlos FELIZARDO, Debtor.**

**NO. 99-18026-BKC-RAM**

(Cite as: 255 B.R. 85)

**ORDER DENYING DEBTOR'S MOTION TO  
AVOID JUDGMENT LIEN OF RAQUEL RODRIGUEZ**

Carlos Felizardo, the Debtor, seeks to avoid a charging lien of attorney/creditor Raquel Rodriguez ("Rodriguez"). In determining whether the charging lien may be avoided under §522(f) of the Bankruptcy Code, the Court must consider two legal issues: 1) whether, under §522(f) of the Bankruptcy Code, an attorney's charging lien which has been reduced to judgment "impairs" the Debtor's Florida homestead exemption; and 2) whether, under § 522(f) of the Bankruptcy Code, an attorney's charging lien which has been reduced to judgment is a "judicial lien." After considering the arguments of counsel, the parties' briefs, and the relevant case law, the Court finds that though Rodriguez' charging lien does "impair" the Debtor's homestead exemption for purposes of Bankruptcy law, a charging lien under Florida law does not constitute a "judicial lien" under the Bankruptcy Code. Therefore, §522(f) does not apply, and Debtor's Motion to Avoid Judgment Lien of Raquel Rodriguez must be denied.

**Factual Background**

On September 20, 1996 the Debtor entered into a retainer agreement with attorney Rodriguez. Rodriguez was engaged to represent the Debtor in dissolution of marriage proceedings. Paragraph 4 of the agreement states: "In the event your bill remains unpaid following your discharge of our services or my withdrawal from your representation, you agree to the imposition of a charging lien for the full amount of all reasonable attorney's fees and costs." The agreement is signed by both the Debtor and Rodriguez.

Rodriguez represented the Debtor in the dissolution proceeding, which resulted in a mediation and an equitable distribution. The outcome of the mediation was that the Debtor acquired his former wife's interest in the marital home, 1717 North Bayshore Drive, Apt. #2552, Miami, FL 33132.

The Debtor defaulted on payment of attorney's fees to Rodriguez, and Rodriguez filed a Notice and Claim of Attorney's Charging Lien on September 4, 1998 in the Circuit Court. Rodriguez claimed a charging lien in the amount of \$4,936.28 on all real and personal property of the Debtor, including the Debtor's residence at 1717 North Bayshore Drive, Apt. #2552, Miami, FL 33132. The charging lien allegedly related back to September 6, 1996, the date that Rodriguez sent the retainer agreement to the Debtor.

On September 23, 1998 the Circuit Court held a hearing on Rodriguez' Notice and Claim of Charging Lien. The Debtor appeared at the hearing and argued against the imposition of the charging lien. The Debtor's Affidavit, filed February 11, 2000 in the Bankruptcy Case states:

Ms. Rodriguez did not explain to me the significance of agreeing to a charging lien. She did not tell me that any such lien would attach to my homestead or other property. I would not have agreed to such lien. I attended a hearing on the issue of the charging lien before Judge Feder. I argued against the imposition of the lien, however I was not represented by counsel and I was unsuccessful.

Despite the Debtor's objection, the Circuit Court Judge, on September 23, 1998, entered a Final Judgment of Charging Lien in the amount of \$4,936.28. According to the Final Judgment, the charging lien "attaches to the positive fruits of Mrs. Rodriguez's efforts." Rodriguez properly recorded the judgment on September 29, 1998.

The Debtor filed his Voluntary Petition for Chapter 7 Relief in this Court on August 15, 1999. On his schedules, the Debtor claimed as his homestead the residence at 1717 North Bayshore Drive, Apt. #2552, Miami, FL 33132. On October 25, 1999, the Debtor filed a Motion to Avoid Judgment Lien, seeking to avoid Rodriguez' recorded judgment lien against the Debtor's homestead.

The Court held a hearing on February 8, 2000, to consider the Debtor's Motion to Avoid Judgment Lien. After the hearing, the Court took the matter under advisement, to consider: 1) whether, under §522(f) of the Bankruptcy Code, an attorney's charging lien which has been reduced to judgment "impairs" the Debtor's Florida homestead exemption; and 2) whether, under §522(f) of the Bankruptcy Code, an attorney's charging lien which has been reduced to judgment is a "judicial lien".

**I. Rodriguez' Charging Lien "Impairs" the Debtor's Homestead Exemption Under §522(f).**

Under section 522(f) of the Bankruptcy Code, a Debtor may avoid certain liens. § 522(f) provides:

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 a lien is  
(1) a judicial lien . . .

Since a debtor may only avoid a lien under §522(f) "to the extent that such lien impairs an exemption," a lien that is ineffective against the debtor's exemptions under Florida law might not "impair" a debtor's exemption under §522(f). Such a lien would not be avoidable by a Bankruptcy Court.

Some authority exists for the proposition that, under Florida's broad homestead exemption, no judgment lien is effective against a debtor's homestead, and, therefore, no judgment lien can "impair" a debtor's homestead exemption under §522(f) of the Bankruptcy Code. *See In re Goodwin*, 82 B.R. 616 (Bankr. S.D. Fla. 1988) ("In Florida, a judicial lien which is presently unenforceable against exempt real property does not impair the exemption").

The Bankruptcy Code allows states to opt out of the federal exemption scheme. *See* 11 U.S.C. §522(b). Florida has opted out of the Federal Bankruptcy exemptions. *See* Fla. Stat. §222.20 (1999). Therefore, Florida law governs a Florida Debtor's claim of homestead exemption as well as the validity of any lien that purportedly impairs the Debtor's homestead.

The Florida Constitution makes an individual's homestead immune from many types of purported liens. "Article X, section 4 of the Florida Constitution specifically exempts homestead property from levy and forced sale by judgment creditors and exempts any judgment recorded by the judgment creditor from operating as a lien on such property."<sup>1</sup> *Prieto v. Eastern National Bank*, 719 So.2d 1264, 1266 (Fla. 3d DCA 1998); *see also Demura v. County of Volusia*, 618 So.2d 754, 755 (Fla. 5<sup>th</sup> DCA 1993) (lien by county code enforcement board may not serve as a lien on homestead property). "Although money judgments are statutory liens upon the real estate of the defendant in the county where such judgments are recorded, no judgment can be a lien upon homestead property if the property acquired homestead exempted status prior to the existence of the judgment lien." *Volpetta v. Fields*, 369 So.2d 367, 369 (Fla. 4<sup>th</sup> DCA 1979) (citing *Milton v. Milton*, 58 So. 718 (1912)). Thus, under Florida law, a judgment creditor, who is not a mortgagee or a tax collector or a mechanic's lien holder, may not validly attach an individual's homestead. *See Prieto*, 719 So.2d at 1266 and *Volpetta*, 369 So.2d at 369.

However, "although the lien is unenforceable, the lien still creates a cloud on the title by the mere fact the lien was recorded in the public records. Recordation of a lien, even if unenforceable, is sufficient to impair the debtor's homestead exemption." *In re Lowe*, 250 B.R. 422, 425 (Bankr. M.D.Fla. 2000) (Jennemann, J.) (citing *In re Thornton*, 186 B.R. 155, 157 (Bankr. M.D.Fla. 1995); *In re Watson*, 116 B.R. 837, 838 (Bankr. M.D.Fla. 1990); *In re Calandriello*, 107 B.R. 374, 375-76 (Bankr. M.D.Fla. 1989); *In re Cannon*, 243 B.R. 153 (Bankr. S.D.Fla. 2000); and *In re Bird*, 84 B.R. 858 (Bankr. S.D.Fla. 1988)). This Court agrees that even an ineffective lien under Florida law clouds the title of the debtor's homestead and "impairs" the debtor's exemption for purposes of §522(f). *See id.* Thus Rodriguez' charging lien impairs the Debtor's homestead exemption under §522(f). §522(f) would apply, and the Debtor would be able to avoid Rodriguez' charging lien if the lien is a "judicial lien".

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<sup>1</sup> Article X, section 4 of the Florida Constitution provides:

Section 4. Homestead; exemptions.-

- (a) There shall be exempt from forced sale under process of any court, *and no judgment, decree or execution shall be a lien thereon*, except for the payment of taxes and assessments thereon, obligations contracted for the purchase, improvement or repair thereof, or obligations contracted for the house, field or other labor performed on the realty, the following property owned by a natural person:

(1) *a homestead . . . .*

(emphasis added).

## II. A Charging Lien Under Florida Law does not Constitute a “Judicial Lien” Under §522(f) of the Bankruptcy Code.

The Debtor may avoid the charging lien under §522(f) of the Bankruptcy Code only if the lien is a “judicial lien”. §101(36) of the Bankruptcy Code defines a “judicial lien” as “a lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding.” At first glance, it appears the Rodriguez’s charging lien is a judicial lien and is thus avoidable. The lien was reduced to the Final Judgment of Charging Lien, entered by the Circuit Court on September 23, 1998. The lien is evidenced by a court order. The judgment seems to have been obtained in a legal or equitable proceeding under the definition in § 101(36).

However, the Court must look beyond the face of the judgment. The fact that the lien resulted in a judgment does not necessarily mean that the lien was created by a judgment. For example, mortgage liens are reduced to judgment as part of the state court foreclosure process in Florida, but mortgage liens cannot be avoided under §522(f). “Before the lien may be avoided, prevailing law dictates inquiry into how the lien was created.” *In re Rosen*, 34 B.R. 648, 649 (Bankr. E.D. Wis. 1983).

Analysis of the nature of a charging lien under Florida law is necessary to determine whether a charging lien is a judicial lien under the Bankruptcy Code. Judge Bucklew, of the Middle District of Florida, was the first Florida judge to confront this interplay between charging liens and §522(f) in *In re Washington*, 238 B.R. 852 (M.D.Fla. 1999). Judge Bucklew noted that “in Florida, a charging lien is an attorney’s ‘equitable right to have costs and fees owed for legal services secured by the judgment or recovery in the lawsuit.’” *Washington*, 238 B.R. at 855 (citing *Lochner v. Monaco, Cardillo & Keith, P.A.*, 551 So.2d 581, 583 (Fla. 2d DCA 1989)).

The elements of a valid charging lien are: "1) an express or implied contract between attorney and client; 2) an express or implied understanding for payment of attorney's fees out of the recovery; 3) either an avoidance of payment or a dispute as to the amount of fees; and 4) timely notice." *Law Offices of David H. Zoberg, P.A. v. Rosen*, 684 So.2d 828, 829 (Fla. 3d DCA 1996) (citing *Daniel Mones, P.A. v. Smith*, 486 So.2d 559, 561 (Fla. 1986)).

Under Florida law, “there are no requirements for perfecting a charging lien beyond timely notice.” *Sinclair, Louis, Siegel, Heath, Nussbaum & Zavertrnik, P.A. v. Baucom*, 428 So.2d 1383, 1385 (Fla. 1983). Judge Bucklew correctly explained in *Washington* that “unlike the typical judicial lienholder who does not have an interest in a specific piece of property before the occurrence of some judicial action, the attorney’s charging lien attaches to the fruits of the legal representation without judicial action and relates back to the date that legal services commenced.” 238 B.R. at 856.

In the case before this Court, all of the elements of a valid charging lien have been met. There was a signed retainer agreement between the Debtor and Rodriguez, there was an agreement that Rodriguez’ fees would come out of the recovery, there was a dispute as to payment of fees and Rodriguez filed a timely notice of charging lien. There is no requirement under Florida law that the client specifically consent to the imposition of a charging lien, nor is there any requirement of

judicial action. *See Sinclair*, 428 So.2d at 1385 (Fla. 1983). Under the Bankruptcy Code definition of a judicial lien in § 101(36), Rodriguez' lien was not "obtained by judgment . . . or other legal or equitable . . . proceeding;" rather Rodriguez' lien was "obtained" or created upon filing of the Notice and Claim of Attorney's Charging Lien, well before the hearing or judgment on the charging lien. No court action was necessary to create Rodriguez' charging lien. Therefore, a charging lien under Florida law does not fit within the Bankruptcy Code definition of "judicial lien" under §101(36). Since Rodriguez' charging lien is not a judicial lien, §522(f) does not operate to avoid it.

Moreover, even if this Court were to find that the charging lien is a judicial lien, the lien could still not be avoided, as it attaches to an after-acquired interest which resulted from the Debtor's divorce settlement. *Farrey v. Sanderfoot*, 500 U.S. 291, 299 (1991) (debtor cannot avoid judicial lien in real estate awarded in divorce decree absent showing that debtor held interest in property prior to fixing of lien). This Court is without any statutory authority to avoid the lien. The Court holds that under §522(f) of the Bankruptcy Code, Rodriguez' charging lien is unavoidable and that the Debtor's Motion to Avoid Lien must be denied.

The debtor is certainly not precluded from seeking declaratory relief in state court to avoid Rodriguez' charging lien. However, this Court will not attempt to exercise questionable jurisdiction to resolve this issue of Florida law where there is no basis in the Bankruptcy Code for this Court to act. Therefore, it is-

**ORDERED** that Debtor's Motion to Avoid Judgment Lien is **DENIED**.

**ORDERED** in the Southern District of Florida on this 7<sup>th</sup> day of November, 2000.

ROBERT A. MARK  
Chief United States Bankruptcy Judge