Dated: January 11, 2016
The following is ORDERED:

Jennie D. Latta
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re
PATRICK LEE WASHINGTON, SR. and
DEMETRICE ANN WASHINGTON,
Debtors.

Case No. 15-30188-L
Chapter 7

ORDER GRANTING MOTION TO AVOID JUDICIAL LIEN

BEFORE THE COURT is the motion of the Debtors, Patrick Lee Washington, Sr. and Demetrice Ann Washington, to avoid the judicial lien held by A & A Financial, LLC. The motion recites as follows:

1. The Debtors' Chapter 7 bankruptcy case was filed October 24, 2015.

2. A & A holds a judgment lien in the amount of $9,213.66 resulting from a judgment rendered by the General Sessions Court on May 3, 2011.

3. The Debtors own real property known as 5951 Chandeleur Cove, Memphis, Tennessee.

4. The assessed value of the property is $95,500.00.[1]

5. The property is encumbered by indebtedness in the approximate amount of $106,649.75.

6. The Debtors have no "unexempt" equity in the real property.

7. The Debtors have no "unexempt" personal assets.

Based upon these facts, the Debtors ask that the judicial lien be avoided. No written objection was filed in response to the motion.

The court has reviewed the schedules and statement of financial affairs filed by the Debtors in this case. Schedule C shows that the Debtors have claimed no exemption in the subject property. *See* Schedule C, Docket No. 1. Thus the court took the question of the avoidance of the judicial lien under advisement to determine whether the failure of the Debtors to claim a homestead exemption should prevent the avoidance of the judicial lien.

Although the Debtors' motion makes no reference to the provision of the Bankruptcy Code upon which they rely for the relief they have requested, the court assumes that they rely upon 11 U.S.C. § 522(f)(1), which permits a debtor to avoid a judicial lien, other than a lien securing a debt for domestic support, "to the extent that such lien impairs an exemption to which the debtor *would have been* entitled" under applicable law. Tennessee is an "opt out" state for purposes of the exemption applicable in bankruptcy cases, meaning that Tennessee debtors are only permitted to claim exemptions provided under state law or non-bankruptcy federal law. *See* 11 U.S.C.

[1] In Tennessee, a tax appraisal is not credible evidence of the market value of property. *See In re Northern,* 294 B.R. 821, 828, fn. 9 (Bankr. E.D. Tenn. 2003), and cases cited therein. The "assessed" value is the only value available to the court in this case, however, and A & A Financial, LLC, has not objected to its consideration by the court. In order for A & A Financial's judicial lien to be preserved under the statutory formula, the value of the real property would have to exceed the total of all liens and the Debtors' available homestead exemption, or $123,363.41. No one has suggested that the fair market value of the Debtors' property approaches this amount.

§ 522(b)(2) and Tennessee Code Annotated § 26-2-112. The State of Tennessee permits an individual and his spouse to claim as exempt up to $7,500 in value of real property used as their principal place of residence. *See* Tennessee Code Annotated § 26-2-301(a).[2] The homestead exemption does not, however, operate against debts contracted for the purchase of the homestead or improvements to it. *See* Tennessee Code Annotated § 26-2-301(c).

This case presents the question whether a debtor who has not claimed a homestead exemption in real property used as his residence in connection with his bankruptcy filing, and could not claim a homestead exemption under applicable state law because he has no interest in the property not encumbered by a lien to secure the cost of acquiring the property, may nevertheless avoid a judicial lien on the property pursuant to section 522(f)(1)(A).

Section 522(f)(2)(A) provides a mathematical formula for determining the extent to which a lien is considered to impair an exemption. It provides that "a lien shall be considered to impair an exemption to the extent that the sum of the lien, all other liens on the property, and "the amount of the exemption the debtor could claim if there were no liens on the property" exceeds the value that the "debtor's interest in the property" would have in the absence of any liens." 11 U.S.C. § 522(f)(2)(A). Section 522(f) was added to the Bankruptcy Code as part of the Bankruptcy Reform Act of 1994 for the purpose of clarifying when an exemption is impaired and to what extent a lien should be avoided under § 522(f)(1)(A):

[2] The Tennessee Code specifies higher amounts for homestead exemptions claimed by persons with minor children and for persons over the age of 65. Because the Debtors have not claimed a homestead exemption, the court is without information concerning whether they would be entitled to a higher exemption amount. In any event, the amount of the exemption they could claim does not affect the outcome of the court's decision.

> Because the Bankruptcy Code does not currently define the meaning of the words impair an exemption in section 522(f), several court decisions have, in recent years, reached results that were not intended by Congress when it drafted the Code. This amendment would provide a simple arithmetic test to determine whether a lien impairs an exemption, based upon a decision, *In re Brantz*, 106 B.R. 62 (Bankr. E.D. Pa. 1989), that was favorably cited by the Supreme Court in *Owen v. Owen*, 500 U.S. 305, 313 n. 5, 111 S. Ct. 1833, 1838 n. 5, 144 L. Ed. 2d 350 (1991).

H.R. Rep. No. 835, 103rd Cong. 2d Sess. 52 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3340, 3361).

What is the meaning of the "debtor's interest in the property" for purposes of the statutory formula? If the Debtors' "interest" in their property is taken to be the value of the property without regard to any encumbrances, the formula results in full avoidance of the judicial lien: the amount of the judicial lien ($9,213.66) plus the amount of the mortgage lien ($106,649.75) and the amount of the minimum exemption to which the Debtors would be entitled if there were no liens on the property ($7,500) equals $123,363.41. This exceeds the value of the Debtors' interest in the property ($95,500) by $27,863.41. Since this amount exceeds the amount of the judicial lien, the judicial lien may be avoided in its entirety.

If, however, the Debtors' interest is considered to be $0.00, because the first mortgage exceeds the value of the property, one might say that there is no homestead exemption to which the Debtors would have been entitled had the judicial lien not been present, and thus that the Debtors are not entitled to avoidance of the judicial lien at all. The Debtors's failure to claim a homestead exemption is consistent with the recognition that they are not entitled to claim this exemption under applicable state law.

The Sixth Circuit has not addressed the precise issue presented in this case, but in a case in which the judicial lien in question held a position *superior* to a consensual lien under applicable state law, it said that the formula of section 522(f)(2)(A) is to be applied as it is written, resulting in the

judicial lien being avoided even though the debtor could not have claimed a homestead exemption in the property under applicable state law. *See In re Brinley*, 403 F.3d 415, 421 (6th Cir. 2005). The *Brinley* court quoted with approval this language from the decision of the Eighth Circuit Court of Appeals in *Kolich v. Antioch Laurel Veterinary Hospital (In re Kolich)*, 328 F.3d 406, 410 (8th Cir. 2003):

> [W]e find no sufficient basis for concluding that the statutory formula produces, in this situation, a result "demonstrably at odds with the intentions of the drafters." To be sure, the Bankruptcy Code usually looks to state law to define the property rights and priorities of creditors, including secured creditors. But § 522(f) is an exception to that policy. It was enacted to permit the avoidance of judicial liens that can interfere with the debtor's post-petition fresh start. This selective avoidance gives an advantage under federal law to secured creditors holding consensual liens, typically, residential mortgage lenders. But Congress intended to treat consensual lien holders more favorably, because their contractual relationships with the bankruptcy debtor typically allow the debtor to acquire equity in the exempt property by making post-petition mortgage payments. The 1994 amendment creating the statutory formula here at issue was expressly aimed at overruling prior judicial decisions compromising that intent.
>
> We are not entirely comfortable with the equities of literally applying the statutory formula in this situation. It may give a debtor contemplating bankruptcy the ability to wipe out judicial liens by persuading a lender to take an otherwise junior consensual lien that renders the exempt property over-encumbered and therefore ripe for impairment. One would expect lenders to refuse to make such high risk loans, but there may be times when self-interest or hard-to-detect collusion will lead to an abuse of § 522(f). On the other hand, refusing to apply the statutory formula as written may result in denying deserving debtors the fresh-start advantage § 522(f) was enacted to provide – for example, if a drop in market value has left exempt property over-encumbered by a judicial lien and a junior consensual lien, and the judicial lien holder insists upon foreclosure. With the competing equities both hard to weigh and finely balanced, our task is simply to apply § 522(f)(2)(A) as Congress wrote it.

(Citations omitted.)

The language of *Kalich* gives the reason why Congress might have intended that judicial liens be avoided even in the face of contrary state priority schemes; i.e., the avoidance of these liens

enhances the possibility that the debtor will achieve a fresh start, especially in a case, such as this one, where a drop in market value results in the Debtors' having no equity in their property above the consensual lien for the acquisition of their property.

One might also question whether section 522(f)(1)(A) should apply in a case such as this one in which the debtor has not actually claimed a homestead exemption. The courts that have considered this question have said that it does not matter whether the exemption is *actually* claimed. *See*, e.g., *Botkin v. DuPont Community Credit,* 650 F.3d 396, 400 (4th Cir. 2011) (Debtor need not claim an exemption as a precondition of avoiding a judicial lien on the basis that the lien impairs an exemption). Judge James G. Mixon reached a similar result when debtors claimed only a nominal amount for their homestead exemption in property that was over-encumbered at the time of their bankruptcy filing. *See In re May,* 340 B.R. 633 (Bankr. W.D. Ark. 2006).

Although initially troubled by the fact that the Debtors have not claimed a homestead exemption and are not entitled to claim a homestead exemption under applicable state law, the court is now persuaded that the formula of section 522(f)(2)(A) is to be applied as written because it will enable the Debtors to enjoy a fresh start unencumbered by the possibility that future appreciation in the value of their home will be of no benefit to them. As stated earlier, the application of the statutory formula results in impairment of the Debtors' homestead exemption in an amount that exceeds the amount of the judicial lien. Thus, the Debtors' motion is **GRANTED** and the judicial lien of A & A Financial, LLC avoided in its entirety. This does not, of course, mean that A & A loses its claim, but only that its claim will be treated as an unsecured claim for purposes of distribution of any assets of the bankruptcy estate.

cc: Debtor
Debtor's attorney
A & A Financial, LLC
Chapter 7 Trustee
United States Trustee