UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE

In re:
DANIEL ARTHUR WEAVER, Case No. 03-26184
Debtor. Chapter 7

MEMORANDUM OPINION AND ORDER
ON DEBTOR'S MOTION TO AVOID LIEN

This case began under chapter 13 of the Bankruptcy Code, and in the chapter 13 phase of the case, the Debtor filed and served his motion to avoid the lien of Wells Fargo Financial ("Wells Fargo").[1] No opposition to the motion was filed and an order was entered May 16, 2003, granting the avoidance of the nonpossessory, nonpurchase-money lien. See 11 U.S.C. § 522(f)(1)(B). That order was not appealed and is, therefore, final.

Subsequent to that order and before confirmation, the case was converted to chapter 7. For some reason, the Debtor filed another motion to avoid the same nonpossessory, nonpurchase-money lien of Wells Fargo on the same date as the conversion. Wells Fargo now has counsel who objects, and the parties submitted the contested matter to the Court on the sole question of law that is the issue of this opinion.

ISSUE

Is the final order avoiding the lien of Wells Fargo that was entered in the chapter 13 phase of this case a binding order in the chapter 7 phase?

DISCUSSION

The basis of Wells Fargo's attempted objection is that its collateral is a big-screen television not subject to avoidance under § 522(f)(1)(B). Counsel for the parties submitted the issue of law concerning the effect of the avoidance order that was entered while this case was under chapter 13 of the Code. There is no suggestion by Wells Fargo that it did not receive notice of the chapter 13 Debtor's motion or of the order granting that motion. Rather, Wells Fargo hopes that the conversion of the case gives it another opportunity to object. The question of whether it shall be given that opportunity must be answered in the negative.

The threshold to the Court's analysis is that this is still the same case as it was when filed; it is simply in a different phase. Section 348 of the Code addresses the effect of conversion of cases from one

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[1] The Debtor's chapter 13 plan provided that the lien of Wells Fargo would be avoided and the Debtor followed through with a motion.

chapter to another, and with exceptions that are not relevant here, § 348(a) provides that conversion "does not effect a change in the date of the filing of the petition, the commencement of the case, or the order for relief." In other words, once a case is commenced under any chapter, it remains the same case, notwithstanding its subsequent transition to another chapter of the Code.

Moreover, § 348(f)(1) provides that, except for bad faith conversion (which is not alleged here), conversion of a case from chapter 13 to another chapter has the following effect on the property of the estate: "property of the estate in the converted case shall consist of property of the estate as of the date of filing of the petition, that remains in the possession of or is under the control of the debtor on the date of conversion." There is no contention in the present case that the property subject of the avoided lien is or is not property of the estate, but the general effect of the above provision would be that property of the estate remains property of the estate after conversion. As a leading treatise asserts, there is nothing in § 348 to suggest that a creditor is not bound in the converted case by a lien avoidance in the prior chapter 13 phase of the case. Lundin, CHAPTER 13 BANKRUPTCY 3RD ED. §318.1 (2002) (criticizing *Shaffer v. Williams (In re Shaffer),* 48 B.R. 952, 957-8 (Bankr. N.D. Ohio 1985) (which did not apply res judicata to an avoidance resulting from confirmation of a chapter 13 plan, a different issue from the one before this Court)).

Generally speaking, once the Debtor avoided Wells Fargo's lien in the chapter 13 phase of the case, while claiming that property as exempt, the exempt property ceased to be property of the bankruptcy estate. *See* Brown, Ahern and MacLean, BANKRUPTCY EXEMPTION MANUAL § 2.21 (2003 edition). This is true in the present case, since the chapter 13 plan was not confirmed; therefore, there are no confirmed plan provisions that could maintain exempt property in the estate. The case file contains no objections by anyone to the Debtor's claimed exemptions, either in the chapter 13 or 7 phase of the case.[2] Under a combination of Code § 522(l) and FED. R. BANKR. P. 4003(b), when no timely objection to an exemption is made, the exemption is allowed. *See Taylor v. Freeland & Kronz,* 503 U.S. 638 (1992) (strictly applying Rule 4003(b)'s 30-day objection period). Even if a construction of § 348(f)(1) leads to a conclusion that the Debtor's possession of the television restored it to property of the chapter 7 estate, it is still property that is subject to the lien avoidance order previously entered. If, on the other hand, the avoidance coupled with exemption removed it from the estate, Wells Fargo's lien no longer exists. Under either interpretation of that Code section, Wells Fargo gets no second objection opportunity.

Thus, we have the Bankruptcy Code weighing against Wells Fargo's desire to now object to lien

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[2] The case file contains an exemption schedule filed by the Debtor in the chapter 13 schedules, exemptions which include household goods, presumably the type secured by Wells Fargo.

avoidance, principally because the case in which the avoidance order was entered is still the same case. As to that point, the law-of-the-case doctrine works against Wells Fargo. Under that doctrine, "a decision on an issue made by a court at one stage of a case should be given effect in successive stages of the same litigation." *United States v. Todd,* 920 F.2d 399, 403 (6th Cir. 1990). The order entered in this case was not appealed and is a final one. To permit Wells Fargo to object now would undercut the finality of the Court's own order, essentially being a collateral attack on a final order. As stated, there is no argument that Wells Fargo was without notice of the first motion or its order, nor is there any other due process argument that might permit the Court to overcome the law-of-the-case doctrine with equity or discretion.[3]

Res judicata would also bite at Wells Fargo's effort, since the order granting the first motion is final, involving the same parties and issue, and was actually decided after notice and opportunity for a hearing. *See Sanders Confectionary Prods. Inc. v. Heller,* 973 F.2d 474, 480 (6th Cir. 1992) (for res judicata factors).

There are no arguments raised by Wells Fargo that counter these principles of law, and the Court concludes that, as a matter of law, the entry of the order avoiding Wells Fargo's lien is as binding in the current phase of this case as it was when it became final in the chapter 13 phase of the case. The present objection by Wells Fargo comes too late and must be DENIED. There is no need to grant the Debtor's second motion to avoid the lien, since it has already been avoided.

SO ORDERED this 10th day of October, 2003.

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William Houston Brown
UNITED STATES BANKRUPTCY JUDGE

cc:
B. David Sweeney, attorney for Debtor
David E. Drexler and Jeri Moskovitz, attorneys for Wells Fargo Financial

[3] The Court could wonder why the Debtor filed his second motion to avoid. The reason may be simply precaution or uncertainty, or it may be due to the creditor's indication that it would not be bound by the first order. Whatever the reason for the motion, its filing does not give Wells Fargo any more rights than the Code or other controlling law would permit.