UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

MAUREEN A. AVILA-RAYMOND	CASE NO. 00-61227
Debtor	Chapter 7

APPEARANCES:

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Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Currently before the Court is the July 17, 2000 motion ("Debtor Motion") by the Debtor Maureen A. Avilia-Raymond ("Debtor") pursuant to Section 522(f) of the U.S. Bankruptcy Code, 11 U.S.C. §§ 101-1330 ("Code"), to avoid three (3) judicial liens allegedly impairing the Debtor's exempt equity in certain real property, which liens are held by Finocchio & English ("Finocchio"), NPG Employees' Federal Credit Union ("NPG") and Niagara Mohawk Power Corporation ("Niagara Mohawk"), respectively. Finocchio submitted an Affirmation in Opposition to the Debtor's Motion ("Finocchio Opposition") on August 3, 2000. The Debtor submitted a Reply Affirmation ("Debtor Reply Affirmation") on August 8, 2000. Oral argument

was heard on August 8, 2000, at a motion term held in Syracuse, New York at which time the parties were afforded the opportunity to submit supplemental memoranda.

On September 1, 2000, Finocchio submitted a Memorandum of Law in Support of its Objection to the Avoidance of Lien ("Finocchio Memo of Law"). The Debtor submitted a Memorandum of Law ("Debtor Memo of Law") in support of its position on September 29, 2000. Final oral argument was heard before the Court at a motion term held in Syracuse, New York on October 3, 2000, at which time the matter was submitted for decision.

JURISDICTIONAL STATEMENT

The Court has core jurisdiction over the parties and the subject matter of this contested matter pursuant to 28 U.S.C. §§ 1334 and 157(a), (b)(1) and (b)(2)(A), (K) and (O).

FACTS

On or about July 15, 1987, the Debtor's husband (now former husband) acquired sole title to a parcel of unimproved real property located in Camillus, New York ("Camillus property") upon which the marital residence was subsequently constructed. The Debtor contends that her former husband executed and delivered a mortgage in his name only in order to finance construction of the marital residence. On or about May 26, 1995, the Debtor commenced divorce proceedings in New York State Supreme Court, Onondaga County. Finocchio represented the Debtor's husband during the initial stages of those proceedings, but subsequently withdrew from

representation, sued the Debtor's husband for unpaid attorney's fees and obtained a judgment which Finocchio docketed against the Camillus property in September 1996.[1]

On November 17, 1998, a Judgment and Decree of Divorce ("Divorce Decree") was entered in the divorce proceedings. *See* Debtor Reply Affirmation, Exhibit C. Under the equitable distribution provisions in the Divorce Decree, the Debtor received a distributive award of $33,500.00 representing a one-half equitable share in the value of the Camillus property. *See id.* at 2 ("The Plaintiff's [Debtor's] share in the marital residence is the sum of $33,500.00"). In addition, the Debtor received what would have otherwise been her (now former) husband's equitable share in the equity value of the Camillus property, or $33,500.00, in satisfaction of his child support arrears and in recognition of his waste of marital assets. *See id.* at 3. While the Debtor's distributive award in the Divorce Decree was based on the equity value of the Camillus property, no provision was made therein for the transfer of title to any real property to the Debtor. In this regard, the Debtor's distributive award appears to be a money judgment based on the equity value of the Camillus property.

On March 17, 2000, the Debtor filed a voluntary petition under chapter 7 of the Code. By Order entered on March 24, 2000, New York State Supreme Court Justice, the Honorable Charles T. Major ordered the Debtor's former husband to pay the Debtor the sum of $67,000 plus interest in satisfaction of the equitable distribution award granted in the Divorce Decree. *See* Debtor

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[1] Two subsequent pre-petition judicial liens were docketed against the property. Niagara Mohawk holds a judicial lien docketed in January 1997 and NPG holds a judicial lien docketed in December 1997. Neither Niagara Mohawk or NPG have objected to the avoidance of their respective liens. Accordingly, the Court presumes that Niagara Mohawk and NPG consent to the avoidance of their liens and the Debtor's motion will be granted as to those parties without further discussion.

Reply Affirmation, Exhibit D. The Order provided that if the Debtor's former husband failed to pay the distributive cash award within 90 days, then the Debtor would be entitled to an *ex parte* order directing the Onondaga County Sheriff to deliver title to the Camillus property to the Debtor in satisfaction of the distributive award. *See* Debtor Reply Affirmation, Exhibit D. *See also* N.Y. C.P.L.R. § 5107 ("The court may require the sheriff to convey real property in conformity with its directions.").

On June 28, 2000, the Debtor filed an amended Schedule C to her bankruptcy petition claiming an exemption in the property at "3947 Split Rock Road" [Camillus, NY] pursuant to "N.Y. Civ. Prac. Law and Rules §5206(a)." Debtor Reply Affirmation, Exhibit A, at 2. *See also* N.Y. C.P.L.R. § 5206 ("Property...not exceeding ten thousand dollars in value above liens and encumbrances, owned and occupied as a principal residence is exempt from application to the satisfaction of a money judgment..."). The Debtor claimed the value of the exemptions as "$0.00" *Id.* No party in interest objected to the Debtor's amended Schedule C asserting the claimed exemption. The instant motion for lien avoidance was filed in this Court on July 17, 2000.

On July 26, 2000, the Debtor obtained an order in the state court divorce proceedings directing the Onondaga County Sheriff to execute a quitclaim deed on behalf of the Debtor's former husband and deliver the same to the Debtor giving her sole title to the Camillus property. The Debtor maintains that on August 10, 2000, the sheriff's deed was properly executed whereupon it was duly recorded in the Onondaga County Clerk's Office on September 15, 2000.

ARGUMENT

The Debtor argues that as a threshold matter Finocchio's failure to object to the Debtor's claimed homestead exemption in a timely manner constitutes a forfeiture of its right to now contest the avoidance of its lien. The Debtor contends that pursuant to Rule 4003(b) of the Federal Rules of Bankruptcy Procedure ("Fed.R.Bankr.P.") Finocchio had thirty days from June 28, 2000, the filing date of the Debtor's amended Schedule C, to object to the homestead exemption claimed therein but failed to do so within the prescribed time period. *See* Fed.R.Bankr.P. 4003. The Debtor asserts that the Camillus property was "deemed to be exempt" upon expiration of the thirty day period without objection. Debtor Reply Affirmation, at ¶ 5. In response, Finocchio argues that its failure to object to the Debtor's scheduled homestead exemption does not affect its right to object to the avoidance of its lien. In this regard, Finocchio argues that a determination that certain property is exempt does not automatically extinguish liens existing prior to the Debtor's acquisition of an interest in that exempt property.

With regard to the avoidance claim, both the Debtor and Finocchio urge that the instant motion generally turns on this Court's application of the 1991 Supreme Court decision in *Farrey v. Sanderfoot*, 500 U.S. 291 (1991). The Supreme Court in *Farrey* ruled that "unless the debtor had the property interest to which the lien attached at some point ***before*** the lien attached to that interest, he or she cannot avoid the fixing of the lien under the terms of [Code] § 522(f)(1)." *Farrey*, 500 U.S. at 296 (emphasis in original). In the first instance the Debtor argues that *Farrey* is inapplicable to the instant motion for three reasons. First, the Debtor contends *Farrey* is factually distinguishable. Second, the Debtor contends that the ruling in *Farrey* is "bad law...and has been supplanted by the addition of 11 U.S.C. § 522(f)(A)(i)." Debtor Memo of Law, at 4. Third, the Debtor argues that application of the *Farrey* rule would be unduly harsh given the facts

of this case.

Alternatively, the Debtor argues that in the event this Court applies the *Farrey* rule to the instant case, that the Court should concomitantly issue a declaratory ruling that the subject liens apply only to a one-half interest in the Camillus property. The Debtor argues that because she and her former husband were married at the time he acquired title that the property is "marital property" as that term is defined in New York Domestic Relations Law ("N.Y. DOM. REL. LAW") § 236-B. *See* N.Y. DOM. REL. LAW § 236-B.[2] As such, the Debtor contends that she had a legitimate, ongoing one-half ownership interest in the property from the time the Debtor's former husband acquired title; her former husband owning the other one-half interest. The Debtor argues that the subject liens should attach only to the one-half interest her former husband owned at the time the liens attached to the property.

Finocchio argues that *Farrey* is the standing rule of law in the Second Circuit and as such the lien is unavoidable under Code § 522(f) since the Debtor did not have an interest in the Camillus property prior to the fixing of its lien. *See Marine Midland Bank v. Scarpino (In re Scarpino)*, 113 F.3d 338 (2d Cir. 1997) *relying on Farrey, supra*.

Finally, the Debtor argues that even if the Court determines that she did not own an interest in the Camillus property at the time her petition was filed, the Camillus property is

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[2]N.Y. DOM. REL LAW § 236-B(1)(c) defines "marital property" as all property acquired by either or both spouses during the marriage...regardless of the form in which title is held...[and]...shall not include separate property as hereinafter defined." N.Y. DOM. REL LAW § 236-B(1)(c). Separate property includes "property acquired by bequest, devise, or descent, or gift from a party other than the spouse..." N.Y. DOM. REL LAW § 236-B(1)(d)(1). While the totality of the circumstance surrounding the Debtor's former husband's acquisition of sole title to the property are unclear, the Debtor contends in her moving papers that "On July 15, 1987, Mr. Raymond's [Debtor's former husband] parents deeded title to the property located at 3947 Split Rock Road, Camillus, New York to Mr. Raymond individually." Debtor Memo of Law, at 2.

nonetheless property of the estate under Code § 541(a)(5)(B). Property of the estate under Code § 541(a)(5)(B) includes "[a]ny interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire the property within 180 days after such date as a result of a property settlement agreement with the debtor's spouse, or an interlocutory or final divorce agreement." Code § 541(a)(5)(B). The Debtor argues that, "Therefore, the homestead exemption will apply and the Debtor will be entitled to avoid the judicial lien of the Creditor [Finocchio]." Debtor Reply Affirmation, at ¶ 11.

DISCUSSION

A. Failure to Object to Exemption

A debtor's bankrupt estate is generally comprised of all property interests of the debtor at the time the debtor's bankruptcy petition is filed. *See* Code § 541. *See also Marine Midland Bank v. Scarpino (In re Scarpino)*, 113 F.3d 338, 340 (2d Cir. 1997). Code § 522 permits a chapter 7 debtor to exempt certain property from inclusion in the bankrupt estate thus protecting it from liquidation. *See* Code § 522. "The effect of exemption is to immunize the exempt property from seizure or attachment for satisfaction of debts incurred prior to the bankruptcy proceedings." *Marine Midland Bank*, 113 F.3d at 340 *citing* Code § 522(c). Pursuant to Code § 522(f), the debtor in bankruptcy may avoid a judicial lien fixed upon the debtor's interest in real property to the extent the lien impairs the debtor's homestead exemption. *See* Code § 522(b)(1), (d)(1) and (f)(1)(A). "The purpose of allowing such exemptions is to help to ensure that 'a debtor

that [sic] goes through bankruptcy comes out with adequate possessions to begin his fresh start.'" *Marine Midland Bank*, 114 F.3d at 440 *citing* H.R. REP. NO. 95-595, at 126 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6087.

Code § 522(l) provides that unless a party in interest objects to a debtor's scheduled exemptions, then the property the debtor scheduled as such is exempt. *See* Code § 522(l). Fed.R.Bankr.P. 4003(b) provides that any creditor may file objections to the debtor's scheduled exemptions under Code § 522 within thirty days of the filing of the debtor's amended schedules. *See* Fed.R.Bankr.P. 4003(b). See also N.Y. C.P.L.R. § 5206 ("Property...not exceeding ten thousand dollars in value above liens and encumbrances, owned and occupied as a principal residence is exempt from application to the satisfaction of a money judgment..."). The Supreme Court has said that "[b]y negative implication, the Rule [4003(b)] indicates that creditors may not object after the 30 days 'unless, within such period, further time is granted by the court.'" *Taylor v. Freeland & Kronz*, 503 U.S. 638, 643 (1992)(holding that a chapter 7 trustee may not object to a debtor's scheduled exemption past the 30-day limit imposed in Fed.R.Bankr.P. 4003(b) where the court has not granted an extension of time to do so even where the debtor has no colorable statutory basis for claiming said exemption). Thus, a creditor's failure to object to a debtor's scheduled exemptions within 30 days following the filing of the debtor's schedules will foreclose that creditor's ability to do so later, absent court extension within the 30-day period prescribed in Fed.R.Bankr.P. 4003(b). *See generally Bell v. Bell (In re Bell)*, 225 F.3d 203, 209 (2d Cir. 2000)("By its terms Rule 4003(b) allows an extension of the time period for filing objections only if the extension is granted within the 30-day period itself").

The distinction, however, between exemption and lien avoidance is that "[e]xemption only

has the effect of removing property from the debtor's estate[,]...[t]hus property that is exempt will not be administered for the benefit of creditors. Lien avoidance, on the other hand, has the effect of removing a property right held by a party other than the debtor, ***and it does not occur automatically with exemption.***" *In re Franklin*, 210 B.R. 560, 566 (Bankr. N.D. Ill. 1997)(emphasis added) *citing Marine Midland Bank v. Scarpino (In re Scarpino)*, 113 F.3d 338 (2d Cir. 1997). Moreover, the immunization on exempt property provided for in Code § 522(c), *supra*, does not extend to liens secured by such exempt property, unless the liens qualify for avoidance under Code § 522(f). *See Marine Midland Bank*, 113 F.3d at 340 *citing* Code § 522(c)(2) *and Johnson v. Home State Bank*, 501 U.S. 78, 82-84 (1991). Thus, the conclusion that Finocchio is precluded from objecting to the Debtor's scheduled exemptions for failure to do so within the self-executing time period does nothing to prejudice its right to object to the Debtor's motion for lien avoidance. In the words of the Second Circuit Court of Appeals, simply because exempt property is "immunized" from post-petition seizure and attachment, does not automatically "immunize" that property from liens that attached pre-petition. *See Marine Midland Bank*, 113 F.3d at 340. In order for lien "immunization" to be available, the liens must independently qualify under Code § 522(f). *See generally id.* Thus, Finocchio's failure to object to the Debtor's scheduled exemption within the requisite thirty days will not prejudice its right to object to the lien avoidance sought in the instant motion.

B. Lien Avoidance

Code § 522(f) states in pertinent part that a "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...if such lien is...a judicial lien." Code § 522(f)(1)(A). The U.S. Supreme Court held in *Farrey*, *supra*, that Code § 522(f)

> expressly states that the debtor may avoid "the fixing" of a lien on the debtor's interest in property. The gerund "fixing" refers to a temporal event. That event--the fastening of a liability--presupposes an object onto which the liability can fasten. The statute defines this pre-existing object as "an interest of the debtor in property." Therefore, unless the debtor had the property interest to which the lien attached at some point ***before*** the lien attached to that interest, he or she cannot avoid the fixing of the lien under the terms of § 522(f)(1).

Farrey, 500 U.S. at 296. Thus, a "debtor cannot avoid liens that fix to property before or, in some cases simultaneously with, an acquisition." *Colehamer v. Town of Sandgate (In re Colehamer)*, 133 F.3d 906 (2d Cir. 1997) *citing Marine Midland Bank v. Scarpino (In re Scarpino)*, 113 F.3d 338, 342 (2d Cir. 1997).

In the case presently before the Court, the "critical inquiry remains whether the debtor ever possessed the interest to which the lien fixed, before it fixed...[because]...[i]f...she did not, § 522(f)(1) does not permit the debtor to avoid the fixing of the lien on that interest." *Farrey*, 500 U.S. at 298. Whether the Debtor possessed an interest in that to which the lien attached, namely the Camillus property, is a question of state law. *See id.* Under New York law, "[t]here are no vested present or contingent property rights or interests, legal or equitable, in such marital property solely because it is marital property under the New York Domestic Relations Law." *Cooper v. Frederes (In re Frederes)*, 141 B.R. 289, 291-292 (Bankr. W.D.N.Y. 1992) *citing Goldberg v. Hilsen (In re Hilsen)*, 100 B.R. 708 (Bankr. S.D.N.Y. 1989) *rev'd on other grounds* 119 B.R. 435 (S.D.N.Y. 1990). Moreover, where property titled in one spouse's name is deemed "marital property" under N.Y. DOM. REL LAW § 236-B and thus subject to equitable distribution

in a divorce proceeding, the non-titled spouse's rights in that property vest only when there is an actual judgment awarding distribution. *In re Frederes*, 141 B.R. at 291. *See also, Goldberg v. Hilsen (In re Hilsen)*, 119 B.R. 435 (S.D.N.Y. 1990).

In the instant case, the Finocchio lien was docketed against the Camillus property in September 1996. The Debtor did not obtain the Divorce Decree until November 17, 1998. In addition, the sheriff was not ordered to transfer title of the Camillus property to the Debtor until July 26, 2000, and, in fact, did not transfer title until August 10, 2000. Arguably, the earliest date that the Debtor obtained an interest in the Camillus property cognizable under New York law is the date of the Divorce Decree, or November 17, 1998. Consequentially, since the Debtor did not possess an interest in the Camillus property prior to the attachment of Finocchio's lien, the lien is not subject to avoidance under Code § 522.[3] *See Farrey*, 500 U.S. at 296; *Colehamer v. Town of Sandgate (In re Colehamer)*, 133 F.3d 906 (2d Cir. 1997); *Marine Midland Bank v. Scarpino (In re Scarpino)*, 113 F.3d 338, 342 (2d Cir. 1997).

The Court would be remiss not to note that it finds meritless the Debtor's argument that "the *Farrey* rule is bad law...and has been supplanted by the addition of [Code] § 522(f)(1)(A)(i)." Debtor Memo of Law, at 4. Code § 522(f)(1)(A)(i) excludes from the general lien avoidance

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[3]The Court notes that the Debtor acknowledges in her moving papers that she never acquired title of any form in the Camillus property prior to the divorce, nor does it appear that she possessed any right to pledge, sell or in any way encumber the Camillus property prior to her formal acquisition of title following the July 26, 2000 state court Order. In this regard, the Debtor contends in her moving papers that the mortgagee financing the note and mortgage encumbering the property would not allow the Debtor to co-sign the mortgage delivered by her former husband in 1986. *See* Debtor Memo of Law, at 2. The Debtor contends the mortgagee refused her offer to co-sign the mortgage due to her prior bankruptcy rather than the fact that she was not a record owner of the property. Conversely, the record would indicate that as sole title holder, the Debtor's former husband was free to defease himself of the property at will or to mortgage, sell or encumber the property without the consent of the Debtor.

provisions of the Code a lien that "secures a debt...to a spouse [or] former spouse...for alimony to, maintenance for, or support of such spouse...in connection with...a divorce decree..." Code § 522(f)(1)(A)(i). The Debtor contends that this provision makes "the ruling in *Farrey* unnecessary...[and]...eliminat[es] the need for common law on such an issue." Debtor Memo of Law, at 7. The Court is at a loss as to how Code § 522(f)(1)(A)(i) supplanted the *Farrey* ruling, since in that case, as in the instant case, the debtor sought to avoid a lien on property the debtor acquired through an equitable distribution award. Code § 522(f)(1)(A)(i) clearly insulates from avoidance a judicial lien on property of a debtor that secures maintenance or child support. The Court fails to see the connection and the Debtor's failure to offer any substantive argument on the subject, in law or in fact, renders this argument lacking in merit. The lien that is the subject of this motion is one securing a debt for legal services rendered to the Debtor's husband in connection with the state court divorce proceedings and is decidedly not a lien securing maintenance or child support as intended by Code § 522(f)(1)(A)(i).

Alternatively, the Debtor contends that application of the *Farrey* rule to the instant case will result in an "unduly harsh result and prevent her from obtaining a 'fresh start' as intended by the Bankruptcy Code." Debtor Memo of Law, at 7. In an attempt to support this argument, the Debtor queries, "Why is this debtor not entitled to this relief when those debtors who have neglected their debts to such a point that judgments have been entered against them are so entitled? Is it merely because they owned the subject real property before the judgment was entered? What is so unique about this condition that would allow relief to the first class, but not the second?" *Id.* The Debtor makes light of the fact that she did not own the subject premises when the liens attached. This, however, is not a trivial fact, rather, it triggers the application of

Supreme Court doctrine that this Court finds wholly applicable to the Debtor's circumstances. In sum, while this Court finds the Debtor's Socratic approach novel at best, it is nonetheless without merit.

C. Property of the Estate

Pursuant to Code § 541, property of a debtor's estate includes "all legal and equitable interests of the debtor in property as of the commencement of the case" as well as "[a]ny interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date...as a result of...an interlocutory or final divorce decree" Code § 541(a)(1) and (5)(B), respectively. It is well settled that while federal law determines what constitutes property of the debtor's bankrupt estate, it is state law that determines the nature of a debtor's interest in that property. *Crysen/Montenay Energy Co. v. Esselen Assocs., Inc. (In re Crysen/Montenay Energy Co.)*, 902 F.2d 1098, 1101 (2d Cir. 1990) *citing Sanyo Electric, Inc. v. Howard's Appliance Corp. (In re Howard's Appliance Corp.*), 874 F.2d 88, 93 (2nd Cir.1989). As more fully discussed *supra*, under New York law, the earliest at which the Debtor obtained an interest in the Camillus property was the date of the Divorce Decree, namely November 17, 1998, in which case the Camillus property is property of the estate under Code § 541(a)(1). *See* Code § 541(a)(1), *supra*. Alternatively, the latest at which the Debtor obtained an interest in the Camillus property under state law was August 10, 2000, the date of delivery of the Sheriff's Deed conveying the Camillus property to the Debtor, in which case the property is property of the estate under Code § 541(a)(5)(B). *See* Code § 541(a)(5)(B), *supra*. Thus, the Camillus property will be considered property of the estate under Code § 541 for the purpose of determining its

eligibility for exemption under Code § 522. As more fully discussed above, the Camillus property was deemed exempt on or about July 28, 2000 by operation of Code § 522(l) and Fed.R.Bankr.P. 4003(b) with no objection thereto.

Based on the foregoing, it is hereby,

ORDERED that the Debtor's motion for avoidance of the Finocchio judicial lien on the Camillus property pursuant to Code § 522(f) is denied as that relief is unavailable to the Debtor; and it is further

ORDERED that the Debtor's motion for avoidance of the Niagara Mohawk and NPG judicial liens on the Camillus property pursuant to Code § 522(f) is granted; and it is further

ORDERED that the Debtor's motion for a determination that the Camillus property qualifies as property of the estate under Code § 541 is granted; and it is further

ORDERED that the Debtor's motion for a determination that the Camillus property is exempt property pursuant to Code § 522 is granted.

Dated at Utica, New York

this 25th day of January 2001

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STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge