

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO**

In re: ELOY MARTINEZ¹ and
ROSINA MARTINEZ,

No.10-11101-j7

Debtors.

MEMORANDUM OPINION AND ORDER

THIS MATTER is before the Court following a trial on the merits of the Debtors' motion to avoid judicial lien. *See* 2nd Amended Debtor Rosina Martinez Motion to Void Liens Pursuant to 11 USC 522(f) ("Second Motion to Avoid Lien") – Docket No. 192. Jennie Deden Behles appeared at the trial on behalf of Rosina Martinez, and Denise J. Trujillo appeared at the trial on behalf of creditor Walter Gould.

Ms. Martinez seeks to avoid a judicial lien against residential real property located at 501 Roman Drive, Espanola, New Mexico in which she has claimed a homestead exemption. The property consists of a .16 acre lot where the home is situated (the "Residence"), and a .27 acre backyard lot (the ".27 Acre Lot") (the Residence and the .27 Acre Lot together are referred to as the "Property"). The parties agree that the .27 Acre Lot is part of the homestead.² The parties also agree for purposes of applying the lien avoidance formula found in 11 U.S.C. § 522(f) that Ms. Martinez is entitled to a homestead exemption in the amount of \$60,000 and that Mr. Gould holds a judicial lien³ in the amount of \$85,000. The only remaining issue for the Court to

¹ Eloy Martinez passed away in July of 2015. *See* Suggestion of Death – Docket No. 226.

² *See* Stipulated Order Resolving Debtors' Objection to the Claim of Creditor Gould, Gould's Motion for Summary Judgment, Debtors' Motion for Additional Time Regarding Summary Judgment, and Value of Espanola Property ("Stipulated Order") entered while Debtors' case was pending under Chapter 13 – Docket No. 91, ¶ 1 ("Debtors and Gould have stipulated that Gould is a secured creditor, to the extent that his lien is not avoided in regard to the residence located at 501 Roman Drive, Espanola, New Mexico and the lot behind the residence . . . under 11 U.S.C. § 522(f).").

³ Mr. Gould holds a transcript of judgment that was recorded in the real property records of the county where the Property is located. *See* Claims Register, Claim No. 5-1. A transcript of judgment is a type of judicial lien subject to lien avoidance under 11 U.S.C. § 522(f). *See* 11 U.S.C. § 101(36) ("The term 'judicial lien' means lien obtained

determine is the value of the Property. After careful review of the evidence before the Court, the Court finds that the value of the Property is \$150,000 as of the date of commencement of Debtor's Chapter 13 case. Because the value of the Property as of that date exceeds the sum of the judicial lien plus Ms. Martinez's homestead exemption, Mr. Gould's judicial lien does not impair Ms. Martinez's homestead exemption. Ms. Martinez therefore cannot avoid the judicial lien.

BACKGROUND AND PROCEDURAL HISTORY

Debtors filed a voluntary petition under Chapter 13 of the Bankruptcy Code on March 8, 2010. Debtors listed the Property in Schedule A and claimed a homestead exemption in the Property on Schedule C. *See* Docket No. 15. On Schedule D, Debtors identified Walter R. Gould as a secured creditor with a judgment lien against the Property. *Id.* While the case was pending under Chapter 13, Debtors unsuccessfully sought to avoid Mr. Gould's judgment lien.⁴ In June of 2014, Debtors converted their Chapter 13 case to a case under Chapter 7 of the Bankruptcy Code. *See* Docket No. 177. After converting the case to Chapter 7 on June 25, 2014, Ms. Martinez again sought to avoid Mr. Gould's judgment lien as impairing her homestead exemption. *See* Docket Nos. 182 and 193. Ms. Martinez asserted that the Property has significantly depreciated in value since the filing of the bankruptcy case in 2010, and that the

by judgment, levy, sequestration, or other legal or equitable process or proceeding.”); *In re Hamilton*, 461 B.R. 878, 892 (stating that the creditor's “transcript of judgment constitutes a judicial lien subject to avoidance under 11 U.S.C. § 522(f).”) (Bankr. D.N.M. 2011) (citations omitted); *In re Gregory Rockhouse Ranch*, 380 B.R. 258, 262 (Bankr. D.N.M. 2007) (stating that “[t]ranscripts of judgment are the type of judicial lien that is avoidable under 11 U.S.C. § 522(f).”) (citation omitted). *See also, Ranchers State Bank of Belen v. Vega*, 99 N.M. 42, 44, 653 P.2d 873, 875 (1982) (explaining that, “[u]nder New Mexico Law, a money judgment becomes a lien on the judgment debtor's realty when the transcript of the judgment docket is filed and recorded with the county clerk of the county in which the realty is situated.”) (citation omitted).

⁴ *See* Debtor's Motion to Avoid Liens Pursuant to 11 U.S.C. § 522(f) (Docket No. 36), Memorandum Opinion (Docket No. 101); and Order Denying Debtors' Motion to Avoid Liens Pursuant to 11 U.S.C. § 522(f) (Docket No. 102).

appropriate date to value the Property for purposes of applying the lien avoidance formula is the date the case converted to Chapter 7. *See* Docket No. 198.

On cross-motions for summary judgment,⁵ the Court determined, among other things,⁶ that that the date Debtors originally commenced their bankruptcy case on March 8, 2010 as a case under Chapter 13 (the “Petition Date”) is the operative date to fix the value of the Property for purposes of lien avoidance under 11 U.S.C. § 522(f)(1).⁷ *See* Memorandum Opinion on Cross-Motions for Summary Judgment – Docket No. 210. Because there was insufficient evidence on summary judgment of the Property’s value as of the Petition Date, the Court set a trial on the Second Motion to Avoid Lien.

FACTS

The Property

The Property is located in Espanola, New Mexico, within Rio Arriba County. It is residential real property with mountain views located on the end of a cul de sac. The east side of the Property abuts property owned by the Santa Clara Pueblo. The Residence consists of a frame-stucco 1252 square foot home with three bedrooms and one bathroom. It was built during the 1960s. Ms. Martinez’s mother transferred the Residence to her many years ago. Ms. Martinez has lived there for more than 30 years. The home is in need of some repairs. The

⁵ *See* Debtor’s Motion for Summary Judgment Allowing her to Avoid Judgment Lien – Docket No. 198; Creditor Walter Gould’s Motion and Memorandum in Support of Motion for Summary Judgment Denying Debtors’ Motion to Avoid Liens Pursuant to § 522(f) – Docket No 199.

⁶ Mr. Gould argued on summary judgment that the Debtors were bound by the stipulation of the Property’s value that the parties entered into while the case was proceeding under Chapter 13. The Court determined that under the plain language of 11 U.S.C. § 348(f)(1)(B), all valuations made while a case is pending under Chapter 13 “do not apply” upon conversion to Chapter 7, and that the parties’ stipulation of value lacked specificity to except it from the application of 11 U.S.C. § 348(f)(1)(B) absent extrinsic evidence of the parties’ intent. *See* Memorandum Opinion on Cross-Motions for Summary Judgment – Docket No. 210. At trial, neither party offered any evidence regarding the parties’ intent at the time they entered into the stipulation.

⁷ All future statutory references in this decision are to the Bankruptcy Code, codified in Title 11 of the United States Code.

bathub and bathroom fixtures need to be replaced. The poor condition of the bathtub existed since 2010. The furnace in the home is the original furnace. The roof had a few leaks in 2010 which were repaired with temporary patches. Since then, Ms. Martinez had part of the roof replaced at a cost of approximately \$3,000. Some bubbles from prior leaks remain visible on the underside of the porch roof and on the interior ceiling of the home. The bubbles on the interior ceiling did not worsen until 2014 when it rained a lot.

The .27 Acre Lot is located behind the Residence. Ms. Martinez considers the .27 Acre Lot to be the backyard of the home. There is no fence between the Residence and the .27 Acre Lot. There is no separate access to the .27 Acre Lot from the rear or side of the .27 Acre Lot. The only way to get to the .27 Acre Lot is on the side of the Residence. At one time, Ms. Martinez conveyed the .27 Acre Lot to her son, Ernie Archuleta, together with a twenty-five foot right of way easement over the lot on which the home is situated to access the .27 Acre Lot. Ms. Martinez and her son intended that he would place a manufactured home on the .27 Acre Lot. But when it turned out that there was insufficient space alongside the house for the twenty-five foot easement granting access to the .27 Acre Lot, Ms. Martinez's son conveyed both the .27 Acre Lot and the twenty-five foot right of way easement back to Ms. Martinez. *See Warranty Deed, Exhibit A, p. 22.* Without space for a twenty-five foot easement, the .27 Acre Lot can only be used as a backyard to the Residence.

The Lien

Mr. Gould holds a judgment lien against the Property. The amount of the lien as of the Petition Date was \$85,000. The Chapter 13 case converted to Chapter 7 on June 25, 2014.

The Property's Value

Ms. Martinez and Mr. Gould each offered expert testimony to show the value of the Property. Ms. Martinez's expert, Tracy Smith, appraised the Property with a value of \$75,000 as of December 20, 2013, and \$65,000 as of September 21, 2015, based on a comparable sales approach to valuation. *See* Exhibits 15 and 16.⁸ Neither of these values is relevant for purposes of lien avoidance because such values are not tied to the Petition Date. Mr. Gould's expert, Don W. Milligan, appraised the Property in September 20, 2010, a few months after the Debtors filed their Chapter 13 bankruptcy case. *See* Exhibit B. He also prepared a retrospective appraisal in 2015 valuing the Property as of the Petition Date, March 8, 2010. *See* Exhibit A.

Since 2010 properties in Espanola, New Mexico have generally been declining in value. Both Mr. Milligan and Mr. Smith agreed that the decline became more pronounced in 2011 and 2012, and that the market was better in 2010 than it is now. There were some foreclosure properties before 2010 in the neighborhood where the Property is located. When appraising residential real property, appraisers try not to use foreclosure sales or sales of real-estate owned ("REO") properties because foreclosure sales and REO sales typically yield below non-REO market value sales prices. In searching for comparable residential properties in rural areas, it is acceptable to use a property within a 5 mile radius of the subject property, though appraisers ideally try to find a property within 1 mile of the subject property.

Mr. Milligan's September 2010 Appraisal

a) The Residence

Mr. Milligan used the comparable sales approach to value the Residence. Of the three properties he used as comparable sales, only one, located at 504 E. Jonathan Dr. (the "504

⁸ The Court sustained Mr. Gould's objection to the admission of Debtor's Exhibits 15 and 16, but agreed to treat Exhibits 15 and 16 as part of the Debtor's offer of proof with respect to the argument that the conversion date is the appropriate date to value the Property for purposes of judicial lien avoidance.

Jonathan Property”) is in the same neighborhood as the Residence. The square footage of the home located on the 504 Jonathan Property is slightly smaller than Ms. Martinez’s home. The 504 Jonathan Property sold for \$129,900 in April of 2010. It does not have a lot behind the home, nor does it have a mountain view. The other two properties used as comparables to the Residence were further away from the Residence and required greater adjustments: one is much smaller, but has a garage and carport, and the other is both larger than Ms. Martinez’s home and has a garage. Based on these comparable sales, Mr. Milligan valued the Residence at \$130,000 as of September 30, 2010 (exclusive of the .27 Acre Lot). The market trend noted in the September 2010 appraisal is “declining.” *See Exhibit B.*

b) The .27 Acre Lot

Mr. Milligan appraised the .27 Acre Lot separately from the Residence. He did so because of the apparent 25-foot easement referenced in the Warranty Deed signed by Ms. Martinez’s son, and because the .27 Acre Lot has a separate deed. For comparable properties, Mr. Milligan used stand alone, unimproved, vacant properties. Two of the three properties are similar in size to the .27 Acre Lot, but one parcel of land required a significant adjustment due to its much larger size. The sales prices for the unimproved lots used as comparables ranged from \$45,000 to \$52,000, and the values as adjusted to make them comparable to the .27 Acre Lot ranged from \$42,600 to \$49,000. *See Exhibit B.* After adjustments to the comparable properties, Mr. Milligan ascribed a value of \$38,000 to the .27 Acre Lot. The unimproved lots used as comparable properties are not located behind a residence and do not have potential access issues similar to the .27 Acre Lot. Consequently, such properties are not comparable to the .27 Acre Lot used as a backyard for the Residence notwithstanding the fact that the .27 Acre Lot has a

separate deed. The values of such properties are not a reliable indicator of value for the .27 Acre Lot.

Mr. Milligan's March 2010 Retrospective Appraisal

In September of 2015, Mr. Milligan conducted a retrospective appraisal of the Property as of the Petition Date, March 8, 2010. Again, the market trend in the March 2010 appraisal is noted as “declining.” See Exhibit A. Mr. Milligan valued the Property as of March 8, 2010 at \$170,000: \$132,000 for the Residence and \$38,000 for the .27 Acre Lot. Again he used the comparable sales approach to valuation.

a) The Residence

The 504 Jonathan Property is the only property used in both the September 2010 appraisal and March 2010 retrospective appraisal as a comparable sale for the Residence. See Exhibits A and B. In the March 2010 appraisal, Mr. Milligan adjusted the 504 Jonathan Property downward by \$3,000 because it does not have a mountain view. He did not make this adjustment in the September 2010 appraisal. The adjusted value of the 504 Jonathan Property in the retrospective appraisal as of March 2010 is \$132,938, whereas the adjusted value of the 504 Jonathan Property in the September 2010 appraisal is \$129,935.

The other two properties Mr. Milligan used in the March 2010 appraisal for comparable sales (the “Denton Property” and the “Camino Rio Vista Property”) are located in other neighborhoods a mile or so away from the Residence. See Exhibit A. Unlike the Residence, the Denton Property and the Camino Rio Vista Property each have an additional bathroom, for which Mr. Milligan made a downward adjustment of \$2,000 to the sales price for those

properties; a garage, for which Mr. Milligan made a downward adjustment of \$3,000; and no mountain views, for which Mr. Milligan made an upward adjustment of \$3000. Mr. Milligan made other adjustments to the Denton Property and the Camino Rio Vista Property to account for differences in gross living area and for heating and cooling features. In addition, The Denton Property and the Camino Rio Vista Property are both located on the other side of the river. Properties located on the other side of the river often have water rights, which generally increase a property's value. Mr. Milligan did not confirm whether the Denton Property or the Camino Rio Vista Property has water rights and made no adjustment for water rights to the value ascribed to those properties. Neither the Denton Property nor the Camino Rio Vista Property used to value the Residence in the March 2010 appraisal is very comparable to the Residence.

b) The .27 Acre Lot

Just as in the September 2010 appraisal, the March 2010 appraisal separately values the .27 Acre Lot. Only one of the properties used in the March 2010 appraisal for comparable sales for the .27 Acre Lot is the same comparable property used in the September 2010 appraisal. Another property used in the March 2010 appraisal as comparable to the .27 Acre Lot has associated water rights, for which Mr. Milligan made a downward adjustment of \$3,000. The sales prices for the three unimproved lots used as comparable sales in the March 2010 appraisal range from \$40,000 to \$60,000, and the adjusted values for those properties to make them comparable to the .27 Acre Lot range from \$20,400 to \$51,600. Based on these comparable sales, Mr. Milligan again valued the .27 Acre Lot as of March 8, 2010 at "near Thirty Eight Thousand Dollars." Exhibit A. Again, because the unimproved properties used in the March 2010 appraisal are not comparable to the .27 Acre Lot, they do little to establish the fair market value of the .27 Acre Lot as of the Petition Date.

The Tax Assessments

Tax assessment information for the Residence for Tax Year 2015 reflect an actual value in 2015 of \$91,000, and an assessed value of \$30,379; and an actual value in 2014 of \$88,481, and an assessed value of 31,171. *See* Exhibit C. Taxes on the Residence went up from \$270.60 in 2005 to \$482.24 in 2013. *See* Exhibit D. In 2014, taxes on the Residence decreased to \$476.16. *Id.*

Tax assessment information for the .27 Acre Lot for Tax Year 2015 reflect an actual value in 2015 of \$49,014, and assessed value of \$16,338; and an actual value in 2014 of \$47,586 and an assessed value of 15,862. *See* Exhibit C. Taxes on the .27 Acre Lot increased from \$370.54 in 2005 to \$457.88 in 2014.

The Court draws no conclusion as to the fair market value of the Residence or the .27 Acre Lot based on the tax assessment values or from the tax amounts. No evidence was presented to indicate that property values contained in a tax assessment are a reliable indicator of actual fair market value. To the contrary, the sales comparison approach is the method most often used to value residential properties and both appraisers used the comparable sales method of valuation to value the Property. Appraisers use tax statements only as secondary sources of information regarding property values.

Property located at 505 Roman

A residential property located at 505 Roman in Espanola, New Mexico (the “505 Roman Property”), two doors down from the Property, sold in 2009 for \$150,000. Like the Property, the 505 Roman Property has a backyard lot behind the residence. At the time of sale it was an REO property. It later became vacant, and then went through a second foreclosure. Mr. Milligan did not use the 505 Roman Property as a comparable property to appraise the Property because the

access to the backyard lot of the 505 Roman Property is much narrower than the Property access to the .27 Acre Lot and because the 505 Roman Property was a foreclosure property.

The residence on the 505 Roman Property is about the same size and age as the Residence, but has two bathrooms whereas the Residence has only one bathroom. Having one fewer bathroom can affect a property's value. In the March 2010 appraisal, Mr. Milligan made a \$2,000 downward adjustment to the comparable properties with two bathrooms. However, in the September 2010 appraisal, Mr. Milligan made no adjustment to the comparable property with two bathrooms. *See Exhibits A and B.* Unlike the Property, the 505 Roman Property does not have a mountain view. Mr. Milligan made \$3,000 upward adjustments to all three comparable properties used in the March 2010 appraisal to account for their lack of mountain views. *See Exhibit A.* The \$150,000 sales price for the 505 Roman Property in 2009 included the backyard lot.

In light of all the evidence before the Court, the Court finds that the value of the Property as of the Petition Date is \$150,000. The two most comparable properties are the 504 Jonathan Property and the 505 Roman Property which are both located in the same neighborhood. The 504 Jonathan Property which has one fewer room than the Residence and no separate backyard lot sold for \$129,900 in April of 2010. Mr. Milligan's adjusted value of the 504 Jonathan Property was \$129,935 in the September 2010 appraisal, and \$132,938 in the March 2010 appraisal. Clearly the .27 Acre Lot adds value to the Property even without an easement over the Residence property. The value of the Property, including the .27 Acre Lot must therefore be greater than the approximate \$130,000 value of the 504 Jonathan Property.

The 505 Roman Property, which sold for \$150,000 in 2009, has a backyard lot similar to the .27 Acre Lot but slightly smaller at .225 acres. To determine the comparable value of the

505 Roman Property, upward adjustments to the \$150,000 sales price must be made because it was sold by a lender as REO, does not have the more desirable mountain views, and has less acreage. Downward adjustments must also be made to the \$150,000 sales price of the 505 Roman Property to adjust for its additional bathroom and the declining market between the 2009 sales date and the Petition Date.

Comparing the Property with 1) the 504 Jonathan Property which does not have a large backyard lot; and 2) the 505 Roman Property which is almost next door to the Property and has a backyard lot, the Court finds that the fair market value of the Property (consisting of the Residence together with the .27 Acre Lot) as of March 8, 2010 is \$150,000.⁹

DISCUSSION

The Court previously held that the Petition Date, not the conversion date, is the operative date to value of the Property and to determine the amount of the liens against the Property notwithstanding the Debtors' conversion of their case from Chapter 13 to Chapter 7. *See* Memorandum Opinion – Docket No. 210.¹⁰ “Value” is defined for purposes of 11 U.S.C. § 522 as the “fair market value as of the date of the filing of the petition, or with respect to property that becomes property of the estate after such date, as of the date such property becomes property of the estate.” 11 U.S.C. § 522(a)(2). As determined above, the fair market value of the Property as of the Petition Date is \$150,000.

⁹ The \$150,000 value of the Property attributes an approximate \$20,000 value to the .27 Acre Lot. That is the low end of the six unimproved lots Mr. Mulligan used as comparables in valuing the .27 Acre Lot. Mr. Mulligan assigned adjusted values for those six lots of \$48,500, \$49,000, \$42,600, \$20,400, \$48,600 and \$51,600, from which he then attributed a \$38,000 value to the .27 Acre Lot. *See* Exhibits A and B.

¹⁰ *See also, In re Martinez*, 469 B.R.74, 83 (Bankr. D.N.M. 2012) (“The petition date is the operative date to make determinations under 11 U.S.C. § 522(f)(2)(A), including determinations of lien amounts and the value of the exempt property.”); *In re Levinson*, 372 B.R. 582, 586-87 (Bankr. E.D.N.Y. 2007), *aff’d*, 395 B.R. 554 (E.D.N.Y. 2008) (stating that “the petition date has been held to be the operative date for all § 522(f) determinations, including determinations regarding the value of the debtor’s property and the value of the liens.”) (citations omitted); *In re Pacheco*, 342 B.R. 352, 357 (Bankr. D.N.M. 2006) (“the value of the liens, the value of the property and the amount of the exemption are all measured as of the date of the filing of the petition.”) (citations omitted)

Section 522(f) allows a debtor to avoid a judicial lien on the debtor's property "to the extent" that the lien impairs the debtor's exemption. 11 U.S.C. § 522(f)(1).¹¹ Impairment is determined according to the following formula:

[A] lien shall be considered to impair an exemption to the extent that the sum of—

- (i) the lien;
- (ii) all other liens on the property; and
- (iii) the amount of the exemption that 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).

Using this formula, the sum of Mr. Gould's lien of \$85,000 plus Ms. Martinez's \$60,000 exemption is less than the \$150,000 value of the Property as of the Petition Date.¹² The lien therefore does not impair Ms. Martinez's homestead exemption. She cannot avoid the lien. In the event Mr. Gould forecloses his transcript of judgment, the buyer at the foreclosure sale will be required to pay Ms. Martinez the amount of her homestead exemption.¹³

¹¹ Section 522(f)(1) provides in full:

Notwithstanding any waiver of exemptions but subject to paragraph (3), 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 lien is—

- (A) a judicial lien, other than a judicial lien that secures a debt of a kind that is specified in section 523(a)(5); or
- (B) a nonpossessory, nonpurchase-money security interest in any—
 - (i) household furnishings, household goods, wearing apparel, appliances, books, animals, crops, musical instruments, or jewelry that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor;
 - (ii) implements, professional books, or tools, of the trade of the debtor or the trade of a dependent of the debtor; or
 - (iii) professionally prescribed health aids for the debtor or a dependent of the debtor.

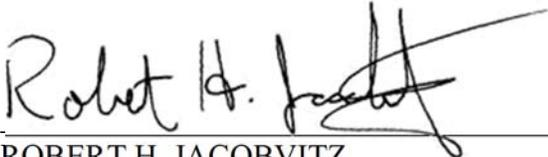
11 U.S.C. § 522(f)(1).

¹² \$85,000 + \$60,000 = \$145,000

\$145,000 (the sum of the lien plus the exemption amount) < \$150,000 (the value of the Property).

¹³ *Cf. Morgan Keegan Mortg. Co. v. Candelaria*, 124 N.M. 405, 408, 951 P.2d 1066, 1069 (Ct.App. 1997) (affirming trial court's order allowing mortgagor's homestead exemption against the judgment creditor's transcript of judgment where the owner asserted the exemption in response to the foreclosure action and obtained judicial approval of the homestead exemption before the sale of the property had been consummated).

WHEREFORE, IT IS HEREBY ORDERED that the Second Motion to Avoid Lien is
DENIED.



ROBERT H. JACOBVITZ
United States Bankruptcy Judge

Date entered on docket: January 4, 2016

COPY TO:

Jennie Behles
Behles Law Firm PC
Attorney for Debtors
PO Box 7070
Albuquerque, NM 87194-7070

Denise J Trujillo
George Giddens, PC
Attorney for Creditor
10400 Academy Rd NE Ste 350
Albuquerque, NM 87111