No. 10-56114
D.C. No. CV-08-5652-GW
BK No. ND-08-10952-RR

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re Michael T. Keys, Debtor. _____ Charlene Van Deusen, Appellant, vs. Michael T. Keys, Appellee.	No. 10-56114 D.C. No. CV-08-5652-GW Central District of California, Los Angeles BK No. ND-08-10952-RR Central District of California, Santa Barbara Chapter 7 **APPELLANT'S OPENING BRIEF**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

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I. STATEMENT OF BASIS OF APPELLATE JURISDICTION.

This is an appeal from an order of the bankruptcy court, by which order the court granted the debtor Michael Keys' motion to avoid an equitable lien. The Ventura County Superior Court had entered a judgment imposing the lien, in favor of appellant Charlene Van Deusen, in December of 2007. ER 56:19. Appellant recorded the superior court judgment in the Official Records of Ventura County on January 18, 2008. ER 91-96. Petitioner file his Chapter 7 petition on April 30, 2008. He then moved to avoid the lien, on the basis that it impaired his homestead exemption. ER 61 et seq.

On July 17, 2008, the bankruptcy court filed its order granting the debtor's motion to avoid the lien. ER 303-307. One day later, on July 18, 2008, appellant filed a motion for reconsideration of the bankruptcy court's decision. ER 308-312. The court denied the motion for reconsideration, in an order filed on July 24, 2008. ER 338-342.

On August 1, 2008, appellant filed a notice of appeal from the decision of the bankruptcy court. ER 343-344. The district court had jurisdiction over the appeal pursuant to 28 U.S.C. § 158(b). On July 2, 2010, the district court filed a decision affirming the ruling of the bankruptcy court. On July 12, 2010, appellant filed her notice of appeal from the order of the district court. The Court of Appeals therefore has jurisdiction over the present appeal pursuant to 28 U.S.C. § 158(d).

II. STATEMENT OF QUESTIONS PRESENTED.

The questions presented in this appeal are:

1. Whether the bankruptcy court erred when it denied appellant's motion for reconsideration with respect to an issue which the court had raised *sua sponte* at oral argument (regarding whether, under California law, the priority of an equitable lien relates back to the time of the acts which gave rise to the lien)?

2. Whether the bankruptcy court erred by confining its decision to the four corners of the superior court order recognizing appellant's equitable lien, and by not taking further evidence as to the rationale of the superior court, or ordering a hearing to otherwise further consider the validity and priority of the equitable lien claimed by appellant.[1]

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[1] As the district court noted in its decision, the bankruptcy court's "order does not set out a basis for the court's decision, other than 'the Court['s] having made findings of fact and conclusions of law as set forth in the record.'" Statement of Decision re Bankruptcy Appeal, at 3; citing ER 304. The written order of the bankruptcy court merely refers to that court's having made findings on the record during the hearing. ER 304:1-6. However, during the hearing, the court stated several times that it did not believe that it had before it a declaration of appellant with respect to the underlying facts and the rationale of the decision of the superior court judge. ER 358:12-18, 372:17-23, and 376:19-21. This led to some confusion during the hearing, because, as counsel for appellant informed the court during the hearing, he had prepared such a declaration, and did not understand why it was not in the court's file. ER 376:22-377:2. Actually, the declaration was in the court file all along, ER 283-286, but the bankruptcy court did not notice it. ER 333. The bankruptcy court acknowledged this error in a handwritten notation made in its

3. Whether the rule of *Hise v. Superior Court* (Cal. 1943), which establishes that the priority of an equitable lien relates back to the time of the acts which gave rise to the lien, applies in the context of a motion to avoid a lien under Bankruptcy Code § 522(f)?

4. Whether, on the facts of this case, appellant's equitable lien fixed on the interest of the debtor in his Oxnard residence at the time he purchased his residence, and that therefore, under the rule of *Farrey v. Sanderfoot* (U.S. 1991) the debtor may not avoid the lien because it did not affix to a preexisting interest of the debtor?

III. STANDARD OF REVIEW.

In the Ninth Circuit, the Court of Appeals independently reviews bankruptcy court decisions, giving no deference to determinations by either the district court or the Bankruptcy Appellate Panel. *In re B.U.M. Int'l, Inc.*, 229 F.3d 824, 827 (9th Cir. 2000); *In re Kadjevich*, 220 F.3d 1016, 1019 (9th Cir. 2000). Such review of district court decisions is made under a de novo standard, without giving deference to the decision of the district court. See, *In re Bevan*, 327 F.3d 994 (9th Cir. 2003). The Court of Appeals is in as good a position to review decisions of the bankruptcy court as is the district court or the Bankruptcy Appellate Panel. *In re Emery*, 317 F.3d 1064 (9th Cir. 2003); *In re Caneva*, 550 F.3d 750 (9th Cir. 2008).

IV. STATEMENT OF THE CASE.[2]

A. The Facts.

The underlying facts involve three individuals: Mr. Keys, Ms. Van Deusen, and Mr. Roy Hargett. Mr. Hargett and Ms. Van Deusen were nonmarried cohabitants who lived together for 34 years, from 1963 to 1997. Ms. Van Deusen is Michael Keys' mother. Mr. Hargett is Mr. Keys' stepfather. ER 283:3-4.

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order denying appellant's motion for reconsideration. ER 333:12-15. However, the court also stated in its handwritten notation that it had made its decision to grant the motion to avoid the lien based on the representations of counsel made during the hearing with respect to those underlying facts. *Id.*

[2] The entirety of Section IV of this brief is taken virtually verbatim from the Statement of the Case in appellant's opening brief before the district court. The district court's review of the facts is based largely on appellant's Statement of the Case, and is essentially correct.

In 1975, Mr. Hargett and Ms. Van Deusen bought two adjacent unimproved one-acre residential lots in Ojai. In 1978, they completed construction of a residence on one of the lots (referred to as "Lot 1", or the "Residence"). All three of the parties lived in Residence until 2007. In that year, the relationship of Mr. Hargett and Ms. Van Deusen ended. Mr. Hargett and Mr. Keys moved out of the Residence, and have lived together ever since. Ms. Van Deusen continues to live in the residence to this day. ER 283:5-9.

Over time, commencing in the early 1980's, Mr. Hargett and Ms. Van Deusen made certain improvements to Lot 2 of their Ojai property. The improvements consisted of several small unpermitted housing units, which they rented out. Over time, Mr. Hargett and Ms. Van Deusen borrowed against the increasing equity in both of the Ojai properties. Most of the borrowed funds were used to purchase additional one-family properties in the Ojai area. Those purchases were made in Mr. Keys' name, and the loans to finance the purchases were taken out in his name, because he maintained a better credit rating than did either Mr. Hargett or Ms. Van Deusen. ER 283:1-16.

These three individuals lived together essentially as a family unit until 1997, when Mr. Hargett and Mr. Keys moved out. During the period of time they remained together, the parties did not make any ready distinction as among each other as to who was the true owner of the various properties, and in what proportion. They commingled and shared the rental income, and generally used the accumulated funds and borrowings to pay household expenses and to buy more property. Title to all of the property purchased was in Mr. Keys' name. ER 283:17-22.

In 1997, the parties entered into what the trial judge later determined to be an implied agreement. The terms of the implied agreement were that Ms. Van Deusen would keep the Residence Property as her own, and that Mr. Hargett and Mr. Keys would keep the remaining properties as their own. Those remaining properties, particularly Lot 2 adjacent to the Residence, generated substantial amounts of rent.

By this time, approximately $300,000 in debt had been taken out against the Residence Property. The agreement of the parties was that Mr. Keys and Mr. Hargett would use the rent from the other properties to service the debt on the Residence. They did so, until 2006, as is detailed below. ER 283:23-284:2.

As of 1998, title to the Residence continued to be in Mr. Keys' name. During that year, in order to have record title conform to the agreement of the parties, Ms. Van Deusen requested that Mr. Keys transfer title to the Residence to her. Mr. Keys did so. Mr. Keys and Mr. Hargett continued to see to the payment of the mortgage on Residence Property. ER 284:3-6.

In 1999, Mr. Keys approached Ms. Van Deusen with a request that they refinance the Residence Property. Ms. Van Deusen agreed to cooperate in their doing so. In order to allow the refinancing to take place, Ms. Van Deusen conveyed title to the Residence Property to Mr. Keys. She did so based on Mr. Keys' assurance that he would reconvey title to her after the refinancing closed. The refinancing, which continued to leave a $300,000 encumbrance against the property, was completed. However, Mr. Keys never reconveyed title to Ms. Van Deusen. ER 284:7-12.

From time to time Ms. Van Deusen would ask Mr. Keys to see to the transfer of title back to her. Mr. Keys would reply that there was this or that problem with his doing so, or would promise to do so and not follow through. Ms. Van Deusen did not harshly confront Mr. Keys about the situation or bring the matter to court because she trusted Mr. Keys and did not want to disturb the family relationships. ER 284:13-16.

This state of affairs continued until 2006. From Ms. Van Deusen's perspective, the implied agreement was apparently being honored by Mr. Keys and Mr. Hargett. Ms. Van Deusen complied with her part of the bargain by forbearing from participating in the flow of rental income, from Lot 2 and the other properties, as well as the proceeds of sale of the other properties which took place along the way. ER 284:17-20.

Things changed in 2006. Out of the blue, a process server appeared at Ms. Van Deusen's door, with a sixty-day notice to quit the premises. That was shortly followed

by a thirty-day notice to quit. Neither Mr. Hargett nor Mr. Keys even called Ms. Van Deusen to speak about why they were initiating foreclosure proceedings, and what legal support there was for their doing so. Shortly following the service of the notices, Mr. Hargett and Mr. Keys put Lot 2 up for sale. That transaction closed toward the end of 2006. Mr. Hargett and Mr. Keys retained the proceeds of that sale for their own use. They did so after prevailing in a hard-fought battle over Ms. Van Deusen's filing a lis pendens against that property, and whether the lis pendens should be expunged. ER 284:21-28.

It was not until these events of 2006, that Ms. Van Deusen learned that Mr. Hargett and Mr. Keys, in Mr. Keys' name, had borrowed more than $200,000 more against the Residence Property. Thus, by 2006, there was well over $500,000 in debt against the property, in Mr. Keys' name. Ms. Van Deusen learned about Mr. Hargett's and Mr. Keys' misappropriating the equity in the Residence Property only after the Ventura litigation commenced in 2006. ER 285:11-13.

Shortly after Mr. Hargett and Mr. Keys put Lot 2 on the market, Ms. Van Deusen brought an action against them seeking to quiet title to the Residence Property in her name, and related relief. It was only during the discovery process in that suit that Ms. Van Deusen learned of the additional borrowing against the Residence Property. ER 285:1-3.

Mr. Keys brought an unlawful detainer case at around the same time that Ms. Van Deusen brought the quiet-title case. Ms. Van Deusen moved in the unlawful detainer case for an order quashing service because the matter was not a legitimate landlord-tenant case, and the quiet-title case was pending. The trial court, a commissioner, rejected that motion based on the standard rule that title is not to be tried in unlawful detainer cases. The Appellate Division of the Superior Court reversed the trial court on that issue, and stayed proceedings in the unlawful detainer case pending the outcome of the quiet title case. ER 285:4-10.

During this period of time, Ms. Van Deusen was made to endure the prospect

that her own son and former nonmarried cohabitant would somehow succeed in evicting her from her residence of 38 years, on sixty days notice, on the patently false theory that Ms. Van Deusen was a tenant in the property. ER 285:14-17.

B. The Decision of the Superior Court

In June of 2007, trial of the quiet title case took place in the Ventura County Superior Court. After a trial which took several weeks to complete, and after and significant post-trial briefing and debate, the court entered judgment on December 20, 2007. A copy of the judgment is appears at pages 277 through 280 of the Excerpts of the Record submitted herewith. The court refrained from conducting an exact accounting. Rather, it ordered that each of the parties would be responsible for payment of one-third of the debt encumbering the Residence Property. Because Mr. Keys and Mr. Hargett operated jointly, their obligation to pay two-thirds of the debt was adjudged to be their joint debt. ER 278:4-8.

The court further ordered in the judgment that Mr. Hargett and Mr. Keys join with Ms. Van Deusen in paying off the debt encumbering the Ojai property by ninety days following the entry of judgment. ER 279:9-14. The court based its decision as to Mr. Hargett on *Marvin* principles. It based its decision as to Mr. Keys on the theory of a breach of fiduciary duty, which duty arose because of Mr. Keys' confidential relationship with his mother.

Most significantly for purposes of this bankruptcy case, the superior court decreed in the judgment the establishment of an equitable lien against the Oxnard property for purposes of securing Mr. Keys' and Mr. Hargett's obligation to pay their two-thirds of the debt.[3] At the request of Mr. Keys and Mr. Hargett, the court also decreed the existence of a similar lien in their favor against the Residence Property to

[3] The question of who, as between Mr. Hargett and Mr. Keys, owned what share of the Oxnard property was never an issue in the superior court case. Rather, it simply ordered that the lien be established, and that any surplus generated from any possible sale of the Oxnard property be paid out to the two defendants "as their interests may appear". (Judgment, at 4:15.)

secure Ms. Van Deusen's obligation to pay her one-third share. ER 278:19-25. The judgment provided that should either side fail to provide the funds necessary to close escrow, the other side may bring a motion for an order compelling the sale of either the Oxnard property or the Residence Property, as the case may be, to generate the necessary funds. ER 280:11-24.

Ms. Van Deusen was ready to perform within the ninety-day period, and so informed Mr. Hargett and Mr. Keys. Mr. Hargett and Mr. Keys failed to perform. On April 1, 2008, Ms. Van Deusen filed a motion in the Superior Court for an order compelling the sale of the Oxnard property. That motion was initially set for hearing on April 17, and continued to May 1. On April 28, 2008, Mr. Keys filed his Chapter 7 petition.

C. Rationale of the Superior Court for Imposing an Equitable Lien on the Oxnard Property.

The superior court's rationale for imposing the equitable lien in this case was not simply that the debtor used some of the funds from Lot 2 to purchase the Oxnard property. Rather, as is described in the superior court's judgment, it related to apportionment of responsibility for paying the approximately $555,000 in mortgage debt encumbering appellant's Ojai residence. The court found that all three of the parties played some role in borrowing the funds which resulted in the $555,000 encumbrance. ER 278:6-279:8.

The court decided to apportion responsibility for payment of the debt one-third to appellant, and two-thirds jointly to the debtor and his stepfather. The court arrived at that figure without a specific accounting, but rather based on its general sense from the evidence at trial of the parties' complicated dealings from the early 1980's to 1997. Under such circumstances, where a detailed accounting is not possible, the court is authorized to apportion debt based on an overall inference of the relative responsibilities of the parties. See, *Milian v. DeLeon*, 181 Cal.App.3d 1185, 226 Cal.Rptr. 831 (1986).

The court heard argument that appellant's not asserting a right to Lot 2 rental income from 1997 on provided additional cash each month to the defendants, and generally enhanced their financial position, in such a way as to assist them in purchasing and financing the Oxnard property. ER 283:23-28.

The court concluded that the link between appellant's performing her part of the bargain by forbearing from asserting any interest in Lot 2 rents, and the defendants' purchase of the Oxnard property, were closely-enough related that it would constitute unjust enrichment of Mr. Keys and Mr. Hargett if the court did not impose a lien on the Oxnard property to secure payment of their two-thirds of the debt on the Ojai property.

As to the debtor's obligation to pay the remaining third of the debt, that obligation was already implicitly secured in favor of the defendants because the $550,000 encumbered appellant's residence. However, at the request of the defendants, the superior court included language in its judgment imposing on appellant's residence a complementary equitable lien for the benefit of defendants, securing appellant's obligation to pay her one-third share. This would seem to be unnecessary surplusage. But it was something which was done at the debtor's request. The fact that cross-equitable liens were imposed on the parties' respective properties makes it all the more justifiable that the equitable lien against the Oxnard property should survive the debtor's bankruptcy.

The superior court did not look to the 1999 deed as being important in establishing the rights of the parties in the Ojai property. The 1999 deed from appellant to Mr. Keys was executed solely for purposes of refinancing the $300,000 debt on the property. The only mention of the deed in the superior court judgment is the statement requiring defendants to execute quitclaim deeds of the property to appellant. This is important because in the present case, the debtor argues that the 1999 deed is the point of departure for analyzing what interest he owned in his mother's residence. The superior court answered that question: None. Unfortunately,

however, Mr. Keys exploited receiving the 1999 deed by helping himself to approximately $200,000 in equity in his mother's residence by borrowing such additional funds between 1999 and 1996, without his mother's knowledge or permission.

D. Bankruptcy Code § 522, *Farrey v. Sanderfoot* (U.S. 1991) and *Owen v. Owen* (U.S. 1991).

In 1991 the Supreme Court decided two cases which greatly affected the analysis of lien avoidance in bankruptcy cases. The cases were *Farrey v. Sanderfoot*, 500 U.S. 291, 111 S.Ct. 1825, 114 L.Ed.2d 337 (1991), and *Owen v. Owen*, 500 U.S. 305, 111 S.Ct. 1833, 114 L.Ed.2d 350 (1991). The Court's decisions in those two cases established two important rules regarding lien avoidance under Bankruptcy Code § 522(f).

Section 522(f)(1) provides, in relevant part:

> (f)(1) 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–
> >
> > . . . . [Emphasis added.]

In *Farrey*, the Court construed § 522(f) to mean that a debtor may avoid the fixing of a judicial lien only if the lien attached to the debtor's interest at some point after the debtor obtained the interest. *Farrey*, 500 U.S. at 296. In *Owen*, the Court held that a judicial lien may be avoided under § 522(f) even if the state has defined exempt property in such a way as specifically to exclude property encumbered by such lien.

Owen, 500 U.S. at 308.[4]

Farrey involved an equalizing payment ordered in a divorce decree. One spouse was made the owner of the divorcing couple's residence by virtue of the decree. However, that spouse became obligated to pay the other spouse an equalizing payment. Soon after entry of the divorce decree, the obligor spouse filed for bankruptcy. He then moved to avoid the lien of the non-debtor spouse by asserting that it impaired the debtor's homestead exemption.

In deciding the case, the Supreme Court first observed that the § 522(f) does not permit the avoidance of a *lien*, per se, but rather permits the avoidance of "the *fixing* of a lien on an interest of the debtor". *Farrey*, 500 U.S. at 296. [Emphasis added.] The Court then determined that under state law, the divorce court had restructured the respective ownership interests of the parties by the language in the divorce decree. As a result, the debtor's interest in the property was different from what his interest had been before entry of the divorce decree. The court noted that the reordering of property interests and the creation of the lien occurred simultaneously, by entry of the divorce decree.

The court then decided that the lien could not be avoided, because there was a contemporaneous occurrence of both the change of the interest of the debtor and the establishment of the lien securing the equalizing payment. The court's holding was that under § 522, a debtor may avoid a lien ". . . only where the lien attached to the debtor's interest at some point after the debtor obtained the interest." *Farrey*, 500 U.S. at 295. That requirement, the court decided, is not met when the debtor's interest and the lien are created simultaneously.

Farrey provides the rule of decision in this case. Appellant should prevail

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[4] Appellant argued in the bankruptcy court that her equitable lien could not be avoided, because California's homestead exemption applies only to money judgments, not equitable liens. See, C.C.P. § 703.010. The debtor prevailed below with respect to that argument, based on the court's applying *Owen*. Appellant does not press the point in this appeal.

because in this case, the priority of appellant's equitable lien relates back to the time of the acts which gave rise to the lien. (See, *Hise v. Superior Court*, 21 Cal.2d 614, 134 P.2d 748.) The act in this case was the debtor's purchase of the Oxnard property in 1998, using in part his increased additional monthly resulting from his mother's keeping her side of the bargain and not asserting an ownership interest in that rental income. Thus, here, as in *Farrey*, the debtor's interest and the lien were created simultaneously, and the lien should not be avoided. That is the crux of appellant's argument in this appeal.

E. The Equitable Lien in the Present Case Is Not Avoidable under Section 522 of the Code Because it Arose Simultaneously with the Debtor's 1998 Purchase of the Oxnard Residence, and Therefore Did Not Affix to a Preexisting Interest of the Debtor.

The facts in the instant case come within *Farrey*. This is so because the lien in this case came into existence at the moment the debtor purchased the Oxnard property in 1998. ER 72:6-8. Similarly, in *Farrey* the lien came into existence at the moment the divorce decree rearranged the ownership interests of the couple in their residence property. A year before Mr. Keys' 1998 purchase of the Oxnard property, consistent with the agreement of the parties, appellant began forbearing from asserting the right to participate in rental income from Lot 2. ER 283:23-28.

Appellant's forbearance immediately enhanced the debtor's financial position. It did so first because the debtor started receiving more cash rental income from Lot 2 immediately, and secondly because the debtor could point to a higher level income in connection with financial applications.

In *In re Destro*, 675 F.2d 1037 (9th Cir. 1982), the Court of Appeals considered whether the creditor in a bankruptcy case had an equitable lien on certain real property. *Destro* was not a divorce case. It was decided under the Bankruptcy Act, not the Bankruptcy Code. However, like the present case, it did involve an equitable-lien priority issue. In considering that issue, the court first decided that it should look to California law to decide the question of priorities. *Destro*, 674 F.2d at 1041. It then

noted that under California law, the priority of an equitable lien relates back to the time of the conduct of the parties which gave rise to the lien. The case the court relied on for that principle was *Holder v. Williams*, 167 Cal.App.2d 313, 334 P.2d 291 (1959). *Holder*, in turn, had relied on *Hise*.

The *Destro* court applied and *Holder*, and concluded that the equitable lien rights of the creditor in that case arose at the time of the acts which gave rise to the lien. It then held that the as a result, the creditor's equitable lien had priority over the rights of the trustee in bankruptcy.[5] Later cases within the Ninth Circuit in which the courts have applied the California relation-back rule under the Bankruptcy Code include *In re Nunez*, 196 B.R. 150 (9th Cir. BAP 1996), at fn. 1; and *In re Stratton*, 106 B.R. 188, 193 (Bankr. E.D. Cal. 1989).

The court should apply the same relation-back principle in the present case. The combination of the relation-back of the equitable lien, the simultaneous arising of the lien and purchase of the Oxnard property, and the rule set down by the Court in *Farrey* should result in the court's denying the debtor's motion to avoid the equitable lien.

F. *In re Farnsworth* (Bankr. D.Ariz. 2008) and *In re Yerrington* (9th Cir. Bap 1992) Provide a Road Map for the Court's Decision in the Present Case.

In re Farnsworth, 384 B.R. 842 (Bankr.D.Ariz 2008) is an important case to which the court should look for guidance in deciding the instant case. *Farnsworth* was not an appellate case. However, the facts of *Farnsworth* were very similar to those of the present case. In *Farnsworth*, the lien creditor was the former nonmarried cohabitant of the debtor. The lien creditor had provided some of the money which he and the debtor had used to purchase a residence. However, they purchased the property solely in the debtor's name.

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[5] Under § 70(c) of the Bankruptcy Act, which applied in *Destro*, the trustee was considered to be a hypothetical lien creditor as of the date of the filing of the petition in bankruptcy. See, *Sequoia Machinery, Inc. v. Jarrett*, 410 F.2d 1116 (9th Cir. 1969). The trustee has the same rights under the Bankruptcy Code. See, 11 U.S.C. § 544.

Prior to the bankruptcy filing in *Farnsworth*, the creditor brought a case in the superior court. That court decided that an equitable lien should be imposed on the property. The debtor then promptly filed bankruptcy, even before the superior court entered final judgment. The debtor claimed a homestead exemption. The creditor then brought a motion challenging the debtor's right to the homestead exemption.

The *Farnsworth* court decided that under § 522(f) and *Farrey*, the equitable lien could not be avoided. The court reasoned that the equitable lien came into being at the time of the act which gave rise to the lien. That act was the providing of money to be used to buy the real estate. Because the creditor's providing the funds preceded the debtor's purchase of the property, the court decided, the debtor could not avoid the lien under § 522. The court held that *Farrey* applied because the debtor could do so ". . . only where the lien attached to the debtor's interest at some point after the debtor obtained the interest." *Farrey*, 500 U.S. at 295.

In re Yerrington, 144 B.R. 96 (9th Cir. BAP 1992) was another case decided within the Ninth Circuit which involved an equitable lien and the application of *Farrey*. *Yerrington* was an Alaska divorce case. There, the divorce court had entered a decree establishing that the husband was to be the owner of the couple's property, but also requiring the husband to execute an equalizing promissory note to the wife, to be secured by a deed of trust against the property.

Shortly after entry of the divorce decree, the husband in *Yerrington* filed for Chapter 7 bankruptcy. The wife then brought an adversary proceeding objecting to the husband's classifying her claim as being unsecured and objecting to the discharge of the husband's debt to her.

On those facts, the BAP first decided that the wife's lien was a judicial lien within the meaning of § 101(36). The court then noted that the purpose of the wife's equitable interest was to secure the debtor's obligation to pay the wife for her share of the property. It concluded that the wife's interest was therefore in the nature of an equitable lien. The court then applied *Farrey*, and concluded that the husband did not

possess an interest to which the lien attached, before it attached. It therefore reversed the lower court and ordered that the lien should not be avoided. *Yerrington*, 144 B.R. at 99.

Farnsworth and *Yerrington* are both similar to the present case.[6] In both of those cases, the court decided that the creditor's lien was a judicial lien. Both courts then looked past that label to hold that notwithstanding the characterization of the lien as a judicial lien, the lien could not be avoided under § 522(f) because it did not affix to a preexisting interest of the debtor. This court should reach the same result in the present case the courts did in those two cases.

G. The Equitable Lien in this Case Should Not Be Avoided Because Avoidance of the Lien Would Result in Unjust Enrichment of the Debtor at the Appellant's Expense.

"An equitable lien is a creature of equity. It is the right to have a fund or specific property applied to the payment of a particular debt. It is based on the equitable doctrine of unjust enrichment." *United States v. Adamant Co.*, 197 F.2d 1, 10, (9th Cir. 1952), cert. den. sub nom. *Bullen v. Scoville*, 344 U.S. 903, 73 S.Ct. 283, 97 L.Ed 698 (1952)[7]. "Equitable liens are 'much favored by the courts to do justice and prevent unfair results.'" *In re Destro*, 675 F.2d 1037 (9th Cir. 1982), quoting *Holder v. Williams*, 167 Cal.App.2d 313, 334 P.2d 291 (1959).

In the present case, the superior court imposed an equitable lien because doing so was necessary to prevent unjust enrichment. The debtor ought not be permitted to undo the equitable result ordered by the superior court by resorting to lien-avoidance rules in bankruptcy. See, *Farnsworth*, supra; *In re Nunez*, 196 B.R. 150 (9th Cir. BAP

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[6] *Farnsworth* is particularly relevant to the present case because it was decided more recently, and therefore includes a more up-to-date analysis of the issues.

[7] See also *In re Stratton*, 106 B.R. 188 (Bankr. E.D. Cal. 1989), fn. 3; *County of Los Angeles v. Construction Laborers Trust Funds for Southern California Administrative Co.*, 137 Cal.App.4th 410, 39 Cal.Rptr.3d 917 (1970).

1996)[8]. In *Farnsworth*, the court observed that if the debtor were to succeed in having the lien set aside, she would be getting a fresh start with someone else's money. Like the court in *Farnsworth*, the court in this case should not countenance the debtor's using the homestead exemption as a sword, instead of a shield.

H. The Bankruptcy Court Erroneously Based its Decision in Significant Part on Appellant's Not Having a Lis Pendens in Place at the Time the Debtor Filed His Bankruptcy Petition.

The conclusions drawn by the bankruptcy court in the present case were erroneous in part because in its analysis of *Farnsworth*. The court's primary error regarding *Farnsworth* was attaching significance to the recording of a lis pendens in the state-court litigation in that case. ER 362:19-21. This was error because the only significance of the lis pendens in *Farnsworth* was that it caused the priority of the judgment obtained in state court to relate back to a time prior to the filing of the bankruptcy petition. This had nothing to do with § 522(f), *Farrey*, and the timing of the acts which gave rise to the equitable lien. Rather, it pertained to the debtor in *Farnsworth* invoking 11 U.S.C. § 547 (the preferential-transfer section of the Code), and § 544 (the "strong-arm" section of the Code) as alternative methods of avoiding the equitable lien.

The court in *Farnsworth* rejected debtor's attempt to use §§ 547 and 544 to avoid the lien in that case. Its rationale for doing so with respect to § 547 was that the recording of the lis pendens took place more than ninety days before the filing of the petition, and therefore was not within the preferential-transfer period of § 547. Similarly, the *Farnsworth* court rejected the debtor's attempt to use § 544 because the lis pendens was recorded before the filing of the petition in that case, notwithstanding the fact that the state-court judgment was not entered until after the filing of the petition. This caused the date of the judgment to relate back to the date of the

[8] In *Nunez* the court decided that on remand, the equitable lienor would be permitted to challenge the debtor's homestead exemption on the basis that some of the money for improvements made to the homestead were fraudulently obtained from the lienor.

recording of the lis pendens in that case.

In the present case, the bankruptcy court decided that because appellant here had not recorded a lis pendens in the Ventura County case, the equitable lien had nothing to relate back to. ER 365:12-14; 365:25-366:1. This is flat wrong. The relation-back rule establishes that the effective date of an equitable lien is the date on which the acts which gave rise to the lien occurred. That has nothing whatsoever to do with whether a lis pendens is recorded in litigation subsequently brought to recognize the lien.[9] Stated another way, there were two separate "relation-back" mechanisms in *Farnsworth*: the lis pendens and the equitable lien. The bankruptcy court in the instant case failed to recognize the distinction between the two.

V. THE BANKRUPTCY COURT FAILED TO RECOGNIZE THAT APPELLANT HAD PROPERLY PLACED EVIDENCE BEFORE IT WITH RESPECT TO THE RATIONALE FOR THE EQUITABLE LIEN.

Both sides presented their respective legal arguments and declarations to the bankruptcy court in connection with the debtor's motion to avoid the lien. Unfortunately, however, at the time of the hearing on the motion, the bankruptcy court was not aware that appellant had filed a declaration. As a result, the court several times questioned whether appellant had properly put any evidence before it in opposition to the motion. See, ER 358:12-18, 372:17-23, and 376:19-21. In contrast, the court referred to the declaration of the debtor as something which ". . . hasn't been controverted." ER 259:25. The crucial distinction between the declarations of the debtor and the appellant which were before the court is that in his declaration, the debtor asserted that the rationale which appellant was advancing in support of her

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[9] To put this point in perspective, if there were no prepetition state-court litigation, the bankruptcy court itself could conduct a trial decide whether to impose an equitable lien. See, e.g., *In re Destro* (9th Cir. 1982), supra. If the creditor were to prevail in such a trial, the priority of the equitable lien would relate back to the time of the acts which gave rise to it. (*Ibid.*) In contrast, if the rule were that for purposes of lien-avoidance claims in bankruptcy, the equitable lien related back only to the time of the state-court judgment, the diligent creditor would be on the losing side in the bankruptcy court *because* he prevailed in state court. Such a result would be grossly inequitable.

equitable lien pertained only to events which took place after the debtor's 1998 purchase of his Oxnard residence. ER 72-73. Appellant's declaration, on the other hand, included averments with respect to her forbearance from participation in Lot 2 rents during the period of time before the debtor purchased the Oxnard property. ER 283:23-284:2. Thus, the bankruptcy court's reliance on the debtor's declaration as being uncontroverted was an incorrect interpretation of the facts before it.

Based on this critical misunderstanding of the state of the record before it, the bankruptcy court stated the following with respect to the "fixing" issue:

> "So, there was - - the Debtor did have an interest in real property in Oxnard in 1998. There is no lien, no judicial lien created until at the earliest December of 2007, and more rationally January of 2008 when the judgment was recorded. It is called an equitable lien. However, under California law and Ninth Circuit law, an equitable lien created by a judicial process is a judicial lien. I have no evidence, only argument, that there was any prior event to which an equitable lien could relate -- and I have no statutory or case law presented to justify the relation back of any judgment lien to a prior event. There's no lis pendens in this case. [¶] So, there is a fixing in 2007 or 2008, as the case may be, with the recordation of the judgment on an interest of the Debtor in property." ER 7-21.

The quoted language shows the error of the court, which failed to recognize that the debtor used his additional financial strength and available funds, both of which resulted from his receiving Lot 2 rental income which otherwise would have belonged to his mother, for the purpose of purchasing the Oxnard residence. The debtor's doing so formed the basis for the trial court's recognizing and imposing an equitable lien on the residence. The purchase of the residence took place after the debtor had benefited from appellant's forbearance. Thus, the equitable lien affixed to the debtor's interest in the newly-purchased residence the moment the debtor purchased it. See, *Farrey*, supra.

By imposing the equitable lien, the superior court sought to prevent the debtor from unjustly enriching himself at his mother's expense. The bankruptcy court should have done the same, either by recognizing and accepting the equitable lien imposed by the superior court, or by itself thoroughly reviewing the facts record and/or conducting

an evidentiary hearing for the purpose of deciding whether to impose such a lien.

VI. THE BANKRUPTCY COURT SHOULD HAVE GRANTED APPELLANT'S MOTION FOR RECONSIDERATION.

Appellant moved for reconsideration of the bankruptcy court's decision avoiding the equitable lien. ER 308-313. In the motion for reconsideration, appellant pointed out that her declaration had indeed properly been before the court at the time of the hearing. ER 310. Appellant also responded to an issue which the court raised on its own during the hearing. That issue was whether, under California law, the creation of an equitable lien is deemed to have taken place at the time of the acts which gave rise to it, regardless of the lien's not being recognized until a subsequent judgment. Neither party had focused on this issue, as a matter of state law, in the moving or opposing papers. In her motion for reconsideration, appellant cited *Hise v. Superior Court* as establishing that principle under California law. ER 311:17-22.

Further regarding the relation-back issue, appellant cited in her opposing papers several federal cases which involved the relation-back issue. One such case was *In re Nunez*, 196 B.R. 150 (9th Cir. BAP 1996). Nunez, in turn, cited *In re Hise*. As can be seen, the bankruptcy court appears not to have considered at all appellant's argument that the relation-back rule was established under California law by *Hise*. The district court also erred, by noting the appellant's argument, but refusing to apply *Hise* in the context of a motion to avoid a lien. Decision of District Court on Appeal, at 4-5. Appellant respectfully submits that the conclusion of the district court was error.

A party may support its position with respect to a motion regarding nondischargeability of a debt under 11 § 523 by producing a state-court judgment regarding the underlying facts. *In re Hudson*, 859 F.2d 1418 (9th Cir. 1988). However, a prepetition judgment is not essential. *Id.* If the state-court record is insufficient, the party may present further evidence to the bankruptcy court. *In re Felski*, 277 B.R. 732 (E.D. Mich 2002). This rule is also recognized in the context of a motion to avoid an equitable lien as impairing a homestead exemption. See, *In re Nunez*, 196 B.R. 150

(9th Cir. BAP 1996). It therefore was error for the bankruptcy court to deny a motion for reconsideration of a decision against the lien creditor under such circumstances. (*Id.*)

Further, the court should take judicial notice of state court records concerning the recognition of an equitable lien. (*Id.*) Appellant submits that in this regard, a motion under § 523 and a motion under § 522 should be treated no differently, and that the court should allow a party to prove its position by reference either to a state-court judgment or by further independent proof to be proffered to the bankruptcy court.

In lien-avoidance cases, the priority of an equitable lien relates back to the time of the conduct of the parties which gave rise to the lien. *In re Nunez*, 196 B.R. 150 (9th Cir. BAP 1996); *In re Stratton*, 106 B.R. 188 (Bkrtcy. E.D.Cal. 1989), citing *Hise v. Superior Court*, 21 Cal.2d 614, 134 P.2d 748 (1943). A case similar to the case at bar is *In re Reinders*, 138 B.R. 937 (Bkrtcy. N.D.Iowa 1992). In *Reinders*, the court held that a judicially-recognized equitable lien pertaining to the parents in law of the debtor having provided funds for the purpose of purchasing a home was not avoidable.

VII. APPELLANT REQUESTS THAT THE COURT TAKE JUDICIAL NOTICE OF CERTAIN PAPERS FROM THE SUPERIOR COURT CASE, PARTICULARLY A TRANSCRIPT IN WHICH THE COURT NOTES THAT DEFENDANTS WOULD NOT HAVE BEEN IN A FINANCIAL POSITION TO PURCHASE THE OXNARD PROPERTY WERE IT NOT FOR THE AVAILABILITY TO THEM OF CERTAIN FUNDS FROM LOT 2 RENTS WHICH FUNDS WOULD HAVE OTHERWISE BEEN PROPERTY OF APPELLANT.

Appellant is submitting with this brief a separate document requesting that the court take judicial of certain papers from the Ventura County Superior Court case. These papers generally show that the issue of imposition of an equitable lien was one which was very much debated before the superior court. They also show that the basis for the court's imposing the lien was related to the debtor's purchase of the Oxnard property using, at least in part, funds from Lot 2 rents which funds would not have been available to him in the absence of his mother's forbearing from asserting an ownership interest in those rents after 1997. The court's comments can be found on page 476 of the submitted materials, near the bottom of the page.

Appellant respectfully submits that the cumulative weight of the papers from the superior court demonstrates that the priority of the equitable lien relates back to 1997, before the debtor purchased the Oxnard property. This court should find that such is the case as a matter of law. At the least, this court should decide that the issue is raised clearly enough in the superior court papers to justify, and require, the court to return the case to the bankruptcy court for further proceedings with respect to the priority of the equitable lien and whether the lien is avoidable.

The papers submitted for judicial notice are as follows:

Exhibit	Title	Significance
EXHIBIT A: (page 401)	Tentative Decision, filed by Hon. Vincent J O'Neill, Jr. on 08/17/07.	Refers to appellant's relinquishing her share of Parcel 2 income. 403:25-26 and 404:11-13.
EXHIBIT B: (page 406)	Defendant's Objection to Plaintiff's Proposed Change to Tentative Decision and Plaintiff's Request Re. Final Judgment, filed by Michael T. Keys and Roy Hargett on 08/24/07.	Generally shows existence of dispute with respect to proposed change of tentative decision.
EXHIBIT C: (page 412)	Plaintiff's Proposed Change to Tentative Decision and Request that Final Judgment Include Language Authorizing the Recording of the Judgment as a Lien on Real Property of Defendants filed, by Charlene Van Deusen on 08/28/07.	Generally includes request for imposition of lien.
EXHIBIT D: (page 416)	Defendants' Objections to Plaintiff's Proposed Judgment, filed by Michel T. Keys and Roy Hargett on 09/10/07.	Generally shows debtor's objection to order establishing joint liability of debtor and Mr. Hargett, and to appellant's request for imposition of lien.

EXHIBIT E: (page 426)	Defendants' Objections to Plaintiff's (2d) Proposed Judgment After Court Trial, filed by Michael T. Keys and Roy Hargett on 11/02/07.	Shows debtor's strenuously arguing against imposing of equitable lien. 430-436. Also, includes transcript of hearing in which court observes that defendants would not have been able to buy the Oxnard property without "money that came out of Miss Van Deusen's pocket to some extent . ." 441:3-8.
EXHIBIT F: (page 443)	Plaintiff's Reply with Respect to Proposed Judgment filed, by Charlene Van Deusen on 11/13/07.	Generally shows further detailed argument concerning legal and factual basis for imposition of constructive trust and/or judicial lien. 444:17-446:6. Also, includes entire transcript of hearing of 10/9/07, at which the court heard argument concerning the equitable lien issue and decided to impose such a lien. 454-480. Includes argument by appellant's counsel that under the Bankruptcy Code the recording of the equitable lien may not be considered a preferential transfer because it's simply reflective of what the status quo ante had been. 461, at bottom of page. Court refers to debtors' use of money from appellant to some extent for purchase of Oxnard property. 476, at bottom of page.
EXHIBIT G: (page 486)	Defendants' Objections to Plaintiff's [Proposed] Final Judgment after Bench Trial, filed by Michael T. Keys and Roy Hargett on 12/10/07.	Generally shows further debate regarding imposition of equitable lien.
EXHIBIT H: (page 490)	Proposed Final Judgment After Bench Trial, filed by Charlene Van Deusen on 12/20/07.	Judgment establishing equitable lien.
EXHIBIT I: (page 496)	Final Judgment After Bench Trial, recorded on 1/18/08.	Copy of judgment as recorded.

VIII. CONCLUSION.

Appellant has essentially never had her day in court. The bankruptcy court decided the motion based on the faulty premise that appellant had not placed proper evidence before the court. Once the court became aware that there was indeed proper

evidence, it does not appear to have anywhere considered the merits of appellant's argument in her motion for reconsideration that the court should rely on *Hise v. Superior Court* for purposes of relating back the priority of the equitable lien to the time when of the acts of the parties which gave rise to the lien. In this case, the relevant act was appellant's forbearance from collecting Lot 2 rents after the parties made their implied agreement, during the period leading up to the debtor's purchase of the Oxnard residence in 1998.

Appellant submits that the *Farnsworth* court got it right when it refused to permit a debtor to avoid an equitable lien which and thereby be unjustly enriched at the creditor's expense. The *Farnsworth* court's decision was consistent with the long-recognized principle that a bankruptcy court is a court of equity. See, *In re United Energy Co.*, 944 F.2d 589 (9th Cir.1991).

Here, as in *Farnsworth*, the equities strongly favor the lien creditor. Mr. Keys callously breached his agreement with his mother in 2006 by asserting that he was the rightful owner of her residence. Unbeknownst to his mother, Mr. Keys had by that time already further breached the agreement by helping himself to $200,000 in new loans against the property - his mother's property - between 1999 and 2006. The superior court saw through all this, and ordered Mr. Keys to reconvey title to the property to his mother. It also imposed an equitable lien against Mr. Keys' property to secure payment of a considerable amount of the debt encumbering the mother's Ojai property.

These arguments, and the underlying facts, are wholly supported by the accompanying materials which appellant submits with her request for judicial notice.

This court should apply § 522(f) and find that the lien is not avoidable because it arose at the time the debtor purchased the Oxnard property. This is a straightforward application of the statute and *Farrey*. The timing of the superior court judgment, and the presence or absence of a lis pendens, are mere distractions to the core legal issues raised under *Farrey*. The court should not sidetracked by those

factors.

Based on the above, appellant respectfully submits that the court should reverse the decision of the bankruptcy court, and enter an order denying the debtor's motion to avoid appellant's equitable lien. The court should do so on equitable grounds to avoid unjust enrichment, or by applying *Farrey*, or on both grounds on an alternative basis, as did the court in *Farnsworth*.

Dated: December 20, 2010

_____/s/_____
Dennis J. Shea
Attorney for Appellant,
Charlene Van Deusen

PROOF OF SERVICE

DECLARATION OF SERVICE BY MAIL

STATE OF CALIFORNIA

COUNTY OF SANTA BARBARA

I, Dennis J. Shea, having an address of 903 State Street, Suite 208, Santa Barbara, California, declare:

On December 20, 2010, I served a true copy of the within **APPELLANT'S OPENING BRIEF** by first class mail on the following persons:

Office of the U.S. Trustee
Northern Division
128 E. Carrillo Street, Suite 126
Santa Barbara California 93101

Sandra McBeth, Esquire
3450 Professional Parkway
Santa Maria, California 93455

Michaelson, Susi & Michaelson
7 West Figueroa Street
Santa Barbara, California 93101

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: December 20, 2010

_____/s/_____
Dennis J. Shea

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United States Court of Appeals for the Ninth Circuit

Notice of Docket Activity

The following transaction was entered on 12/20/2010 at 11:54:25 AM PST and filed on 12/20/2010

Case Name: In re: Michael Keys
Case Number: 10-56114
Document(s): Document(s)

Docket Text:
Submitted (ECF) Opening brief for review. Submitted by Appellant Charlene Van Deusen. Date of service: 12/20/2010. [7586116] (DJS)

The following document(s) are associated with this transaction:
Document Description: Main Document
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[26d99838010edca7d2a1e73a6e4dd566a22c8ee3f972ab7ecb7655d25f2cef51d0aedcf84b291318ad2cc5af4601d9cb42079b0a001f295927e08d7939c3f696]]

Notice will be electronically mailed to:

Mr. Shea, Dennis Joseph, Attorney

Case participants listed below will not receive this electronic notice:

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