The Memorandum Decision and Order re Cross-Motions for Summary Judgment below is hereby signed. Dated: May 12, 2008.

S. Martin Teel, Jr.
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

In re	)	
	)	
WILLIAM EARLY,	)	Case No. 05-01354
	)	(Chapter 7)
Debtor.	)	
_____	)	
	)	
	)	
KEVIN R. McCARTHY, Trustee,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Adversary Proceeding
	)	No. 05-10079
FINANCIAL FREEDOM SENIOR FUNDING CORPORATION,	)	
	)	Not for Publication in West's Bankruptcy Reporter
Defendant.	)	

MEMORANDUM DECISION AND ORDER
RE CROSS-MOTIONS FOR SUMMARY JUDGMENT

The plaintiff McCarthy in this adversary proceeding is the trustee in the case under chapter 7 of the Bankruptcy Code (11 U.S.C.) of the debtor, William Early. Pursuant to 11 U.S.C. §§ 544, 547, 550, and 551, McCarthy's complaint seeks to avoid the lien of the defendant, Financial Freedom Senior Funding Corporation, on the debtor's interest in a parcel of real

property (the "Property") that he and his wife own as tenants by the entirety. Although the complaint requests that upon avoidance of the lien, McCarthy either recover the avoided lien or its value, McCarthy has filed a motion for summary judgment in which he seeks both avoidance of the lien, and upon avoidance of the lien, a monetary judgment against Financial Freedom for one-half of the balance due under the avoided deed of trust and related loan agreement.

Although Financial Freedom concedes McCarthy's right to avoid the lien as to the debtor's interest in the Property, it has filed a motion for partial summary judgment, contending that even if McCarthy were entitled to recover the value of the lien under § 550, McCarthy has failed to submit expert testimony as to the value of the avoided lien, as required. Financial Freedom contends that because McCarthy was required to submit expert valuation testimony, and because the deadline for disclosing experts has expired, McCarthy will be unable to demonstrate the value of the avoided lien at trial. Accordingly, it argues, the court should grant partial summary judgment in favor of Financial Freedom and deny McCarthy's request for a monetary judgment for the value of the avoided lien.

For reasons stated in more detail below, the court will grant McCarthy's motion in part to allow him to avoid and preserve the lien as to the debtor's one-half interest in the

property for the benefit of the estate. The court will deny McCarthy's motion as to his request for entry of a monetary judgment, and deny Financial Freedom's motion for partial summary judgment.

I

FACTS

Other than the value of the lien sought to be avoided, the relevant facts are not in dispute.

As tenants by the entirety, the debtor and his wife Annell Wilson Early own the Property, real estate located at 209 Florida Avenue, N.W., Washington, D.C. On February 28, 2005, the debtor and his wife executed an Adjustable Rate Home Equity Conversion Deed of Trust ("Deed of Trust") in favor of Financial Freedom on the Property to secure a Home Equity Conversion Loan Agreement ("Loan Agreement") dated February 28, 2005, in the maximum principal amount of $469,342.40 executed by them.[1] Financial

[1] Although the instrument granting a security interest in favor of Financial Freedom is a deed of trust, both parties have described the instrument as a reverse mortgage or a reverse mortgage deed of trust. Indeed, the Deed of Trust bears the hallmark features of a reverse mortgage, which Black's Law Dictionary describes as "[a] mortgage in which the lender disburses money over a long period to provide regular income to the (usu. elderly) borrower, and in which the loan is repaid in a lump sum when the borrower dies or when the property is sold." BLACK'S LAW DICTIONARY 1028 (7th Ed. 1999). Although the Deed of Trust together with the Loan Agreement calls for Financial Freedom to make monthly advances to the debtor and his spouse, Financial Freedom's obligation to make such advances terminated as of the petition date pursuant to paragraph 4.4 of the Loan Agreement.

Freedom initially loaned the debtor and his wife a total of $188,099.78, including a payoff of $138,198.63 to the prior recorded deed of trust, which was released of record on May 17, 2005. As of May 31, 2006, the balance due on the loan was $203,940.13, consisting of $183,199.78 in the initial advance, $5,075 in credit line advances, $1,274.33 in MIP interest, $13,911.02 in contractual interest, and $480 in service fees.

On September 10, 2005, the debtor filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code. Although executed on February 28, 2005, and the disbursement date shown on the HUD-1 for the subject transaction was March 4, 2005, and the prior recorded deed of trust was released of record on May 17, 2005, after being paid off by proceeds from the Deed of Trust loan, the Deed of Trust was not recorded until September 26, 2005, almost seven months after the Deed of Trust was executed and sixteen days after the petition was filed.

II

McCARTHY IS ENTITLED TO AVOID AND PRESERVE THE LIEN FOR THE BENEFIT OF THE ESTATE

Financial Freedom does not dispute that McCarthy is entitled to avoid Financial Freedom's lien as to the debtor's one-half interest in the property under § 547 or § 544 of the Bankruptcy Code, and that the avoided lien is preserved for the benefit of the estate under 11 U.S.C. § 551.

McCarthy can seek to avoid as a transfer the fixing of its lien as to the debtor's one-half interest in the Property either as a preference under section 547 or pursuant to a trustee's § 544 strong-arm powers. See Walker v. Elm (In re Fowler), 201 B.R. 771, 779 (Bankr. E.D. Tenn. 1996) ("If the holder of a security interest in the debtor's property fails to perfect that interest prior to the filing of the bankruptcy, the trustee can avoid that interest, reducing the holder to the status of an unsecured creditor."); Farmer v. Green Tree Servicing LLC (In re Snelson), 330 B.R. 643, 648 (Bankr. E.D. Tenn. 2005) (creation of lien constitutes transfer within the meaning of the Bankruptcy Code). When exercising his strong-arm powers under § 544, a trustee enjoys the status of a bona fide purchaser for value and McCarthy is thus insulated from certain defenses that might be available to Financial Freedom were he to proceed under section 547.[2] The court will thus examine only McCarthy's power to avoid

[2] For example, some courts require that a trustee seeking to avoid and recover a transfer under §§ 547 and 550 first demonstrate that the transfer caused a diminution to the estate. Creditors often raise this defense, and the related common-law earmarking doctrine, when a lien sought to be avoided was acquired through the refinancing of real property and there was a corresponding (if not contemporaneous) release of a pre-existing and valid security interest that would have been enforceable against the trustee had it not been released. See, e.g., Collins v. Greater Atlantic Mortgage Co. (In re Lazarus), 334 B.R. 542 (Bankr. D. Mass. 2005). The court expresses no view as to the applicability of the earmarking doctrine were McCarthy's avoidance action being pursued exclusively under § 547, and observes merely that the defense is unavailable to defendants when the trustee's avoidance action arises under § 544.

the lien under § 544.

Under § 544, a trustee in bankruptcy "shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by . . . a bona fide purchaser of real property . . . from the debtor, against whom applicable law permits such transfer to be perfected . . . ." Although a trustee's strong-arm powers arise under federal law, her rights as a "bona fide purchaser" are governed by state law. Sovran Bank/DC National v. United States (In re Aumiller), 168 B.R. 811, 817 (Bankr. D.D.C. 1994). In the District of Columbia, "a deed conveying an interest in real property is not effective against a subsequent bona fide purchaser or creditor without notice unless it is recorded." Id.; D.C. Code § 42-401.[3] The parties agree that, pursuant to D.C. law, Financial Freedom's failure to timely record the Deed of Trust entitles McCarthy to avoid the recording of the deed under § 544.

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[3] D.C. Code § 42-401 (2001) provides that "Any deed conveying real property in the District, or interest therein, or declaring or limiting any use or trust thereof, executed and acknowledged and certified as provided in [other sections of the D.C. Code] and delivered to the person in whose favor the same is executed, shall be held to take effect from the date of the delivery thereof, except that as to creditors and subsequent bona fide purchasers and mortgagees without notice of said deed, and others interested in said property, it shall only take effect from the time of its delivery to the Recorder of Deeds for record."

Once a trustee has avoided the fixing of a lien under § 544, the lien is automatically preserved for the benefit of the estate under § 551 and becomes property of the estate under § 541(a)(4). Hendon v. G.E. Capital Mortg. Servs., Inc. (In re Carpenter), 266 B.R. 671 (Bankr. E.D. Tenn. 2001), citing Walker v. Elan (In re Fowler), 201 B.R. 771, 781 (Bankr. E.D. Tenn. 1996).

The debtor listed the Property as exempt on Schedule C of his Schedules pursuant to D.C. Code § 15-501(a)(14). The debtor's equity in the Property (as opposed to the lien on the Property) became exempt when no one timely objected under F.R. Bankr. P. 4003(b) to the claim of exemption. 11 U.S.C. § 522(l). Under 11 U.S.C. § 522(c)(2), if the lien on the Property is avoided and, as a consequence, automatically preserved for the benefit of the estate under 11 U.S.C. § 551, the Property will remain subject to the lien pursuant to 11 U.S.C. § 522(c)(2), despite the claim of exemption regarding the Property. See In re Bethea, 275 B.R. 127, 134 (Bankr. D.D.C. 2002). See also In re Guido, 344 B.R. 193 (Bankr. D. Mass. 2006); Styler v. Local Loan Fin. Servs. (In re Lanctot), 6 B.R. 576 (Bankr. D. Utah 1980). The lien on the debtor's interest in the Property, because preserved for the benefit of the estate, becomes property of the estate pursuant to 11 U.S.C. § 541(a)(4).

McCarthy is thus entitled to summary judgment adjudicating that the lien granted to the defendant on the debtor's one-half

interest in the Property is avoided as against the estate. Furthermore, he is entitled to summary judgment pursuant to 11 U.S.C. § 551 decreeing that the lien is automatically preserved for the benefit of the estate (unless he were held to be entitled to a monetary judgment against Financial Freedom in lieu of asserting his rights under § 551).

III

IF A TRUSTEE ELECTS TO PROCEED UNDER § 551 TO RECOVER AN AVOIDED LIEN, THAT PRECLUDES RESORT TO THE TRUSTEE'S RIGHT UNDER § 550(a) TO RECOVER A MONETARY JUDGMENT, AND THE TRUSTEE'S RIGHTS AS THE NEW HOLDER OF THE AVOIDED LIEN RISE NO HIGHER THAN THE RIGHTS THAT WERE HELD BY THE PREVIOUS HOLDER OF THE LIEN

Section 550(a) may allow an alternative remedy of recovering a monetary judgment for an avoided lien if the trustee does not assert the automatic preservation of the avoided lien under § 551. But the remedies are mutually exclusive: a trustee may not both recover the lien via automatic preservation under § 551 and recover a monetary judgment for the value of the lien. Lindquist v. Household Indust. Fin. Co. (In re Vondall), 352 B.R. 193, 200 (Bankr. D. Minn. 2006), aff'd, 364 B.R. 668 (B.A.P. 8th Cir. 2007). If a trustee proceeds under § 551, or the court holds that the trustee must proceed under § 551, no other provision of the Bankruptcy Code gives her the right to obtain a monetary judgment against the previous holder of the lien.

If a trustee announces that she is willing to forego proceeding under § 551, and seeks a judgment under § 550(a), the

trustee's contentions in attempting to invoke § 550(a) regarding what difficulties she would face if she only proceeded under § 551 must accurately take account of the rights conferred on her by reason of § 551. McCarthy contends that he would have difficulty proceeding under § 551, for one reason, because he would likely not be able to sell the entire Property under § 363(b) because he would not likely be able to show under 11 U.S.C. § 363(h)(3) that "the benefit to the estate of a sale of such property free of the interests of [the debtor's wife] outweighs the detriment . . . to [the debtor's] wife." However, the avoided and preserved lien would not give McCarthy the right to attempt to sell even the debtor's interest in the Property under § 363(b). The lien would not confer title to the Property on the estate, and thus McCarthy is not entitled to sell title to the Property under § 363(b). Were the law otherwise, a debtor who files a bankruptcy case could see his home sold under § 363(b) by the trustee who avoids an unperfected lien on the home even though the debtor is current on the mortgage and was looking to live there indefinitely by continuing to make mortgage payments. Congress surely did not intend that result.

By reason of § 551, a trustee steps by way of subrogation into the shoes of the lienor whose lien is avoided. See Taubel-Scott-Kitzmiller Co., Inc. v. Fox, 264 U.S. 426, 436-37 (1924) (subrogation is the process by which the preservation of the lien

was made available under a similar provision under the Bankruptcy Act providing for preservation of an avoided lien for the benefit of the estate). In the shoes of the former holder of the lien by reason of § 551, a trustee's rights to enforce the avoided lien are governed by nonbankruptcy law. See In re John I. Paulding, Inc., 76 B.R. 7, 8 (Bankr. D. Mass. 1987). A trustee's rights pursuant to the lien to which she is subrogated pursuant to § 551 are no greater than those of the creditor who held the avoided lien. See In re Haberman, 347 B.R. 411, 414-15 (B.A.P. 10th Cir. 2006) ("§ 551 . . . does not expand or otherwise enhance the status of the avoided lien.").[4] Accordingly, except as provided by nonbankruptcy law, the avoided lien here does not give the trustee a right to sell the debtor's interest in the Property itself. Under nonbankruptcy law, the avoided lien does not give McCarthy an ownership interest in the Property, it only gives him the enforcement rights available to a lienor.

[4] See also See also Baker v. CIT Group/Consumer Fin. Inc. (In re Hastings), 353 B.R. 513, 520 (Bankr. E.D. Ky. 2006); In re Seibold, 351 B.R. 741, 746 (Bankr. D. Idaho 2006); Carvell v. Bank One, Lafayette, N.A. (In re Carvell), 222 B.R. 178, 180 (B.A.P. 1st Cir. 1998).

IV

THE AVAILABILITY OF AUTOMATIC PRESERVATION UNDER § 551 OF A LIEN FULLY INTACT SINCE THE DATE OF ITS TRANSFER GENERALLY RENDERS RELIEF UNDER § 550 INAPPROPRIATE

As explained in In re Schmiel, 319 B.R. 520, 529 (Bankr. E.D. Mich. 2005):

> [U]nder § 551, once the transfer to Interstate is avoided, it is automatically preserved for the benefit of the estate. That "stick" is returned to the "bundle" that makes up estate property. "Section 541(a)(4) [ ] makes explicit that any interest that is 'preserved for the benefit of ... the estate under section ... 551' is part of the bankruptcy estate." Suhar v. Burns (In re Burns), 322 F.3d 421, 428 (6th Cir. 2003) (quoting 11 U.S.C. § 541(a)(4)).

Accordingly, resort to § 550(a) to recover a lien is almost

never, if ever, necessary.[5] When a lien is preserved under § 551 in an intact state (that is, without having been diminished since the transfer date), resort instead to § 550 to make a monetary recovery is generally inappropriate. See Gold v. New Century Mortg. Corp. (In re Salintro), 355 B.R. 15 (Bankr. E.D. Mich. 2006); Lindquist v. Household Indust. Fin. Co. (In re Vondall), 352 B.R. 193, 200 (Bankr. D. Minn. 2006), aff'd, 364 B.R. 668 (B.A.P. 8th Cir. 2007); Kelley v. Chevy Chase Bank (In re Smith),

[5] In In re Greater Southeast Community Hosp. Found., Inc., 237 B.R. 518 (Bankr. D.D.C. 1999), the debtor had granted a prepetition lien on accounts receivable that were no longer property of the debtor when the case commenced. The accounts receivable were thus not property of the estate when the case commenced. When the lien was avoided under § 544, the new owner of the accounts receivable argued that the lien was not automatically preserved for the benefit of the estate because § 551 provides for such preservation "only with respect to property of the estate." However, it was evident that even if that were true, resort to § 550(a) could recover the avoided lien and bring it back into the estate. Instead of resorting to § 550 in Greater Southeast, the court, as in In re Schmiel, could have viewed the avoidance of the transfer of the lien, and its automatic preservation for the benefit of the estate, as *implicitly* placing the transferred property represented by the lien back into the estate (except to the extent that the lien had reached property that was not a transfer of property subject to avoidance, and that thus would not be hauled into the estate). The lien itself would *explicitly* become property of the estate under the somewhat redundant provision in 11 U.S.C. § 541(a)(4). The restriction in § 551 of automatic preservation of the avoided transfer for the benefit of the estate "only with respect to property of the estate" would still serve a purpose. For example, as discussed in the legislative history, an avoided federal tax lien for nondischargeable claims against an individual debtor would be preserved for the estate with respect to property of the estate but not with respect to the debtor's postpetition salary. See Greater Southeast, 237 B.R. at 522-23 and 527.

236 B.R. 91, 100 (Bankr. M.D. Ga. 1999); Kelley v. GMAC (In re Farmer), 209 B.R. 1022, 1024-25 (Bankr. M.D. Ga. 1997). In In re Salintro, the court held that once a lien is avoided on a car that is property of the estate and automatically preserved for the benefit of the estate under § 551, the trustee may not recover a monetary judgment against the entity to whom the lien had been transferred. The court reasoned that once a lien is preserved for the benefit of the estate upon avoidance, "there is nothing for the trustee to recover under § 550(a)." In re Salintro, 355 B.R. at 20. The theory is that if the estate already owns the collateral itself, the estate makes a full recovery by virtue of avoidance of the lien. See In re Farmer, 209 B.R. at 1025.

The holding in In re Salintro ought not apply when the avoided lien is not preserved intact without having been diminished via enforcement or other events, then a monetary recovery under § 550 may be necessary and appropriate. That a trustee may invoke § 550 if § 551 alone would not make the trustee whole is illustrated by Seaver v. Mortgage Elec. Registr. Sys., Inc. (In re Schwartz), 383 B.R. 119 (B.A.P. 8th Cir. 2008). There the debtor refinanced a prepetition mortgage postpetition through a loan from postpetition lenders. In the postpetition refinance, the holders of the prepetition mortgage received full payment of the obligation secured by that mortgage, and released

the lien. The trustee avoided the prepetition mortgage as a preference under § 547. Because the postpetition lenders' mortgages still encumbered the property, the estate would not have been made whole by the mere avoidance of the prepetition lenders' mortgage. Accordingly, it was appropriate to grant the trustee a monetary recovery under § 550(a) against the entities that had held the prepetition mortgage. Id. at 126-27. "A money judgment under Section 550(a) was the only remedy available to restore the bankruptcy estate to the pre-preference position of the Debtor because the Lenders no longer held the mortgages and thus could not return them to the bankruptcy estate." Id. at 128.

Resort to § 550 may also be unnecessary if the proceeds of collateral can be traced. A lien follows the proceeds of the collateral. Phelps v. United States, 421 U.S. 330, 334-35 (1975), citing Sheppard v. Taylor, 5 Pet. 675, 710, 8 L.Ed. 269 (1831); and Loeber v. Leininger, 175 Ill. 484, 51 N.E. 703

(1898).[6] But if the proceeds of the collateral could no longer be traced to a specific fund, the lien would be avoidable but worthless as such (because no collateral could be identified). However, the value of the lien as it existed at the time of the transfer could be recovered by the trustee by virtue of the ability of the court to order under § 550(a) that the trustee recover the value of the property transferred. See also Halverson v. Le Sueur State Bank (In re Willaert), 944 F.2d 463, 464 (8th Cir. 1991) (payment of a bank's preferential mortgage from sale of real estate prepetition was nothing more than the proceeds of the preferential transfer, and the trustee was thus entitled to recover from the bank pursuant to § 550(a) the amount of the payment it had received); In re Schwartz, 383 B.R. at 125

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[6] In Sheppard v. Taylor, seamen held a lien on a ship for unpaid wages, but the ship had been condemned by Spain as engaging in illicit trade. The owners assigned their rights to assignees (who, as against the seamen, did not enjoy the status of bona fide purchasers). Those assignees later made a recovery from Spain in compensation for the ship pursuant to a treaty between the United States and Spain. The seamen sought to enforce their lien on those proceeds of the ship. The Court observed:

> [T]here is no difference between the case of a restitution in specie of the ship itself, and a restitution in value. The lien reattaches to the thing and to whatever is substituted for it. This is no peculiar principle of the admiralty. It is found incorporated into the doctrines of courts of common law and equity. The owner and the lien holder, whose claims have been wrongfully displaced, may follow the proceeds wherever they can distinctly trace them.

Sheppard v. Taylor, 5 Pet. at 710.

("Any preferential cash payments received by the Lenders from the Debtors are proceeds of the mortgages and their recovery is included in the judgment amounts.")

McCarthy cannot contend that his one-half of the lien has been diminished in value through acts of Financial Freedom, and there are not yet any proceeds of the lien. Financial Freedom has left the lien undisturbed, and the lien is not yet even ripe to be enforced. Nevertheless, this case is distinguishable from the cases in which the courts ruled that the availability of § 551 makes resort to § 550 unnecessary, as discussed below.

V

THE TRUSTEE HAS SHOWN SPECIAL CIRCUMSTANCES THAT MAY MERIT THE IMPOSITION OF A MONETARY JUDGMENT AGAINST FINANCIAL FREEDOM

Section 550(a) permits the trustee to recover the transferred property or, upon court order, the transferred property's value, yet "[n]either the statute nor the legislative history gives any guidance as to when the court should order a transferee or a beneficiary of a transfer to pay over the value of the property transferred." Gennrich v. Mont. Sport U.S.A. (In re Int'l Ski Serv., Inc.), 119 B.R. 654 (Bankr. W.D. Wis. 1990), quoting The Trustee's Recovery in Preference Actions, 3 Bankr. Dev. J. 449, 467 (1986). Although it is within this court's discretion to award the trustee the value of the lien, it is a remedy to only "be employed in limited circumstances, and only

where the voiding of the lien is inadequate or unavailable as a remedy."[7] Kelley v. Chevy Chase Bank (In re Smith), 236 B.R. 91, 100 (Bankr. M.D. Ga. 1999); Cooper v. Ashley Communications, Inc. (In re Morris Communications NC, Inc.), 75 B.R. 619 (Bankr. W.D.N.C. 1987), rev'd on other grounds, In re Morris Communications NC, Inc., 914 F.2d 458 (4th Cir. 1990) (finding under § 550 "a congressional intent to return the property transferred unless to do so would be inequitable . . . . [because] [t]his approach avoids unnecessary contests over the meaning of the term "value," and thereby promotes judicial economy.").

The trustee cites to several cases in which courts have addressed the question of when it is appropriate to award a trustee the value of an avoided transfer under § 550(a) rather

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[7] The trustee cites to Bank of America (In re Howell), A.P. No. 02-10017 (Bankr. D.D.C. January 27, 2003), as an example of this court's recognition of its right to "award the value of the lien rather than [limit the trustee's recovery to] recovery of the lien itself for the benefit of the estate." In that case, however, the issue was not whether it would be appropriate for the court to award the trustee the value of the avoided lien, but rather whether the trustee, as opposed to the bank, was entitled to post-petition payments from the debtor under the promissory note. The holding in Howell was limited to a decree that future payments to the bank would not diminish the trustee's lien. See also, Morris v. Vulcan Chemical Credit Union (In re Rubia), 257 B.R. 324 (B.A.P. 10th Cir. 2001) (dissenting opinion discussing the valuation of an avoided lien and why postpetition payments reduce the value of the lien by reducing the underlying obligation and should be deemed proceeds of the loan). Although Howell remains good law, it is of little relevance to this dispute.

than limit the trustee's recovery to the transferred property itself; however, none of the cases cited by the trustee address the avoidance of a one-half interest in a lien on real property. In re Int'l Ski Service, Inc., 119 B.R. 654 (Bankr. W.D. Wis. 1990) (within discretion of court to award trustee value of avoided transfer of machinery and equipment); Morris v. Kansas Drywall Supply Co., (In re Classic Drywall, Inc.), 127 B.R. 874 (D. Kan. 1991) (within discretion of court to require supplier to pay trustee value of avoided transfer of merchandise removed from the debtor's warehouse); First Software Corp. V. Computer Associates International, Inc. (In re First Software Corp.), 107 B.R. 417 (D. Mass. 1989) (not abuse of discretion for bankruptcy court to award trustee value of preferential transfer of computer software that had depreciated in value after the transfer); Pritchard v. Brown (In re Brown), 118 B.R. 57 (Bankr. N.D. Tex. 1990) (trustee awarded value of transferred oil and gas lease where the value of such lease was now more speculative than it had been at time the preferential transfer was made).

Among the relevant factors that a court may consider in deciding whether to permit a trustee to recover the value of an avoided transfer rather than the transferred property itself include: (1) the presence of conflicting evidence with respect to the value of the transferred property; (2) whether the property has been converted and is thus no longer recoverable; (3) whether

the property has depreciated in value subsequent to the transfer; and (4) whether the value is readily determinable and awarding the value would realize a savings for the estate. See In re Int'l Ski Service, 119 B.R. at 657-58 (citing cases); In re Classic Drywall, 127 B.R. at 877.

McCarthy has shown special circumstances that may make resort to a monetary judgment under § 550(a) appropriate. First, McCarthy does not have the right under § 363(b) to attempt to sell the Property, and thus would not be able to collect an amount equal to one-half of the value of the lien via a § 363(b) sale of the Property. Second, McCarthy would be left under § 551 with only one-half of a lien. Although McCarthy could attempt to sell his one-half of the lien, any sale of that one-half interest would present marketing problems because the purchaser would have to deal with Financial Freedom as the owner of the other half of the lien. The trustee would thus not be able to realize one half of the value of the entire lien.

Unless 11 U.S.C. § 363(h) applies, the trustee would be authorized to sell under § 363(b)(1) only the estate's share of the lien on the Property. The only co-owner of that lien is Financial Freedom, not the debtor's wife. It is not clear that § 363(h) would apply to permit a sale of the entire lien as property, that by reason of the avoidance of the debtor's transfer of the lien, would be treated as property in which "the

debtor had, at the time of the commencement of the case, an undivided interest." However, Financial Freedom is in a position to consent to the trustee's selling the entire lien, with the proceeds to be divided between the estate and Financial Freedom. If Financial Freedom refuses such consent, and § 363(h) were held to be inapplicable, that would put the trustee in the position of attempting to sell only the estate's one-half interest in the lien.

Financial Freedom has not yet addressed whether it is willing to permit the trustee to sell the entire lien. If it expresses such willingness, that might alter the court's conclusion that a monetary judgment may be appropriate under § 550(a). The costs the trustee would face in selling a reverse mortgage for which there is a limited market would not be reason to award him a monetary judgment when he is allowed to dispose of the entire conveyed interest. See In re Farmer, 209 B.R. at

1025.[8] The trustee has not shown that this case is similar to a conveyance of a special type of equipment for which only the transferee would have a use, and as to which it might be appropriate to award a judgment for the amount that was paid for the equipment as a measure of its value to the transferee. There is no evidence in the record that only Financial Freedom would have reason to want to hold the lien. Moreover, Financial Freedom has taken no steps to impair the value of the lien. Unlike a lien on a car where the collateral's value clearly depreciates, with the lienor receiving periodic payments to guard against such depreciation, the lien here was on a home and Financial Freedom did not insist on any periodic payments to protect it against any decline in the value of the Property. Any decline in value of the Property (and thus of the lien) is a

[8] In In re Farmer, a case in which the trustee successfully avoided a car lien and sought recovery of the value of the lien under § 550 because it would work a savings for the estate, the court made the astute observation that although "awarding a monetary recovery to the Trustee would save the estate the costs which it would otherwise incur in trying to sell the vehicle. . . . this fact does not justify such an award. If it did, the value of the property would always be awarded, and the section 550 provision allowing the trustee to recover the property transferred would be rendered meaningless, a result which Congress could not have intended. While there are circumstances in which an award of the value of the property transferred is appropriate, no such circumstances exist in the instant case. The vehicle subject to the avoided lien, rather than being in the hands of a bona fide purchaser, is in the Debtors' possession, available to be administered by the Trustee as an asset of the estate." In re Farmer, 209 B.R. at 1025.

function of market forces. If Financial Freedom is willing to permit the trustee to sell the entire lien, it would be inequitable to hold Financial Freedom liable for such a decline in value, and to permit McCarthy to resort to a monetary judgment based on the value at the time of transfer. Correspondingly, if the Property has increased in value, Financial Freedom's willingness to permit the entire lien to be sold would assure that the estate realized its share of any increase in the value of the lien (if it did not originally equal the debt).

Absent special circumstances, this case does not present any need for the trustee to resort to § 550(a) if he is permitted to sell the entire lien. The lien has been avoided with the collateral still in place and with the amount secured by the lien at the petition date still owed. The lien as it existed on the petition date thus remains fully intact.[9]

If Financial Freedom will not consent to a sale by McCarthy of the entire lien, then a monetary judgment may be appropriate. When the lien that a lender received extended to both the debtor's and another party's interest in real property, the difficulties that a trustee would face in realizing the value of the lien may warrant resort to a monetary judgment under §

[9] This case does not present the issue of payments made by the debtor to the lienor on the debt secured by the lien (and by virtue of there being a lien because the debt itself would be discharged if unsecured), and made prior to the lien being avoided.

550(a). Although the court's research did not find any cases dealing with a lien that extended to property jointly owned by the debtor and someone else, the point is illustrated by Bohm v. Dolata (In re Dolata), 306 B.R. 97 (Bankr. W.D. Pa. 2004). There the debtors owned real property adjoining real property owned by relatives. In building their own residence (the Personal Residence), the relatives encroached onto part of the real property owned by the debtors. The debtors then transferred that part of their real property (the Corrective Deed Property) to the relatives in an avoidable transfer. Even though the trustee's avoidance of the transfer of the Corrective Deed Property nullified the transfer and restored title in the debtors, the court decided that a monetary judgment under § 550(a) was the appropriate remedy "because, in order to effect a recovery of the Corrective Deed Property itself, such property, which now constitutes but a small portion of the Personal Residence, would have to be partitioned from such latter property, which partitioning the Court suspects would be very difficult, if not impossible." Id. at 138.

Here, as in Bohm, the trustee in effect is invoking avoidance only as a vehicle to entitle him to proceed to invoke § 550(a) to obtain a monetary judgment because a sale of only one-half of the lien would likely not yield one-half of the value of the entire lien (as one would hesitate to buy only half of a

lien) and because he believes there is little market for selling even the entire lien. Upon recovery of that judgment he would waive the nullification results of the avoidance of the lien, leaving Financial Freedom free to enforce the entire lien on the Property. The court, however, does not believe that the trustee has established that for summary judgment purposes he is entitled to proceed by way of obtaining a monetary judgment in lieu of simply recovering the avoidable lien. That is a discretionary decision upon which different factfinders could reasonably rule differently, and it will depend in part on whether Financial Freedom is willing to let McCarthy sell the entire lien, not just the one-half of the lien that McCarthy has avoided. The court thus holds that summary judgment in favor of the trustee is precluded at this juncture regarding his entitlement to proceed under § 550(a).

VI

THE TRUSTEE HAS NOT SHOWN THE VALUE OF THE LIEN IF HE IS ENTITLED TO RECOVER A JUDGMENT FOR THE VALUE OF THE LIEN

Even if the court were inclined to award the trustee a monetary judgment for the value of the lien under § 550, the trustee must first demonstrate the value of the lien in question. The trustee contends that the value of the lien is at least equal to the balance due under the Loan Agreement because, according to the trustee, the Property must have a fair market value in excess

of the balance due under the Loan Agreement given that it anticipates future advances and Financial Freedom presumably believed its loan to be fully secured. Thus, submits the trustee, the one-half of the lien that he has avoided has a value of one-half the balance due under the Loan Agreement. Financial Freedom, by contrast, contends that the unique features of a reverse mortgage in the debtor's one-half interest in the Property preclude the trustee from establishing the value of the avoided lien by mere reference to the value of the property securing the debt or by reference to the balance due under the Loan Agreement. Rather, Financial Freedom urges that the trustee must present expert testimony to establish the value of the avoided lien, an option that is no longer available to the trustee given that the deadline for disclosing experts has expired.

The trustee urges that the court need only look to the balance due under the Loan Agreement and the fact that the loan is fully secured to conclude that the value of the lien is one-half the balance due under the Loan Agreement. In support of this theory, the trustee has submitted an unsworn declaration to which he has attached the debtor's schedule A listing the property as having a market value of $158,620, a District of Columbia Property Detail showing an assessed value of $158,620 for the tax year 2006 and a proposed new assessed value of

$220,860 for the tax year 2007, a copy of Financial Freedom's proof of claim for $199,231.13, and data relating to sales in the debtor's neighborhood since January 1, 2005. Financial Freedom complains that this evidence is both inadmissible and insufficient. The debtor's schedules are admissible evidence as to the value of the Property as a homeowner can testify as to the value of his home. Although the debtor's statement of the value of the Property matches the tax assessed value, there is no evidentiary restriction on how the homeowner is entitled to form his view of the value of the Property. Moreover, as McCarthy contends, he would be entitled to call the debtor as a witness at trial to establish that the value of the Property has increased.

The Bankruptcy Code does not define "value" for purposes of § 550(a), and it has been observed that "[t]here is no word used in the bankruptcy court which is more elusive than the word value." Crampton v. Dominion Bank of Bristol (In re H.P. King Co.), 64 B.R. 487, 489 n.1 (Bankr. E.D.N.C. 1986), quoting In re

Rehbein, 49 B.R. 250, 252 (Bankr. D. Mass. 1985).[10] Although there is ample authority for the proposition that "value" as that term is used in § 550(a) refers to market value, Widemire v. Siddiki Bros., Inc. (In re King Arthur Clock Co.), 105 B.R. 669 (Bankr. S.D. Ala. 1989) ("The term value connotes market

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[10] Section 550(a) is one of several Code provisions giving rise to litigation over the meaning of the term "value." For example, § 550(b)(1) provides that the trustee may not recover from a "transferee that takes for value . . . in good faith, and without knowledge of the voidability of the transfer avoided." Courts, however, are divided on whether value as that term is used in § 550(b)(1) signifies fair market value, or if the proper measure is reasonably equivalent value. Rodgers v. Monaghan (In re Laguna Beach Motors, Inc.), 159 B.R. 562 (Bankr. C.D. Cal. 1993) (further explaining that the meaning of value under § 550(b)(1) differs from the meaning of value under § 550(a) because "[t]he two sections use value for different purposes. Section 550(a) seeks to recover property from a person who has wrongfully taken funds from an estate, while § 550(b)(1) is meant to protect an innocent third party transferee from liability on avoidable transfers.").

A similar dispute arises under § 363(f)(3), which permits the trustee to sell estate property if "such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property." Courts disagree as to whether the term value as it is used in that section refers to the "face amount of the claim secured by the lien, i.e. the amount owed to the lienholder . . . . [or whether value should be] interpreted . . to mean the economic value of the lien as determined by the fair market value of the property." Criimi Mae Services Limited Partnerhip v. WDH Howell, LLC (In re WDH Howell, LLC), 298 B.R. 527, 531 (D.N.J. 2003)(referring to the different views as the "face value approach" and the "economic value approach.").

Assuming the trustee could prove that the value of the Property exceeds the balance due under the Loan Agreement, the trustee's proffered valuation would survive scrutiny under either the economic value or face value approach. The trustee has not, however, explained why the court should accept the valuation methods applicable to a § 363(f)(3) analysis as indicative of the market value of the avoided lien under § 550.

value."), there is no prescribed valuation formula under § 550(a) and the value indicator relied upon by a court in any given case depends upon the circumstances of the case and the nature and relative weight of the available evidence. See Am. Furniture Outlet USA, Inc. V. Woodmark Originals, Inc., 209 B.R. 49, 52 (Bankr. M.D.N.C. 1997)(sales price more reliable indicator of market value than letter of credit). For example, determining the market value of transferred property is simplified if that property was transferred by way of a sale, because "what a willing buyer will pay a willing seller is the absolute best indication of fair market value." In re First Software Corp., 84 B.R. at 284. If the property was not transferred pursuant to a sale, however, other circumstances surrounding the transfer of the property may provide insight into the fair market value of the property. Derryberry v. Albers (In re Albers), 67 B.R. 530, 534 (Bankr. N.D. Ohio 1986) (best indicator of value of transferred trailer was the amount credited to debtor's account in exchange for trailer).

The first issue to address is whether the value is to be based on one-half of the value of the entire lien, or instead the value of the one-half of the lien held by the trustee. The value should be the former. The debtor and his wife both had to agree to make the transfer to Financial Freedom because the Property was held by them as tenants by the entirety. Accordingly,

Financial Freedom would not have been able to obtain a lien by virtue of only the debtor conveying a lien on the debtor's interest in the Property. The debtor's conveyance was thus part of a conveyance of the entire Property. Had he and his wife sold the Property, the value of the conveyance would be attributable equally to both of them. Moreover, in Financial Freedom's hands as transferee, the one-half of the lien avoided here had one-half of the value of the entire lien. It is thus appropriate to use one-half of the value of the entire lien as the measure of the value of what the debtor transferred to Financial Freedom.

McCarthy has satisfactorily shown the value of the Property as of the petition date, which is close enough in time to use as the value of the Property at the time of the prepetition transfers (consisting of the initial conveyance of the deed of trust, as well as the lending of additional amounts before the filing of the petition which became additional amounts secured by the deed of trust). McCarthy also points out that he would be entitled to call the debtor as a witness at trial to establish the current value of the Property (which McCarthy believes has increased in value).

The issue, however, is whether the value of the Property may be used to measure the value of the lien. Were this a case of a lien on a car, a depreciating asset, with the lien enforceable in the event of default in monthly payments, it might make sense to

rule that McCarthy is entitled to recover one-half of the value of the Property on the petition date, limited by the amount of the debt secured by the Property. In Morris v. St. John Nat. Bank (In re Haberman), 347 B.R. 411, 417 (B.A.P. 10th Cir. 2006), aff'd, 516 F.3d 1207, 1209 (10th Cir. 2008), the court ruled that for purpose of awarding a monetary judgment to a trustee with respect to an avoided lien that had been held by a Bank, the trustee's "rights in the collateral were to be valued at the amount of the Bank's debt [sic: should be claim] on the petition date, limited by the value of the collateral on that date." McCarthy understandably viewed this case as similar. There is no evidence in this case that Financial Freedom looked to anything other than the Property to assure that its claim would be paid. From this it may be inferred that Financial Freedom viewed the Property as fully securing its loan, whenever it might come due. If the lien had become enforceable shortly after the petition date, that is, if both the debtor and his wife died, then a sale of the Property in enforcement of the lien should have fetched the value ascribed to it by the debtor on his schedules. The lien protected Financial Freedom to that extent, and that, McCarthy would argue, is a fair measure of the value of the lien.

Although the trustee proposes that the value of the lien be established by reference to the balance due under the loan, capped by the value of the Property, McCarthy himself asserts

that there is an "obviously limited market for an avoided reverse mortgage lien on the Debtor's interest in the Property." When a trustee asserts a right to recover the value of an avoided lien due to the general unmarketability of the avoided lien, Financial Freedom contends that it stands to reason that the holder of the lien against whom the trustee seeks to recover the lien's value should be entitled to rely on that same limited market to establish that the market value of the lien is less than the lien's face value. When looking at the market value of the lien, it may be appropriate to consider, for example, the secondary market for reverse mortgages as compared with conventional mortgages, and the effect of changing interest rates on the value of the debt.

But when a monetary judgment is granted under § 550(a), McCarthy can respond, the value is not necessarily what the lien would have fetched if sold on the open market, but, as in Haberman, the value of the lien in the hands of the entity whose lien was avoided, measured by the amount it could realize via enforcement of the lien. Nevertheless, that value turns on the prospect of when the lien would be enforceable, and that distinguishes this case from Haberman. The lien's enforceability depends on the life expectancies of the debtor and his wife, and measuring the value of the lien today depends on a prediction of the present value of the lien today based on the amount of debt

that will be owed and what the Property will be worth at the time it becomes enforceable.

Financial Freedom urges that because expert testimony is required to establish the value of the avoided lien, and because the deadline for disclosing experts has expired, the trustee is unable meet his burden of proving the value of the avoided transfer. In response, the trustee, assuming that the only issue pertinent to valuation is the fair market value of the house, suggests several options that would allow him to demonstrate the fair market value of the lien without running afoul of the scheduling order. As discussed at length above, valuation evidence is required not simply to demonstrate the value of the house, but to further establish the market value of the avoided lien. It may be that the value of the house and the face value of the lien are reflective, at least in part, of the fair market value of the avoided lien as to the debtor's one-half interest in the Property, but such evidence is merely a starting point for such an analysis.

The deadline for disclosing experts has expired, and it is thus evident that the trustee will not be able to demonstrate the value of the lien on only the debtor's interest in the Property. Nevertheless, it is understandable that McCarthy might have viewed Financial Freedom as itself viewing its claim as fully secured. Moreover, the case law has not discussed how to value a

reverse mortgage lien under § 550(a), and it was not clear that the value of the Property and the amount of the debt would not establish the value of the lien. Finally, a court's scheduling order is not carved in stone, and may be modified in the interest of justice. The court will reopen discovery for a period of time to permit McCarthy to obtain the opinion of an expert as to the value of the lien.

VII

In light of the foregoing, it is

ORDERED that Financial Freedom's motion for partial summary judgment is denied without prejudice. It is further

ORDERED that the trustee's motion for summary judgment is granted in part to allow the trustee to avoid the fixing of one-half of the lien granted to Financial Freedom on the Property owned by the debtor and his wife, and pursuant to 11 U.S.C. § 551 that lien is preserved for the benefit of the estate (unless the trustee recovers a monetary judgment against Financial Freedom for the value of the one-half of the lien). It is further

ORDERED that the trustee's motion for summary judgment is otherwise denied. It is further

ORDERED that the parties appear before the court on the date that was set for argument on the motions for summary judgment to address modifications of the scheduling order.

[Signed and dated above.]

Copies: All counsel of record; Office of U.S. Trustee.