UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF DONALD LEROY LORENZEN and NORMA LOUISE LORENZEN, DEBTORS	)	CASE NO. BK85-1932 A86-160
DONALD LEROY LORENZEN and NORMA LOUISE LORENZEN, Plaintiff vs. FIREMAN'S FUND INSURANCE COMPANY, Defendant	)	Chapter 13

MEMORANDUM OPINION

This matter was submitted on written stipulation of facts and briefs filed by the parties. Howard T. Duncan of Omaha, Nebraska, represented the debtors/plaintiffs and Kevin D. Van Dyke of Council Bluffs, Iowa, represented the defendant.

Issue

Does the establishment of a judicial lien within 90 days of the order for relief constitute a preference which can be avoided by the debtor?

Facts

Parties have filed a written stipulation of facts which can be summarized as follows:

1. Plaintiffs are debtors in a Chapter 13 bankruptcy which was commenced by the filing of a petition on the 23rd day of August, 1985. Defendant, Fireman's Fund Insurance Company, claims a lien on certain property of the debtors in the amount of $10,605.65. Defendant did file a claim in the Chapter 13 case on the 9th day of October, 1985. The lien results from a judgment entered in the Iowa District Court for Pottawattamie County, Iowa, July 30, 1985, in the sum of $10,329.49 with interest thereon at the rate of 10% per year from June 20, 1985, plus court costs.

2. The judgment was entered in an action which was based upon the terms of a General Indemnity Agreement and three surety bonds issued pursuant to the agreement by defendant, as surety, to Booth Refrigerated Lines, Inc., as principal, in the ordinary course of business and according to ordinary business terms.

3. Plaintiffs were shareholders, corporate officers and corporate directors of Booth Refrigerated Lines, Inc., a corporation.

The corporation and the plaintiff/debtors in their individual and corporate capacities executed a written General Indemnity Agreement on the 15th day of September, 1983, thereby agreeing to jointly and severally indemnify the Surety against any and all liability, loss, costs, damages, fees of attorneys and other expenses which the Surety may sustain or incur by reason of, or in consequence of, the execution of certain bonds which the defendant issued at the request of the corporation.

The parties have stipulated that the written General Indemnity Agreement was executed by the parties in the ordinary course of business and according to ordinary business terms.

4. Three different creditors of the corporation requested that the defendant make good on three separate bonds and the defendant did make payment pursuant to the bonds.

5. Plaintiffs did not comply with the terms of the General Indemnity Agreement in that they refused to indemnify the defendant for sums paid by the defendant in performing its contractual obligations under the agreement. As a result, the lawsuit was filed on June 20, 1985, in the Iowa District Court for Pottawattamie County and, as indicated above, judgment was entered on July 30, 1985.

Debtors now desire to avoid the lien which results from the entry of the judgment.

Conclusions of Law

The Bankruptcy Code at §547(c)(2) provides:

> "(c) The trustee may not avoid under this section a transfer--
>
> (2) to the extent that such transfer was--
>
> (A) in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee;

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attached. This Court does not agree. In Chapter 13 cases the exemptions listed are basically for information purposes only. Listing of exemptions is necessary to enable creditors and the debtor to determine what creditors would have received in a Chapter 7 liquidation case. However, since the debtors in a Chapter 13 case are keeping the property, exemption rights are of very little significance. In a Chapter 13 case the Chapter 13 trustee frequently declines or is not interested in pursuing an adversary proceeding to set aside a lien. If successful, the Chapter 13 trustee has gained nothing for the estate nor for the trustee. Therefore, it is unlikely in most cases that the Chapter 13 trustee will exercise the right to attempt to avoid preferential transfer, such as the judgment lien in this case. The incentive of the trustee and the benefit to the estate in a Chapter 7 case are totally different and it is the opinion of this Court that the language of §522(h) regarding avoidance of liens to the extent of the exemption is applicable to a Chapter 7 case and, at least in the case before the Court, is applicable in a Chapter 13 case.

The Court declines to limit the avoidance of the transfer of property by judicial lien to that amount which would have been exempt in a Chapter 7 case.

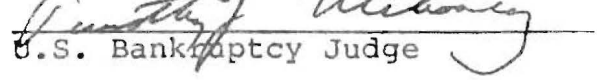
Decision

The judicial lien of the defendant is avoided.

Separate Journal Entry shall be entered.

DATED: February 11, 1987.

BY THE COURT:



U.S. Bankruptcy Judge

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