

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:)
)
DOUGLAS & DOLORES HARDERS,) CASE NO. BK02-40331
)
Debtor(s).) CH. 7

MEMORANDUM

Hearing was held in Lincoln, Nebraska, on April 17, 2002, on Debtors' Motion to Avoid Lien of Five Points Bank (Fil. #7) and Resistance (Fil. #12). Jerry Milner appeared for the debtor, and William Francis appeared for Five Points Bank. This memorandum contains findings of fact and conclusions of law required by Fed. R. Bankr. P. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(B).

The motion is granted.

The debtors own a 1989 Pontiac Grand Am SE automobile. The car was used as part of the collateral necessary to obtain a \$4,400 loan from Five Points Bank in March 2000 to purchase a new furnace and air-conditioner for debtors' residence. It is undisputed that the Bank holds a nonpossessory, nonpurchase-money security interest in the car. The Bank's evidence indicates that \$2,985 is currently due on the debt.

The debtors claim a tool-of-the-trade exemption of \$1,000 in the car. The Bank asserts that the car is worth \$2,500. The debtors suggest that the car is currently worth \$770.

Under § 522(f)(1)(B)(ii), a debtor may avoid liens on tools of the trade to the extent the lien impairs an exemption. Owen v. Owen, 500 U.S. 305, 307 (1991). In Nebraska, a debtor may claim as exempt up to \$2,400 of the fair market value of tools of the trade. Neb. Rev. Stat. § 25-1556(4). A vehicle used by a debtor or his family in his job or to commute to and from his job is considered a tool of the trade. Id. In its objection to the motion, the Bank asserts that the vehicle is not a tool of the trade. The debtors' affidavit states that Mrs. Harders drives the Grand Am to work; this evidence is uncontroverted. Therefore, the vehicle can be considered a tool of the trade.

Section 522(f)(2)(A) of the Bankruptcy Code "provides a simple arithmetic test to determine the extent to which a lien impairs an exemption of specific property. The exemption is impaired to the extent the total of all liens on the property plus the exemption exceed the fair market value of the property." In re Gostian, 215 B.R. 237, 238 (Bankr. M.D. Ala. 1997), quoted in Kolich v. Antioch Laurel Veterinary Hosp., Inc., 273 B.R. 199, 202 (B.A.P. 8th Cir. 2002).

If the total of the liens against the property and the debtors' exemption in the property is less than the debtors' interest in the property absent any liens, then the lien does not impair the exemption and cannot be avoided. If the total of the liens and the exemption exceeds the debtors' interest absent liens, then the lien impairs the exemption and is avoided by the amount of the difference. If the amount of the difference exceeds the amount of the lien, then the lien is avoided in full. See In re Holt, Neb. Bkr. 97:233 (Bankr. D. Neb. 1997). See also Soost v. NAH Inc. (In re Soost), 262 B.R. 68, 74 (B.A.P. 8th Cir. 2001) (where lien need not be avoided in its entirety to alleviate impairment of an exemption, it may be avoided only in part and only to extent of impairment).

When the numbers in this case are plugged into the mathematical formula of § 522(f)(2)(A), it becomes clear that the Bank can retain its lien, or any part of it, only if the value of the vehicle exceeds the amount of the exemption. To demonstrate, using for comparison the debtors' valuation, the Bank's valuation, a valuation equal to the full exemption amount, and a valuation exceeding the exemption amount for illustrative purposes only:

Amount of Bank's lien:	\$ 2,985	\$ 2,985	\$ 2,985	\$ 2,985
Amount of other liens:	\$ 0	\$ 0	\$ 0	\$ 0
Amount of exemption that debtor could claim absent any liens:	\$ 770	\$ 2,400	\$ 2,400	\$ 2,400
Total:	\$ 3,755	\$ 5,385	\$ 5,385	\$ 5,385

Less value of debtors' interest absent any liens:	\$ 770	\$ 2,500	\$ 2,400	\$ 4,000
Extent of impairment: (amount of lien to be avoided)	\$ 2,985	\$ 2,885	\$ 2,985	\$ 1,385

It becomes clear that even if the car were valued as the Bank suggests at \$2,500, all but \$100 of the Bank's lien would be avoided.

The question raised by the parties is the fair market value of the vehicle.

The term "fair market value" is a term of art that has been commonly used by courts in the United States as a standard for determining the "price" of property. In arriving at a value for property, the "fair market value" standard attempts to replicate the market place by assuming a hypothetical sale of the property between a willing seller and a willing buyer in an arm's length transaction.

In re Mahoney, 251 B.R. 748, 755 (Bankr. S.D. Fla. 2000).

This generally means "replacement value." See Associates Commercial Corp. v. Rash, 520 U.S. 953, 965 (1997) (holding that "replacement value" standard governs in Chapter 13 cram-down cases). For purposes of valuing an automobile, the retail price is generally a fair assessment of the replacement value.

Both parties rely on the N.A.D.A. and Kelley Blue Book valuation guidelines. According to the N.A.D.A. appraisal information for used passenger cars available on the Internet¹

¹This resource was consulted to clarify the evidence before the court. The Bank's evidence did not contain a copy of the material to which its affiant referred in forming her opinion of the car's value. While the debtors did submit photocopies from the N.A.D.A. book with their affidavit, the copies were illegible after being scanned into the electronic case management database.

at <http://www.nadaguides.com>², the average retail value for this vehicle is \$2,425. "Average retail value" in the N.A.D.A. report is described as follows:

An average retail vehicle should be clean and without glaring defects. Tires and glass should be in good condition. The paint should match and have a good finish. The interior should have wear in relation to the age of the vehicle. Carpet and seat upholstery should be clean, and all power options should work. The mileage should be within the acceptable range for the model year. . . .

Id.

The same source gives a "low retail value" of \$1,600 for the car if it has extensive wear and tear, body blemishes and dents, mechanical problems, and visible interior wear. Likewise, the "high retail value" is \$3,025, for a vehicle in "flawless" condition.

Neither "high" nor "low" retail value appears to be appropriate for this car, based on the debtors' description of its condition. I find that an average retail value of \$2,400 is appropriate for this vehicle. Accordingly, the entire amount of the Bank's lien should be avoided.

Separate Order to be entered.

DATED: May 21, 2002

BY THE COURT:

/s/Timothy J. Mahoney
Chief Judge

Notice given by the Court to:

*Jerry Milner, Atty. for Debtors
William Francis, Atty. for Five Points Bank
John Wolf, Chap. 7 Trustee
U.S. Trustee

²<http://www3.nadaguides.com/Values/ValueReport.asp?UserID=06205433DD2&DID=37396&Type=DM&GCode=OC&wPg=1107&wSec=1&Com=0013&Year=1989&Model=04001300075>, visited on May 20, 2002.

Movant (*) is responsible for giving notice of this order to all other parties not listed above if required by rule or statute.

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ORDER

Hearing was held in Lincoln, Nebraska, on April 17, 2002, on Debtors' Motion to Avoid Lien of Five Points Bank (Fil. #7) and Resistance (Fil. #12). Jerry Milner appeared for the debtor, and William Francis appeared for Five Points Bank.

IT IS ORDERED Debtors' Motion to Avoid Lien of Five Points Bank (Fil. #7) is granted, and the entire amount of the Bank's lien is avoided pursuant to 11 U.S.C. § 522(f)(1)(B)(ii).

See Memorandum filed this date.

DATED: May 21, 2002

BY THE COURT:

/s/Timothy J. Mahoney
Chief Judge

Notice given by the Court to:

*Jerry Milner, Atty. for Debtors
William Francis, Atty. for Five Points Bank
John Wolf, Chap. 7 Trustee
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