

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF: )  
)  
KENNETH MAYFIELD, ) CASE NO. BK03-41432  
)  
Debtor(s). ) CH. 7

MEMORANDUM

Hearing was held in Lincoln, Nebraska, on July 2, 2003, on an objection to exemptions by First State Bank Shelton (Fil. #10) and resistance by the debtor (Fil. #25). Kenneth Fritzler appeared for the debtor, and Victor Covalt appeared for First State Bank Shelton. This memorandum contains findings of fact and conclusions of law required by Federal Rule of Bankruptcy Procedure 7052 and Federal Rule of Civil Procedure 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(B).

Ruling on the objection is deferred, pending the receipt of additional evidence from the parties.

Background

The bank objects to debtor's claimed tool-of-the-trade exemption<sup>1</sup> of \$1,500 in a 1983 Ford pickup truck. The bank asserts that such an exemption is unavailable to the debtor because his schedules state that he was unemployed as of the petition date and therefore does not have a principal place of trade or business to commute to.

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<sup>1</sup>Neb. Rev. Stat. Ann. § 25-1556(4) (Michie Supp. 2002) provides:

No property hereinafter mentioned shall be liable to attachment, execution, or sale on any final process issued from any court in this state, against any person being a resident of this state: . . . (4) the debtor's interest, not to exceed an aggregate fair market value of two thousand four hundred dollars, in implements, tools, or professional books or supplies held for use in the principal trade or business of such debtor or his or her family, which may include one motor vehicle used by the debtor in connection with his or her principal trade or business or to commute to and from his or her principal place of trade or business[.]

The bank currently has the pickup, having replevied it around the time this bankruptcy case was filed. There is some dispute as to whether the vehicle was seized before or after the bankruptcy petition was filed.

The debtor argues that he wants to work but cannot do so without this pickup, while the bank takes the position that a debtor is not entitled to a tool-of-the-trade exemption if the debtor has no job on the petition date.

#### Law

The general rule is that a debtor's entitlement to an exemption is determined on the day the bankruptcy petition is filed. Mueller v. Buckley (In re Mueller), 215 B.R. 1018, 1022 (B.A.P. 8th Cir. 1998); In re Hughes, 244 B.R. 805, 812 (Bankr. D.S.D. 1999). There are no Nebraska appellate or bankruptcy court decisions addressing this factual situation. However, an exception to the general rule has been carved out for debtors who intend to resume working. See Flick v. United States ex rel. Farmers Home Admin., 47 B.R. 440 (W.D. Pa. 1985), where the debtor moved to avoid liens on farm implements to the extent of the § 522(d)(6) tools-of-the-trade exemption. The secured creditor argued that the debtor was not a farmer as he had sold his livestock and abandoned the farming enterprise pre-petition. On review, the district court noted:

Although as a general rule a debtor must be engaged in the relevant trade on the date of the bankruptcy petition, a temporary abatement of work in the trade may not be fatal to the claimed exemption for tools of the trade. Courts have upheld the exemption in the absence of an intentional abandonment of the trade by the debtor.

Flick, 47 B.R. at 443 (internal citations omitted).

The district court remanded the case for findings of fact as to whether the debtors were "legitimately engaged" in farming.

The same approach was used in Maynard Sav. Bank v. Banke (In re Banke), 275 B.R. 317 (Bankr. N.D. Iowa 2002), a case in which the tool-of-the-trade exemption was addressed in the context of avoiding the bank's lien to the extent it impaired the exemption on a boat that the debtor claimed to use in his fishing guide business.

The Court focuses at the date of the petition to determine whether Debtors were engaged in a trade for lien avoidance purposes. In re Janz, 67 B.R. 553, 556 (Bankr. D.N.D. 1986); In re Ackerman, No. 94-21846KD, slip op. at 7, 1995 WL 916986 (Bankr. N.D. Iowa April 12, 1995).

Debtors may be entitled to lien avoidance if they have temporarily ceased their trade or business as of the petition filing date and intend to return to it. See In re Mausser, 225 B.R. 667, 671 (Bankr. N.D. Iowa 1998) (considering exemption of farming equipment and whether debtor was "engaged in farming"); In re Indvik, 118 B.R. 993, 1008 (Bankr. N.D. Iowa 1990) (considering 522(f)(2)(B) lien avoidance for farmer's tools of the trade). A temporary abatement of work in the trade absent intentional abandonment of the trade by the debtor may not be fatal to lien avoidance. In re Ottoway, 169 B.R. 581, 584 (Bankr. E.D. Va. 1994).

Banke, 275 B.R. at 325.

The Banke court then laid out the factors to consider when making the factual findings necessary in determining whether a debtor has only temporarily ceased his business or trade:

In order to determine that debtors are engaged in a trade or business, the Court considers the intensity of debtors' past business, the sincerity of their intentions to continue the business, and whether debtors are legitimately engaged in a business which currently and regularly uses the specific implements exempted and on which lien avoidance is sought. See LaFond, 791 F.2d at 626; Mausser, 225 B.R. at 671. The prospects for returning to the business, evidence of the amount of time since the debtors had engaged in the trade and any other circumstances affecting the debtors' return to the trade should also be examined. In re Richardson, 47 B.R. 113, 119 (Bankr. W.D. Wis. 1985). The key factor is the intention of the debtors to resume their business operations.

In In re Johnson, 230 B.R. 608, 609 (8th Cir. B.A.P. 1999), the court considered avoidance of liens on tools of the trade for a debtor claiming to be engaged in farming. The debtor was employed full time at an off-farm business, was not currently farming in any fashion, had not farmed for two years prepetition except to help out his father, and did not know



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ORDER

Hearing was held in Lincoln, Nebraska, on July 2, 2003, on an objection to exemptions by First State Bank Shelton (Fil. #10) and resistance by the debtor (Fil. #25). Kenneth Fritzler appeared for the debtor, and Victor Covalt appeared for First State Bank Shelton.

IT IS ORDERED: The debtor shall submit additional evidence on his objection to exemptions by First State Bank Shelton (Fil. #10) on or before July 25, 2003. The bank may respond by August 5, 2003. The matter will then be ready for decision.

See Memorandum entered contemporaneously herewith.

DATED: July 8, 2003

BY THE COURT:

/s/Timothy J. Mahoney  
Chief Judge

Notice given by the Court to:

\*Victor Covalt  
Kenneth Fritzler  
United States Trustee

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