

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)
)
RICHARD K. BURKMAN,) CASE NO. BK94-80679
)
DEBTOR) CH. 7

MEMORANDUM

Hearing was held on September 2, 1994. Appearing on behalf of debtor was Randall Lippstreu of Harris & Lippstreu, P.C., Scottsbluff, Nebraska. Appearing on behalf of FirstTier Bank was John Selzer of Simmons, Olsen, Ediger & Selzer, P.C., Scottsbluff, Nebraska. Appearing as Trustee was Phil Kelly. This memorandum contains findings of fact and conclusions of law required by Fed. Bankr. R. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(B).

Background

The debtor, Richard K. Burkman, filed a petition for Chapter 7 relief on April 26, 1994. Prior to this bankruptcy case, a creditor, FirstTier Bank-N.A., Scottsbluff, Nebraska (FirstTier), filed suit against the debtor in the District Court of Scotts Bluff County, Nebraska to enforce unsecured bank notes. A pre-judgment order of attachment was issued in favor of FirstTier and against the debtor on November 7, 1993. Judgment was entered in favor of FirstTier on March 2, 1994 in the amount of \$86,958.41 principal plus \$6,490.44 interest.

Pursuant to the pre-judgment order of attachment and prior to the bankruptcy case, the Sheriff of Scotts Bluff County took possession of the following assets of the debtor: (1) the sale proceeds from the debtor's auction of household goods and furniture and personal property; (2) a 1985 Chevrolet Blazer, a 1988 Ford Ranger Pickup truck, and a 1964 Ford pickup truck; (3) a diamond ring, which formally belonged to the debtor's deceased wife; (4) other titles and documents which were located in the debtor's safety deposit box at FirstTier; and (5) approximately forty (40) head of cattle subject to a security agreement, which were later sold.

On June 1, 1994, the debtor filed a Motion to Avoid Judicial Lien of FirstTier Bank-N.A. under 11 U.S.C. § 522(f)(1). Filing no. 11. The motion requests that the Court avoid the judicial liens in the property that is exempt under Nebraska law because the judicial liens impair the debtor's interest in said exempt property.

FirstTier resists the debtor's motion on the ground that the property claimed by the debtor as exempt is in excess of the amount allowable under Nebraska law. Filing no. 18. The debtor is requesting that the Court avoid the liens in the following property:

<u>Exempt Item</u>	<u>Value of Item</u>
Necessary Wearing Apparel	\$ 200.00
Kitchen Utensils and Household Furniture, including \$500 proceeds from sale of household goods	\$1,000.00 \$ 500.00
Immediate Personal Possession, Deceased Wife's Diamond Ring	\$1,000.00
1985 Chevrolet Blazer	\$2,750.00
1964 Ford Pickup	\$1,250.00

Discussion and Decision

Judicial liens may be avoided in a bankruptcy proceeding pursuant to Section 522(f)(1), which states:

Notwithstanding any waiver of exemptions, 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 [state law], if such lien is -- (1) a judicial lien;

11 U.S.C. § 522(f)(1).

The exemptions that the debtor has elected to claim in this case are located at Section 25-1552 and Section 25-1556 of the Nebraska Revised Statutes. Section 25-1552 is the exemption granted to debtors in lieu of the homestead exemptions and states:

All persons who have neither lands, town lots, or houses subject to exemptions as homestead, under the laws of this state, shall have exempt from forced sale on execution the sum of twenty-five hundred dollars in personal property, except wages....

NEB. REV. STAT. § 25-1552 (Reissue 1989).

Section 25-1556 lists specific exemptions that every debtor may claim, and states:

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: (1) The immediate personal possessions of the debtor and his family; and (2) all necessary wearing apparel of the debtor and his family; all kitchen utensils and household furniture, to be selected by the debtor, not exceeding in value fifteen hundred dollars; all equipment or tools used by the debtor or his family for their own support not exceeding fifteen hundred dollars in value; ... All of the articles hereinbefore intended to be exempt shall be chosen by the debtor, his agent, clerk or legal representative, as the case may be.

NEB. REV. STAT. § 25-1556 (Reissue 1989).

The debtor and FirstTier agree that the debtor may claim the \$200.00 exemption for wearing apparel and at least, \$1,000.00 of household goods and furniture. The remaining issues are the following: (a) whether the debtor may claim two vehicles under Sections 25-1552 and 25-1556; (b) whether the proceeds from the sale of household goods and furniture may be claimed as an exemption; and (c) whether the diamond ring qualifies as an immediate personal possession.

FirstTier also raised concern that the cattle which are subject to a security agreement, and not a judicial lien, were being claimed as exempt by the debtor, but this issue is moot because the debtor has never claimed an exemption in the cattle or the proceeds from the sale of the cattle. The debtor originally claimed other cash proceeds as exempt under Section 25-1552, but based on the valuation of the vehicles submitted by the debtor, the Court has treated that claimed exemption as abandoned by the debtor.

(a) Sections 25-1552 and 25-1556:
"Tool of Trade" and "In Lieu of Homestead" Exemptions

The debtor proposes to claim the Chevrolet Blazer under the "tool of the trade" exemption, and the market value of the Blazer in excess of that exemption and the 1964 Ford truck under the "in lieu of homestead" exemption.

The evidence shows that the debtor requires a vehicle to perform his employment obligations. The debtor has two employers. One requires the debtor to deliver farm chemicals and fertilizers,

and the other requires the debtor perform farm work and irrigate crops. It appears that the Chevrolet Blazer is necessary for the debtor to perform these tasks.

The "tool of the trade" exemption under Section 25-1556(2) is for \$1500.00. The Chevrolet Blazer has a value of \$2,750.00. The debtor proposes to apply the \$1250.00 of value in excess of the "tool of the trade exemption" toward the "in lieu of homestead" exemption in Section 25-1552. Since Section 25-1552 is a general exemption for personal property, which does not specify the type of property which may be claimed as exempt, the remaining market value of the Blazer may be claimed as exempt under that section.

After the remaining \$1250.00 value of the Blazer is applied to the "in lieu of homestead" exemption, the debtor is entitled to claim an additional \$1250.00 worth of personal property as exempt before satisfying the total \$2500.00 exemption. The debtor has chosen to claim the 1964 Ford truck for the remaining portion of the exemption. The truck qualifies as "personal property," and the value of the truck, \$1250.00, will not cause the debtor's claimed exemption to be in excess of the \$2,500.00 ceiling on Section 25-1552 exemptions. Therefore, both vehicles may be claimed as exempt pursuant to Sections 25-1552 and 25-1556(2).

FirstTier takes the position that the debtor should not be entitled to take the "tool of the trade" exemption because the debtor has not been in possession of the vehicles for over one year. Since the debtor has managed to stay employed without using the Blazer for over one year, it is the position of FirstTier that the Blazer is not necessary for the debtor to support himself.

The debtor used the Blazer for his support before it was seized through execution by the sheriff. Such seizure did not terminate debtor's property interest in the vehicle. Since the seizure of the vehicle, the debtor has been leasing a replacement vehicle. The debtor stated that he would terminate this lease once his Blazer is returned. The debtor should not be forced to continue leasing a vehicle when he already owns a vehicle which is exemptible under Nebraska law. The fact that the debtor had to go into the market and lease a vehicle is evidence that the debtor requires a vehicle to perform his job. FirstTiers' resistance to this exemption is overruled.

(b) Proceeds from the Pre-Petition Sale
of Exempt Property as Household Goods and Furniture

The debtor has claimed \$1,000.00 of household goods as exempt pursuant to Section 25-1556(2), but since Section 25-1556(2) permits the total exemption for household goods to be \$1500.00, the debtor requests that the Court permit the debtor to claim an additional \$500.00 cash as exempt because the cash represents proceeds from the pre-petition sale of household goods.

The use of cash proceeds to maximize the total value of exemptions allowable under Section 25-1556 is not permissible. The United States District Court for the District of Nebraska has previously held that the proceeds from the sale of crops could not be exempted as "provisions" necessary for six months' support for a family. First Nat'l Bank of Wahoo v. Pihai, 136 B.R. 810 (D. Neb. 1989). In that case, the court focused on the definition of the word "provisions" and concluded that if crop proceeds were in fact exempt as "provisions," then any asset which can be reduced to cash would be exemptible because cash can always purchase provisions necessary for a family's support. Id. at 813. Thus the court declined to find that crop proceeds were exemptible, and instead held: "Nothing may be exempted unless it is specifically mentioned in the statutes." Id.

In this case, cash proceeds are not specifically mentioned as exemptible under the household goods exemption. If the debtor does not own household goods with a value sufficient to reach the maximum value exemptible, the debtor cannot use the full statutory exemption. It is not relevant that the proceeds are the result of a sale of household goods. Under Nebraska case law, exemptions in property must be claimed before the property is sold. Chesney v. Francisco, 12 N.W. 94, 12 Neb. 626 (Neb. 1882); Crans & Hazlett v. Cunningham, 13 N.W. 176, 13 Neb. 204 (Neb. 1882). Therefore, the debtor may only claim as exempt the value of tangible household goods and furniture and not cash proceeds from the pre-petition sale of such goods.

(c) The Diamond Ring: Immediate Personal Possessions

The debtor claims that a diamond ring, which once belonged to his deceased wife, is exemptible as an immediate personal possession pursuant to Section 25-1556(1). The debtor is correct, and the diamond ring is exempt in this case.

No case law exists on whether a diamond ring qualifies as an immediate personal possession, but it is reasonable to interpret "immediate personal possessions" to include those items which are traditionally sentimental and symbolic of the family, e.g. photo album, family bible, etc. A wedding or an engagement ring satisfies this standard.

The diamond ring that the debtor has claimed as exempt as an immediate personal possession once belonged to his deceased wife. Even though it is not clear whether this ring was a wedding ring or an engagement ring, it is evident that the ring was claimed by the debtor because it is symbolic of his marriage. The ring has a relatively modest value. The debtor has not claimed any other assets as "immediate personal possessions." These factors constitute evidence that the debtor is not abusing this exemption by claiming a diamond ring as exempt.

FirstTier has raised a legitimate concern that permitting a debtor to claim a piece of jewelry as exempt may cause other debtors to convert their assets into jewelry or claim large amounts of jewelry as exempt. However, on a case-by-case basis, the Court should be able to distinguish between a debtor who claims a single ring of modest value which once belonged to his deceased wife and a debtor who claims several pieces of jewelry or an "outrageously" expensive ring. The statute does not limit the value of "immediate personal possessions" and the determination of what is or is not exempt under the statute is a question of fact to be determined in each case.

Conclusion

The debtor is entitled to the exemptions of property granted by Sections 25-1552 and 25-1556 of the Nebraska Revised Statutes. Under Section 25-1556(2), the debtor may claim all of the wearing apparel that he has claimed as exempt, but the debtor may only claim tangible household goods and furniture as exempt. The debtor may not maximize the household goods and furniture exemption with the cash proceeds from the pre-petition sale of exempt property.

The debtor may also claim the Chevrolet Blazer as exempt under the Section 25-1556(2) "tool of the trade" exemption. The debtor is free to apply the value of the Blazer which exceeds this exemption towards the Section 25-1552 "in lieu of homestead" exemption. The debtor is entitled to maximize the "in lieu of homestead" exemption with the 1964 Ford pickup.

The diamond ring claimed by the debtor as exempt does qualify as an "immediate personal possession" of the debtor pursuant to Section 1556(1). The debtor has shown that the ring is being retained as a symbol of his marriage and not to keep valuable assets from his creditors.

The assets claimed by the debtor as exempt are currently subject to the judicial lien which FirstTier caused to attach. The debtor may avoid the judicial lien to the extent that the judicial lien impairs any interest of the debtor in exempt property. The debtor's motion is granted and FirstTiers' resistance is denied to the extent ordered herein.

A separate journal entry shall be entered.

DATED: November 8, 1994

BY THE COURT:

/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

Copies faxed by the Court to:

SELZER, JOHN	308-635-0907
KELLY, PHILIP	8-308-635-1387

Copies mailed by the Court to:

Randall Lippstreu, 212 W. 27th St., Scottsbluff, NE 69361
United States Trustee

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

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)	
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RICHARD K. BURKMAN,)	CASE NO. BK94-80679
)	A
<u>DEBTOR(S)</u>)	
)	CH. 7
)	Filing No. 11, 18
Plaintiff(s))	
vs.)	<u>JOURNAL ENTRY</u>
)	
)	DATE: November 8, 1994
<u>Defendant(s)</u>)	HEARING DATE: September
)	2, 1994

Before a United States Bankruptcy Judge for the District of Nebraska regarding Motion to Avoid Lien and Resistance by FirstTier Bank N.A., Scottsbluff, Nebraska.

APPEARANCES

Randall Lippstreu, Attorney for debtor
Phil Kelly, Trustee
John Selzer, Attorney for FirstTier Bank

IT IS ORDERED:

The motion to avoid judicial liens is granted concerning actual household goods and furniture, a diamond ring, the Chevrolet Blazer and the 1964 Ford pickup. See memorandum this date.

BY THE COURT:

/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

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