

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:)
)
THOMAS A. HOLT,) CASE NO. BK96-82049
)
DEBTOR) CH. 11

MEMORANDUM

Hearing was held on April 24, 1997, on a Motion to Avoid Lien of Richard J. Hruza, Jr. Appearances: Donald Girard for the debtor and Greg Jensen for Richard Hruza. 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)(K).

Background

On or about February 6, 1995, Richard Hruza obtained a judgment against various defendants other than the debtor in this proceeding, Thomas Holt. On appeal, the Nebraska Court of Appeals affirmed the judgment, and modified it to include the debtor. On July 22, 1996, the Judgment on Mandate of the Nebraska Court of Appeals was entered as a judgment in the District Court of Valley County, Nebraska against the debtor in the sum of \$34,000. The judgment constitutes a lien on real property owned by the debtor in Valley County.

The property owned by the debtor was purchased in two separate transactions. The first transaction occurred on August 5, 1986 when the debtor and his wife purchased a five acre tract of real estate together with a home, outbuildings, a barn and a silo which were located on the property. The second transaction took place on November 26, 1986, when the debtor and his spouse purchased 300 acres of real estate that was contiguous to the five acre tract previously purchased.

The entire 305 acres is worth \$175,000. It is encumbered by the following liens:

1) Equivest Financial --	\$ 6,853.07
2) Valley County Treasurer --	\$ 4,489.00
3) Five Points Bank --	\$208,021.00
4) Farmers Home Administration --	\$125,176.00

5) Internal Revenue Service --	\$ 14,383.00
6) North Loup River Public Power --	\$ 9,059.89
7) Richard J. Hruza, Jr. --	<u>\$ 36,982.71</u>
TOTAL	\$404,964.67

On February 27, 1997, the debtor filed a motion to avoid the judicial lien of Richard Hruza pursuant to 11 U.S.C. § 522(f). This motion was resisted by Hruza on March 7, 1997, and a hearing on the matter was held on April 24, 1997.

Decision

The entire amount of Hruza's lien may be avoided pursuant to 11 U.S.C. § 522(f).

Discussion

Section 522(f)(1) of the Bankruptcy Code provides in part that:

. . . 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 subsection (b) of this section, if such lien is --

(A) a judicial lien . . .

11 U.S.C. § 522(f)(1). The Bankruptcy Reform Act of 1994 significantly altered § 522 of the Bankruptcy Code in determining whether a judicial lien impairs an exemption. "The Reform Act added § 522(f)(2)(A) to the Code, which 'sets forth a mathematical formula to determine whether a lien impairs an exemption.'" Higgins v. Household Fin. Corp., 201 B.R. 965, 967 (BAP 9th Cir. 1996). That subsection provides:

For purposes of this subsection, a lien shall be considered to impair an exemption to the extent that the sum of --

(i) the lien,

(ii) all other liens on the property; and

(iii) the amount of the exemption that the debtor could claim if there were no liens on the property;

exceeds the value that the debtor's interest in the property would have in the absence of any liens.

11 U.S.C. § 522(f)(2)(A).

In order to determine whether a lien impairs an exemption pursuant to § 522(f)(2)(A), a court must add up the values of the liens and exemptions contained in § 522(f)(2)(A)(i), (ii), and (iii), and then determine if the total exceeds the value of the debtor's interest in property without liens. If the total value of (i), (ii), and (iii) is less than the debtor's interest in the property without liens, then the judicial lien does not impair an exemption. If the total value of (i), (ii), and (iii) exceeds the debtor's interest in property without liens, then the judicial lien does impair an exemption, and the lien may be avoided by the amount of the difference. If the amount of the difference is greater than the amount of the judicial lien, the judicial lien may be avoided in full. See, In re Cavenaugh, 1995 WL 602487 (E.D. Penn. Oct. 11, 1995); Higgins, 201 B.R. at 967; Corson v. Fidelity & Guaranty Ins. Co. (In re Corson), 206 B.R. 17 (Bankr. D. Conn. 1997); In re Diegel, 206 B.R. 194 (Bankr. D.N.D. 1997); Butler v. Southern O Corp. (In re Butler), 196 B.R. 329 (Bankr. W.D. Va. 1996); In re Jakubowski, 198 B.R. 262 (Bankr. N.D. Ohio 1996); In re Todd, 194 B.R. 893 (Bankr. D. Mont. 1996); Jones v. Mellon Bank (In re Jones), 183 B.R. 93 (Bankr. W.D. Penn. 1995); In re Johnson, 184 B.R. 141 (Bankr. D. Wyo. 1995); In re Thomsen, 181 B.R. 1013 (Bankr. M.D. Ga. 1995).

In this case, the value of § 522(f)(2)(A)(i), (ii), and (iii) is \$414,964.67 (value of Hruza's judicial lien + value of other liens + \$10,000 homestead exemption). The debtor's interest in the entire 305 acres is \$175,000. However, the debtor may only claim 160 acres as a homestead pursuant to Neb. Rev. Stat. § 40-101 (Reissue 1993), and there is no evidence of that value. Therefore, this court will use the value of the 305 acres, without any decrease for the reduced amount of land actually available for the homestead exemption. The difference between the two amounts is \$239,964.67, an

amount greater than Hruza's judicial lien. Accordingly, the entire amount of Hruza's judicial lien may be avoided.

Hruza has argued that the debtor is only entitled to a homestead exemption regarding the initial five acre tract purchased that contains the home and outbuildings because the debtor purchased the tracts separately and because he owns the five acre tract as a joint tenant and the other as a tenant in common.

However, as construed by the Nebraska Supreme Court, § 40-101 permits a debtor to claim a homestead with regard to two separate tracts of land if the tracts are contiguous and are operated as one farm. Thomas v. Sternhagen (In re Thomas' Estate), 178 Neb. 578, 134 N.W.2d 237 (1965); Whitford v. Kinzel, 92 Neb. 373, 138 N.W. 597 (1912). Furthermore, the homestead applies to both a joint tenancy and a tenancy in common. Giles v. Miller, 36 Neb. 346, 54 N.W. 551 (1893). Therefore, the debtor may claim a homestead exemption in the five acre tract initially purchased and 155 acres of the second tract.

Separate journal entry to be filed.

DATED: May 1, 1997

BY THE COURT:

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

Copies faxed by the Court to:

GIRARD, DONALD 308-532-5275

Copies mailed by the Court to:

Greg Jensen, P.O. Box 310, Ord, NE 68862
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.

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FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:)	
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THOMAS A. HOLT,)	CASE NO. BK96-82049
)	A
<u>DEBTOR(S)</u>)	CH. 11
)	Filing No. 19, 23
Plaintiff(s))	
vs.)	<u>JOURNAL ENTRY</u>
)	
)	DATE: May 1, 1997
<u>Defendant(s)</u>)	HEARING DATE: April 24,
)	1997

Before a United States Bankruptcy Judge for the District of Nebraska regarding Motion to Avoid Lien of Richard J. Hruza, Jr., and resistance thereto.

APPEARANCES

Donald Girard, Attorney for debtor
Greg Jensen, Attorney for Hruza

IT IS ORDERED:

The motion to avoid lien is granted. See memorandum this date.

BY THE COURT:

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

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