

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:)
)
WILLIAM A. WILL,) CASE NO. BK99-80413
)
DEBTOR.) CH. 7

MEMORANDUM

Hearing was held on September 9, 1999, on Motion to Avoid Lien. Appearances: Mary Lee Skaff for the debtor and John Reefer, Jr., for the creditor. 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) and (K).

Facts and Positions of the Parties

When this Chapter 7 bankruptcy case was filed, the debtor, a single man, owned residential real estate, the value of which he scheduled at \$81,000.00. There were mortgage liens against the property in the total amount of \$71,000.00 and two judgment liens, the first in the amount of \$3,087.76 and the second in the amount of \$13,914.29.

Although it does not appear on the face of the schedules that the debtor, a single man, has a right to claim a homestead exemption under Neb. Rev. Stat. § 40-101 et seq., apparently no interested party objected to the homestead claim on a timely basis. Therefore, pursuant to the United States Supreme Court decision in Taylor v. Freeland & Kronz, 503 U.S. 638, 112 S.Ct. 1644, 118 L.Ed. 2d, 280 (1992), for the purposes of this bankruptcy case, the debtor does receive the benefit of the homestead exemption statute.

Initially, the Chapter 7 trustee claimed an interest in the real property on the theory that its value was far in excess of the \$81,000.00 scheduled. The trustee obtained evidence that the property was worth approximately \$93,000.00 and, rather than litigate the valuation issue, the debtor

purchased the estate's interest from the trustee for approximately \$3,000.00.

The debtor then filed a motion to avoid the judicial liens claiming that such liens impaired his Nebraska homestead exemption. The debtor alleges that the total equity in the property, \$22,000.00, must be reduced by hypothetical sales costs in the approximate amount of \$9,600.00. That number must then be reduced by the homestead amount of \$12,500.00. Making such deductions, argues the debtor, will result in the debtor having the complete benefit of the homestead exemption only if part or all of the judicial liens are avoided pursuant to 11 U.S.C. § 522(f)(1)(A).

The judgment lien holder resists the motion to avoid the liens and claims that the hypothetical costs of sale may not be deducted from the equity debtor retains in the property. If the hypothetical costs of sale are not deducted, only a portion of the largest judicial lien may be avoided as impairing the homestead exemption.

Decision

1. In determining whether a judicial lien may be avoided because it impairs the homestead exemption, the hypothetical cost of sale of the property may not be deducted from the debtor's equity in the property.

2. Only the portion of the judicial liens that actually impairs the homestead exemption may be avoided.

Conclusions of Law and Discussion

A. Impairment

The Bankruptcy Code at 11 U.S.C. § 522(f)(1) provides that a debtor "may avoid the fixing of a lien on an interest of the debtor in property to the extent that such a lien impairs an exemption to which the debtor would have been entitled. . .if such lien is a judicial lien other than a judicial lien" which secures a debt for alimony, maintenance, or support. 11 U.S.C. § 522(f)(1)(A). Further, 11 U.S.C. § 522(f)(2) provides the mathematical formulation for determination of whether the judicial lien impairs an exemption. Section 522(f)(2) states that:

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 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.

The majority of courts which have published opinions on this issue have determined that, when applying Section 522(f), market value, not liquidation value, is determinative. See Sheth v. Affiliated Realty & Management Co. (In re Sheth), 225 B.R. 913 (Bankr. N.D. Ill. 1998); In re Sumerell, 194 B.R. 818 (Bankr. E.D. Tenn. 1996); In re Abrahamzadeh, 162 B.R. 676 (Bankr. N.J. 1994); In re Yackel, 114 B.R. 349 (Bankr. N.D.N.Y. 1990); In re Windfelder, 82 B.R. 367 (Bankr. E.D. Pa. 1988); In re Shuttleworth, 12 B.R. 27 (Bankr. W.D. Pa. 1981) *But see* In re Walsh, 5 B.R. 239 (Bankr. D.C. 1980). Therefore, unless a sale has been completed and the costs actually incurred, hypothetical liquidation costs, including the costs of sale, should not be deducted from the fair market value when determining the extent of lien avoidance pursuant to 11 U.S.C. § 522(f)(2). Applying the lien avoidance formula to the facts in this case results in one of the liens being partially avoided.

The approximate fair market value of the property is \$93,000.00. When, according to the statute, one sums the judgment liens of \$3,087.76 and \$13,914.29, the mortgages against the property of \$71,000.00, and the debtor's exemption of \$12,500.00, the total is \$100,502.05. When one takes this amount and subtracts the debtor's interest in the property in the absence of any liens, \$93,000.00, the debtor's exemption is impaired to the extent of \$7,502.05. Therefore, \$7,502.05 of the second judicial lien is avoided because it impairs the debtor's homestead exemption.

B. Avoidance

The purpose of the statutory judicial lien avoidance provision is to protect the debtor's statutory exemption, in this case, a \$12,500.00 homestead exemption.

The judicial lien is partially avoided in this case rather than avoided in full because to do otherwise would produce a windfall to the debtor, equity in the residence in excess of the homestead exemption. See Nelson v. Scala, 1999 WL 768536, __B.R.__(1st Cir. 1999).

Separate journal entry to be filed.

DATED: October 26, 1999

BY THE COURT:

/s/Timothy J. Mahoney
Chief Judge

Copies faxed by the Court to:
09 MYERS, RICHARD

Copies mailed by the Court to:
John Reefe, Jr., 1904 Farnam St., #700, Omaha, NE
68102
Mary Skaff, 7940 Pacific St., Omaha, NE 68114-0402
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.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

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| IN THE MATTER OF: |) | |
| |) | |
| WILLIAM A. WILL, |) | CASE NO. BK99-80413 |
| |) | A |
| <u>DEBTOR(S).</u> |) | |
| |) | CH. 7 |
| |) | Filing No. 11, 15 |
| Plaintiff(s) |) | |
| vs. |) | <u>JOURNAL ENTRY</u> |
| |) | |
| |) | |
| |) | DATE: October 26, 1999 |
| <u>Defendant(s)</u> |) | HEARING DATE: September 9, 1999 |

Before a United States Bankruptcy Judge for the District of Nebraska regarding Motion to Avoid Lien and Resistance b Merchants Credit Adjusters, Inc.

APPEARANCES

Mary Lee Skaff, Attorney for debtor
John Reefe, Jr, Attorney for creditor

IT IS ORDERED:

Seven thousand five hundred two dollars and five cents of the judicial lien in the amount of \$13,914.29 is avoided because it impairs the debtor's homestead exemption. See memorandum filed contemporaneously.

BY THE COURT:

/s/Timothy J. Mahoney
Chief Judge

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