

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

IN THE MATTER OF:)
)
DANIEL DUANE MOYER) CASE NO. 07-11149
)
)
Debtor)

DECISION AND ORDER
DENYING MOTION TO AVOID A JUDICIAL LIEN

At Fort Wayne, Indiana, on August 17, 2007.

This matter is before the court on debtor's motion, filed pursuant to 11 U.S.C. § 522(f)(1), to avoid a judicial lien which allegedly impairs an exemption in real estate. The lien in question is held by First Federal Savings Bank. Notice of the motion has been given to the lienholder and there has been no objection thereto. Although there have been no objections to the motion, the court notes that neither the notice of the motion and opportunity to object thereto nor the associated proof of service are dated. See, N.D. Ind. L.B.R. B-2002-2(c)(7). Without this information, the court cannot determine if or when notice of the motion with the opportunity to object was given, and therefore, whether the notice was proper. Ordinarily, when the debtor has not given proper notice to the lienholder, the court orders the movant to serve an amended notice which corrects the deficiencies in the original notice of the motion. In this instance, however, there is little point in doing so, because the motion itself suffers from deficiencies which would prevent the court from granting it even if notice had been properly given.

Lien avoidance pursuant to § 522(f)(1) is available only where the judicial lien impairs a claimed exemption. The concept of impairment was reduced to a mathematical formula by the amendments to § 522(f) promulgated by the Bankruptcy Reform Act of 1994. 11 U.S.C.

§ 522(f)(2)(A); In re Thomsen, 181 B.R. 1013, 1015 (Bankr. M.D. Ga. 1995). When the amount due on account of the liens sought to be avoided, all other liens on the property and the amount of the debtor's exemption "exceeds the value that the debtor's interest in the property would have in the absence of any liens" the debtor's exemption is impaired. 11 U.S.C. §522(f)(2)(A)(I) thru (iii). Thus, in order for the court to determine if a judgment lien impairs an exemption to which a debtor may be entitled, in addition to identifying the property subject to the judicial lien, the motion must provide information concerning the value of the property, the amount due on account of all liens against it, and the amount of the exemption claimed by the debtor. 11 U.S.C. § 522(f)(2)(A); see also Thomsen, 181 B.R. at 1015-16.

The present motion asserts that the debtor has claimed an exemption in the amount of \$15,000. The debtor has not, however, actually claimed such exemption in the property. Exemptions in bankruptcy are not automatic. They exist only as a result of the affirmative declaration of the debtor. See, 11 U.S.C. § 522(1); Fed. R. Bankr. P. Rule 4003(a). See also, Matter of Sherbahn, 170 B.R. 137, 140 (Bankr. N.D. Ind. 1994)("the extent of [an] exemption is determined by the value claimed exempt which the debtor places in its schedule of exemptions."). The debtor makes this declaration only through Schedule C - Property Claimed as Exempt. Unless the debtor does so, there is no exemption and nothing for § 522(f) to protect. See, In re Berryhill, 254 B.R. 242, 243 (Bankr. N.D. Ind. 2000); In re Wall, 127 B.R. 353, 356 (Bankr. E.D. Va. 1991)("[I]t does not make sense to allow a lien to be avoided on property that has not been claimed exempt."); Swaim v. Kleven, 1:04-CV-33 (D. N.D. Ind. 2004). See also, In re Mukhi, 246 B.R. 859, 862 (Bankr. N.D. Ill. 2000)(one requirement for lien avoidance under 522(f) is that debtor claim an exemption); In re Rushdi, 174 B.R. 126, 127 (Bankr. D. Idaho 1994)(debtor has burden of showing that property is

listed on debtors schedules as claimed exemption). Although the court notes that the debtor has filed a notice of amendment of Schedule C, to which a copy of an amended schedule C is attached, the debtor has not filed an Amended Schedule C. To file a notice indicating that certain things were filed is not the same thing as filing the documents. Taking the debtor's submission at face value, the only thing filed was a notice of filing an amended schedule. See, N.D. Ind. L.B.R. B-9013-1(a) (all requests shall be named in the caption). See also, N.D. Ind. L.R. 5.1(a). As of yet, there is no amended schedule. The debtor has not claimed an exemption in the real estate described in the motion. As a result, § 522(f) may not be used to avoid any judicial liens against that property.

The motion to the avoid the judicial lien of First Federal Savings Bank is therefore DENIED, without prejudice.

/s/ Robert E. Grant
Judge, United States Bankruptcy Court