

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

IN THE MATTER OF:)
)
DAVID WAYNE WELLS) CASE NO. 05-13437
)
)
Debtor)

DECISION

At Fort Wayne, Indiana, on September 3, 2008.

This matter is before the court on debtor’s motions in this reopened case, filed pursuant to 11 U.S.C. §522(f)(1), to avoid judicial liens which allegedly impair an exemption in real estate. The liens in question are held by Discover Bank and Great Seneca Financial Corporation. Notice of the motions has been given to the lienholders and there has been no objection thereto.¹ Despite the fact that the motions are unopposed, the court cannot properly grant them, because they fail to allege sufficient facts to state a cognizable claim for lien avoidance pursuant to §522(f)(1). See, In re Wall, 127 B.R. 353, 355 (Bankr. E.D. Va. 1991). Unlike adversary proceedings which contemplate notice pleading, motions initiating contested matters are required to state the grounds for relief “with particularity.” See, Fed. R. Bankr. P. Rule 9013.

Not every judicial lien upon exempt property may be avoided. 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

¹As to the motion to avoid the lien held by Discover Bank, the court would note that neither the motion nor the notice of the opportunity to object to it were served upon the lienholder, but upon an attorney who has not filed an appearance in the bankruptcy. This is not appropriate. In re Rae, 286 B.R. 675 (Bankr. N.D. Ind. 2002). See also, Matter of Teknek, LLC, 512 F.3d 342, 346 (7th Cir. 2007).

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 lien 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, the amount of the lien to be avoided, 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.

In order to determine whether the judicial lien against the debtor’s property impairs an exemption, the court must apply the formula set out in § 522(f)(2)(A). Yet, before that becomes necessary, the court should first determine whether the debtor has actually claimed an exemption in the property, because lien avoidance pursuant to § 522(f)(1) is available only where the judicial lien impairs an exemption. Where a debtor has not claimed an exemption in the property subject to a judicial lien, there is 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).

The debtor asserts that it could not claim an exemption in the property, because there was no equity in the property. A review of the debtor's Schedule C reveals that debtor's claimed exemption for the property was \$0.00.² Nothing prevents a debtor from claiming an exemption in encumbered or over encumbered property. While the value of property in relationship to the amounts due on account of liens and encumbrances against it – particularly non-avoidable liens and encumbrances – may well have an impact upon the value of any exemption debtors might wish to claim, equity is not a prerequisite for the claim itself. In re Higgins, 201 B.R. 965, 967-68 (9th Cir. BAP 1996); In re Bartlett, 326 B.R. 436 (Bankr. N.D. Ind. 2005); In re Taras, 304 B.R. 912, 915 (Bankr. S.D. Ga. 2004); Berryhill, 254 B.R. at 244; In re VanZant, 210 B.R. 1011, 1016 (Bankr. S.D. Ill. 1997); Matter of Sherbahn, 170 B.R. 137, 139 (Bankr. N.D. Ind. 1994); In re Bernstein, 62 B.R. 545, 550 (Bankr. D. Vt. 1986). See also, Swaim v. Kleven, 1:04-CV-33 p. 3 (D. N.D. Ind. 2004). Indeed, significant portions of § 522 are designed to allow a debtor to create equity in exempt property. 11 U.S.C. § 522(f), (g), (h), (i). If equity were a prerequisite to a claimed exemption, those avoiding powers would have little meaning.

Without an exemption in the property, there is nothing that § 522(f) can be used to protect, and debtor's motion should be denied. An order doing so will be entered.

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

²The court would also note that this case was closed on July 18, 2007, and was reopened on debtor's motion to file motions to avoid judicial liens. Once a case has been closed, a debtor may no longer amend its exemptions. In re Bartlett, 326 B.R. 436 (Bankr. N.D. Ind. 2005); In re Clear, 1992 WL 1359570 (Bankr. N.D. Ind. 1992). Since the debtor did not claim an exemption in this property before the case was closed, it may not do so now.