

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION AT LAFAYETTE

IN THE MATTER OF:)
)
JEFFREY RICHARD GRUPP) CASE NO. 08-40940
)
Debtor)

DECISION

At Fort Wayne, Indiana, on April 6, 2009.

This matter is before the court on debtor's motions, 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 Citifinancial and Beneficial/HSBC. Notice of the motions has been given to the lienholders and there has been no objection thereto.¹ Despite the fact that the motion is unopposed, the court cannot properly grant it because it fails 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

¹The court notes that service of both the motions and the notices of them fails to comply with Rule 7004(b)(3) of the Federal Rules of Bankruptcy Procedure which requires that service upon a corporation or partnership by first-class mail to be mailed "to the attention of an officer, managing or general agent, or to any other agent authorized by appointment or by law to receive service of process . . ." Fed. R. Bankr. P. Rule 7004(b)(3). In this instance, both the motions and the notice and opportunity to object were mailed to the respondent without being addressed to the attention of an officer, agent, or particular individual. See, In re Wright, 2009 WL 473168, 2009 Bankr. LEXIS 271 (Bankr. N.D. Ind. 2009).

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.

While the present motion may suggest that the debtors have claimed an exemption in the property in question, it never specifically makes such an allegation. It says nothing about any exemption that was actually claimed. More significantly, a review of the schedule of exemptions - Schedule C - reveals that the debtor has not claimed an 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 it does so, there is no exemption.

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). No exemption has been claimed 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.

Furthermore, the notices of the motions and opportunity to object which were served on creditors and parties in interest do not comply with the local rules of this court. See, N.D. Ind. L.B.R. B-2002-2.

- a. The notices do not clearly state the date upon which the motions were filed. N.D. Ind. L.B.R. B-2002-2(c)(2). The notices state that the motions were filed on “September March 12, 2009.” Which month was it?
- b. The notices do not adequately “state the relief sought” by the motion. N.D. Ind. L.B.R. B-2002-2(c)(3). The notices do not identify the property subject to the liens.
- c. The notices do not “contain a brief summary of the ground for the motion or have a copy of the motion attached to it.” N.D. Ind. L.B.R. B-2002-2(c)(4).
- d. The address of the Office of the United States Trustee to which objections should be mailed and upon which the notices and motions were served is incorrect. This case is pending in the Northern District of Indiana, yet the notices and motions were served upon the Office of the United States Trustee for the Southern District of Indiana and ask that objections be mailed to that same address.

For all of these reasons, the motions to avoid judicial liens held by Citifinancial and Beneficial/HSBC will be DENIED.

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