

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)
)
MARK ELMO SENIOR and) CASE NO. 09-35527 HCD
EVA CELESTE SENIOR,) CHAPTER 13
)
DEBTORS.)

Appearances:

Loraine P. Troyer, Esq., counsel for debtors, 121 North Third Street, Goshen, Indiana 46526; and

Bradford R. Shively, Esq., counsel for creditor Nate Roll, Sanders Pianowski, LLP, 300 Riverwalk Drive, Elkhart, Indiana 46516.

DECISION and ORDER

At South Bend, Indiana, on January 23, 2013.

Before the court are the Motion to Avoid Lien Pursuant to 11 U.S.C. § 522(f), filed by the debtors Mark Elmo Senior and Eva Celeste Senior (“debtors”), by counsel, and the Objection to Debtors’ Motion, filed by creditor Nate Roll (“creditor”), by counsel.¹ *See* R. 133, 142. After the parties filed a Response and Reply, the court took the matter under advisement. *See* R. 167. For the reasons that follow, the court denies the debtors’ Motion to Avoid Lien and sustains the creditor’s Objection.²

These facts are not in dispute. The debtors owned real estate on Mark Drive in Bristol, Indiana. The creditor held a judicial lien on that residential property pursuant to a judgment entered in his favor on April 11, 2008, in the Elkhart Superior Court, in the amount of \$59,232.87 plus interest. The debtors filed their chapter 13 petition on November 20, 2009. On Schedule A they listed the residential real estate at issue

¹ The court received notice of the death of the debtor Mark Elmo Senior on April 14, 2012. *See* R. 129. Because the events at issue took place during the debtor’s lifetime, when the property was owned jointly by the debtors, the court refers to the debtors jointly throughout this Decision and Order.

² The court has jurisdiction to decide the matter before it pursuant to 28 U.S.C. § 1334 and § 157 and the Northern District of Indiana Local Rule 200.1. The court has determined that this matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(B).

and stated its current value as \$250,000.00. On Schedule C they claimed an exemption of \$30,000.00 in the real estate and again listed the fair market value of that property as \$250,000.00. *See* Ind. Code § 34-55-10-2(c)(1) (entitling joint debtors to a homestead exemption of \$30,000 under Indiana law). On Schedule D, amended on December 17, 2009, the debtors listed the liens as follows:

\$66,978.37 – creditor’s judicial lien
\$2,707.64 – Tax lien held by Elkhart County Treasurer
\$3,963.11 – Tax lien held by Indiana Department of Revenue

R. 14. In the debtors’ Motion to Avoid Lien, the lien amounts were listed as follows:

\$66,978.37 – creditor’s judicial lien
\$16,397.35 – two Internal Revenue Service liens, dated May 1, 2002 and November 12, 2007
\$8,319.05– tax lien held by the Elkhart County Treasurer

R. 133 at 2. Those liens, in total, amount to \$91,694.77. The creditor agrees with that figure. *See* R. 142 at 6. The court therefore finds that the cumulative total of the liens against the debtors’ residential property is \$91,694.77.

In their Motion to Avoid Lien, the debtors alleged that the value of the real estate was \$118,000.00, rather than \$250,000.00, on the ground that, when the Trustee listed the real estate for sale, the highest and best offer received for it was \$118,000.00.³ Using those figures, the debtors argued that the creditor’s lien was partially avoidable pursuant to 11 U.S.C. § 522(f) and specifically that the lien should be avoided in the amount over and above \$54,283.60. *See* R. 133 at 2. The creditor objected, asserting that the value of the property sought to be exempted was to be determined by its value on the date of the debtors’ bankruptcy petition. *See* R. 142 at 5. Because the debtors declared that valuation to be \$250,000.00, he argued, the debtors’ exemption was not impaired and they were not entitled to avoid the creditor’s judgment lien. *See id.* at 8.

³ The debtors also alleged that the costs of the sale were estimated at \$9,000.00. The court notes that, on June 7, 2012, the court entered an Order Authorizing Sale of Real Estate which granted the sale of the real estate free and clear of liens and stated that the liens would attach to the proceeds of the sale of the property in an amount to be determined by the court at a later date. *See* R. 140.

DISCUSSION

Section 522(f) of the Bankruptcy Code permits the avoidance of judicial liens. It provides 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 . . . if such lien is . . . a judicial lien.”

11 U.S.C. § 522(f)(1)(A). The statute provides the means for calculating the impairment:

[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). The statute also defines “value” to mean “fair market value as of the date of the filing of the petition” in § 522(a)(2). The debtors, as the movants seeking to avoid the judicial lien, have the burden of proving, by a preponderance of the evidence, each element of the § 522(f) lien avoidance calculation. *See Schoonover v. Karr*, 285 B.R. 695, 700 (S.D. Ill. 2002); *In re Kelly*, 350 B.R. 778, 787 (Bankr. N.D. Ill. 2006).

The Seventh Circuit has stated clearly that “the date of valuation of an asset for purposes of determining whether it can be exempted is the date on which the petition for bankruptcy is filed; it is not a later date on which the asset may be worth a lot more.” *In re Polis*, 217 F.3d 899, 902 (7th Cir. 2000); *see also In re Willett*, 544 F.3d 787, 791 (7th Cir. 2008); *In re Patterson*, 825 F.2d 1140, 1144 (7th Cir. 1987). Accordingly, the parties are required to apply § 522(f) using the petition date as the operative date for determining the value of the debtors’ residence.

There is no challenge to the debtors’ assertion that they hold an interest in the residential property and a valid Indiana statutory homestead exemption in it, or to creditor’s claim that he holds a valid judicial

lien under Indiana law on that property. The issue is whether the creditor's lien impairs the debtors' exemption and therefore is avoidable.

It is clear from the statute and the case law that the value of the debtors' interest in the property is determined on the petition date, November 20, 2009, and not on the later sale date, when the property was worth much less. The debtors listed the fair market value of the property on their bankruptcy schedules at \$250,000.00. In addition, the Schultz Appraisal Services, Inc., completed an Appraisal Report on June 7, 2012, which also reported that the market value of the real estate on November 20, 2009, was \$250,000.00. *See R. 142, Ex. A.*

To determine whether the creditor's judicial lien impairs these debtors' exemption, the court turns to the arithmetic calculation of § 522(f)(2) and follows its mathematical requirements: "[A]dd (i) the lien the debtor seeks to avoid, (ii) all other liens, and (iii) the exemption amount in the absence of all other liens, and subtract the value of the debtor's interest in the property in the absence of all liens." *In re Kelly*, 350 B.R. at 787. In this case, the following figures were presented by the debtors, who had the burden of proving that the creditor's lien could be avoided:

\$66,978.37 – creditor's judicial lien
\$16,397.35 – two Internal Revenue Service liens, dated May 1, 2002 and November 12, 2007
\$8,319.05 – tax lien held by the Elkhart County Treasurer
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\$91,694.77 – TOTAL liens
\$30,000.00 – homestead exemption
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\$121,694.77 – TOTAL of liens and exemption

When comparing that sum (\$121,694.77) to the property's value on the date of the debtors' petition (\$250,000.00), the court finds that the liens and the exemption are less than the debtors' interest in the property and that there is equity in the property in the amount of \$128,305.23 to support the liens without impairing the homestead exemption. *See In re Marcovitz*, 2011 WL 5041507 at *6 (Bankr. D. Idaho, Oct. 24, 2011) (allowing partial avoidance of amount of creditor's lien). Therefore, it concludes, the creditor's judicial lien does not impair the debtors' homestead exemption and thus is not subject to avoidance.

Accordingly, for the reasons set forth in this Decision and Order, the Debtors' Motion to Avoid Lien is denied and the creditor's Objection to Debtors' Motion is sustained.

SO ORDERED.

/s/ HARRY C. DEES, JR.
HARRY C. DEES, JR., JUDGE
UNITED STATES BANKRUPTCY COURT