

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF INDIANA  
FORT WAYNE DIVISION

IN THE MATTER OF: )  
 )  
RALPH DAVID ROWE ) CASE NO. 05-11073  
TERESA IRENE ROWE )  
 )  
Debtors )

**DECISION**

At Fort Wayne, Indiana, on December 1, 2005.

This matter is before the court on debtors' motion, 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 Steuben County Office of Family and Children and Household Finance. Notice of the motion has been given and there have been no objections thereto.<sup>1</sup> 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

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<sup>1</sup>The notice of the motion and opportunity to object which was served on creditors and parties in interest does not comply with the local rules of this court. See, N.D. Ind. L.B.R. B-2002-2. The certificate of service accompanying the notice does not indicate that the notice was served upon one of the lienholders, Household Finance. Furthermore, the notice is less than clear as to which liens the debtors seek to avoid, as there is some reference to a possible additional lien held by Ameriquet Mortgage.

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. The motion will be DENIED.

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