

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

IN THE MATTER OF:)
)
MITCHELL J. FREMION) CASE NO. 05-14422
)

DECISION

At Fort Wayne, Indiana, on December 2, 2005.

This matter is before the court on debtor’s motion, filed pursuant to 11 U.S.C. §522(f)(1), to avoid judicial liens which allegedly impair an exemption in shares of stock and various household goods. The liens in question are held by Cindy G. Fremion and Latrielle Wheat. Notice of the motion has been given to the lienholders¹ and one of them, Cindy G. Fremion, has filed an objection. Although such an objection would usually prompt the court to hold on hearing on the motion, in this case, the court cannot properly grant the motion 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

¹The 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 notice does not correctly state the date upon which the motion was filed. N.D. Ind. L.B.R. B-2002-2(c)(2). The motion was filed on October 17, 2005, while the notice refers to a motion filed on October 14, 2005. Additionally, the notice does not adequately “state the relief sought” by the motion, N.D. Ind. L.B.R. B-2002-2(c)(3), because the notice does not identify the property subject to the liens.

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).

While the present motion may suggest that the debtor has 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 shares of stock or the household goods.

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 property described in the motion. As a result, § 522(f) may not be used to avoid any judicial liens against the property. The motion will be DENIED.

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