

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF IOWA

IN RE:)
) Chapter 7
MICHAEL M. MALATEK,)
) Bankruptcy No. 03-02281
Debtor.)

ORDER RE: MOTION TO AVOID LIENS

This matter came before the undersigned on October 20, 2009 on Debtor's Motion to Avoid Liens on Exempt Property. Debtor Michael Malatek appeared with attorney Michael Mollman. Creditor F.J. Krob & Co. ("Krob") was represented by attorney Jon McCright. After the presentation of evidence and argument, the Court took the matter under advisement. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(B) and (K).

STATEMENT OF THE CASE

Debtor seeks to avoid judgment liens, claiming they impair his homestead exemption. Krob objects. It asserts the homestead is not exempt from its judgment which arose from debt predating Debtor's acquisition of his homestead.

FINDINGS OF FACT

Debtor contracted with Krob for the delivery of feed for his farm operation between 10/22/96 and 4/19/97. When Debtor failed to pay for the feed, he signed a Promissory Note in Krob's favor on 7/11/00 in the amount of \$5,388. Krob subsequently sued on the note in Small Claims Court and received a judgment for \$4,000 plus interest on 3/29/01

In November 1998, Debtor and his wife moved into a mobile home on farm real estate at 2968 240th Street, North Liberty, Iowa. Debtor had received a partial interest in the farm real estate with his three siblings when their father, Marvin Malatek, died in June 1995 without a will. Debtor's wife, Barbara Malatek, would not move to the house on the farm at that time because it wasn't "up to her standards". Prior to Marvin Malatek's death, Debtor and his wife had lived at 245 Juniper Court, North Liberty, Iowa since January 1978.

Barbara Malatek testified that she and Debtor have been married for 34 years, but they have not always resided together. They lived at 245 Juniper Court for 20 years until they sold it

in January 1998. At that time, Ms. Malatek signed a lease for an apartment at 20 Sugar Creek Lane. She and Debtor moved to the mobile home on the farm property in November 1998.

Both Debtor and Ms. Malatek testified that Debtor lived at the farm after his father died. Debtor testified that he kept all his possessions at the farmhouse and slept there, even though his wife refused to move there because it was not "up to her standards". He stated he was trying to fix it up and get it cleaned up and considered it his residence. In 1998, Debtor decided to purchase a mobile home so his wife would move in with him. They purchased the mobile home and placed it on the farm property in November 1998.

Krob presented testimony from Russell Swenka who worked in sales for Krob for 26 years. He sold crop inputs and feed to Debtor and his father. During the time that Debtor's feed debt arose in 1996 and 1997, Mr. Swenka believed that Debtor was residing at the Juniper Court address with his wife. He stated that he could find Debtor at the farm and at Juniper Court at various times during 1997, but he saw no evidence that Debtor was actually living at the farm. Krob's Exhibits show that documents from 1996 and 1997 were addressed to Debtor at the Juniper Court address. Mr. Swenka testified that he would have asked for Debtor's current address before Krob's documents were drafted.

Debtor filed his Chapter 7 petition on June 12, 2003. He amended Schedule C to claim his mobile home and real estate exempt on September 16, 2003. No objections were filed to this claim of exemption. Debtor reopened this case and filed his Motion to Avoid Liens on September 8, 2009. He asserts Krob's small claims judgment impairs his homestead exemption. Debtor argues that Krob is barred from asserting his homestead is not exempt because it failed to timely object to exemptions in 2003.

Krob asserts that the debt underlying its judgment arose prior to the time Debtor acquired his homestead. Thus, it asserts, the homestead is not exempt as to this preacquisition debt under Iowa law. Krob argues that its failure to timely object to the homestead exemption does not bar its objection to Debtor's attempt to avoid its lien.

CONCLUSIONS OF LAW

Under Iowa law, "[t]he homestead of every person is exempt from judicial sale where there is no special declaration of statute to the contrary." Iowa Code § 561.16. Thus, "a judgment lien generally cannot attach to land used and occupied as a

homestead and land designated as a homestead generally cannot be executed upon to enforce a judgment lien." Baratta v. Polk County Health Services, 588 N.W.2d 107, 110 (Iowa 1999).

"Actual occupation of the premises as a home is required, except in cases of temporary absence, to support a claim of homestead; mere use or cultivation is not sufficient." Harris v. Carlson, 205 N.W. 202, 204 (Iowa 1925). A homestead is acquired by actual use and occupation of the property as a homestead. Streeper, 158 B.R. at 788. The date when a person acquires title to the property is not determinative. Id.

Exceptions to the homestead exemption are found in section 561.21, which states, in pertinent part: "The homestead may be sold to satisfy debts . . . contracted prior to its acquisition." Iowa Code § 561.21(1). When determining whether a debt predates the acquisition of a homestead under section 561.21(1), "[t]he date of contracting the debt is the test, and not that of the rendition of the judgment." Bills v. Mason, 42 Iowa 329, 334 (1876); Streeper, 158 B.R. at 788. The judgment lien relates back to the contracting date for purposes of determining the applicability of section 561.21(1). Bills, 42 Iowa at 334; In re Versluis, No. 94-61420, slip op. at 2 (Bankr. N.D. Iowa Jan. 5, 1995).

Entitlement to an exemption and entitlement to avoid a lien on exempt property are separate questions. In re Indvik, 118 B.R. 993, 1007 (Bankr. N.D. Iowa 1990). "The lien avoidance motion does not place in question the [debtors'] entitlement to the exemption, merely their entitlement to avoidance of the lien." Streeper, 158 B.R. 783, 788 (Bankr. N.D. Iowa 1993); see also, Meseraull v. Rick Miller Constr., Inc., 82 F.3d 421, at *1 (8th Cir. 1996) (unpublished decision; stating judgment creditor's failure to object to the claimed exemption does not bar it from challenging the debtor's ability to avoid a lien); In re Schoonover, 331 F.3d 575, 578 (7th Cir. 2003) (holding that lienholders may wait for a motion to avoid lien to object to exemptions).

Pursuant to 11 U.S.C. § 522(f)(1)(a), the Court may grant a debtor's motion to avoid a judicial lien if such lien impairs an exemption to which the debtor would otherwise be entitled. Under Iowa law, a debtor is not entitled to claim a homestead exemption against preacquisition debt. Iowa Code § 561.21(1). Therefore, a lien arising from such a debt does not impair an exemption to which the debtor would otherwise be entitled. Meseraull, 82 F.3d 421, at *1-2, aff'g In re Meseraull, No. 94-11048 (Bankr. N.D.

Iowa Nov. 18, 1994); Streeper, 158 B.R. at 787; In re Rubino, 2004 WL 1701105, at *1 (Bankr. N.D. Iowa May 28, 2004).

ANALYSIS

Pursuant to the foregoing, the Court finds that the debt was contracted with the agreement between Debtor and Krob dated October 22, 1996. Formalizing the debt with the promissory note in 2000 and reducing it to judgment in 2001 do not change the date that it was contracted. In addition, the Court finds that Krob is not barred from challenging Debtor's ability to avoid the judgment lien by its failure to timely object to exemptions in 2003. It is settled law in this district that the exemption issue and the lien avoidance issue are separate questions.

The remaining issue is whether the farm property was Debtor's homestead on October 22, 1996. The Court must decide whether Debtor established the farm as his homestead when he inherited an interest in the real estate on his father's death in June 1995 or when he moved into the mobile home on the property with his wife in November 1998. The only evidence Debtor offered to show he established his homestead on the farm property prior to contracting the debt was his and his wife's statements that he was living in the farmhouse on the property during that time period.

In contrast, Krob's salesman, Mr. Swenka, testified that he asked Debtor for his address before preparing documents and Debtor gave him the Juniper Court address. Also, Mr. Swenka testified that he could find Debtor at either the Juniper Court house or at the farm at various times during the period. The farmhouse was likely in a state of disrepair after Marvin Malatek's death. Ms. Malatek testified that the reason she refused to live there was the farmhouse was not up to her standards. And, the home where Debtor and his wife had lived for almost 20 years remained occupied by at least Ms. Malatek, according to the testimony, until early 1998.

The record presented establishes that Debtor established a homestead on Juniper Court in North Liberty in 1978 and maintained that homestead for a considerable period. The burden is upon Debtor to establish an abandonment of that homestead and establishment of his homestead on the farm property in question. Viewing the record as a whole, the Court concludes as a fact that Debtor had not abandoned the homestead in North Liberty and did not transfer his homestead to the farm by actual use and occupation before he contracted with Krob in October 22, 1996. It is the factual conclusion of this Court that, when the debt

arose between October 1996 and April 1997, Debtor's homestead was the Juniper Court home where he lived with his wife. Even though Debtor periodically stayed at the farmhouse, the evidence supports a finding that Debtor did not intend to permanently reside at the farm property until late 1998 when he and his wife moved into the mobile home which they placed on the property. Therefore, the farm real estate is not exempt from the debt to Krob and Debtor is not entitled to avoid Krob's lien on the real estate.

WHEREFORE, Debtor's Motion to Avoid the Lien of F.J. Krob & Co. is DENIED.

FURTHER, Debtor's real estate is not exempt from F.J. Krob & Co.'s judgment lien.

FURTHER, counsel for Debtor is directed to submit proposed orders regarding each of the remaining lienholders listed in the Motion to Avoid Liens for the Court's consideration.

DATED AND ENTERED: November 9, 2009



PAUL J. KILBURG
CHIEF BANKRUPTCY JUDGE