

# In the United States Bankruptcy Court

## for the Northern District of Iowa

DAVID L. WINKOWITSCH, LAURA K.  
WINKOWITSCH

Debtors.

Bankruptcy No. 93-60712LW

Chapter 7

Contested No. 3571

### ORDER RE: MOTION TO AVOID LIEN

This matter came on for hearing before the undersigned on August 18, 1993 on Motion to Avoid Lien by Debtors David and Laura Winkowitsch. Debtors were represented by Attorney James V. Gibson. Attorney Kathleen Corcoran represented creditor Monte Hefty. The Court issues its findings of fact and conclusions of law pursuant to Rule 7052 F.R.B.P. This is a core proceeding pursuant to 28 U.S.C. 157.

Debtors have claimed their personal residence exempt as their homestead under Iowa Code sec. 561.16. No creditors filed a timely objection to this claim of exemption. Debtors' Motion to Avoid Liens sought to avoid several judicial liens on their homestead under 11 U.S.C. 522(f)(1). Liberty Bank & Trust filed an objection. While not present at this hearing, the Court was informed that Liberty Bank & Trust had reached an agreement with Debtors regarding its objection. A stipulated order was entered on August 27, 1993 denying Debtors' motion to avoid Liberty Bank & Trust's lien. Other lienors include Hobson, Cady & Cady; Willow Tree Investments; and Clerk of the District Court of Butler County. These parties filed no objection to the Motion to Avoid Liens and the Court entered an order on August 9, 1993, allowing their liens to be avoided under 522(f)(1).

The remaining creditor holding a judicial lien against the homestead is Monte Hefty, who obtained a judgment against Debtors on May 20, 1992 for \$7,898.86 plus interest and costs. Debtors had an arrangement with Hefty to purchase 10 cows through two "Lease Agreements." The judgment in Butler County District Court resulted from Hefty's action against Debtors for conversion of these cows. Debtors have stipulated that Hefty's judgment was entered prior to the acquisition of their homestead.

Debtors assert that their homestead is exempt from Hefty's judicial lien. They state that the lien impairs their exemption and may be avoided under 522(f)(1). Debtors claim that Hefty's judgment does not represent a purchase money interest. They also assert that Hefty may not object to lien avoidance because he failed to timely object to their claim of exemptions. Hefty argues that Debtors may not avoid his judicial lien because it arose from a debt contracted prior to Debtors' acquisition of their homestead. He asserts he did not waive objections to lien avoidance by failing to object to exemptions. He also argues that Debtors used the proceeds from the sale of his 10 cows to purchase the homestead.

In In re Streeper, No. 93-10013LC (Bankr. N.D. Iowa Aug. 10, 1993), Judge Edmonds considered issues nearly identical to those presented here. He held that a creditor may object to avoidance of its judicial lien even though no objection was made to exemptions. Id. slip op. at 8. Entitlement to exemptions and to avoid liens are separate questions. Id. at 4. The debtor has the burden to prove the elements of 522(f)(1) to be entitled to lien avoidance. Id. The lack of objection to exemptions by a creditor does not absolve the debtor from having to prove the exempt property is appropriate property for lien avoidance. In re Indvik, 118 B.R. 993, 1007 (Bankr. N.D. Iowa 1990). The debtor may not use the exempt status of property as proof by preclusion that it is appropriate for lien avoidance. Id.

In Streeper, Judge Edmonds also addressed the issue of whether debtors may avoid a judicial lien which arose prior to acquisition of their homestead.

A debtor is not entitled to an exemption under Iowa Code 561.16 and 561.21(1) for debt contracted prior to the acquisition of the homestead. . . . The debtor would not be entitled to the homestead exemption even in the absence of a judicial lien. A homestead subject to a lien for the types of debt in 561.21(1) . . . would not be exempt if the lien were avoided. Therefore, the lien would not be avoidable under 522(f).

Streeper, slip op. at 9. This analysis relies upon and is consistent with the U.S. Supreme Court holding in Owen v. Owen, 111 S. Ct. 1833, 1838 (1991). The Court held that, in considering whether 522(f) applies, the first inquiry is whether avoiding the lien would entitle the debtor to an exemption. Id. On remand, the Eleventh Circuit found that under Florida law, like Iowa law, the homestead is not exempt from judicial liens predating acquisition of the homestead. In re Owen, 961 F.2d 170, 171 (11th Cir.), cert. denied, 113 S. Ct. 659 (1992). The lien was not avoidable because there was no exemption the debtor would have been entitled to but for the lien. Id. at 173.

This analysis also comports with the holding of Farrey v. Sanderfoot, 111 S. Ct. 1825, 1830 (1991). The Court considered whether a lien arising from a divorce decree and attaching to property the debtor received in the divorce decree could be avoided under 522(f)(1). Id. at 1828. The Court held that the debtor cannot use 522(f)(1) to avoid a lien on an interest acquired after the lien attached. Id. at 1830. "[Section] 552(f)(1) of the Bankruptcy Code requires a debtor to have possessed an interest to which a lien attached, before it attached, to avoid the fixing of the lien on that interest." Id. at 1831.

The Courts of the Northern and Southern Districts of Iowa have come to the same conclusion. In re Ellingson, 82 B.R. 88, 92 (N.D. Iowa 1986), held that 522(f)(1) is not available to avoid a lien on a homestead arising from an antecedent debt. Such a lien does not impair an exemption. Id. In re Nehring, 84 B.R. 571, 576 (Bankr. S.D. Iowa 1988), held that the debtor may not exercise lien avoidance to the extent there is an antecedent debt which cannot be satisfied by exhaustion of other property of the debtor under Iowa Code sec. 561.21(1).

Applying the above analyses to this case, the Court concludes that Debtors may not avoid Hefty's judicial lien. Hefty is not barred from objecting to lien avoidance by his failure to timely object to exemptions. Debtors have stipulated that Hefty's judgment was entered prior to the time they acquired their homestead. Under Iowa Code sec. 561.21, a homestead is not exempt from antecedent debt. Therefore, Hefty's judicial lien arising from antecedent debt does not impair Debtors' homestead exemption. Debtors may not avoid the lien under 522(f)(1).

**WHEREFORE**, Debtors' Motion to Avoid Lien of Monte Hefty is DENIED.

**FURTHER**, Monte Hefty's judgment remains a lien on the property Debtors claim exempt as their homestead.

**SO ORDERED**, this 20th day of September, 1993.

Paul J. Kilburg, Judge  
U.S. Bankruptcy Court