

# **In the United States Bankruptcy Court**

## **for the Northern District of Iowa**

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GARY RAY ACKERMAN, LINDA SUE  
ACKERMAN  
Debtors.

Bankruptcy No. 94-21846KD

Chapter 7

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### **ORDER RE: MOTION TO AVOID LIEN**

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On March 8, 1995, the above-captioned matter came on for hearing pursuant to assignment. Debtors Gary and Linda Ackerman appeared in person with Attorney Thomas McKay. Attorney Steven Kahler appeared on behalf of Maquoketa State Bank. This is a core proceeding pursuant to 28 U.S.C. 157(b)(2)(B, K).

#### **STATEMENT OF THE CASE**

For ten years, Debtors have operated a masonry business in Bellevue, Iowa. This is Gary Ackerman's primary business. Linda Ackerman is also actively involved in the business. She manages the office: doing bookkeeping, handling payroll, and attending incoming and outgoing telephone calls. She periodically helps on job sites. She mixes mortar, makes deliveries to job sites, and operates some of the equipment including the stone splitters and masonry mixers. She also delivers materials to the job, removes debris and performs clean-up work. She has helped set up and take down scaffolding. Mrs. Ackerman does not lay brick and does not consider herself to be an apprentice or a journeyman mason. However, she considers herself an important part of the business. Mr. Ackerman testified that he could not have operated the business for this length of time without his wife's help.

Debtors testified that immediately prior to filing the bankruptcy petition in November of 1994, they had difficulty collecting payment for several jobs. This created financial and cash flow problems. From August until December, 1994 Mr. Ackerman took a job with Mulligan Masonry, where he was required to provide his own tools of the trade, including trowels and other small tools. He was not required to provide stone splitters, mixers or scaffolding.

Debtors testified that the Ackerman Masonry Company is an ongoing business. While Mr. Ackerman worked for Mulligan, he continued to retain a crew. Although off the job site, he provided supervision in completing remaining jobs. Since January of 1995, he has not worked for Mulligan. Ackerman Masonry Company has not had any contracts since January, partly because of the weather. Debtors testified that they have several masonry jobs scheduled for Spring and Summer of 1995, as soon as weather permits concrete construction. Debtors assert their intention to continue in the concrete masonry construction business. They have attempted to maintain a crew in place.

Since filing for bankruptcy, Mrs. Ackerman undertook outside employment as a computer technician. However, she continues to perform bookkeeping and office work for the Ackerman business.

Debtors move to avoid liens held by Maquoketa State Bank. They claim certain items exempt as tools of the trade under Iowa Code sec. 627.6(10). Debtors testified that they need these tools of the trade for their future masonry business. The items they claim exempt and their values are:

a. Two stone splitters	\$1,200.00 total
b. One trailer	\$ 800.00
c. Two concrete mixers	\$2,000.00 total
d. Scaffolding	\$6,000.00 total
e. Pressure washer	\$1,800.00
f. Miscellaneous tools	\$1,500.00 total
g. Brick and block	\$ 500.00.

These items have a total aggregate value of \$13,800.00. These values represent fair market value and are reasonable valuations based upon the evidence presented.

Maquoketa State Bank objects to Debtors' motion to avoid lien. Bank officer, Kevin Burns, testified that some of the tools are subject to a purchase-money security interest. Various promissory notes Debtors and the Bank signed were offered into evidence. The items in question are:

- a. Stone mortar mixer with a Honda engine
- b. Five sections of 5 ft. Scaffold with bracing & aluminum planking
- c. Ratchet
- d. One two and a half gallon gas can
- e. One Champion heater

Debtors agree with the Bank's assertion that these items are subject to purchase-money security agreements. The liens on items subject to the Bank's purchase-money security interest are not avoidable under 522(f)(1)(B). Comparing the items Debtors claim exempt against the items which are encumbered by the Bank's purchase-money security agreement, the total value of the items claimed exempt is reduced to \$11,200.00. The ratchet, gas can and heater are not claimed exempt by Debtors and are, therefore, not necessary for this analysis. The difference of \$2,600.00 is based on the remaining two items:

- a. One mixer with a Honda engine \$ 800.00
- b. Five sections of 5 ft. scaffold with bracing & aluminum planking \$1,800.00

The Bank's interest in all the items first listed, except the mixer with a Honda engine and five sections of scaffold with bracing & aluminum planking, remains subject to Debtors' claim of exempt status and potential lien avoidance.

The Bank argues that Debtors have terminated their masonry construction business and are not entitled to claim tools of the masonry trade as exempt. The Bank also alleges that Mrs. Ackerman is not and has never been a mason and thus, is unable to claim any tools of the trade exempt under Iowa Code sec. 627.6(10). A question is also raised whether the trailer and the brick and block are tools of the trade.

## CONCLUSIONS OF LAW

A debtor in Iowa may only claim exemptions under Iowa law. In re Myers, 56 B.R. 423, 425 (Bankr. S.D. Iowa 1985); Iowa Code

sec. 627.10. A valid exemption under state law is a prerequisite to receiving relief through lien avoidance. Myers, 56 B.R. at 425. State law governs the availability and scope of exemptions while federal law determines the availability of 522(f)(1) lien avoidance. In re Thompson, 884 F.2d 1100, 1102 (8th Cir. 1989). Section 522(f)(1) "extinguishes the property rights of creditors." In re Streeper, 158 B.R. 783, 787 (Bankr. N.D. Iowa 1993). However, "lien avoidance does not follow automatically." In re Indvik, 118 B.R. 993, 1004 (Bankr. N.D. Iowa 1990). Debtor has the burden of proving entitlement to the lien avoidance protection of 522(f)(1). Streeper, 158 B.R. at 786; In re Winkowitsch, No. 93-60712LW, slip op. at 2 (Bankr. N.D. Iowa Sept. 20, 1993).

Under Iowa Code sec. 627.6(10), Debtors may exempt tools of the trade. In re Graettinger, 95 B.R. 632, 634 n.4 (Bankr. N.D. Iowa 1990); In re Guynn, No. L-91-1545C, slip op. at 1 (Bankr. N.D. Iowa Aug. 17, 1993). Each Debtor is entitled to exempt tools of the trade up to an aggregate value of \$10,000.00. Iowa Code sec. 627.6(10). If Debtors are entitled to claim tools of the trade exempt, they are also entitled to avoid any nonpossessory, nonpurchase-money security liens on the tools of the trade in favor of Maquoketa State Bank, pursuant to 522(f)(1). Section 522(f)(1) states:

Notwithstanding any waiver of exemptions but subject to paragraph (3), 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 under subsection (b) of this section, if such lien is-

...

(B) a nonpossessory, nonpurchase-money security interest in any--

...

(ii) implements, professional books, or tools of the trade of the debtor or the trade of a dependent of the debtor.

The Bankruptcy Code does not define purchase money security interest. Courts have uniformly looked to the law of the state to determine whether or not a purchase money security interest exists. In re Hansen, 85 B.R. 821, 824 (Bankr. N.D. Iowa 1988); In re Ganders, 176 B.R. 581, 583 (Bankr. N.D. Okla. 1995).

It is well established that 522(f)(1) allows debtors to avoid liens which impair an exemption to which Debtors would in fact be entitled but for the lien itself. Owen v. Owen, 111 S. Ct. 1833, 1836 (1991); Streeper, 158 B.R. at 786; Indvik, 118 B.R. at 1004. The Court must determine whether Debtors are entitled to exempt these items, and if so, it must then determine whether the lien impairs that exemption. Streeper, 158 B.R. at 786. See In re Kahler, No. 94-10285KC, (Bankr. N.D. Iowa June 15, 1994).

Debtors claim exempt the tools of the trade they use in the Ackerman Masonry business. The Court has determined which items are subject to a purchase money security interest. The total value of the remaining items which Debtors claim exempt is \$11,200.00. The tools of the trade not subject to a purchase-money security interest are subject to lien avoidance.

However, before the Court grants Debtors Motion to Avoid Lien under 522(f)(1), it must determine: (1) whether or not Debtors have an ongoing business; (2) whether Mrs. Ackerman is entitled to exempt some items as tools of the trade even though she is not a mason; and (3) whether a flatbed trailer and brick and blocks constitute tools of the masonry construction business.

The Bank asserts that Debtors have ceased work in the masonry business. In considering when a debtor is involved in a particular trade or business, this Court held that "Debtors claiming an exemption for tools of the trade must be engaged in the trade at the time of filing the bankruptcy petition." In re Jenkins, No. 93-51649XS, slip op. at 6 (Bankr. N.D. Iowa May 31, 1994), citing Myers, 56 B.R. at 426. In In re Bishop, No. 93-60176LW, slip op. at 3 (Bankr. N.D. Iowa June 29, 1993), this Court held that a temporary cessation of a particular business does not per se defeat the exemption, under Iowa law, if the debtor intends to return to that business in the future. A key factor is the intention of the debtors to resume their business operations. Jenkins, slip op. at 7; Bishop, slip op. at 3. See In re Indvik, 118 B.R. at 1008 (explaining that debtor's desire and intent to return to farming, when credible, allows the court to avoid liens impairing debtor's interest on exempt tools of the farming trade).

Debtors have a clear and genuine intent to continue in the masonry construction business. They have several masonry jobs lined up for the near future and have attempted to maintain a crew. At the time of the filing of this petition, Debtors considered the Ackerman Masonry business as a going concern. This Court concludes that Debtors have an ongoing, extant masonry construction business and the Bank's argument to the contrary is rejected.

The Bank argues that Mrs. Ackerman is not, and never has been, a mason and is, therefore, not entitled to claim the tools of the trade exempt pursuant to Iowa Code sec. 627.6(10). This argument runs contrary to the view this Court and most other courts have adopted.

In Kahler, this Court held that "for purposes of the Iowa exemption statute, as well as for lien avoidance under 522(f), [Debtor's wife] was a farmer." Kahler, slip op. at 4, citing In re Peters, 60 B.R. 711, 715 (Bankr. D. Minn, 1986); Accord In re Schmitt, 56 B.R. 708, 709 (Bankr. N.D. Iowa, 1986). In Kahler, the debtor's wife operated farm equipment and did some plowing and discing; she helped feed and care for the hogs, used the grinder to prepare feed for the hogs, and was responsible for farrowing. Id. She helped in planting and hauled seed corn, fertilizer and other supplies to and from the fields during planting season. Id. Finally, the Court concluded that the debtor's wife was "engaged in farming under the [Iowa Code], and thus entitled to claim [exempt] implements and equipment related to [the business operations]." Id.

The facts here are similar to those found in Kahler. The only distinction is in the type of business operations. Mrs. Ackerman operated masonry construction equipment; she mixed mortar, and has run the stone splitters; and she is primarily responsible for the management of the office. She has helped at the job site by removing debris and performing clean-up work. She has made deliveries of materials to the job sites. She has carried materials on the job and has set up and taken down scaffolding. She is indisputably involved in the various operations of this business.

The argument raised by the Bank, for practical purposes, relates only to those items designated as miscellaneous tools with a total value of \$1,500. The Bank's argument largely asserts that masonry is a specialized trade which requires specialized education and equipment. Based upon that specialized training and education, the tools utilized by this occupation are unique to the individual possessing those skills. In the present case, that argument could only appropriately be addressed to the category designated as miscellaneous tools with a total value of \$1,500. The remainder of the equipment,

including the stone splitters, trailer, cement mixer and scaffolding are general tools of the trade used in a general business sense which can be used by trained, as well as untrained, laborers. It is ultimately the conclusion of this Court that, to the extent the Bank's argument has validity, it is largely irrelevant to a determination of the issues in this case. The Court has determined that the Ackerman's have an ongoing masonry business which requires all of the tools of the trade listed with the possible exception of the miscellaneous tools as argued by the Bank. However, under Iowa Code sec. 627.6 (10), each debtor is allowed to exempt up to \$10,000 in the aggregate. The total aggregate value of all assets claimed exempt is less than \$14,000. A judicious exercise of the exemption election effectively renders this entire analysis moot.

This Court concludes that Mrs. Ackerman is entitled to the \$10,000.00 exemption under Iowa law for implements or tools of the trade. Just as in other cases where debtors' spouses have been allowed to claim exemptions under Iowa law, Mrs. Ackerman here is entitled to claim exempt tools of the trade, based on her substantial and continuous involvement in the Ackerman Masonry Company. See In re Jones, 87 B.R. 738 (Bankr. M.D. Ga. 1988) (explaining that debtor does not have to meet statute definition of farmer; he only needs to prove that he is legitimately in the trade using those tools).

The record establishes that Mrs. Ackerman uses and operates these tools, and that in order to continue in business the Ackerman Company needs those tools. Debtors, therefore, have met their burden of proving that Mrs. Ackerman uses these tools in the trade, and is entitled to exempt the tools of the masonry trade.

Finally, this Court must determine whether a flatbed trailer and brick and block constitute tools of the trade under Iowa law. Debtors use the flatbed trailer to transport tools and other related equipment from job site to job site. The test ordinarily applied is whether or not this item is reasonably necessary to Debtors' trade or business. In re La Fond, 791 F.2d 623, 627 (8th Cir. 1986); Graettinger, 95 B.R. at 635.

In Graettinger, this Court applied the Eighth Circuit Court of Appeals' "reasonable necessity" test. Graettinger, 95 B.R. at 635. The debtor in Graettinger claimed exempt as tool of the trade a pick-up truck, which he used to deliver grain bins. This Court held that the pick-up truck was a necessity to carry out his business and the debtors were entitled to avoid the creditor's lien. Id. Accord In re Bulger, 91 B.R. 129 (Bankr. M.D. Ala. 1988) (holding debtor's truck used in pulpwood hauling business was a tool of the trade).

In a similar case, the Bankruptcy Court for the Southern District of Iowa held a debtor's fifth-wheel camper was not an exempt tool of the trade under 627.6(10). In re Honomichl, 82 B.R. 92 (Bankr. S.D. Iowa, 1987). The facts in Honomichl involved a debtor using the trailer primarily as shelter when working away from home. Id. at 94. Additionally, the debtor used the trailer to transport "specialized wearing apparel and a variety of tools and equipment which may not be available in each job site." Id. The court held that the trailer was not a reasonably necessary tool of the debtor's trade because the camper served primarily as a shelter for the debtor. Id.

This case differs from Honomichl and is in accord with La Fond and Graettinger. The flatbed trailer is reasonably necessary for Debtors to pursue business operations in transporting materials and equipment from one job site to another. Debtors do not have additional uses for the flatbed trailer, as did the debtor in Honomichl. Accordingly, this Court concludes that the flatbed trailer is exempt as a tool of the trade.

The Court must lastly determine whether brick and block constitute tools of the trade exempt under 522(f)(1)(B). Although Iowa courts liberally interpret Iowa's exemption statute, this Court must ultimately conclude brick and block are items of inventory and not tools of the trade. In a somewhat analogous case, the Bankruptcy Court determined that salvage lumber was an item of inventory rather than tools of the trade and denied the debtor the right to exempt the lumber. In re Metzger, 33 B.R. 620, 623 (Bankr. N.D. Tex. 1983). Generally, the only practical test is an independent determination of the nature of an item based upon general industry standards. In re Hernandez, 131 B.R. 61, 64 (Bankr. W.D. Tex. 1983). Here, Debtors utilized the brick and block as a filling and support material on various job sites. The materials are utilized once and left on the job site. These materials are most appropriately categorized as general inventory and not tools of the trade. See Iowa Code sec. 554.9109(4)(defining inventory items as goods held by a person who holds them for sale or lease or to be furnished under contracts of service, or if they are raw materials, or materials used or consumed in a business). It is the conclusion of this Court that the brick and block used by Debtors constitute inventory as defined by the Iowa Uniform Commercial Code which would be consistent with standards in the construction industry. Therefore, these items are not tools of the trade and not exempt under Iowa law.

**WHEREFORE**, Debtors' Motion to Avoid Lien is granted as to the following items:

a. Two stone splitters	\$1,200.00 total
b. One trailer	\$ 800.00
c. Concrete mixer with a Briggs engine	\$1,200.00
d. Scaffolding other than the aluminum scaffold valued at \$1,800	\$4,200.00
e. Pressure washer	\$1,800.00
f. Miscellaneous tools	\$1,500.00 total
	\$10,700.00

**FURTHER**, the objection by Maquoketa State Bank is overruled.

**SO ORDERED** this 12th day of April, 1995.

Paul J. Kilburg  
U.S. Bankruptcy Judge