

# In the United States Bankruptcy Court

## for the Northern District of Iowa

### Western Division

---

Mark A. Moulton  
*Debtor(s)*.

Bankruptcy No. 97-00920S  
Chapter 7

---

### ORDER RE: DEBTOR'S MOTION TO AVOID LIEN

---

Debtor Mark A. Moulton requests the court to avoid a mechanic's lien held by The Glass House, Inc. as a lien against exempt real property. Hearing was held July 2, 1997, in Sioux City. Kay E. Dull appeared for the debtor. No one appeared for The Glass House, Inc. This is a core proceeding under 28 U.S.C. § 157(b)(2)(K).

#### Findings

Mark Moulton filed his chapter 7 petition on April 2, 1997, and listed The Glass House, Inc. as holding an unsecured nonpriority claim. By motion filed April 23, 1997, Moulton stated that The Glass House, Inc. held a mechanic's lien against his exempt homestead, and alleged that the lien was a non-possessory, non-purchase money lien. He sought to avoid it under 11 U.S.C. § 522(f)(2). The 1994 amendments to 11 U.S.C. § 522(f) resulted in a renumbering of its subsections, and the court believes Mr. Moulton is actually arguing for lien avoidance under 11 U.S.C. § 522(f)(1)(B). The Glass House, Inc. is in default as it has failed to file an objection to the motion for lien avoidance.

#### Discussion

##### I. Default

The entry of a default judgment under Fed.R.Civ.P. 55 or Fed.R.Bankr.P. 7055 is left to the sound discretion of the court. Valley Oak Credit Union v. Villegas (In re Villegas), 132 B.R. 742, 746 (B.A.P. 9<sup>th</sup> Cir. 1991). *See also* Wright, Miller, & Kane, 10 Federal Practice & Procedure §2685 (2d ed. 1983). Although the moving party may technically be in default, a default judgment does not automatically issue. "If the plaintiff's claim lacks merit and is unsupported by the law, the court may deny a motion for default judgment despite the technical default." In re Wall, 127 B.R. 353, 355 (Bankr. E.D. Va. 1991). A recent Eighth Circuit B.A.P. opinion echoed this position, while noting further that a defaulted debtor would be permitted to appeal the default by challenging the legal sufficiency of the claim. Miller v. Kasden (In re Kasden), \_\_\_ B.R. \_\_\_, 1997 WL 309958, at \*1 (B.A.P. 8<sup>th</sup> Cir. June 11, 1997). Therefore, an examination of the sufficiency of movant's claim is appropriate.

##### II. Lien Avoidance

Section 522(f)(1) of the Bankruptcy Code states:

(f)(1) Notwithstanding any waiver of exemptions...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--

- A. a judicial lien ... or
- B. a nonpossessory, nonpurchase-money security interest in any--
  - i. household furnishings, household goods, wearing apparel, appliances, books, animals, crops, musical instruments, or jewelry that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor;
  - ii. implements, professional books, or tools, of the trade of the debtor or the trade of a dependent of the debtor; or
  - iii. professionally prescribed health aids for the debtor or a dependent of the debtor.

11 U.S.C. § 522(f)(1)(A)and(B).

Two possibilities exist under 11 U.S.C. § 522(f) for avoiding a lien on exempt property. To qualify under the first option (§ 522(f)(1)(A)), the lien must be a judicial lien. Section 101(36) of the Bankruptcy Code defines a judicial lien as a "lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding." The creation of a mechanic's lien is not dependent upon "judgment, levy, sequestration, or other legal or equitable process or proceeding." It is not a judicial lien but a statutory lien, created under Iowa Code § 572.2 (1997). Section 572.2 of the Iowa Code states:

Every person who shall furnish any material or labor for, or perform any labor upon, any building or land for improvement, alteration, or repair thereof ...by virtue of any contract with the owner...shall have a lien upon such building or improvement, and land belonging to the owner on which the same is situated ...to secure payment for material or labor furnished or labor performed.

Case law also supports the proposition that a mechanic's lien is a statutory lien within the meaning of 11 U.S.C. § 101(53). Souers v. Nevada Ready Mix (Matter of Souers), 163 B.R. 346, 349 (Bankr. S.D. Iowa 1994); In re Lionel Corp., 29 F.3d 88, 94 (2d Cir. 1994).

The second possibility for avoiding a lien under 11 U.S.C. § 522(f) is that found in § 522(f)(1)(B). The initial question to consider is whether the mechanic's lien qualifies as a security interest. As noted *supra*, a mechanic's lien is a statutory lien. A statutory lien, by definition, is not a security interest. 11 U.S.C. § 101(53); In re Seel, 22 B.R. 692, 695 (Bankr. D. Kan. 1982).

Additionally, § 101(51) of the Code defines a security interest as a lien "created by an agreement." The effect of this definition is to impart a requirement of voluntariness upon the creation of the lien. A mechanic's lien does not qualify as a security interest because it is automatically created by statute and can be perfected by the lienholder without the consent of the debtor.

Moreover, the real property to which this lien is attached is not included in any of the categories listed in § 522(f)(1)(B)(i)-(iii), thus the lien likewise fails to qualify under subsection (B).<sup>(1)</sup>

The mechanic's lien which Debtor seeks to avoid does not fall under either of the categories permitted by § 522(f)(1)(A) or (B), and as such the motion for lien avoidance will be denied.

IT IS ORDERED that Debtor's motion to avoid the mechanic's lien under 11 U.S.C. § 522(f) is denied. Judgment shall enter accordingly.

SO ORDERED THIS 10<sup>th</sup> DAY OF JULY 1997.

William L. Edmonds  
Chief Bankruptcy Judge

---

1. A further consideration under § 522(f)(1)(B) is the requirement that the security interest be nonpossessory and nonpurchase-money. While it is not clear from the facts, it is possible that the lien of The Glass House, Inc. secures payment of the purchase price of materials, which could further disqualify it under the section.