

# In the United States Bankruptcy Court

## for the Northern District of Iowa

### Western Division

NEAL J. ANTHONY  
DENISE M. ANTHONY  
*Debtor(s).*

Bankruptcy No. 97-00803-S

Chapter 7  
Contested No. 7123

### ORDER RE: MOTION TO AVOID LIEN

The matter before the court is the motion of Neal Anthony, d/b/a Anthony Trucking, to avoid the lien of LeMars Bank and Trust Company. Hearing was held on August 6, 1997 in Sioux City. Wil L. Forker appeared for debtor Anthony. Daniel D. Dykstra appeared for the Bank. This is a core proceeding under 28 U.S.C. § 157(b)(2)(K).

#### FINDINGS OF FACT

Neal Anthony, d/b/a as Anthony Trucking, and Denise M. Anthony filed a joint Chapter 7 petition on March 24, 1997. Their schedule of personal property included the following items:

Office equipment	\$ 1,000.00
3 computers	(\$650)
fax machine	(\$100)
phone system	(\$50)
photocopier	(\$200)
Shop equipment	5,200.00
jacks	(\$200)
forklift	(\$1,000)
power washer	(\$1,000)
various tools	(\$1,500)
skid loader	(\$1,500)
Fuel storage unit & pump	500.00
Lawn mower	3,000.00
Model A John Deere tractor & bucket	500.00
<b>TOTAL</b>	<b>\$ 10,200.00</b>

These items were claimed exempt under Iowa Code § 627.6(10) as tools of the trade. The meeting of the creditors was held on April 28, 1997. No one objected to the Anthonys' claim of exemptions.

On June 19, 1997, the debtors filed a motion under 11 U.S.C. § 522(f)(1)(B)(ii) to avoid the Bank's lien on the items claimed exempt as tools of the trade. On July 8, 1997, Bank filed a resistance to the motion. Bank admitted that its interest in the property at issue is a nonpossessory, non-purchase money security interest, but denied that the items described in the motion, particularly the lawn mower and tractor, are the debtors' tools of the trade. Bank also contended that some of the property was actually owned by the debtors' corporation, Anthony Trucking, Inc. At the hearing on the motion, counsel for debtors made clear that the movant is Neal Anthony only, and that Denise Anthony does not claim the property as tools of her trade. Counsel acknowledged that the total value of the property exceeded the amount Anthony would have been entitled to claim exempt, and stated that he would reconcile the \$200 discrepancy with the Bank if the motion were granted.

## DISCUSSION

Section 522(f) of the Bankruptcy Code provides in relevant part:

(f)(1) [D]ebtor 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....

11 U.S.C. § 522(f)(1)(B)(ii).

The debtor bears the burden of proof on each element of lien avoidance. In re Streeper, 158 B.R. 783, 786 (Bankr. N.D. Iowa 1993). Although the property is deemed exempt under 11 U.S.C. 522(f) because no one objected to the claim of exemption, Taylor v. Freeland & Kronz, 503 U.S. 638, 112 S.Ct. 1644 (1992), Anthony may not establish the elements of lien avoidance by issue preclusion from the Bank's failure to object to the exemption. In re Streeper, 158 B.R. at 786-87; In re Indvik, 118 B.R. 993, 1007 (Bankr. N.D. Iowa 1990). Anthony has the burden of proof that the items of property at issue are his property and that they are the tools of his trade.

Under 11 U.S.C. § 522(f), a debtor may avoid a lien "on an interest of the debtor in property" which impairs an exemption he would have been entitled to under § 522(b) but for the lien. Section 522(b) allows a debtor to take exemptions from property of the estate. Therefore, a debtor must have an interest in the property in order to avoid the creditor's lien. Anthony testified that he purchased the items of property personally, and that the corporation has never owned the equipment. He purchased some of the items before 1988 when the corporation was formed. Bank presented no evidence to refute debtor's testimony. The preponderance of the evidence is that Anthony is the owner of the property.

Anthony's business is hauling freight, both locally and over the road. He also operates what he calls a pit lagoon service, hauling manure for hog farmers and injecting it into the ground. At the peak of his business, he ran 18 trucks. On the date of his bankruptcy filing he had four trucks, and on the date of the hearing on this matter he operated six. He employs six mechanics who also operate the lagoon trucks.

Anthony has his own shop for truck repairs. He uses the forklift to load and unload trailers at a dock. The power washer is used to wash out trucks. He uses the mower to maintain the area where the trucks are parked. The tractor is used to drag the yard and to remove snow in the winter. Office equipment is necessary to dispatch the trucks and to maintain the books and records of the business.

The Bank's objection to lien avoidance on the tractor and mower seems to be that they are not strictly necessary to operate the trucks. The applicable test in determining whether an item can be found a tool of the trade is the "reasonable necessity of the item to the debtor's trade or business." Production Credit Ass'n of St. Cloud v. LaFond (In re LaFond), 791 F.2d 623, 627 (8th Cir. 1986). This standard promotes the debtor's fresh start by allowing the debtor to continue practicing his trade or occupation and earning an income. In re Graettinger, 95 B.R. 632, 635 (Bankr. N.D. Iowa 1988). The court concludes that Anthony has established that the property at issue is reasonably necessary for the operation of his trucking business. The motion should be granted.

Anthony concedes that he makes some personal use of the mower and tractor. This seems to be an incidental benefit of the location of his home above the business. For example, when Anthony clears snow from the yard for his trucks, it also enables him to get in and out on personal business. This incidental effect is not significant enough to prevent a finding that the items of equipment are tools of the Anthony's trade.

The Bank notes that several of the items were described on Anthony's Schedule B as something other than tools of the trade. For example, he listed the lawn mower and tractor under item 33, "other personal property of any kind not already listed," and not under item 27, "machinery, fixtures, equipment, and supplies used in business." Bank's argument, apparently, is that Anthony has admitted the items are not tools of his trade. The court disagrees. Anthony's Schedule C, filed at the same time, showed an intent from the commencement of the case to claim the items exempt under Iowa Code § 627.6(10) as tools of the trade.

### **ORDER**

IT IS ORDERED that the motion of Neal Anthony to avoid the lien of LeMars Bank and Trust Company on tools of the trade is granted to the extent of property valued at \$10,000.00, and is overruled as to property in excess of that value.

IT IS FURTHER ORDERED that Neal Anthony shall have 14 days to delete an item now subject to the motion which has a value of \$200 or more. He may not add new items. The court will allow the amendment to the motion nunc pro tunc to August 6, 1997. If the debtor fails to delete an item as required, the court will vacate this order and deny the motion in its entirety.

SO ORDERED THIS 25<sup>th</sup> DAY OF AUGUST 1997.

William L. Edmonds  
Chief Bankruptcy Judge

I certify that on I mailed a copy of this order by U.S. mail to Wil Forker, Daniel Dykstra, Don Molstad, 2002 List and U.S. Trustee.