

THIS OPINION IS NOT INTENDED FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:)	Case No. 95-50849
)	
DONALD LEE WITHROW)	Chapter 7
POLLY ANN WITHROW)	
)	JUDGE MARILYN SHEA-STONUM
Debtors)	
)	<u>ORDER ALLOWING DEBTORS</u>
<u>TO</u>)	<u>PARTIALLY</u>
<u>CREDITOR'S</u>)	<u>AVOID</u>
)	<u>LIEN</u>

This matter is before the Court on Debtors' Motion to Avoid Lien of Creditor, Beneficial Ohio, Inc. ("Beneficial"). Beneficial filed an objection to Debtors' motion and the matter came on for hearing on August 10, 1995. Appearing at said hearing were Robert Whittington, Jr., counsel for Debtors; and Joseph Gorman, for Frank Steel, counsel for Beneficial. Evidence was presented in the form of testimony from Debtors, Donald and Polly Withrow, and through the admission of Beneficial's loan application. At the conclusion of the hearing, the Court took the matter under advisement, granted Beneficial time to respond to Debtors' memorandum in support of its motion, and further granted Debtors time to reply to such response. Each party timely filed such documents.

Pursuant to Bankruptcy Rules 9014 and 7052 the Court makes the following findings of fact and conclusions of law. For the reasons set forth herein, Debtors' Motion to Avoid Lien of Creditor, Beneficial, is granted, and Debtors may partially avoid Beneficial's lien.

I. BACKGROUND

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On May 17, 1995, Debtors, Donald and Polly Withrow, filed a joint and voluntary petition under chapter 7 of the Bankruptcy Code. On Schedule C of their petition, Debtors claimed exemptions in, *inter alia*, a Japanese doll and a decorative Japanese screen ("the subject property"). Beneficial holds a nonpossessory, nonpurchase-money security interest in the subject property and did not file any objection to Debtors' claim of exemption.

On June 9, 1995, Debtors filed a motion to avoid Beneficial's lien on the subject property, pursuant to 11 U.S.C. §522(f).¹ On July 3, 1995, Beneficial filed an objection to that motion.

In the memorandum in support of their motion, Debtors contend that, because Beneficial did not object to Debtors' claim of exemption regarding the subject property, Beneficial is now precluded from challenging those exemptions in any way. In the alternative, Debtors contend that even if Beneficial is not precluded from challenging Debtors' exemption, that exemption is still valid and the lien is avoidable as the subject property is "household goods" or "household furniture." Beneficial contends that although it did not object to Debtors' claim of exemption in the subject property, it is not precluded from objecting to Debtors' exemption as it relates to the motion to avoid its lien, and that the lien should not be avoided as the subject property is not "household goods" or "household furniture."

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Debtors' motion also sought to avoid Beneficial's lien on a video cassette recorder ("VCR") and certain machinist tools. Debtors later conceded that Beneficial's lien on the tools was not avoidable as they were not "household goods" and Beneficial withdrew its objection to the lien avoidance on the VCR pursuant to this Court's decision in *In re Wood*, Case No. 94-51365 (December 27, 1995).

II. DISCUSSION

The threshold issue in this matter is whether Beneficial's failure to object to Debtors' claim of exemption in the subject property precludes Beneficial from challenging whether the subject property is exempt for the purpose of objecting to Debtors' motion to avoid its lien pursuant to 11 U.S.C. §522(f). The resolution of this issue requires an analysis of the interplay between subsections (f) and (l) of 11 U.S.C. §522.

A. 11 U.S.C. §522(l) - Exemption by Default

Section 522 of the Bankruptcy Code addresses the role of exemptions within the bankruptcy estate. In relevant part, subsection (l) of §522 provides:

(l) The debtor shall file a list of property that the debtor claims as exempt under subsection (b) of this section ... Unless a party in interest objects, the property claimed as exempt on such a list is exempt.

11 U.S.C. §522(l). *Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992), holds that any exemption claimed pursuant to 11 U.S.C. §522(l), whether or not based in law, causes the property at issue to be excluded from administration in the bankruptcy estate if a party in interest does not timely object to the validity of the exemption. Bankruptcy Rule 4003(b) sets forth the time frame for objecting to debtor's claim of exemption to within 30 days from the date that the first meeting of creditors is concluded. B.R. 4003(b).

In the case at bar, it is undisputed that Debtors claimed an exemption in the subject property and that neither Beneficial nor any other party in interest objected to that exemption within the 30 day rule period. Accordingly, Debtors' unchallenged exemption in the subject property removes those items from administration in Debtors' bankruptcy estate. As a basis for their argument that

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Beneficial is precluded from challenging Debtors' motion to avoid its lien, Debtors rely upon *Taylor*. For the reasons set forth below, *Taylor* is not dispositive of this issue.

B. Effect of Default Exemption on Lien Avoidance

Although the subject property is now exempt from bankruptcy administration by the chapter 7 trustee via operation of §522(l), the Court must decide whether this default exemption applies to lien avoidance actions. Lien avoidance actions are governed by 11 U.S.C. §522(f), the statutory language of which yields a four-part test:

- (1) There must be an exemption to which the debtor "would have been entitled" under subsection (b) of §522;
- (2) The property must be listed on the debtor's schedules and claimed as exempt;
- (3) The lien at issue must impair the claimed exemption; and
- (4) The lien must be either a judicial lien (not associated with familial support obligations) or another type of lien specified by statute.

Morgan v. Federal Deposit Insurance Corp. (In re Morgan), 149 B.R. 147, 151 (9th Cir. BAP 1993); *In re Mohring*, 142 B.R. 389, 392 (Bankr. E.D. Cal. 1992)²; 11 U.S.C. §522(f).

Some courts have determined that once an exemption comes into existence via the §522(l) default provision, that for lien avoidance purposes, a creditor cannot challenge whether the debtor would have been entitled to that exemption under §522(b). Those courts reason that the creditor, by its failure to

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11 U.S.C. §522(f) was amended by the Bankruptcy Reform Act of 1994. However, the amendments have not changed the test set forth above except as noted by the parenthetical qualification in the fourth part of the test.

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timely object to the claimed exemption, has either waived its rights to challenge the exemption or is estopped from doing so. See *In re Indvik*, 118 B.R. 993, 1004 (Bankr. N.D. Iowa 1990); *In re Bradlow*, 119 B.R. 330, 331 (Bankr. S.D. Fla. 1990); *In re Van Pelt*, 83 B.R. 617, 618-19 (Bankr. S.D. Iowa 1987); *In re Keyworth*, 47 B.R. 966, 970 (D. Colo. 1985). Other courts, however, have held that a creditor's failure to object to a debtor's claim of exemption does not preclude that creditor from challenging the viability of that exemption for the purposes of a lien avoidance analysis. See *Morgan v. Federal Deposit Insurance Corp. (In re Morgan)*, 149 B.R. 147, 151 (9th Cir. BAP 1993); *In re Moe*, 179 B.R. 654, 656 (Bankr. D. Mont. 1995); *In re Streeper*, 158 B.R. 783, 786 (Bankr. N.D. Iowa 1993); *In re McKaskle*, 117 B.R. 671, 673 (Bankr. N.D. Okla. 1990); *In re Mitchell*, 80 B.R. 372, 375-76 (Bankr. W.D. Tex. 1987). For the following reasons, this Court finds the reasoning of the latter cases to be more persuasive.

In the absence of ambiguity, the Court must give effect to the plain meaning of the governing provisions of the Bankruptcy Code. *United States v. American Trucking Ass'n*, 310 U.S. 534, 543-44 (1940). Section 522(f)(1) clearly states that the debtor may avoid a lien on the debtor's property to that extent that the lien impairs an exemption to which the debtor "would have been entitled" under §522(b). 11 U.S.C. §522(f)(1). Therefore, for the purposes of a lien avoidance analysis, subsection (b), and not subsection (l), dictates what

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exemptions cannot be impaired.³ If certain property is deemed to be exempt only through the mechanisms of procedural default, that property has not then been given the legal status of exempt property as defined by the applicable federal or state exemption statutes. Therefore, even though the Debtors are entitled to an exemption in the subject property under §522(l), they are not automatically entitled to avoid liens on the subject property under §522(f).

The conclusion that subsection (b), and not subsection (l), controls a lien avoidance analysis is further supported by the different purposes that each of these subsections serve.

Section 522(f) allows the debtor to avoid certain types of liens on property that has been liberated from the bankruptcy estate. Lien avoidance actions need not be promptly commenced and do not interfere with administration of the estate. Section 522(l), by contrast, allows the trustee to promptly determine what assets of the debtor are available for distribution to creditors. As a result, allowing a debtor to use the exemption-by-default of §522(l) in a lien avoidance action is not necessary to harmonize the purpose of the two statutes.

Morgan v. Federal Deposit Insurance Corp. (In re Morgan), 149 B.R. 147, 152 (9th Cir. BAP 1993). The operation of §522(l), as so interpreted, does not disturb perfected lien rights.

In short, allowing a debtor to rely upon a default exemption to avoid a secured creditor's lien would raise due process concerns. The case at bar is typical of the standard procedures in a chapter 7 case; the Bankruptcy Clerk's notice of the §341 meeting included a provision stating that a creditor must file

exemption scheme, pursuant to applicable state law.

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any objection to a claimed exemption not later than 30 days after the conclusion of the meeting of creditors. That notice did not, however, include a list of Debtors' claimed exemptions nor a copy of Debtors' §521(2) Statement of Intentions. Therefore, the only way that Beneficial could have determined if its lien was in jeopardy, prior to the filing of Debtors' motion to avoid that lien, was to examine the court file. "At a minimum, due process should require that the lien creditor receive notice (rather than be required to search for it) that the lien property is claimed as exempt before the time to object has expired." *Morgan*, 149 B.R. at 152 (citing *In re Smith*, 119 B.R. 757, 760 (Bankr. E.D. Cal. 1990)).

Based upon the foregoing, the Court concludes that Beneficial is not precluded from challenging Debtors' exemption in the subject property for the purpose of objecting to their motion to avoid its lien. As such, the next issue to be addressed is whether Debtors would have been entitled to an exemption in the subject property under §522(b).

C. Application of the Ohio Exemption Statute

Pursuant to 11 U.S.C. §522(f), Debtors can avoid the fixing of Beneficial's lien on Debtors' interest in the subject 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 nonpossessory, nonpurchase-money security interest in any household furnishings, [or] household goods." 11 U.S.C. §522(f)(1)(B)(i). The referenced subsection (b) provides a list of federal exemptions, but also provides that states may "opt out" of this federal list. Ohio is such an "opt out" state. Ohio Revised Code §2329.66(A) addresses the exemptions at issue and states:

(A) Every person who is domiciled in this state may hold property exempt

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from execution, garnishment, attachment, or sale to satisfy a judgment or order as follows:

(4)(b)[T]he person's interest not to exceed two hundred dollars ... in household furnishings, [and] household goods, ... that are held primarily for the personal, family, or household use of the person.

O.R.C. §2329.66(A)(4)(b). In the case at bar, Debtors ask the Court to decide that the terms "household goods" and "household furniture," as they are used in O.R.C. §2329.66, include the subject property and thus entitle Debtors to avoid Beneficial's lien to the extent that the lien impairs their exemption rights.

The subject property was described during the testimony of Debtor, Polly Withrow. The first item was described as a 15 inch, ceramic, Japanese doll that is encased in glass and that is used as decoration on the mantle. The second item was described as a three and one half foot decorative Japanese screen that hangs on the dining room wall. Mrs. Withrow indicated that the items were purchased in Japan sometime between 1985 and 1987 when she was a child and lived there with her parents.

During the hearing Mrs. Withrow testified that the approximate values of each item were \$125.00 for the doll and \$135.00 for the screen. However, on the Valuation of Personal Property portion of the Loan Agreement entered into with Beneficial in March, 1994, the Debtors approximated the market and replacement values of the doll at \$300.00 and the screen at \$400.00. Beneficial Exhibit 1. During cross-examination, Mrs. Withrow could not identify any reason for a decrease in the subject property's value as the items were still being used for decoration and were not in any way damaged or broken.

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The terms "household goods" and "household furnishings" are not defined in either the Bankruptcy Code or in the Ohio Revised Code, which is typical of state exemption statutes, thus leading to a panoply of definitions by Bankruptcy Courts that are forced to determine the terms' scope. See, e.g., *In re Farson*, 172 B.R. 17 (Bankr. N.D. Ohio 1994); *In re Reid*, 121 B.R. 875 (Bankr. D.N.M. 1990); *In re Gonshorowski*, 110 B.R. 51 (Bankr. N.D. Ala. 1990); *In re Vale*, 110 B.R. 396 (Bankr. N.D. Ind. 1989). Debtors contend that "the screen and doll are reasonable in the context of their day-to-day household life and exempt household items under the definition that has generally become adopted in Northern Ohio." Debtors, however, fail to provide the Court with the "definition" to which they refer.

The definition of exempted "household goods" and "household furnishings" that this Court must apply is an issue of state law. However, there exist no Ohio state court decisions which directly address this issue.

Debtors rely on *McMicken v. McMicken University*, 3 Ohio Dec. Reprint 429 (Sup. Ct. Cinn. 1863) which, in determining a testator's intent as to a family portrait, defined "household furniture" as "everything ... which may contribute to the use or convenience of the householder or the ornament of the house, [such] as plate, linen, china, both useful and ornamental, and pictures." *McMicken*, 3 Ohio Dec. Reprint at 431. The *McMicken* Court, however, went on to limit this definition of "household furniture" to items of strictly personal significance.

We ought not to extend the exemption in these clauses to the private gallery of a connoisseur, nor yet to costly picture, the subject of which are not connected with the family in whose possession they are found. As the family Bible is specially excepted which preserves the names, the births, the marriages, and the burial of the parents and the children, so the portrait of a father or a mother may well be preserved as a living memory to a

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son or a daughter, alike consecrated by human sympathy, and vindicated by the law.

Id. at 431-32.

In determining whether a lien can be avoided, both the Debtors and Beneficial have burdens of proof to satisfy. Generally, a movant bears the burden of proof necessary to warrant the relief sought. See *In re Shands*, 57 B.R. 49 (Bankr. D.S.C. 1985); *In re Piambino*, 45 B.R. 243 (Bankr. S.D. Fla. 1984). Thus, the Debtors bear the initial burden of proof on all the essential elements of 11 U.S.C. §522(f). See also *In re Maylin*, 155 B.R. 605, 614 (Bankr. D. Me. 1993). However, Bankruptcy Rule 4003(c) assigns a burden of proof to any party objecting to a claimed exemption, and thus Beneficial bears the burden of establishing that the subject property is not exempt.

Given the presumption that claimed exemptions are valid, the Debtors can state a *prima facie* case of entitlement to an exemption by specifically listing the exemption at issue on the schedules and by clearly designating the basis for the exemption claimed. See *id.* Thereafter, the burden shifts to the objecting creditor to prove that a claimed exemption is not proper. See *id.*; *In re Peters*, 60 B.R. 711, 715 n.1 (Bankr. D. Minn. 1986); B.R. 4003(c).

In this case, Debtors have made a *prima facie* case that the elements of §522(f) are met. First, the Debtors listed the subject property on their schedules and claimed it as exempt. Second, it is undisputed that the lien at issue impairs the claimed exemption and that it is a nonpossessory, nonpurchase-money security interest. Finally, by clearly stating that their exemption in the subject property was valid by virtue of O.R.C. §2329.66(a)(4)(b), the Debtors have cited the exemption to which they "would have been entitled." In doing so, the

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Debtors have invoked the presumption that such exemption is valid. The Debtors have made a *prima facie* case for lien avoidance, and the burden to prove that the exemption that the Debtors have invoked is not available to them shifts to Beneficial.

Mrs. Withrow testified that the subject property was purchased for her when she was much younger and lived overseas with her family. This testimony is some evidence of the personal significance alluded to in the *McMicken* case. Beneficial did not present any evidence to disprove such significance. Therefore, given that Ohio's exemption statutes are to be liberally construed in favor of the Debtors, and given that Beneficial did not meet its burden of proof to overcome Debtors' *prima facie* case, the objection to Debtors' right to an exemption for lien avoidance purposes must fail. See *State ex rel. Coles v. Shook*, 118 N.E. 1010, 1012 (Ohio 1918) (stating that "[i]t is the policy of this state ... to construe laws exempting property of a debtor ... liberally in his favor, and it is the duty of courts to see that the beneficial object of the law is accomplished").

D. Value of the Subject Property

The next issue to be determined is to what extent Beneficial's lien impairs Debtors' exemption. To do that the fair market value of the subject property

⁴ The fair market value of property has been defined as:

[the price] expected ... if offered for sale in a fair market; not the price which might be obtained on a sale at public auction or a sale forced by the necessities of the owner, but such a price as would be fixed by negotiation and mutual agreement, after

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must be determined.⁴ As support for their contention that Beneficial's lien wholly impairs the \$200 per item exemption, Debtors asserted that the approximate values of each item are \$125.00 for the doll and \$135.00 for the screen. However, at the hearing, Beneficial introduced into evidence the portion of the loan application which showed that Debtors, when contracting with Beneficial, approximated the market and replacement values of the doll at \$300.00 and the screen at \$400.00. Further, Mrs. Withrow could not offer any explanation as to why the subject property could have decreased in value. Therefore, given that the Debtors failed to produce the subject property so that the Court could actually view it, and given that Debtors could offer no explanation as to why the subject property could now be worth less than when it was offered as collateral to secure the loan with Beneficial, the fair market value of the doll is \$300.00 and the fair market value of the screen is \$400.00.

Beneficial's lien can be avoided by \$400.00, the amount that its lien impairs Debtors' exemption. Beneficial retains its lien on the subject property in the amount of \$300.00, the extent that the lien is still supported by value after Debtors' exemption is satisfied.

III. CONCLUSION

Based upon the foregoing, this Court finds that Beneficial was not precluded from objecting to Debtors' exemption in the subject property for the

ample time to find a purchaser, as between a vendor who is willing (but not compelled) to sell and a purchaser who desires to buy but is not compelled to take the particular piece of property.

BFP v. Resolution Trust Corp., 114 S.Ct. 1757, 1761 (1994) (citing Black's Law Dictionary 971 (6th ed. 1990)).

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purpose of objecting to Debtors' motion to avoid Beneficial's lien. Further this Court finds that the fair market value of the subject property is \$300.00 for the doll and \$400.00 for the screen. Therefore, pursuant to the Court's finding and 11 U.S.C. §522(f)(1)&(2), Debtors' Motion to Avoid lien is hereby granted, Beneficial's lien may be avoided by \$400.00, and Beneficial retains its lien on the subject property in the amount of \$300.00.

IT IS SO ORDERED.

MARILYN SHEA-STONUM
Bankruptcy Judge

DATED: 11/17/95