

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

IN RE:   )) Case No. 96-50334  
          HOWARD R. WENK,                     )  
          Debtor.                                    )) Chapter 7  
  )) JUDGE MARILYN SHEA-STONUM  
  ))  
  )) **MEMORANDUM OPINION AND**  
  )) **ORDER GRANTING DEBTOR'S**  
  )) **MOTION TO AVOID LIENS, IN PART,**  
  )) **AND DENYING DEBTOR'S MOTION,**  
  )) **IN PART, AND DENYING MIRA'S**  
  )) **MOTION TO STRIKE**

This matter is before the Court on the Debtor's Motion to Avoid Liens pursuant to 11 U.S.C. § 522(f). The lien holder, Manufacturers' Industrial Relations, Inc. ("MIRA"), objected to that motion, and the matter came on for hearing on August 22, 1996. Appearing at said hearing were Edward J. Riegler, counsel for MIRA, and Anthony DeGirolamo, counsel for Debtor. At the hearing, counsel disagreed over the application of the formula for determining whether an exemption is impaired by a lien. MIRA argued for using the "value of the property" to determine if a lien should be avoided; debtor argued for using the "value of the debtor's interest in property."

I. JURISDICTION

This matter arises under 11 U.S.C. § 522(f) of the Bankruptcy Code and involves a determination concerning one of the debtor's exemptions. Pursuant to 28 U.S.C. § 157(b)(2)(B), this matter is a core proceeding. This Court has

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jurisdiction over this matter pursuant to 28 U.S.C. § 157(a) and (b)(1) and by the Standing Order of Reference entered in this District on July 16, 1984.

**II. UNDISPUTED FACTS**

Debtor, Howard Wenk, filed a Petition for Relief under Chapter 7 of the Bankruptcy Code on February 20, 1996. The debtor claimed an exemption in his interest in the property under Ohio Revised Code § 2329.66(A)(1) in the amount of \$5,000. Debtor's real property schedule indicates that debtor owns a one-half interest in certain real estate, his primary residence. Debtor and his non-debtor spouse own the property as tenants in common. The parties stipulate that the fair market value of that property is \$110,000. Beneficial Mortgage has a mortgage on the property in the amount of \$72,774.49. Manufacturers' Industrial Relations, Inc. ("MIRA") holds a judgment lien on debtor's property in the amount of \$257,376.00. MIRA's lien was filed on June 29, 1990 and on November 22, 1995 in the Office of the Summit County Clerk.

On July 22, 1996, debtor filed a motion to avoid the judicial lien of MIRA relying on 11 U.S.C. § 522(f). A hearing on debtor's motion was held on August 22, 1996. At the hearing, the parties disputed over how to apply the formula for determining whether an exemption is impaired by a lien and were permitted to file post hearing briefs on that issue.

**III. LAW**

MIRA argues for using the "value of the property" to determine if a lien should be avoided under 11 U.S.C. § 522(f); debtor argues for using the "value of the debtor's interest in property." 11 U.S.C. § 522(f)(2)(A) provides, "a lien shall be considered to impair an exemption to the extent that the sum of (i) the lien, (ii) all other liens on the property; and (iii) the amount of the exemption that

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the debtor could claim if there were no liens on the property; exceeds **the value that the debtor's interest in the property** would have in the absence of any liens." Value is defined earlier in the same section to mean the fair market value as of the date of filing. 11 U.S.C. § 522(a)(2).

The plain language of the statute supports the debtor's argument that the "value of the debtor's interest in property" be used in determining whether a lien is avoided under 11 U.S.C. § 522(f). MIRA cites to various cases and law review articles for the proposition that the "value of the property" should be used instead of debtor's proposition, i.e., using the "value of the debtor's interest in property." However, the cases to which MIRA cites do not involve situations where a debtor and a non-debtor spouse own the property as tenants in common. The debtor and the debtor's spouse own their primary residence as tenants in common. See Ohio Rev. Code § 5302.19 (Anderson 1989) As tenants in common the property interest of each person is divisible. See *Spector v. Guinta*, 62 Ohio App. 2d 137, 138(Ct App., Erie County 1978); see also 19 O. Jur. 3d Cotenancy and Partition § 5(1980). Both have a half interest in the property. See *Bryan v. Looker*, 94 Ohio App. 3d 228, 231(Ct. App., Allen County 1994); and *Spector v. Guinta*, 62 Ohio App. 2d at 138. Thus, the value of the debtor's interest in the property is one half of the fair market value of the property, i.e., \$55,000.

As stated above, 11 U.S.C. § 522(f) allows a debtor to avoid "the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption..." A mathematical formula for determining when a lien impairs an exemption is provided in 11 U.S.C. § 522(f)(2)(A). The first step is to determine what interest the debtor has in the property, i.e. debtor's equity in the property.

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Then, the value of all liens on the property, including the judgment lien at issue, and the debtor's exemption must be calculated. The third step is to subtract the debtor's interest in the property, i.e. the debtor's equity, from the sum of the value of all liens and the value of the debtor's exemption. The result is the amount by which the judgment lien exceeds the value of the debtor's interest in property. To that extent the lien is avoidable. Finally, the result must be subtracted from the value of the judgment lien to determine to what extent the lien is not avoidable.

The following is an application of the formula to this case:

FAIR MARKET VALUE("FMV")	110,000.00
Beneficial Mortgage("Mortgage")	<u>72,774.49</u>
Owners' Equity	37,225.51
Debtor's Interest in the property(Half of the Owner's Equity)	<span style="border: 1px solid black; padding: 2px;">18,612.76</span>

To the extent that the sum of all liens on the property and the amount of the exemption the debtor could otherwise claim exceeds 18,612.76, MIRA's judgment lien is avoidable.

Value of MIRA's Judgment Lien	257,376.00
Value of Debtor's Exemption	5,000.00
SUM	<span style="border: 1px solid black; padding: 2px;">262,376.00</span>

The sum of the value of all liens on the property and the value of the debtor's exemption exceeds \$18,612.76 by \$243,763.25. Thus, the debtor may avoid \$243,763.25 of MIRA's judgment lien. Conversely, the debtor may not avoid the remaining \$13,612.75 of MIRA's judgment lien.

In addition, Debtor alleges in paragraph 10 of his motion to avoid liens that the lien filed by MIRA on June 29, 1990 became dormant when not renewed as of June 29, 1995. The lien filed on June 29, 1990 was based on a judgment

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rendered in the United States District Court for the Northern District of Ohio against the debtor on September 19, 1989. On either June 10, 1991 or June 14, 1991, the District Court set aside the judgment. The Sixth Circuit Court of Appeals reversed the District Court on June 21, 1995 and reinstated the September 19, 1989 judgment. Thereafter, on November 22, 1995, MIRA filed another certificate of judgment. Exactly 90 days later, on February 20, 1996, the Debtor filed a petition for relief under Chapter 7 of the Bankruptcy Code. However, as to the potential dormancy or invalidity of the lien under state law is not properly before the Court at this time.

Presumably, the potential dormancy raises issues concerning the debtor's ability to use the trustee's avoidance powers to avoid the lien. In paragraph 11 of the motion to avoid liens, counsel for the debtor writes that the liens against the debtor, to the extent they may be valid liens under Ohio law, are avoidable pursuant to 11 U.S.C. § 522(f). A proceeding by the debtor to avoid a lien under 11 U.S.C. § 522(f) is a contested matter commenced by motion. Bankruptcy Rules 4003(d) & 9014. Thus, debtor's motion to avoid judgment lien under 11 U.S.C. § 522(f) is properly before the Court. However, the issue of the ability of the debtor to challenge the lien's under the trustee's avoidance powers is not. See Bankruptcy Rules 7001(2) and 7003. Bankruptcy Rule 7001 specifically defines an adversary proceeding as a proceeding "(1) to recover money or property, except a proceeding to compel the debtor to deliver property to the trustee, or a proceeding under § 554(b) or § 725 of the Code, Rule 2017, or Rule 6002, (2) to determine the validity, priority, or extent of a lien or other interest in property other than a

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proceeding under Rule 4003(d)..." Thus, a proceeding to use the trustee's avoidance powers to recover property either independently or under 11 U.S.C. § 522(h) requires an adversary proceeding. Adversary proceedings are commenced by the filing of a complaint. B.R. 7003(incorporating F.R.C.P. 3, "a civil action is commenced by filing a complaint with the court."); see *Karr v. Pankey*(*In re Pankey*), 122 B.R. 710, 712 (W.D. Tenn. 1991)(A motion does not commence an adversary proceeding); but see *In re Walters*, 142 B.R. 192, 193. The debtor, Wenk, has only filed a motion seeking relief under § 522(f); no adversary proceeding has been commenced. Thus, the substantive issues surrounding the debtor's ability to use the trustee's avoidance powers will not be addressed as they are not properly before this Court. Finally, as to the September 30, 1996, motion to strike the sur reply of the debtor filed on September 10, 1996, this Court denies the motion to strike the sur reply. The sur reply, filed on September 10, 1996, did not add anything substantive to the issues before this Court and was not prohibited. Therefore, the motion to strike is denied, although the denial of the motion does not prejudice MIRA in any manner.

For the above stated reasons, the motion to avoid liens is granted, in part, and denied, in part, and the motion to strike the debtor's sur reply is denied.

**IT IS SO ORDERED.**

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MARILYN SHEA-STONUM

Bankruptcy Judge

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DATED: 12/19/96