

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE))	CASE NO. 92-51422
CHARLES L. HOLDREN AND))	
BARBARA J. HOLDREN,)	CHAPTER 7
Debtors.		
		JUDGE MARILYN SHEA-STONUM
))	MEMORANDUM OPINION AND
)	ORDER DENYING DEBTORS'
		MOTION TO AVOID LIEN

This matter is before the Court on the Debtors' motion to Avoid Liens pursuant to 11 U.S.C. § 522(f). The Lien Holder, National City Bank, objected to that motion and the matter came on for hearing on August 20, 1996. Appearing at said hearing were Donald Mitchell, counsel for the Debtors, and Alan Hocheiser, counsel for National City Bank("NCB").

At the hearing, counsel agreed that pre-1994 law controls the disposition of this case. However, counsel disagreed about how to apply that law to this case. NCB argues that under pre-1994 law in this jurisdiction the Debtors' exemption is not impaired absent a sale or involuntary execution on the property. Conversely, Debtors argue that under pre-1994 law in this jurisdiction their exemption is impaired as a result of their Chapter 7 proceedings. Debtors further argue that the Order dated August 19, 1992 recognizing the Debtors' entitlement to a homestead exemption in the amount of \$10,000, to which NCB

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did not object, controls the disposition of this case.

I. JURISDICTION

This matter arises under 11 U.S.C. § 522(f) and involves a determination concerning the Debtors' homestead exemption. Pursuant to 28 U.S.C. § 157(b)(2)(B), this matter is a core proceeding. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 157(a) and (b)(1) and by Standing Order of Reference entered in this District on July 16, 1984.

II. UNDISPUTED FACTS

On June 12, 1992, Debtors filed a petition for relief under Title 11. At that time, the Debtors were the owners of the real property located at 13046 State Route 44, Mantua, Ohio. On their schedules, the Debtors listed the value of the property as \$48,600 and the value of a first mortgage as \$38,554. Debtors listed National City Bank ("NCB") on 'Schedule F' as a 'Creditor Holding Unsecured Nonpriority Claims'. However, NCB had obtained a deficiency judgment against the Debtors and had filed that judgment with the Portage County Recorder's Office on February 26, 1992. Thus, NCB held a judgment lien as of February 26, 1992 upon the real estate owned by the Debtors, i.e., the Debtors' primary residence located at 13046 State Route 44, Mantua, Ohio. National City Bank did not assert its lien during the Debtors' Bankruptcy and remained silent. On August 19, 1992, upon motion by the Trustee, the Court entered an order abandoning the real property of the Debtors, i.e., the Debtors' primary residence. In that order the Court recognized that the Debtors claimed and were entitled to an exemption in the property. At no time did NCB object to the Debtors' claimed exemption; however, there is nothing in the file that would evidence that NCB was specifically notified that the Debtors asserted such an exemption. The

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Court granted the Debtors a Chapter 7 discharge on October 22, 1992 and closed the case on February 11, 1993.

On January 23, 1996, Debtors filed a motion to reopen their Chapter 7 case for the purpose of avoiding a judgment lien held by NCB pursuant to 11 U.S.C. § 522(f). National City Bank objected on the grounds that the Debtors' homestead exemption may not be asserted because their primary residence has not been subject to a judicial sale or other involuntary execution, and under those circumstances no reason exists to reopen the case. The Debtors argued that no motion to avoid NCB's lien was made while the case was open because no one was aware of NCB's lien. The motion to reopen was granted on March 20, 1996. Thus, only the Debtors' motion to avoid a lien pursuant to 11 U.S.C. § 522(f) filed on May 29, 1996 is presently before the Court.

III. LAW

This case requires this Court to make a determination about avoiding a judgment lien on the Debtors' primary residence. This case arose prior to the 1994 amendments to 11 U.S.C. § 522(f), the section of the Bankruptcy Code which pertains to judgment lien avoidance. The parties agree that the law applicable to the case is the law as it existed while the case was pending. Therefore, the 1994 amendments to section 11 U.S.C. § 522(f) are not considered in this case, and all references to 11 U.S.C. § 522(f) are to the

This Court respectfully declines to follow *In re Miller*, 198 B.R. 500(1996). Congress has made clear the manner in which 11 U.S.C. § 522(f) is to be applied after October 22, 1994. However, prior to the effective date of the 1994 amendments the controlling law in this jurisdiction on the issue of judgment lien avoidance under Ohio law was *In re Dixon*, 885 F.2d 327(6th Cir. 1989) and *In re Moreland*, 21 F.3d 102(6th Cir. 1994). This Court is bound by the principles of *stare decisis* to follow the law that bound judges considering these issues prior to the effective date of the 1994 amendments.

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statute as it was written prior to October 22, 1994.¹

Under 11 U.S.C. § 522(f)(1)(A), a debtor may avoid a judgment lien to the extent it impairs an exemption to which the Debtors would have been entitled under § 522(b). In Ohio, an "opt out" state², a debtor is entitled to a homestead exemption as specified in O.R.C. § 2329.66(A)(1)(b). The statute provides,

Every person who is domiciled in this state may hold property exempt from execution, garnishment, attachment, or sale to satisfy a judgment or order, as follows: ...the person's interest, not to exceed five thousand dollars, in one parcel or item of real or personal property that the person or a dependent of the person uses as a residence.

Prior to the 1994 amendment, Ohio courts interpreted O.R.C. § 2329.66(A)(1)(b) and 11 U.S.C. § 522(f) to mean that in Ohio a homestead exemption is not impaired absent a judicial sale or involuntary execution. *In re Dixon*, 885 F.2d 327, 330 (6th Cir. 1989); *In re Moreland*, 21 F.3d 102,106 (6th Cir. 1994); *In re Bursee*, 142 B.R. 167,169 (N.D. Ohio 1992); *In re Braverman*, 150 B.R. 681,684-85 (S.D. Ohio 1993); *In re Cushman*, 183 B.R. 139, 141 (N.D. Ohio 1995). *But see In re Boswell*, 148 B.R. 31(N.D. Ohio 1992); *In re*

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The Federal exemptions provided in 11 U.S.C. § 522(d) are specifically not allowed in Ohio. Ohio Rev. C. § 2329.662, see 11 U.S.C. § 522(b)(1). The exemptions available to an Ohio debtor are set forth in Ohio Rev. C. § 2329.66.

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Mershman, 158 B.R. 698(N.D. Ohio 1993); *In re Brown*, 81 B.R. 432(N.D. Ohio 1985). This interpretation does not deprive the debtor of the exemption, but only affects the timing of its availability. See *Cushman*, 183 B.R. at 141. The Debtors' property has not been the subject of such a sale or involuntary execution. This Court finds that in this case the Debtors may not avoid NCB's judgment lien as it does not impair an exemption to which the Debtors would have been entitled in 1992.

The Debtors argue that 11 U.S.C. § 522(f) applies differently in a chapter 7 than in a chapter 13. Therefore, the Debtors assert that *In re Dixon*, a chapter 13 case, is inapplicable to the case at hand. Rather Debtors urge this Court to rely upon *In re Brown*, 81 B.R. 432, for the premise that the Debtors' real property is subject to "execution, garnishment, attachment, or sale" by virtue of having voluntarily filed a petition for relief under chapter 7 of the Bankruptcy Code.

However, the Sixth Circuit in noting that a conflict of authority existed among the district and bankruptcy courts in the Sixth Circuit which had addressed this issue specifically referenced *In re Brown* as an example of the conflict. *In re Dixon*, 885 F.2d 327, 329 n.3. The Sixth Circuit resolved the issue by adopting the view contrary to the holding in *In re Brown*. Thus, this Court does not believe itself able to follow *In re Brown* because of the explicit treatment of that case in *In re Dixon*, 885 F.2d 327, 330(6th Cir. 1989). Debtors' property is not subject to a judicial sale or involuntary execution. Thus, under the pre-1994 amendment case law, the Debtors' homestead exemption is not impaired. Therefore, NCB's judgment lien cannot be avoided under the old 11 U.S.C. § 522(f).

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The Debtors' second argument is that the Order dated August 19, 1992 recognizing the Debtors' entitlement to a homestead exemption, to which NCB did not object, satisfies the requirements of O.R.C. § 2329.66(A)(1)(b) thereby making *In re Dixon* and its progeny inapplicable to the case at hand. Debtors are mistaken.

The Sixth Circuit dealt with the issue of a creditor who remains silent in the face of a debtor who claims a homestead exemption in *In re Moreland*, 21 F.3d 102 (1994). The Sixth Circuit wrote, "The RTC [creditor] had no basis for objecting to Moreland's claimed homestead exemption. As discussed below, under Ohio law, Moreland was entitled to claim a homestead exemption...and the RTC [creditor] did not waive any rights by not objecting." *In re Moreland*, 21 F.3d at 104. The Sixth Circuit went on to hold that the debtor's claimed homestead exemption was not impaired absent a judicial sale or involuntary execution. *In re Moreland*, 885 F.3d at 105-06. The Debtors are entitled to claim their homestead exemption as reflected in this Court's August 19, 1992 Order. However, that exemption is not impaired under 11 U.S.C. § 522(f) absent a judicial sale or involuntary execution.

Further, the order dated August 19, 1992 cannot control the disposition of this case because of due process concerns. That order abandoning real property was the result of a notice of proposed abandonment filed by the trustee but not served on any creditors other than the mortgage holder, Nowak. Absent service on NCB, due process concerns prevent the order of August 19, 1992 from controlling the disposition of this case.

IV. CONCLUSION

Therefore, based on the law as it existed prior to 1994, the Debtors'

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motion to avoid lien is denied.

IT IS SO ORDERED.

MARILYN SHEA-STONUM
Bankruptcy Judge

DATED: 1/29/97