

THIS OPINION IS NOT INTENDED FOR PUBLICATION

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

IN RE)	CASE NO. 98-53936	
)		
DIANNA RAE MCCLAIN)	CHAPTER 7	
BOBBY RAY MCCLAIN)		
)	JUDGE	MARILYN
)	SHEA-STONUM	
DEBTOR(S))		
)	ORDER DENYING MOTION	
)	TO AVOID LIENS	

This matter came before the Court on the debtors' motion to avoid liens held by Morgan Bank, N.A. ("Morgan Bank"), which was filed on March 30, 1999 (the "Motion"). Morgan Bank filed an objection to the Motion on April 19, 1999 (the "Objection"). A hearing on the matter was held on May 5, 1999 at which Joel Dayton appeared on behalf of Morgan Bank and Chris Manos appeared on behalf of the debtors. At that hearing, counsel indicated that the parties do not dispute the facts and that the issue of whether Morgan Bank's liens should be avoided is a question of law that could be decided by the Court on the pleadings already filed. The Court then gave the parties until May 5, 1999 in which to file a list of stipulated facts. That list was timely filed and the matter was then taken under advisement.

This proceeding arises in a case referred to this Court by the Standing Order of Reference entered in this District on July 16, 1984. This matter is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(A) and (K) over which this Court has jurisdiction pursuant to 28 U.S.C. §1334(b). Based upon the pleadings filed herein, the Court makes the following findings of fact and conclusions of law.

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I. FACTS

The relevant facts in this case are not in dispute. The debtors filed a chapter 7 bankruptcy petition on December 14, 1998. In their petition, the debtors claimed a \$10,000.00 exemption in their residential real property located at 2073 Canton Road, Akron, Ohio (the "Subject Property") and no objections to that claimed exemption have been filed. The Subject Property was listed in the debtors' schedules as having a fair market value of \$110,000.00 and being encumbered by first and second mortgages held by Ford Consumer Finance Company ("Ford") in the total amount of \$112,374.70.

On September 5, 1995, the debtors entered into an agreement with Morgan Bank whereby they guaranteed a loan being made from Morgan Bank to Coast to Coast Machine, Inc., a company in which the debtors were officers and shareholders. On March 30, 1996, the debtors entered into another agreement with Morgan Bank whereby they guaranteed an additional loan being made to Coast to Coast Machine, Inc. from Morgan Bank. As security for those guarantees, the debtors granted Morgan Bank two separate mortgages in the Subject Property.

As of the petition date, the amounts still owing to Morgan Bank were \$88,421.53 under the guarantee dated September 5, 1995 and \$26,198.99 under the guarantee dated March 30, 1996. Morgan Bank's liens constitute valid third and fourth mortgages against the Subject Property behind the first and second mortgage interests held by Ford.

In the Motion, the debtors claim that Morgan Bank's liens on the Subject Property impair the exemption to which they are entitled under Ohio Revised Code §2329.66(A)(1). Given such alleged impairment, the debtors contend that, pursuant to 11 U.S.C. §§522(f) and 506(d), Morgan Bank's liens should be avoided. In the Objection, Morgan Bank claims that even if its liens on the Subject Property do impair the debtors' exemption, those liens are not of a type that can be avoided under §522(f). Morgan Bank also contends that because this is a chapter 7 case, the debtors may not rely on §506(d) to avoid the liens at issue.

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II. DISCUSSION

Lien Avoidance Under §522(f): Pursuant to §522(f) of the Bankruptcy Code, a debtor may avoid a lien on an interest in property to the extent that such lien impairs an exemption to which the debtors would have been entitled, if such lien falls into one of two categories: (1) judicial liens or (2) nonpossessory, nonpurchase-money security interests in household goods; goods used in the debtor's trade; or professionally prescribed health aids for the debtor or a debtor's dependents. *See* 11 U.S.C. §522(f)(1)(A) and (B). Given the limited scope of §522(f), and the failure of the debtors to argue otherwise, the liens held by Morgan Bank may only be avoided if they fall within one of the two enumerated categories. *See Bradley v. Austin*, 841 F.2d 1288, 1293 (6th Cir. 1988) (in determining meaning of legislation court must first look to plain language of statute itself).

A "lien" is a charge against or interest in property to secure payment of a debt or performance of an obligation. 11 U.S.C. §101(37). A "judicial lien" is a lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding. 11 U.S.C. §101(36). Accordingly, a "judicial lien" is a charge against or interest in property to secure payment of a debt, obtained by judgment or other legal proceedings.

The liens at issue in this case are in the form of mortgages. A mortgage is a charge against or interest in property to secure payment of a debt that is obtained by conveyance or contract. Unlike a judicial lien, a mortgage requires no judgment or other legal proceeding to be effective. Therefore, because the liens held by Morgan Bank are not in the form of judicial liens, they cannot be avoided pursuant to the first enumerated category

¹ A rationale behind limiting what types of liens can be avoided pursuant to §522(f)(1) was discussed in a recent Sixth Circuit case:

One of the purposes of bankruptcy is to allow for the fair treatment of similarly situated creditors, thus preventing creditors' rights from being determined by a race to the courthouse. Another purpose is to provide the debtor with a fresh start. It cannot be disputed that if a judgment creditor [were] allowed to retain its lien on the real property of the debtor...it [would] very likely be able to ascertain the payment of its debt that other creditors, otherwise similar to the judgment creditor, would not be able to obtain. Thus, the judgment creditors [would be] allowed to circumvent the treatment of other creditors under the Bankruptcy Code simply because it [had] raced to the courthouse, obtained a judgment, and placed a lien on the debtor's fully encumbered real property. Further, the debtor would probably be precluded from ever gaining any equity

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of §522(f)(1).¹ See *Commonwealth v. Nat'l Bank v. United States (In re Ashe)*, 669 F.2d 105 (3rd Cir. 1982), cert. granted and judgment vacated on other grounds sub nom., *Commonwealth v. Nat'l Bank v. United States (In re Ashe)*, 712 F.2d 864 (3rd Cir. 1983). See also *In re Kemper*, 225 B.R. 505 (Bankr. M.D.Fla. 1998); *In re Clark*, 217 B.R. 177 (Bankr. E.D.Va. 1998); *Naqvi v. Fisher*, 192 B.R. 591 (Dist. N.H. 1995).

Although the liens held by Morgan Bank are nonpossessory, they are not nonpurchase-money security interests in household goods; goods used in the debtor's trade; or professionally prescribed health aids for the debtor or a debtor's dependents. See, e.g., *In re Kemper*, 225 B.R. 505, 507 (Bankr. M.D.Fla. 1998) (homestead property is not a household good as described in §522(f)(1)(B)). Accordingly, those liens cannot be avoided pursuant to the second enumerated category of §522(f)(1).²

Lien Avoidance Under §506(d): Section 506(d) of the Bankruptcy Code provides that in certain circumstances, debtors may reduce a lien to the judicially determined value of the collateral to which the lien attaches.³ However, in the case of *Dewsnup v. Timm*, 502 U.S. 410 (1992), the U.S. Supreme Court determined that the "lien stripping" mechanism of §506(d) is not available to chapter 7 debtors. Aside from the debtors' cursory reference to this code provision in the Motion, they set forth no legal

in the property, therefore impairing his fresh start.

Holland v. Star Bank, N.A. (In re Holland), 151 F.3d 547, 550 (6th Cir. 1998) (citing *In re Miller*,

198 B.R. 500, 505 (Bankr. N.D. Ohio 1996)).

² Because Morgan Bank's liens do not fall within either category of liens that can be avoided pursuant to §522(f)(1), it is unnecessary for the Court to consider whether or not the debtors' homestead exemption is impaired by those liens.

³ Section 506(d) provides as follows:

(d) To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void, unless -

(1) such claim was disallowed only under section 502(b)(5) or 502(e) of this title; or

(2) such claim is not an allowed secured claim due only to the failure of any entity to file a proof of such claim under section 501 of this title.

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argument as to why or how the "lien stripping" prohibition set forth in *Dewsnup* would not apply to this chapter 7 case. Accordingly, the debtors' attempt to avoid Morgan Bank's liens pursuant to §506(d) of the Bankruptcy Code is also without merit.

III. CONCLUSION

Because Morgan Bank's liens do not fall within the category of liens that may be avoided pursuant to §522(f) and because the "lien stripping" mechanism set forth in §506(d) is not available to chapter 7 debtors, Morgan Bank's mortgage liens cannot be avoided. Accordingly, and for the reasons stated herein, the Motion is hereby denied.

IT IS SO ORDERED.

MARILYN SHEA-STONUM
Bankruptcy Judge

DATED: 5/28/99