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UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

FILED

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NORTHERN DISTRICT OF OHIO  
CLEVELAND

In re:	)	Case No. 95-10867
	)	
MICHAEL D. SROKA,	)	Chapter 13
	)	
Debtor.	)	Judge Pat E. Morgenstern-Clarren
	)	
_____	)	
MICHAEL D. SROKA,	)	Adversary No. 98-1164
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
FIRST FEDERAL SAVINGS AND LOAN	)	
ASSOCIATION OF LAKEWOOD, et al.,	)	<b><u>MEMORANDUM OF OPINION</u></b>
	)	
Defendants.	)	

The Debtor Michael D. Sroka filed a Complaint and an Amended Complaint to determine the nature, priority, and extent of various liens and to avoid judgment liens under 11 U.S.C. § 522(f) (the "Complaint"). (Docket 1, 12). The named Defendants are: (1) First Federal Savings and Loan Association of Lakewood ("First Federal"); (2) Ohio Savings Association ("Ohio Savings"); (3) Shore West Construction Company ("Shore West"); (4) the State of Ohio; (5) Lake Ridge Academy; (6) the United States of America, on behalf of the Internal Revenue Service (the "IRS"); (7) the Cuyahoga County Treasurer; (8) Rita Sroka; and (9) Donahue & Scanlon (the "Firm"). After discovery, the Debtor filed a Motion for Summary Judgment (the "Motion") seeking an order determining all of the Defendants' lien interests and the manner in which they should be paid under the confirmed Chapter 13 plan. (Docket 27, 28). The Firm

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filed the only opposition to the Motion. (Docket 30 ). The Debtor replied to that opposition.  
(Docket 31 ).

**JURISDICTION**

The Court has jurisdiction to determine this matter under 28 U.S.C. § 1334 and General Order No. 84 entered on July 16, 1984 by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. § 157 (b)(2)(K) and (O).

**FACTS**

These are the undisputed material facts based on the facts admitted in the pleadings and the evidence offered by the Debtor in connection with the summary judgment motion:<sup>1</sup>

The Debtor filed his Chapter 13 case on February 28, 1995. Among his assets, he listed property located at 3914 Deepwoods Way, North Olmsted, Ohio (the "Property"). He claimed a \$5,000 homestead exemption under Ohio Revised Code § 2329.66(A)(1) with respect to the Property. No one objected to this exemption claim.

These are the relevant interests in the Property at the time the petition was filed:

1. First Federal held a Note secured by a Mortgage on the Property which was filed on January 26, 1981. First Federal filed a secured claim based on this obligation in the amount of \$107,246.

2. Ohio Savings held a Note secured by a Mortgage on the Property which was filed on February 17, 1982. It filed a secured claim in the amount of \$4,634.67 based on this obligation.

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<sup>1</sup> (Docket 27, 28, 31). The Firm did not offer any evidence in support of its opposition.

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3. The State of Ohio filed a judgment lien on September 20, 1991 in the amount of \$1,103.95 for 1988 taxes which encumbers the Property.<sup>2</sup>

4. The IRS filed tax liens for tax years 1989 and 1990. These liens were filed on September 10, 1990 and October 16, 1991, respectively. Based on the liens, the IRS debt was secured by the Property in the amount of \$6,855.19; and

5. The Cuyahoga County Treasurer had a lien against the Property for pre-petition real estate taxes in the amount of \$23,436.85.

Shore West, Rita Sroka, and Lake Ridge Academy did not have an interest in the Property as of the filing date. (Docket 32).

The Firm asserts a lien against the Property based on a judgment in the amount of \$23,092.38 plus interest and costs rendered by the Cuyahoga County Court of Common Pleas. The Firm filed its judgment lien on October 8, 1993. The Debtor challenges that lien on the ground that it impairs his homestead exemption.

The Property was valued by David Sarver, a broker for ERA Sarver Realty. He is of the opinion that \$145,000 is the current "as is condition" value. He also believes that the Property's "Quick Sale" and "Repaired Sale" values are \$134,000 and \$172,000, respectively.

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<sup>2</sup> The State of Ohio also filed two liens after the Chapter 13 case was filed. The State does not dispute that these liens are invalid. (Docket 1, 15; Movant's Exh. E).

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**DISCUSSION**

**I.**

**The Positions of the Parties**

The Debtor requests summary judgment as to all Defendants in this Adversary Proceeding.<sup>3</sup> Specifically, he requests that these interests be found to be fully secured by the Property as of the petition date: (1) the mortgage of First Federal; (2) the mortgage of Ohio Savings; (3) the lien of the Cuyahoga County Treasurer for pre-petition taxes; (4) the State of Ohio judgment lien for tax year 1988; and (5) the IRS tax liens for tax years 1989 and 1990. Additionally, the Debtor requests a determination as to how these Defendants should be treated in the Chapter 13 plan, including findings that certain creditors have been paid and that others should be paid either inside or outside of the on-going plan payments. He asks for summary judgment avoiding the Firm judgment lien under 11 U.S.C. § 522(f) on the basis that it impairs his homestead exemption in his Chapter 13 case. The Firm opposes this request and asserts that there are issues of material fact.

**II.**

**Summary Judgment Standard**

Summary judgment is appropriate only where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. of Civ. P. 56(c), made applicable by Fed. R. of Bankr. P. 7056; *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986);

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<sup>3</sup> After filing the Motion, the Debtor requested and was granted default judgment extinguishing the interests of Rita Sroka, Lake Ridge Academy, and Shore West. This makes the Motion moot with respect to the relief requested against these Defendants.

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*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). The movant must initially demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. at 323. The burden is then on the nonmoving party to show the existence of a material fact which must be tried. *Id.* The nonmoving party must oppose a proper summary judgment motion “by any of the kinds of evidentiary material listed in Rule 56(c), except the mere pleadings themselves . . . .” *Celotex Corp. v. Catrett*, 477 U.S. at 324. All reasonable inferences drawn from the evidence must be viewed in the light most favorable to the party opposing the motion. *Hanover Ins. Co. v. Am. Eng’g Co.*, 33 F.3d 727, 730 (6<sup>th</sup> Cir. 1994). Conclusory allegations of an affidavit do not, however, create specific fact disputes for summary judgment purposes. *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 888-889 (1990). The issue at this stage is whether there is evidence on which a trier of fact could reasonably find for the nonmoving party. *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1477 (6<sup>th</sup> Cir. 1989).

III.

**The Validity and Priority of Liens Other Than the Firm’s**

The Debtor requests summary judgment that the mortgages and liens of the following Defendants were valid, fully secured liens against the Property in the stated amounts as of the petition date: (1) the mortgage of First Federal (\$107,246); (2) the mortgage of Ohio Savings (\$4,634.67); (3) the lien of the Cuyahoga County Treasurer for pre-petition taxes (\$23,436.85); (4) the State of Ohio judgment lien for tax year 1988 (\$1,103.95); and (5) the IRS tax liens for tax years 1989 and 1990 (\$6,855.19). These Defendants do not oppose this request. The Firm opposes summary judgment arguing that “it is in dispute as to whether the liens represented as

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totally secured are in fact valid. For instance, there are several mortgage liens on the [Property] . . . and a determination as to the validity of these claims must be made.” (The Firm’s Brief in Opposition at 4). The Firm does not, however, identify which liens it disputes or the basis for contesting validity. Additionally, while the Firm questions whether these liens are entitled to priority with respect to its lien, it does not cite or establish any factual basis for this argument.

The evidence submitted by the Debtor proves that First Federal, Ohio Savings, the Cuyahoga County Treasurer, the State of Ohio, and IRS held valid mortgages and liens which were secured by the Property on the petition date. The undisputed evidence also establishes the amounts of those liens and their priority over the Firm’s lien. The Firm has not introduced any evidence to establish that a material fact exists which must be tried on the issue of the validity, amount, or priority of those mortgages and liens. Conclusory allegations are insufficient to establish that such an issue exists. As a trier of fact could not reasonably find for the Firm on this point, the Debtor is entitled to summary judgment determining that these Defendants were fully secured by the Property in the stated amounts, and that they had priority over the Firm’s judgment lien.

IV.

**11 U.S.C. § 522(f)**

The Debtor also requests summary judgment avoiding the Firm’s judgment lien under 11 U.S.C. § 522(f). He argues that the Firm’s judgment lien impairs his \$5,000 homestead exemption based on the existence of the other mortgages and liens and the Property’s value of \$145,000. The Firm contends that there are issues of fact regarding the value of the Property and

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the availability of the homestead exemption. Once again, however, it does not come forward with a factual or legal basis in support of these issues. The Firm also makes the statement that avoidance under § 522(f) is not available in a Chapter 13 case, but fails to support this with any factual or legal argument. For the reasons stated below, the Firm's arguments do not establish that there are issues of fact which must be tried.

**The Value of the Property**

The Debtor introduced evidence to establish that the fair market value of the Property is \$145,000. The Court accepts Mr. Sarver's "as is" valuation as the Property's fair market value for purposes of this decision. *See Tedeschi v. Falvo (In re Falvo)*, 227 B.R. 662 (B.A.P. 6<sup>th</sup> Cir. 1998) (In the absence of a certified appraisal, it is reasonable to accept a broker's real property valuation). The Firm has not introduced any evidence or made any argument to support its conclusory statement that this value is inappropriate.

**Ohio Revised Code § 2326.66(A)(1)**

Under § 2329.66(A)(1)(b), a debtor may exempt his interest, not to exceed \$5,000, in one parcel of real or personal property that he uses as a residence. The Debtor stated in his affidavit that the Property is his residence. The Firm's opposition does not provide any evidence or argument to support its contention that the Debtor is not entitled to the homestead exemption.

**The Applicability of 11 U.S.C. § 522(f) in this Chapter 13 case**

Section 522 is part of Chapter 5 of Title 11. 11 U.S.C. § 103(a) provides generally that "... chapters 1, 3, and 5 apply in a case under chapter 7, 11, 12 or 13 of this title." That section makes lien avoidance under § 522(f) available to this Chapter 13 debtor.

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Section 522(f) provides:

(1) [T]he debtor may avoid the fixing of a lien on the 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 -

(A) a judicial lien...

\* \* \*

(2) (A) For the purposes of this subsection, 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 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.

The Debtor requests summary judgment avoiding the Firm's judgment lien under these provisions. The Firm has not cited any additional factual issues relevant to avoidance of its judgment lien.

Applying the formula set out in §522(f)(2)(A), the Debtor has established these facts regarding impairment:

(i)	the Firm's judgment lien	\$ 23,092.38
(ii)	all other liens on the Property	\$143,276.66
(iii)	the amount of the homestead exemption	\$ 5,000.00
	Total	\$171,369.04

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As the total of \$171,369.04 exceeds the \$145,000 value of the Property by \$26,369.04, it is clear that the Firm's judgment lien impairs the Debtor's exemption. The Debtor takes the position that the entire lien is avoidable under this calculation. *Holland v. Star Bank (In re Holland)*, 151 F.3d 547 (6<sup>th</sup> Cir. 1998). While the Firm claims that the calculation cannot be made at all until the other Defendant's rights are determined, the Firm does not dispute the Debtor's calculations, as set forth above, or the Debtor's conclusion that the lien is avoidable in its entirety. The Firm's lien is, therefore, avoided in its entirety.

**Request for Determination as to Treatment of Claims in the Chapter 13 Case**

The Debtor also requests a determination as to how these secured interests should be treated in the Chapter 13 plan. There are insufficient facts to determine such issues as whether some of the interests have been paid since the case filing and whether remaining debts should be paid inside or outside of the plan. In any event, this Adversary Proceeding is not the appropriate forum in which to address that issue. Any changes to the confirmed plan must be made through a motion to modify the plan, with notice to the Chapter 13 Trustee and other parties in interest. This request is denied without prejudice to the Debtor's right to file such a motion.

**CONCLUSION**

For the reasons stated, the Debtor's Motion for Summary Judgment is granted as to Defendants First Federal, Ohio Savings, the State of Ohio, the United States of America on behalf of the IRS, the Cuyahoga County Treasurer, and Donahue & Scanlon. First Federal, Ohio Savings, the State of Ohio, the United States of America on behalf of the IRS, and the Cuyahoga County Treasurer are determined to be secured with respect to the Property as set forth in this Memorandum of Opinion. Defendant Donahue & Scanlon's judgment lien filed on October 8,

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1993 is avoided under 11 U.S.C. § 522(f). That part of the Debtor's Motion that asks for a determination as to how the claims of these Defendants should be treated in the Chapter 13 plan is denied without prejudice. A separate order will be entered in accordance with this decision.

Date: 26 July 1999

  
\_\_\_\_\_  
Pat E. Morgenstern-Clarren  
United States Bankruptcy Judge

Served by mail on: Donza Poole, Esq.  
Susan Gray, Esq.  
Benton Bassett, Esq.  
Sebraien Haygood, Esq.  
Harvey Labovitz, Esq.  
Christopher Klym, Esq.  
Myron Wasserman, Trustee  
Roy Lachman, Esq.

By: Joyce L. Gordon, Secretary

Date: 1/26/99

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In re:	)	Case No. 95-10867
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MICHAEL D. SROKA,	)	Chapter 13
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Debtor.	)	Judge Pat E. Morgenstern-Clarren
_____	)	
	)	
MICHAEL D. SROKA,	)	Adversary Proceeding No. 98-1164
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
FIRST FEDERAL SAVINGS AND LOAN	)	
ASSOCIATION OF LAKEWOOD, et al.,	)	<b><u>JUDGMENT</u></b>
	)	
Defendants.	)	

For the reasons stated in the Memorandum of Opinion filed this same date, the Motion of Michael D. Sroka for Summary Judgment is granted in part. These Defendants are determined to be secured as of the date the Chapter 13 case was filed in the following amounts: First Federal Savings & Loan Association of Lakewood (\$107,246), Ohio Savings Association (\$4,634.67), the State of Ohio (\$1,103.95), the Cuyahoga County Treasurer (\$23,436.85), and the United States of America on behalf of the Internal Revenue Service (\$6,855.19). Defendant Donahue & Scanlon's judgment lien filed on October 8, 1993 is avoided under 11 U.S.C. § 522(f). The Motion for Summary Judgment is denied as moot as to Defendants Shore West Construction Co.,

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Lake Ridge Academy, and Rita Sroka because default judgment was previously entered against them. To the extent that the Motion requests a determination as to how the various interests should be treated under the confirmed Chapter 13 plan, it is denied without prejudice to file a motion to modify the plan.

IT IS SO ORDERED.

Date: 26 Jan 1999

Pat E. Morgenstern-Clarren  
Pat E. Morgenstern-Clarren  
United States Bankruptcy Judge

Served by mail on: Donza Poole, Esq.  
Susan Gray, Esq.  
Benton Bassett, Esq.  
Sebraien Haygood, Esq.  
Harvey Labovitz, Esq.  
Christopher Klym, Esq.  
Myron Wasserman, Trustee  
Roy Lachman, Esq.

By: Joyce L. Gordon, Secretary  
Date: 1/26/99