

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

)	CASE NO. 03-62445
)	
IN RE:)	CHAPTER 13
)	
JACQUELINE MILDRED SPEROS,)	JUDGE RUSS KENDIG
)	
Debtor.)	
)	MEMORANDUM DECISION
)	
)	

This matter comes before the court upon an objection to debtor's amended plan (hereafter "Objection") by Hudson & Keyse, Inc., Assignee of Household Finance (hereafter "Hudson"). Jacqueline Speros (hereafter "Debtor") replied and Hudson responded. Further before the court is a motion to establish secured value (hereafter "Motion") filed by Debtor. Hudson objected to this motion. The court issued a Memorandum Order following hearing requesting briefs on the issues presented. Debtor filed a brief.

JURISDICTION

The court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334(b) and the general order of reference entered in this district on July 16, 1984. This is a core proceeding under 28 U.S.C. § 157(b)(2)(K) and (L).

FACTS AND ARGUMENTS

Hudson obtained a judgment lien in the amount of \$4,308.75 at 14.90% on August 19, 2002 which Debtor seeks to avoid pursuant to 11 U.S.C. § 522(f)(2). Hudson asserts that avoiding this lien would ignore an entry by the Stark County Common Pleas Court which placed the priority of Hudson's lien first, behind only real estate taxes.

In its objection to Debtor's amended plan, Hudson questions whether Debtor acted in good faith with regards to the equity remaining in her residence. Hudson alleges that on the same day that Debtor executed a mortgage in favor of People's Choice Home Loan, Inc., which was assigned to Fairbanks Capital Corporation (hereafter "Fairbanks"), in the amount of \$58,500.00, she also transferred half of her interest to her daughter for no consideration. Hudson believes that Debtor received cash back from her mortgage and made home

improvements with this. Further, Hudson argues that Debtor valued her home in her Motion at half the amount of the loan she received.

In response, Debtor states that she was required to transfer half of her interest in the real estate to her daughter to be eligible to receive the mortgage. The daughter also signed the note and mortgage. Debtor further argues that the validity of the Fairbanks lien was not changed by the state court judgment. The mortgage is still valid and exceeds the value of the real estate and, thus, impairs Debtor's exemption under O.R.C. § 2329.66 et seq. and can be avoided.

Hudson argues that the case which Debtor cites to support the proposition that junior consensual mortgages must be included when making an impairment calculation should not be followed. Hudson argues that § 522 was not intended to alter state law regarding lien priorities.

In her Motion to establish value, Debtor claims that the value of the real property is \$29,000.00. Fairbanks mortgage is \$58,250.00 and, therefore, leaves no equity and impairs Debtor's exemption. Hudson responds that if Fairbanks' junior lien is not taken into account when calculating impairment, there is plenty of equity after Hudson's lien is satisfied for Debtor to claim the exemption.

Debtor argues that Hudson has not demonstrated by any extrinsic evidence that her plan was filed in bad faith. Further, Hudson is receiving as much as it would in a chapter 7 case since its lien could be avoided in a chapter 7. Debtor further argues that Hudson's support in the cases it cites is misplaced because they do not address the issue of whether Congress intended to disrupt state lien priorities with § 522. Finally, as to Hudson's argument that Fairbanks' mortgage should be equitably subordinated, Debtor argues that this is a complete misreading of 11 U.S.C. § 510(c). Debtor argues that this section applies only to the priority of distribution by the trustee and is not intended to be a vehicle for one creditor to attack another. Hudson did not reply.

ANALYSIS

The court will resolve this matter by considering two issues: (1) whether 11 U.S.C. § 522 can disrupt state lien priorities and (2) whether Debtor has engaged in bad faith conduct that would require this court to grant Hudson's objection to her plan.

A. 11 U.S.C. § 522(f) and the Re-Ordering of State Lien Priorities.

In order to avoid a lien under § 522, Debtor must demonstrate that the judicial lien sought to be avoided impairs a state law exemption to which Debtor is entitled.¹ See Reece v. Parkview Villas of Scottsdale Owners' Assoc. (In re Reece), 274 B.R. 515 (Bankr. D. Ariz. 2001); In re Kerbs, 207 B.R. 211, 214 (Bankr. D. Mont. 1997). Section 522(f)(2)(A) defines the term "impair" as follows:

(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.

11 U.S.C. § 522.

Using this definition, Debtor calculates that she is impaired. The value of Hudson's lien, about \$7,000.00², and the value of Fairbanks' lien, \$58,250.00, produce the sum of \$65,250.00. Add to this number Debtor's \$5,000.00 exemption under O.R.C. § 2329.66(A)(1)(b) and the result is \$70,250.00. Debtor's attached appraisal shows the value of

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Debtor must also demonstrate that she owns the property in question and that the lien sought to be avoided is a judicial lien. These elements are not in dispute.

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Debtor, in her Motion, values Hudson's lien at about \$6,200.00. In its objection Hudson places the value at about \$7,000.00. This difference is most likely attributable to differing calculations of the interest owed. For the purposes of calculating impairment, the difference between \$6,200.00 and \$7,000.00 is not material. The court will use the value of \$7,000.00 only because some number must be used. This is not a ruling on the amount actually owed.

the real estate to be \$29,000.00³. Therefore, Debtor argues that the sum of (i), (ii), and (iii), \$70,250.00, exceed the value of Debtor's interest in the property, \$29,000.00, by \$41,250.00. Since this number is greater than \$7,000.00, Debtor argues that the entire lien of Hudson should be avoided.

Hudson asserts that the above calculation is incorrect. It urges the court to follow the reasoning of courts which exclude mortgage liens which are junior to the judicial lien from the calculation. Specifically, Hudson cites the case of In re Brinley, 278 B.R. 130 (Bankr. W.D. Ky 2002). The Brinley court found that Congress did not intend to upset state priority law with the 1994 revision of § 522(f). Id. The court reasoned that doing so would violate the takings clause of the constitution and produce an unjust result. Id. at 132. The Brinley court relied on the reasoning in the case of In re Dolan, 230 B.R. 642 (Bankr. D. Conn. 1999). Brinley, however, was subsequently overruled in Brinley v. LPP Mortg., Ltd., 2003 U.S. Dist. LEXIS 5287, a fact which Hudson fails to mention.

The opposing argument is represented by the case of Kolich v. Antioch Laurel Veterinary Hospital, 328 F.3d 406 (8th Cir. 2003). The Kolich court frames the issue as whether the phrase "all other liens on the property" in § 522(f)(2) includes junior consensual liens to the judicial lien at issue. Id. at 410. The court found that the plain meaning of § 522 did include junior consensual liens. Id. Further, the court found that applying the literal language of the statute did not produce an absurd result. Id. The court reasoned that Congress intended to treat consensual lien holders more favorably with § 522(f). Id. The court was not entirely comfortable with its decision as it might encourage unscrupulous debtors to persuade a bank to grant a junior consensual lien in order to wipe out a judicial lien. Id. However, the court concluded that "[w]ith the competing equities both hard to weigh and finely balanced, our task is simply to apply § 522(f)(2)(A) as Congress wrote it." Id.

A statute's plain meaning should only be ignored in the rarest of circumstances. "[W]hen the statute's language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms." Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 6 (2000) (internal quotation marks omitted). The "legislature says in a statute what it means and means in a statute what it says there." Connecticut Nat. Bank v. Germain, 503 U.S. 249, 254 (1992). The

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The fact that half of the residence was transferred to Debtor's daughter raises the issue of whether the entire value of the property should be used to calculate impairment or whether the phrase "debtor's interest in the property" requires the court to use half of the value of the residence. Many courts confronted with this issue use the entire value of the property. See e.g. Nelson v. Scala, 192 F.3d 32 (1st Cir. 1999). In this case the issue is not material since the property is so far under water. The court will use the full value of the property since some value must be used to make the calculation.

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language in 11 U.S.C. § 522(f) regarding whether junior, consensual liens are to be included in the calculation could not be plainer. “[A]ll other liens on the property” means just that— *all* other liens. Had Congress desired to not include junior, consensual lien in the calculation, it could have easily drafted language to achieve this effect— but it did not. See Kolich, 328 F.3d at 410.

The Supreme Court’s mandate for a plain meaning interpretation of the Bankruptcy Code is undeniable. There is an unabated string of cases demanding plain meaning interpretation: Unites States v. Ron Pair, 489 U.S. 235, 245-46 (1989); Patterson v. Shumate, 504 U.S. 753, 759 (1992); Rake v. Wade, 508 U.S. 464, 471 (1993); Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 6 (2000).

This interpretation of § 522(f) is admittedly at odds with state law priorities and common logic, but it is not so irrational as to require abandoning the plain meaning directive. It may be deemed to have the legitimate effect of enhancing consensual lending and, thus, may not be declared irrational.

Because Fairbanks’ lien is included in calculating impairment, Hudson’s lien must be avoided in its entirety. As stated above, when Hudson’s lien, all other liens on the property, and Debtor’s exemption are added together the sum is \$70,250.00. Debtor’s appraisal of the property places its value at \$29,000.00. Although Hudson points out that a tax appraisal conducted in 2000 places the value of the property at \$42,900.00, it has shown no reason for the court to question the validity of Debtor’s appraisal which was conducted in April 2003. Therefore, Debtor’s exemption is impaired by \$41,250.00. This greatly exceed the value of Hudson’s lien which is avoided in its entirety pursuant to 11 U.S.C. § 522(f)(2)(A).

B. Good Faith

In order to determine whether a plan is proposed in good faith under 11 U.S.C. § 1325(a)(3), the totality of the circumstances are considered. In re Barrett, 964 F.2d 588, 590 (6th Cir. 1992); Metro Employees Credit Union v. Okoreeh-Baah (In re Okoreeh-Baah), 836 F.2d 1030, 1033 (6th Cir. 1988). Hudson argues that the plan is in bad faith because Debtor transferred half her residence to her daughter just two days after Hudson obtained judgment. At the same time, she signed a mortgage with Fairbanks, received significant money back and made substantial home improvements. It is also claimed that Debtor valued the home for fifty percent of the amount of the mortgage she received.

The court does not agree with Hudson that the above allegations, even if true, amount to bad faith. As Debtor states in her response and Hudson acknowledges in its objection, Debtor transferred half of her interest in the residence at the request of Fairbanks as a condition precedent to receiving her mortgage. It is not suggested that Debtor in any way

encouraged this condition and the court cannot find that this evidences any bad faith. Hudson cites as bad faith the fact that Debtor valued her home at half the amount of the mortgage that Fairbanks received. However, the residence's value is what it is. There is no suggestion that Debtor influenced its appraiser to give the appraisal that he did. The court finds no bad faith in Debtor's valuation of her home. As for making substantial home improvements, Debtor's appraisal states that the home is in bad condition in that the doors needed replaced and the bathroom needed updated. Hudson does not allege that these improvements were unnecessary or excessive.

Finally there is the matter of Debtor receiving cash back from her mortgage with Fairbanks. This is more troubling to the court since it occurred just days after Hudson won its judgement. The court certainly does not want to encourage debtors to rid themselves of all the equity in their homes in order to thwart judgement lien creditors. However, Hudson states that Debtor had a prior mortgage in the amount of \$35,600.00. This is large enough so that Debtor would still have had no equity in her home, even if she had not re-financed and taken cash back. Thus, the court cannot find that Debtor's plan is proposed in bad faith and Hudson's objection to the same is overruled.

This opinion is not for publication.

CONCLUSION

For the foregoing reason, the judgment lien of Hudson is hereby avoided. Further, Hudson's objection to confirmation is overruled. In reaching this conclusion, the court has considered all arguments of the parties, whether or not specifically addressed in this opinion.

So Ordered.

 Russ Kendig

FEB 4 2004

RUSS KENDIG
U.S. BANKRUPTCY JUDGE