

**UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION**

In Re)	Case No. 01-35578
)	
John and Terri Short)	Chapter 7
)	
Debtors.)	
)	JUDGE MARY ANN WHIPPLE

MEMORANDUM OF DECISION

This case is before the court upon Debtor’s Motion to Avoid Lien with Bowling Transportation, Inc. (“Motion”) [Doc. # 24] and Bowling Transportation, Inc.’s (“BTI”) opposition to the Motion [Doc. #28]. At the evidentiary hearing scheduled on the Motion, counsel stipulated to the facts necessary to decide the Motion. Based on the stipulated facts and the conclusions of law explained below, the court finds that the judicial lien in issue shall be partially avoided to the extent of \$20,471.01.

Debtors filed this joint Chapter 7 case on September 6, 2001. The court has jurisdiction over this case under 28 U.S.C. § 1334(a) and (b). The Motion is a core proceeding that this court may hear and determine. 28 U.S.C. § 157(a), (b)(1) and (b)(2)(K) and (O). Debtors’ Chapter 7 case was closed on August 1, 2002, and then reopened on motion of the Debtors granted by the court. Upon reopening of the case, Debtors filed the Motion. The Motion seeks to avoid, as an impairment to their right to an exemption, BTI’s pre-petition judicial lien attached to the Debtors’ residential real property.

Under 11 U.S.C. § 522(b)(1), Ohio has opted out of the federal bankruptcy exemptions established under 11 U.S.C. § 522(d), so bankruptcy debtors are therefore entitled to those exemptions allowed by Ohio law. Ohio Rev. Code § 2329.662. Under Ohio law, each Debtor is entitled to a homestead exemption of \$5,000.00, or \$10,000.00 in total in this case. Ohio Rev. Code § 2329.66(A)(1)(b). The Bankruptcy Code in turn establishes grounds for avoiding judicial liens that impair an exemption to which a debtor is entitled:

(f)(1) Notwithstanding any waiver of exemptions, but subject to paragraph (3), the debtor may avoid the fixing of a lien on an 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...¹

(2)(A) For the purposes of this section, 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(f)(1) and (2)(A).

BTI does not dispute that its lien constitutes a “judicial lien” as defined in 11 U.S.C. § 101(36) and is therefore subject to potential avoidance under § 522(f). And BTI has not contested that Debtors are entitled to a total homestead exemption of \$10,000.00 in the property. BTI asserts two other arguments contesting avoidance. [Doc. #28]. First, BTI argues that the Debtors’ homestead exemption is not yet impaired because no order of sale has issued from the Fulton County, Ohio Common Pleas Court. Second, although not entirely clear, the parties apparently disagree on application of the statutory formula and whether a lien that impairs an exemption should be partially or completely avoided under certain circumstances. At the hearing, counsel also disagreed over whether the lien created by real property taxes should be included in the statutory mathematical formula for impairment.

The United States Court of Appeals for the Sixth Circuit rejected BTI’s first argument in *Holland v. Star Bank (In re Holland)*, 151 F.3d 547 (6th Cir. 1998), basing its decision on Congress’ 1994 amendments to § 522(f).

Although the Sixth Circuit has not addressed the issue of partial avoidance, the Bankruptcy Appellate Panel for the Sixth Circuit did so in *Tedeschi v. Falvo (In re Falvo)*, 227 B.R. 662, 667-68 (B.A.P. 6th Cir. 1998). Applying the Sixth Circuit’s decision in *Holland*, the Bankruptcy Appellate Panel

¹ Not all judicial liens are avoidable. BTI’s judgment and judicial lien are not of a type excepted from avoidance by the statute. See 11 U.S.C. § 522(f)(1)(A)(i) and (ii) and (f)(2)(C).

held in *Falvo* that partial lien avoidance and not total lien avoidance is appropriate where the difference between the lien total and the value of the Debtor's property is less than the total amount

of the creditor's judicial lien. This court will therefore apply the impairment formula in § 522(f)(2)(A) in accordance with *Holland* and *Falvo*.

The final legal issue raised by the parties is whether the lien on Debtor's property created under Ohio law to secure payment of taxes levied on real property is part of the impairment calculation as within the statutory element of "all other liens on the property" at § 522(f)(2)(A)(ii). Tax liens are not "judicial liens" themselves subject to avoidance under § 522(f). But the formula for calculating impairment at § 522(f)(2)(A)(ii) broadly includes within consideration "all other liens" on the property. The only "liens" that are specifically excluded by the statute from consideration in making the mathematical impairment calculation are liens that have been otherwise avoided. 11 U.S.C. § 522(f)(2)(B). Under 11 U.S.C. § 101(37), "lien" is broadly defined as a "charge against or interest in property to secure payment of a debt or performance of an obligation."

The owner of real property is liable under Ohio law for the payment of taxes levied on the property. Ohio Rev. Code § 323.12. Ohio law provides in turn that "[t]he lien of the state for taxes levied for all purposes on the real and public utility tax list and duplicates for each year shall attach to all real property subject to such taxes on the first day of January, annually ... and continue until such taxes, including any penalties, interest, or other charges accruing thereon, are paid." Ohio. Rev. Code § 323.11. The obligation to pay real property taxes under Ohio law is therefore a debt secured by a charge against property, within the meaning of the Bankruptcy Code. *See In re Smith*, 315 B.R. 636, 640 (Bankr. D. Mass. 2004). Based on the plan language of both the relevant Bankruptcy Code provisions and the Ohio tax payment and lien statutes, the court finds that the lien established by Ohio law for real property taxes is a "lien" that must be factored into the calculation of impairment under § 522(f).

The court finds only one unpublished decision that addresses this issue, albeit interpreting Kentucky law and not Ohio law. On appeal, the district court in *Radcliffe v. LPP Mortgage, Ltd.*, 2003 U.S. Dist. LEXIS 5286 (W. D. Ky. April 1, 2003), held that the lien for ad valorem real estate taxes under Kentucky law is a lien that must be factored into determining the extent to which an avoidable lien impairs a bankruptcy debtor's exemption. The court finds this decision persuasive, in that there does not appear to be any meaningful distinction between the Kentucky and Ohio real property tax law frameworks in this context. And other courts have simply included unspecified types of tax liens within the calculation of

impairment without discussion. *See, e.g., In re Plott*, 220 B.R. 596, 597 (Bankr. N.D. Ohio 1998).

The court will therefore include the Debtors' real property taxes in applying the statutory

formula for impairment as within the statutory element of "all other liens on the property" at § 522(f)(2)(A)(ii).

Counsel stipulated on the record to the following facts necessary to calculating impairment under § 522(f). The value of Debtors' property is \$123,600.00. The payoff on the first mortgage to Sky Bank is \$48,119.91. The payoff on the second mortgage to F & M State Bank is \$60,632.26. The real estate taxes are \$1,536.62. BTI's judgment lien amount is \$23,782.22.

In accordance with the court's conclusions of law above, these stipulated facts fit into the statutory impairment formula in § 522(f)(2)(A) as follows:

\$ 23,782.22 (the lien) +	
\$110,288.79 (sum of all other liens on property: Sky Bank lien, F & M State Bank lien and real property tax lien) +	
<u>\$ 10,000.00 (exemption amount)</u> =	
\$144,071.01 -	
<u>\$123,600.00 (value of property)</u> =	
\$ 20,471.01 (extent of impairment)	

See Falvo, 227 B.R. at 666. The amount of BTI's judicial lien (\$23,782.22) exceeds the extent of the impairment (\$20,471.01) by \$3,311.21. Therefore, in accordance with *Falvo*, BTI's lien shall be partially avoided under § 522(f) to the extent of the \$20,471.01 impairment. The balance of BTI's judicial lien in the amount of \$3,311.21 is not avoided and shall remain attached to the property. A separate judgment in accordance with this Memorandum of Decision will be entered by the court.

/s/ Mary Ann Whipple

MARY ANN WHIPPLE
UNITED STATES BANKRUPTCY JUDGE