

THIS OPINION NOT INTENDED FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION



In re:) Case No. 05-10667
)
RICHARD H. BUIE, JR.,) Chapter 7
)
Debtor.) Judge Pat E. Morgenstern-Clarren
)
) **MEMORANDUM OF OPINION**

The debtor Richard Buie moves to avoid a judicial judgment lien held by Landstar Investments II, Inc. on property located at 3555 Lytle Road, Cleveland, Ohio because it impairs his homestead exemption. Landstar opposes the motion. (Docket 12, 16, 17, 31, 32). For the reasons stated below, the motion is denied.

JURISDICTION

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 84 entered 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).

11 U.S.C. § 522(f)

The bankruptcy code provides that a debtor may avoid certain liens:

. . . [T]he 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 . . . [with exceptions not relevant here].

11 U.S.C. § 522(f)(1)(A).

A lien impairs the exemption to the extent that the sum of all liens and the exemption amount exceed the value of the debtor's interest in the property if there were no liens. 11 U.S.C. § 522(f)(2)(A). Stated somewhat differently, the calculation to be made is to add together the value of all liens and the exemption and then subtract the fair market value of the real estate. *Brinley v. LPP Mortgage Ltd. (In re Brinley)*, 403 F.3d 415 (6th Cir. 2005). The challenged lien is then avoided to the extent, if any, that the sum exceeds the property value. *Id.* at 421. The factual issues, therefore, are: what is the market value of the property, what is the amount of each lien that encumbers the property, and what is the value of the exemption. The debtor, as the movant, has the burden of proof. *In re Northern*, 294 B.R. 821, 827 (E.D. Tenn. 2003).

ISSUE

Should the Landstar lien be avoided in whole or in part because it impairs the debtor's homestead exemption?

THE POSITIONS OF THE PARTIES

The debtor claims a \$5,000.00 homestead exemption which Landstar does not dispute. *See* OHIO REV. CODE § 2329.66(A)(1)(b). The debtor argues that the fair market value of his property is \$166,000.00, as determined by the Cuyahoga County auditor's appraised tax value. Starting with that number, he contends that after adding together the first lien held by Aames Home Mortgage and the real estate tax liens, the Landstar lien impairs his statutory exemption.

Landstar argues that the value of the property is not established, although it offers an appraisal valuing the property at \$189,000.00. It also questions the amount of other liens on the property. Additionally, Landstar maintains that the debtor will not be harmed (and thus the lien should not be avoided) because if the property is permitted to go to foreclosure sale, the debtor's

homestead exemption will be paid before Landstar's lien, which is not a first lien against the property.

THE EVIDENTIARY HEARING

The court held an evidentiary hearing on August 18, 2005. The debtor presented his case through stipulated exhibits and cross-examination of Landstar's witness, Michael Bowman.

Landstar presented its case through Mr. Bowman's testimony and stipulated exhibits.

I. The value of the property

The debtor relies on the Cuyahoga County auditor's tax value of \$166,000.00, which Landstar challenges as a different measure than market value. The debtor did not prove that the tax value is an accurate reflection of the market value and it cannot, therefore, be used for that purpose. He argues, alternatively, that he will accept Landstar's appraisal for the lien analysis. The court will, therefore, continue with the calculations using a market value of \$189,000.00.¹

II. Liens on the property

The parties agree that Aames Home Mortgage holds a first lien on the property. They do not agree as to the amount of that lien. They stipulated that the state court entered a judgment in favor of Aames and against the debtor for \$130,439.66 plus interest at 9.92% per annum from July 1, 2002 forward. The debtor argues that Aames's lien is now "about" \$180,000.00 while Landstar argues the lien is now "about" \$160,000.00, but that Aames for some reason tacked on another \$39,000.00 in costs to which it was not entitled. No one from Aames testified and

¹ Landstar seems to argue against using this number because it contends that the value is unknown and can only be determined through a foreclosure sale. This is, however, the appraised value placed into evidence by Landstar and so the court will permit the debtor to agree that this is the market value. Via Mr. Bowman, Landstar also tried to prove that the market value was \$237,000.00. That evidence was, however, too attenuated to support that value.

neither side provided an interest calculation for the court to review. On this record, the debtor did not meet his burden of proving the lien amount.

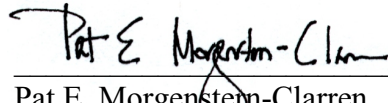
The debtor argued through counsel that unpaid real estate taxes are also liens on the property. Landstar would not, however, stipulate that the taxes were unpaid and so this also fails for lack of proof.

Without evidence as to the amount of the liens on the property, the court cannot determine whether Landstar's lien impairs the debtor's homestead exemption. The motion cannot, therefore, be granted.

CONCLUSION

For the reasons stated, the debtor did not meet his burden of proof and the motion to avoid lien is denied. The court will enter a separate order reflecting this decision.

Date: 8/19/05



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

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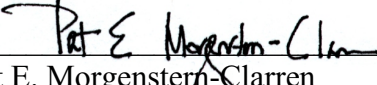


In re:) Case No. 05-10667
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RICHARD H. BUIE, JR.,) Chapter 7
)
Debtor.) Judge Pat E. Morgenstern-Clarren
)
) **ORDER**

For the reasons stated in the memorandum of opinion filed this same date, the debtor's motion to avoid a judicial judgment lien held by Landstar Investments II, Inc. is denied.

IT IS SO ORDERED.

Date: 8/19/05



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

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