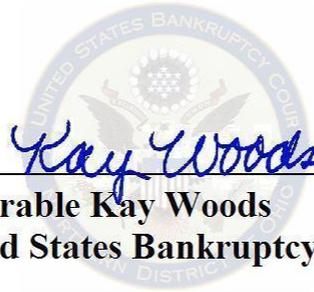


IT IS SO ORDERED.



**Dated: April 13, 2007
08:56:55 AM**

**Honorable Kay Woods
United States Bankruptcy Judge**

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

IN RE:

JAMES KNEPPER,

Debtor.

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CASE NUMBER 05-84381

HONORABLE KAY WOODS

M E M O R A N D U M O P I N I O N

This cause is before the Court on the Motion to Avoid Judicial Lien ("Motion") filed on behalf of Debtor James Knepper ("Debtor") on November 13, 2006. Agland Co-op, Inc. ("Agland") filed Creditor Agland Co-op, Inc.'s Objection to Debtor's Motion to Avoid Judicial Lien ("Objection") on December 6, 2006. A hearing on the Motion was scheduled for December 14, 2006, but the hearing was continued a number of times at the request of the parties.

Ultimately, the parties requested an evidentiary hearing, which was conducted on April 5, 2007. At the hearing, Debtor was present and represented by Richard Hoppel, Esq. Agland was represented by Andrew Lycans, Esq. The Court accepted the

testimony of Debtor. Neither party chose to make opening or closing arguments and Agland offered no affirmative case, relying instead on its cross-examination of Debtor. The Court did not order, nor did the parties move to file, post-hearing briefs.

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334. Venue in this Court is proper pursuant to 28 U.S.C. §§ 1391(b), 1408, and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(K). The following constitutes the Court's findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052.

Pursuant to 11 U.S.C. § 522(f)(1)(A), a debtor may avoid a judicial lien (other than a judicial lien resulting from a domestic support order) on an interest in property to the extent that such lien impairs an exemption¹ to which the debtor is entitled under 11 U.S.C. § 522(b). 11 U.S.C. § 522 (West 2006). A debtor seeking to avoid a lien under § 522(f) must establish the following three essential elements: (1) the lien to be avoided is a judicial lien; (2) the debtor has an interest in the property to which the lien attaches; and (3) the lien impairs an exemption to which the debtor would otherwise be entitled. *In re Weaver*, 248 B.R. 106, 111 (Bankr. N.D. Ohio 2000)(citing *In re Bland*, 91 B.R. 421, 422 (Bankr. N.D. Ohio 1988)).

To determine the extent of impairment under § 522(f), an initial determination must be made of the fair market value of the property for which an exemption is claimed at the time the petition was filed. *In re Mershman*, 158 B.R. 698, 702 (Bankr. N.D. Ohio

¹Debtor relies on R.C. §§ 2329.66(A)(1)(b)("homestead exemption") and (A)(18)("catchall exemption") to establish a \$5,400.00 exemption in the real property. See OHIO REV. CODE ANN. § 2329.66 (West 2006).

1993). Section 522(f)(2)(A) provides the following test to determine whether a lien impairs an exemption:

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 (West 2006).

The debtor bears the burden of proof as to all elements necessary to avoid the judicial lien, including valuation. See *Lee v. Bank One, N.A. (In re Lee)*, 249 B.R. 864, 867 (Bankr. N.D. Ohio 2000) see also *Tedechi v. Falvo (In re Falvo)*, 227 B.R. 662, 664 (B.A.P. 6th Cir. 1998). The burden must be carried by a preponderance of the evidence. *In re Lee*, 249 B.R. at 867.

Debtor and his estranged wife, Julie A. Knepper, are the record owners of two parcels of real estate in Columbiana County identified by the County Auditor as 14421 Old Fredericktown Road and Sprucevale Road (collectively "real property"). Agland obtained and subsequently recorded a judgment against Debtor in the amount of \$16,852.28 with 24% interest from April 30, 2004. However, Agland concedes that First National Community Bank ("Bank") holds the first and best lien on the property in the form of a mortgage in the approximate amount of \$285,000.00, plus interest accruing since December 28, 2006.

At the hearing, Debtor testified that the real property consists of approximately 127 acres of land (50 acres attributable to 14421 Old Fredericktown Road and 77.5 acres attributable to

Sprucevale Road), which was select timber cut in 2003. There is a residence, a century barn, a horse barn with an indoor arena, and another small residence attached to the horse barn, located on 14421 Old Fredericktown Road. However, Debtor testified that these buildings are in need of repair, except the century barn, which is beyond repair and should be torn down.

Debtor further testified that the real property is not accessible from any road, and that his ingress to and egress from the real property is facilitated by an easement by prescription² on the property of his neighbor, Harold Ferguson ("Ferguson easement"). Debtor explained that he has attempted to purchase an easement on Ferguson's property, but Ferguson will not sell an easement to Debtor.

In addition to Debtor's testimony, the Court admitted into evidence Summaries of the real property ("Summaries") downloaded from the County Auditor's website at www.columbianacntyauditor.org. ("Auditor's website"). Debtor's testimony centered on four entries listed for each property:

	<u>Sprucevale</u>	<u>Fredericktown</u>
Mkt Land Value	\$85,500	\$91,640
Cauv Value	\$5,680	\$22,050
Mkt Improvement Value	\$0	\$134,030
Total Value	\$5,680	\$156,080

Based upon the amounts listed in the Summaries, Debtor testified on direct examination that the total value of 14421 Old Fredericktown Road is \$156,080.00, and the total value of Sprucevale Road is \$5,680.00. As a consequence, Debtor testified

²An "easement by prescription," a/k/a "prescriptive easement," is defined as "[a]n easement created from an open, adverse, and continuous use over a statutory period." Black's Law Dictionary, 550 (Eighth Edition 2004).

that the value of the real property is between \$161,000.00 and \$162,000.00.

On cross-examination, however, when Agland's counsel questioned Debtor's valuation of Sprucevale Road, Debtor responded, "Oh, I was wrong. That was my mistake. \$85,000.00 - market land value. I was looking at the taxes or something on it. Okay. Yes, I made a mistake."

Agland's counsel then directed Debtor's attention to the Summary for 14421 Old Fredericktown Road:

Counsel: And if you look on the first sheet, there's a column for market land value and market improvement value. Do you see them?

Debtor: Yes, I do.

Counsel: And if you add those up it's more that the 156,000 figure that you cited.

Debtor: Yeah, I added wrong. I looked at the wrong lines is what I done.

Counsel: No further questions, Your Honor.

Debtor's testimony about the Summaries is the only evidence before the Court regarding the fair market value of the real property. However, in an eleventh-hour pleading captioned "Lienholder's Post-Hearing Brief," ("Post-hearing Brief")³ Agland argues for the first time⁴ that the fair market value of the real

³Agland's Post-hearing Brief prompted Debtor to file Response to Post-Hearing Brief, which prompted Agland to file Lienholder's Reply to Debtor's Response. The briefs are merely argument and do not constitute evidence. *Sicherman v. Cohara (In re Cohara)*, 324 B.R. 24, 28 (B.A.P. 6th Cir. 2005)("Assertions by counsel do not constitute probative evidence.").

⁴In its Objection, Agland argued that the Bank had obtained a summary appraisal report as of February 9, 2006, which valued the real property at \$325,000.00. A copy of the summary appraisal report was attached to the Objection. Agland further stated that it had hired its own appraiser to value the property and was awaiting the appraisal report. Despite Agland's position regarding value and the additional time provided by the Court in continuing the hearing on several occasions, Agland offered no evidence of valuation at the hearing. Having objected to admission of Debtor's appraisal as hearsay, Agland was aware that its unsupported summary was equally inadmissible as evidence.

property is the sum of the market land value (rather than the CAUV value) and the market improvement value provided in the Summary. As a result, Agland contends that the fair market value of the real property is \$311,170.00.

Although Agland had ample opportunity to elicit testimony in support of this argument, Agland failed to adduce any evidence supporting the argument at the hearing. Agland provided no testimony or documentary evidence explaining the CAUV program or its purpose in land valuation.⁵ As a result, Agland's argument that the fair market value of the real property is the sum of the market land value and the market improvement value is just that - argument - and is unsupported by any evidence before the Court.

Furthermore, Debtor's testimony on cross-examination regarding the value of 14421 Old Fredericktown Road is not compelling. Counsel for Agland simply asked Debtor whether the sum of the market land value and market improvement value was greater than the total value listed in the Summary. Debtor conceded that he had "added wrong" and "looked at the wrong lines." The testimony elicited from Debtor falls far short of Agland's characterization of the testimony, that is, that Debtor testified that the value of

⁵Information from the Auditor's website provides that "total value" is defined as "the total market value of land and improvements for the current tax year." The total value on the real property appears to be computed by adding the CAUV value and the market improvement value of the real property.

The Auditor's website defines "CAUV value" as "if the parcel is affected by CAUV reduction, the taxable value of the land used in tax calculation." The Auditor's website further explains:

CAUV is a State-sponsored, county implemented program which provides property tax relief for owners of land exclusively used for agricultural purposes. To qualify, you must have 10 or more acres devoted exclusively for farming, or have less than 10 acres devoted exclusively for farming which produces an average gross income of at least \$2,500.00. . . .

www.columbianacntyauditor.org.

14421 Old Fredericktown Road is \$225,670.00 (the market land value plus the market improvement value). Moreover, Agland failed to address the effects of either (i) the potential that non-transferability of the Ferguson easement may have on the valuation of the real property, or (ii) the fact that Agland's lien is against Debtor, but Debtor has only a one-half interest in the real property.⁶

Based upon Debtor's testimony regarding the Summaries, the Court finds that the real property has a fair market value of \$241,580.00 (\$156,080.00 plus \$85,500.00). The sum of the Bank's lien (\$285,000.00), Agland's lien (\$16,852.28), and Debtor's exemption (\$5,400.00) is \$292,085.28.⁷ The sum of the liens and Debtor's exemption exceed the fair market value of the real property, and, as a consequence, Agland's lien is avoidable as it impairs Debtor's homestead exemption and catchall exemption under Ohio law.

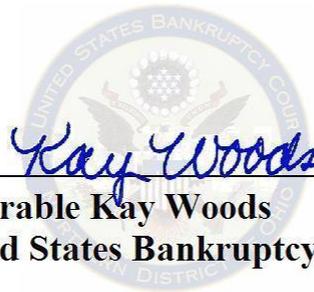
An appropriate order will follow.

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⁶Since Debtor has only a one-half interest in the real property, the amounts for market value and the balance of the loan would be halved (*i.e.*, half of Bank's mortgage (\$142,500.00) plus Agland's lien (\$16,852.28) plus Debtor's exemption (\$5,400.00) = \$164,752.28. Even using Agland's unsupported value of \$311,170.00 (half = \$155,585.00), Agland's lien could be avoided in the amount of \$9,167.28 (\$164,752.28 - \$155,585.00), resulting in a lien of \$7,685.00. This would have been Agland's best case scenario, which it failed to prove.

⁷Because the value of the liens, without interest, and exemptions exceed the fair market value of the real property, the Court need not compute the interest on the liens.

IT IS SO ORDERED.



Dated: April 13, 2007
08:56:56 AM

Honorable Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

JAMES KNEPPER,

Debtor.

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CASE NUMBER 05-84381

HONORABLE KAY WOODS

O R D E R

For the reasons set forth in this Court's Memorandum Opinion entered on this date, the Motion to Avoid Judicial Lien filed on behalf of Debtor James Knepper on November 13, 2006 is granted.

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