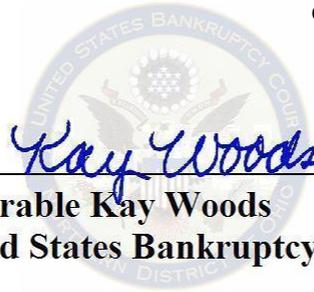


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CLERK U.S. BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
YOUNGSTOWN

IT IS SO ORDERED.



Honorable Kay Woods  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO

IN RE:

WILLIAM SCOTT TALKINGTON,

Debtor.

\*  
\* CASE NUMBER 05-46248  
\*  
\*  
\* CHAPTER 13  
\*  
\*  
\* HONORABLE KAY WOODS  
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M E M O R A N D U M O P I N I O N  
Not Intended for National Publication  
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The following Opinion is not intended for national publication and carries limited precedential value. The availability of this Opinion by any source other than www.ohnbuscourts.gov is not the result of direct submission by this Court. The Opinion is available through electronic citation at www.ohnb.uscourts.gov pursuant to the E-Government Act of 2002 (Pub. L. No. 107-347).

Before the Court is Motion to Avoid Judicial Liens Under 11 U.S.C. Section 522(f)(1) ("Motion") (Doc. # 24) filed by Debtor

William Talkington ("Debtor") on March 3, 2008.<sup>1</sup> In response, Thomas Fence Co. ("Thomas Fence") filed Request for Hearing (Doc. # 27) on March 25, 2008, and Amended Response to Debtor's Motion to Avoid Judicial Liens (Doc. # 36) on April 29, 2008. Debtor then filed Debtor's Brief in Support of Motion to Avoid Lien ("Debtor's Brief") (Doc. # 38) on May 1, 2008. For the reasons given below, Debtor's Motion is denied as to Thomas Fence.

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.

## I. FACTS

Debtor filed a voluntary petition pursuant to chapter 13 of the Bankruptcy Code on September 28, 2005 ("Petition Date").<sup>2</sup> Thomas Fence was not listed as a creditor in Debtor's schedules. Debtor's Schedule A lists his interest in his residence<sup>3</sup> ("Residence") as 100%. Debtor's chapter 13 plan was confirmed on July 24, 2006.

Debtor filed the instant Motion on March 3, 2008. A preliminary hearing on the Motion was held on April 3, 2008, and

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<sup>1</sup>The Motion requested avoidance of two judicial liens: one filed by Thomas Fence and the other by Edward Flynn. On April 4, 2008, the Court entered an Order (Doc. # 30) granting the Motion, in part, as to Edward Flynn.

<sup>2</sup>This case was filed prior to the effective date of the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA") which became effective on October 17, 2005. Consequently, this decision is governed by the pre-BAPCPA Bankruptcy Code. All citations to the Bankruptcy Code are, accordingly, to the 2005 Code.

<sup>3</sup>The Residence is located at 5744 North Ridge Road West, Ashtabula, Ohio.

continued until May 1, 2008. At the May 1, 2008, hearing, the parties requested an evidentiary hearing ("Hearing"), which was conducted on June 17, 2008. At the Hearing, Debtor was represented by Robert Ciotola, Esq., and Thomas Fence was represented by Robert Herman, Esq. The Court received the testimony of Drew Daniel Thomas ("Mr. Thomas"), co-owner of Thomas Fence.

Debtor presented no witnesses and submitted no exhibits at the Hearing. Counsel for Debtor relied upon Exhibit D, offered by Thomas Fence, to establish a value for the Residence. Exhibit D is a print-out from the Ashtabula County Treasurer's Office, which shows that, in 2008, the Residence has an assessed value of \$84,600.00. Neither party offered any other evidence regarding value of the Residence.<sup>4</sup>

Debtor also asked the Court to take judicial notice of Amended Motion of Home Savings & Loan Company of Youngstown, Ohio for Relief From Stay ("Motion for Relief") (Doc. # 46), filed on June 4, 2008, by Home Savings & Loan Company of Youngstown, Ohio. Exhibit C to the Motion for Relief states that the mortgage balance on Debtor's residence was \$125,920.75 as of June 4, 2008.<sup>5</sup> Although the Court took judicial notice of the Motion for Relief as requested, nothing in the Motion for Relief constitutes evidence to establish value of the Residence or the amount of the mortgage lien.

Mr. Thomas was the sole witness for Thomas Fence. The Court found Mr. Thomas's testimony, as follows, to be credible.

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<sup>4</sup>Debtor's Motion asserted that the Residence's fair market value was \$145,000.00, and that the mortgage balance was \$144,000.00. Debtor presented no evidence of these amounts and abandoned these allegations at the Hearing.

<sup>5</sup>The allegations in the Motion for Relief relate to a time period several years after the Petition Date.

Debtor's wife, Annette Talkington aka Annette McLaughlin ("Annette"), phoned Thomas Fence on September 12, 2005, for an estimate for construction of a privacy fence at the Residence. Mr. Thomas went to the Residence later that same day, and gave Annette an oral estimate of \$4,978.00, which was subsequently incorporated into a written contract. Annette did not tell Mr. Thomas that she was married or that Debtor owned the Residence. A copy of the contract (Ex. B) lists "Annette Talkington" as the contracting party. Annette returned the unsigned<sup>6</sup> contract to Thomas Fence in person on September 27, 2005, at which time she also paid a \$500.00 deposit with her personal credit card. It is undisputed that all of these events occurred prior to the Petition Date.

Subsequent to the Petition Date, on November 9, 2005, Thomas Fence (i) delivered and set the fenceposts at the Residence, and (ii) delivered the fence panels so that they could be stained before being hung.<sup>7</sup> Sometime in Spring 2006, Mr. Thomas drove by the Residence and saw that the stained fence panels had been hung.

On January 29, 2007, Thomas Fence filed Complaint for Money Judgment ("Complaint")<sup>8</sup> in the Ashtabula Municipal Court of Ashtabula, Ohio ("Ashtabula Court"). A copy of the Complaint, which was admitted as Exhibit E, names both Debtor and Annette as defendants. The Complaint contains three counts, which specifically charge that "Defendants" (i) "failed to timely remit

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<sup>6</sup>Mr. Thomas testified that when Annette returned the contract, no one at Thomas Fence noticed that she had failed to sign it.

<sup>7</sup>After the panels were delivered, Annette telephoned Mr. Thomas and told him that the panels would not be stained until spring.

<sup>8</sup>The allegations in the Complaint are devoid of any dates. The "account summary" attached to the Complaint lists the date of Annette's down payment as December 21, 2005. Given the inconsistency between the unverified invoice attached to the Complaint and Mr. Thomas's sworn testimony, the Court credits Mr. Thomas's testimony.

amounts owing to plaintiff," (ii) "breached the terms of the [purchase] agreement," and (iii) "have been unjustly enriched . . . at plaintiff's expense and to plaintiff's detriment by failing to pay plaintiff for goods plaintiff sold to defendant." (Ex. E.) Each of the counts requests \$4,637.88 in damages, which Mr. Thomas testified was the amount owing on the contract, plus interest and late charges. On June 21, 2007, the Ashtabula Court entered a default judgment ("Judgment").<sup>9</sup>

## **II. LAW: 11 U.S.C. § 522(f)(1)(A)**

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 exemption to which the debtor is entitled under 11 U.S.C. § 522(b). 11 U.S.C. § 522 (West 2005). A debtor seeking to avoid a lien under § 522(f)(1)(A) 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).

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<sup>9</sup>The Judgment provides as follows:

This cause cameon [sic] to be heard on the plaintiff's motion for default judgment. The Court finds that defendants were served in accordance with law hand [sic] have failed to answer, plead or otherwise defend against the complaint within the time prescribed by the Civil Rules. On that basis the Court finds that the motion is well taken, it is therefore

ORDERED ADJUDGED AND DECREED that the plaintiffs [sic] be awarded judgment against the defendant in the amount of \$4,637.88 together with 8% interest and costs of this action.

(Ex. F.)

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 2005). Therefore, to determine the extent of impairment under § 522(f), the starting point is 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 1993). "[T]he petition date is the operative date to make all § 522(f) determinations for purposes of applying the formula, *i.e.*, the fair market value of the debtor's property, the amount of the debtor's exemption, and the value of the liens are measured as of the date of the filing of the petition[.]" *In re Kanakaris*, 341 B.R. 33, 34 (Bankr. S.D. Cal. 2006) (citing *In re Salanoa*, 263 B.R. 120, 123 (Bankr. S.D. Cal. 2001)).

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). The burden must be carried by a preponderance of the evidence. *Id.*

### III. ANALYSIS

#### A. Section 522(f) Analysis

As discussed above, a debtor seeking to avoid a lien under § 522(f)(1)(A) must establish, by a preponderance of the evidence, the following three 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. at 111.

Here, there is no question that the Judgment is a "judicial lien" as that term is defined in 11 U.S.C. § 101(36): a "lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding." 11 U.S.C. § 101 (West 2005). "[I]t is now the law in [the Sixth C]ircuit that § 522(f) can be used to avoid a judicial lien even in the absence of an execution or some other forced distribution of property." *Tedeschi v. Falvo* (*In re Falvo*), 227 B.R. 662, 666 (B.A.P. 6th Cir. 1998) (citing *In re Holland*, 151 F.3d 547).

The second element required for "the avoidance of a lien is that the debtor have an interest in property to which the lien attaches." *In re Nestor*, No. 05-6772, 2007 Bankr. LEXIS 3742, \*4 (Bankr. N.D. W. Va. 2007). "The 'debtor's interest' as used in the Section 522(f)(2)(A) formula is the fair market value of the real property. The debtors need not have equity in the property [at the time of the hearing] as a condition of avoiding a lien encumbering the property, so long as the lien impairs an exemption they had validly claimed in the property." *Canelos v. Mignini* (*In re Canelos*), 212 B.R. 249, 254 (Bankr. D. Md. 1997) (internal citations omitted). Debtor's interest is determined prior to the

attachment of the lien. *Farrey v. Sanderfoot*, 500 U.S. 291, 296 (1991). Here, Debtor's ownership of the Residence throughout the entire period at issue is undisputed. Debtor listed the Residence on his Schedule A, and Exhibit D lists Debtor as owner of the Residence. Consequently, the second element is met because Debtor has an interest in the Residence.

The third element of a § 522(f) lien avoidance action requires Debtor to establish that (i) the property subject to the lien would otherwise be exempt, and (ii) the lien at issue would impair such exemption. In the instant case, it is this element that Debtor fails to establish.

"The Bankruptcy Code allows debtors to exempt certain property from the bankruptcy estate. The law allows states, however, to withdraw from the federal exemption system and establish their own exemptions, if any." *Holland*, 151 F.3d at 548. See also, 11 U.S.C. § 522(b) (West 2005). Ohio is one such "opt out" state, so Debtor's homestead exemption, if any, will be established by Ohio law.<sup>10</sup> O.R.C. § 2329.66(A)(1)(b) creates a \$5,000.00 exemption "in one parcel or item of real or personal property that the person or a dependent of the person uses as a residence." OHIO REV. CODE ANN. § 2329.66 (LexisNexis 2008). As a domiciliary of Ohio, Debtor has a right to a \$5,000.00 exemption in the Residence.

The remaining question is whether the lien impairs Debtor's exemption in the Residence.

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<sup>10</sup>Pursuant to the 'Bankruptcy Reform Act of 1978,' . . . this state [Ohio] specifically does not authorize debtors who are domiciled in this state to exempt the property specified in the 'Bankruptcy Reform Act of 1978[.]'" OHIO REV. CODE ANN. § 2329.662 (LexisNexis 2008).

To determine the extent of an impairment under Section 522(f), an initial determination must be made regarding the fair market value of the property for which an exemption is claimed at the time that the bankruptcy petition was filed. From this value, the sum of all unavoidable liens and encumbrances, irrespective of priority, are subtracted.

*Mershman*, 158 B.R. at 702 (emphasis added) (internal citations omitted). See also, *Nestor*, 2007 Bankr. LEXIS 3742 at \*6 ("Therefore, under § 522(a), the value of the property for purposes of § 522(f) is determined as of the date of the filing of the petition.") and *In re Dvoroznak*, 38 B.R. at 182 ("The Code and applicable case law hav[e] established the date of filing as the time at which to measure exemptions and to determine which property may be claimed as exempt, [and] to value the exempt property[.]").

Debtor failed to present any evidence at the Hearing concerning the value of the Residence on the Petition Date. The only evidence of valuation was Thomas Fence's Exhibit D, which indicated the Residence has an assessed value of \$84,600.00 in 2008, nearly three years after the Petition Date. Debtor also failed to address the amount of the mortgage as of the Petition Date, instead asking the Court to take "judicial notice" of a 2008 mortgage balance of \$125,920.75. These numbers differ so greatly from those alleged in the Motion and on Debtor's Petition (residential value of \$145,000.00 and mortgage balance of \$144,000.00) that the Court must conclude that the 2008 value and mortgage amounts entered into evidence at the Hearing have little or no significance in establishing the requisite Petition Date amounts necessary to avoid a lien under § 522(f). Debtor failed to offer any evidence concerning (i) the value of the Residence on the Petition Date; and/or (ii) the Mortgage lien amount as of the

Petition Date. As a consequence, Debtor failed to carry his burden of proof on the third element to avoid a judicial lien under § 522(f).

**B. Debtor's Section 362 Argument**

Debtor purported to raise an argument under 11 U.S.C. § 362 in both Debtor's Brief and his closing argument.<sup>11</sup> However, the Court finds that this argument is not properly before the Court at this time.

The Court did not request briefs from the parties, nor did Debtor amend the Motion. Debtor's self-styled Brief, filed two months after the Motion, is actually a supplemental filing that attempts to raise new arguments that were not developed with either testimony or evidence at the Hearing. Moreover, even Debtor's Brief does not specifically request relief based on § 362, but merely concludes that "[t]he filing of the judicial lien by this creditor was in violation of 11 U.S.C. 362 and therefore void." Debtor provides no legal or factual argument to support this conclusion. Courts agree that:

Although the automatic stay is a fundamental protection provided to debtors in bankruptcy, and its scope is extremely broad, it does not serve to stay all actions and proceedings involving debtors. . . . [B]ecause bankruptcy is primarily concerned with the adjustment of the relationships between a debtor and those creditors existing at the time the petition in bankruptcy is filed, actions concerning a debtor's postpetition conduct and dealings are not generally within the ambit of the automatic stay. Therefore, "the automatic stay does not prohibit the prosecution of an action

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<sup>11</sup>Debtor's counsel concluded with, "[If the debt was incurred post-petition,] the lien itself, which is the issue before the Court today, I believe, the lien is still avoidable because that particular judgment would be void because it was obtained after the petition was filed. And I would ask the Court to take judicial notice of the fact there was no Motion For Relief granted. And that would be the extent of my remark." Hearing at 10:17:48.

against a debtor based upon a claim that arose after the filing of the bankruptcy petition."

*Heflin v. Heflin (In re Heflin)*, 145 B.R. 560, 562-3 (Bankr. S.D. Ohio 1992) (internal citations omitted). Even if, *arguendo*, Thomas Fence's filing of the judicial lien did violate the automatic stay, § 362 remedies do not include § 522(f) avoidance of a lien so filed.

Debtor's Brief asserts that "a post-petition creditor does not have recourse to execute upon assets that would have been, but for the filing of a chapter 13 petition, property of the Debtor." This is far from a settled point of law. *See, e.g., United States v. Harchar (In re Harchar)*, 371 B.R. 254, 264-66 (N.D. Ohio 2007), which notes that courts have developed at least four different approaches to this issue.

However, the Court need not weigh in on this issue today. Presently before the Court is only Debtor's Motion, which is premised on § 522(f) and makes no mention of § 362. The Motion contains no allegation of a § 362 violation for Thomas Fence to address, and the Court also declines to address this issue in deciding Debtor's Motion.

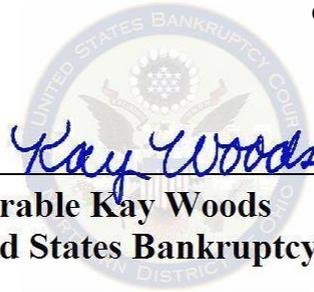
#### **IV. CONCLUSION**

For the reasons given above, the Court finds that Debtor failed to establish all elements necessary to avoid a judicial lien under 11 U.S.C. § 522(f). As a consequence, Debtor's Motion to Avoid Judicial Liens is hereby denied as to Thomas Fence.

An appropriate order will follow.

# # #

IT IS SO ORDERED.



Honorable Kay Woods  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO

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IN RE:	*	CASE NUMBER 05-46248
	*	
WILLIAM SCOTT TALKINGTON,	*	CHAPTER 13
	*	
	*	
Debtor.	*	HONORABLE KAY WOODS
	*	
	*	

\*\*\*\*\*  
ORDER DENYING, IN PART, DEBTOR'S MOTION TO AVOID JUDICIAL LIENS  
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For the reasons set forth in this Court's Memorandum Opinion entered on this date, the Court hereby denies - as to the lien of Thomas Fence Company - Debtor's Motion to Avoid Judicial Liens Under 11 U.S.C. Section 522(f)(1).

# # #