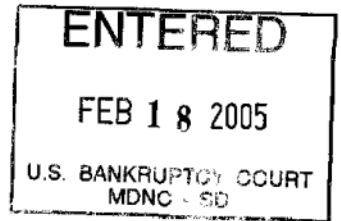


UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION



IN RE:)
)
Donnie Lee Bowes and)
Lila Weaver Bowes,) Case No. 04-81207 C-7D
)
Debtors.)
)

MEMORANDUM OPINION

This case came before the court on January 13, 2005, for hearing upon the Debtors' amended motion to avoid judicial lien of Durham Regional Hospital. Edward C. Boltz appeared on behalf of the Debtors and James H. Hughes appeared on behalf of Durham Regional Hospital ("Durham Regional"). Having considered the motion, the objection by Durham Regional, the matters of record in this case and the arguments of counsel, the court makes the following findings and conclusions of law.

FACTS

This Chapter 7 case was filed on April 21, 2004. When this case was filed, each of the Debtors filed a claim for property exemptions in which each Debtor claimed their homestead exemption in a residence and an adjoining 9.376 acre tract ("the Homestead"). No objections to Debtors' claims for property exemptions were filed.

On the petition date, the Homestead had a value of \$56,564.00 and was subject to a deed of trust securing indebtedness of \$40,412.83. The Homestead also was subject to a judicial lien in

favor of Durham Regional under which \$7,108.66 was due. On August 5, 2004, a final decree was entered in this case and this case was closed without the Debtors having filed a motion to avoid the judicial lien of Durham Regional.

On October 5, 2004, the Debtors filed a motion to reopen this case in order to file a motion to avoid the judicial lien of Durham Regional and an order was entered reopening this case. The Debtors then filed a motion pursuant to § 522(f) of the Bankruptcy Code to avoid the judicial lien of Durham Regional as impairing their homestead exemption. Durham Regional filed an objection to Debtors' motion asserting that the motion should be denied. Thereafter, Debtors filed an amended motion to avoid the lien of Durham Regional which sought essentially the same relief as requested in their original motion.

ANALYSIS

Durham Regional's first ground of objection to the Debtors' motion to avoid its lien is that the Debtors were not entitled to claim the entire Homestead as exempt property. The merits of this argument need not be addressed by the Court because Durham Regional's objection - filed on November 19, 2004 - is untimely. Durham Regional had thirty days after the May 14, 2004 meeting of creditors to object to the Debtors' claim of exemption; thus, its November 19, 2004 objection is too late. See Bankruptcy Rule 4003(b) (objections to exemptions must be filed within thirty

days after the meeting of creditors) and Taylor v. Freeland & Krontz, 503 U.S. 638, 643, 112 S.Ct. 1644, 118 L.Ed.2d 280 (1992) (stating that the trustee's failure to timely object to a claimed exemption within thirty days from the initial creditor's meeting barred the trustee from later challenging that exemption).

Durham Regional also objected on the ground that after claiming the Homestead as exempt property and prior to filing the motions to avoid the judicial lien, the Debtors conveyed 2.6 acres of the Homestead to their daughter ("the Deeded Property"). Durham Regional asserts that as a result of the conveyance, the Deeded Property no longer should be regarded as exempt property of the Debtors and that as to the Deeded Property, the judicial lien therefore does not impair an exemption of the Debtors. According to Durham Regional, this means that § 522(f) is not applicable and may not be used by the Debtors, post-conveyance, to avoid or remove its judicial lien. This argument is without merit. Most courts considering this issue have concluded that the debtor need not have an interest in the exempt property when the motion is filed in order to obtain relief under § 522(f)(1). See e.g., In re Chiu, 304 F.3d 905, 908 (9th Cir. 2002) (holding that so long as the debtor had an interest in the property when the lien was affixed, a subsequent conveyance had no effect on a motion under § 522(f) of the Bankruptcy Code to avoid the judicial lien); In re Orr, 304 B.R. 875, 877 (Bankr. S.D. Ill. 2004) (same); In re Mailhot, 301

B.R. 774, 776 (Bankr. D.R.I. 2003) (same); In re Fairchild, 285 B.R. 98, 100 (Bankr. D. Conn. 2002) (same). This result is consistent with the language and intent behind § 522(f) and is adopted in this case. Accordingly, the Debtors are not barred from seeking relief under § 522(f) as a result of not owning the Deeded Property when their motions to avoid Durham Regional's judicial lien were filed.

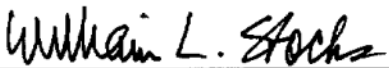
Finally, Durham Regional objects to the Debtors' right to bring a § 522(f) motion to avoid its judicial lien as to the Deeded Property on the basis that when the Debtors conveyed the Deeded Property, they lost their entitlement to claim the Deeded Property as exempt pursuant to N.C.G.S. § 1C-1601(c). That section provides that exemptions "cannot be waived except by . . . [t]ransfer of property allocated as exempt (and in that event only as to the specific property transferred). . . ." A similar argument was rejected in In re Opperman, 943 F.2d 441, 443 (4th Cir. 1991), where the court held that "the provision of N.C.G.S. § 1C-1604(a) limiting the homestead exemption to the duration of the debtor's actual residence in that place must not be applied in preference to the avoidance power of section 522(f)." Similarly, the implication in G.S. § 1C-1601(c) that exemptions can be waived by conveyance of the property "must not be applied in preference to the avoidance power of section 522(f)."

For the foregoing reasons, the objection by Durham Regional

will be overruled and denied. Durham Regional does not dispute that if its objection is overruled and the Debtors are allowed to invoke § 522(f)(1), then under the formula contained in § 522(f)(2)(A) Durham Regional's lien does impair Debtors' exemptions. Therefore, having concluded that Durham Regional's objections should be overruled, Debtors' amended motion to avoid the judicial lien of Durham Regional will be granted and the judicial lien of Durham Regional avoided pursuant to § 522(f)(1).

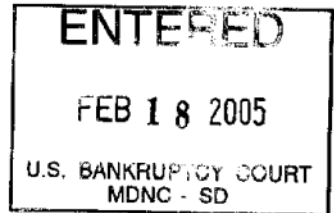
This memorandum opinion constitutes the Court's findings of fact and conclusions of law. A separate order is being entered contemporaneously herewith pursuant to Rule 9021 of the Federal Rules of Bankruptcy Procedure.

This 11th day of February, 2005.



WILLIAM L. STOCKS
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION



IN RE:)
)
Donnie Lee Bowes and)
Lila Weaver Bowes,) Case No. 04-81207 C-7D
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ORDER

In accordance with the Memorandum Opinion entered contemporaneously herewith, it is ORDERED, ADJUDGED AND DECREED as follows:

(1) The objection by Durham Regional Hospital to Debtors' motions to avoid the judicial lien of Durham Regional Hospital is overruled;

(2) Debtors' amended motion to avoid the judicial lien of Durham Regional Hospital is granted; and

(3) The judicial lien held by Durham Regional Hospital and recorded in Judgment Book 195, page 26, in the Person County Registry be and hereby is AVOIDED as to the property known as 3860 Morton Pulliam Road, Roxboro, North Carolina, and which is described in the deed recorded in Book 298, page 789, in the Person County Registry, and such judicial lien is hereby voided and cancelled as to such property.

This 11th day of February, 2005.

William L. Stocks
WILLIAM L. STOCKS
United States Bankruptcy Judge