

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

IN RE:)
)
DONNIE COZART,) CASE NO. 04-11278
)
Debtor.)

ORDER SETTING HEARING

This case came before the Court on January 31, 2006, on the Debtor's amended motion to avoid the judicial lien of NPD Box Company under 11 U.S.C. § 522(f). The motion before the court is one of about twenty identical motions filed under section 522(f). In addition to the judicial liens disclosed in the motions, the Debtor identified two judicial liens in favor of BB&T in exhibits that the Debtor submitted to the Court. The Debtor also referenced the existence of an additional judicial lien that was not previously disclosed in any document. Moreover, the Debtor indicated that some of the liens may have been satisfied in whole or in part before the filing of the petition. It is not known if the judicial liens in favor of BB&T, which also holds a mortgage on the Debtor's residence, are liens arising out of mortgage foreclosures. See § 522(f)(2)(C) (excluding mortgage foreclosure liens from avoidance under section 522(f)).

Without more information, the court is unable to determine which of the Debtor's motions to avoid liens should be granted; therefore, the court will set a further hearing on all the motions filed by the Debtor.

Section 522(f) of the Bankruptcy Code provides the formula for determining whether a judicial lien impairs an exemption:

(A) For the purposes of this subsection, 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) (2) (A)

Pursuant to the formula set forth in section 522(f) (2) (A), the court is required to add the amount of the first mortgage on the property (\$45,822.99), the amount of the second mortgage on the property (\$99,563.05) and the applicable exemption in the property that the Debtor would be entitled to in the absence of any liens (\$10,000). To this number (\$155,386.04) is added the amount of the other liens on the property. Adding up the value of the judicial liens listed in twenty motions in this case results in an additional sum in excess of \$100,000.00. From the total of all of liens and the exemption amount is subtracted the value of the property (\$170,000.00), which results in the extent of the impairment. In other words, using the Debtor's statements regarding the amount of the first and second mortgages and the value of the property, the Debtor will be unable avoid the first \$14,613.96 in aggregate value of the judicial liens, but may avoid

sums in excess of that amount.¹

When determining the total value of the liens against the property, the formula used in section 522(f) does not make any reference to the order of priority of those liens. In fact, even when a judicial lien has priority over a subsequent consensual lien, the judicial lien may nevertheless be avoided under the terms of the formula. E.g., Kolich v. Antioch Laurel Veterinary Hosp. (In re Kolich), 328 F.3d 406 (8th Cir. 2003) (avoiding a judicial lien in its entirety based on the following values: a first mortgage of \$219,000.00, a judicial lien of \$134,000.00, a junior mortgage of \$80,000.00, an exemption of \$8,000.00, and a fair

¹ As gleaned from the Debtor's section 522(f) motions, it would appear that the following eight creditors, in order of priority, hold judicial liens against the Debtor which, in whole or in part, may not be avoided:

<u>Creditor</u>	<u>Judgment Book/Page</u>	<u>Amount</u>
Will Butler	340/049	\$ 1,647.31
General Binding	361/016	\$ 1,328.27
Deal Printing	407/295	\$ 1,038.50
NPD Box	409/085	\$ 1,541.08
Friendly Center Flowers	411/345	\$ 1,747.38
Laminated Specialities	412/054	\$ 416.25
Printer's Part Supplies	413/251	\$ 1,416.28
First Citizens	416/336	<u>\$12,806.13</u>
		\$21,941.20

Thus, were the Court satisfied that these judicial liens were in fact entitled to priority over all other judicial liens on the Debtor's property, and satisfied that the amount stated for each judicial lien was accurate, it would preserve the first seven judicial liens, partially avoid the judicial lien of First Citizens to the extent of \$7,327.24 and avoid all judicial liens having later priority. The Debtor has since withdrawn the motions to avoid the liens in favor of NPD Box and First Citizens.

market value of the property of \$275,000.00 - the extent of the impairment, \$166,000.00, was greater than the amount of the judicial lien).

The language of section 522(f)(2)(A) is silent on the issue of the order in which judicial liens are to be avoided under the formula. Section 522(f)(2)(A) only speaks in terms of a single lien, and while the statute does recognize the possibility that multiple liens might exist, it only provides in section 522(f)(2)(B) that a lien that has been avoided is not to be considered in applying the formula with respect to the remaining liens. Because the statute is silent on the order in which judicial liens are to be avoided in relation to other judicial liens, resort to the statute's legislative history is appropriate. E.g., United States v. Gayle, 342 F.3d 89, 93-94 (2d Cir. 2003) ("Resort to authoritative legislative history may be justified where . . . a statute is silent on an issue of fundamental importance to its correct application."), amended, 2003 U.S. App. LEXIS 26673 (2d Cir. Jan. 7, 2004), cert. denied, 125 S. Ct. 1968 (2005).

The legislative history of section 522(f)(2) is not instructive. Nothing in the 1978 Act addresses the order of avoidance of judicial liens. Likewise, when the section 522(f)(2)(A) formula was added in 1994, the court was unable to locate any legislative history indicating the order of priority in

which judicial liens were to be avoided under the formula. When both the statute and its legislative history are silent on an issue, resort is made to the structure and the purpose of the Bankruptcy Code. E.g., Miles v. Okun (In re Miles), 430 F.3d 1083, 1088 (9th Cir. 2005) ("The Bankruptcy Code and its legislative history are silent on [the issue] Therefore, we look to the structure and purpose of the Bankruptcy Code").

Under the Bankruptcy Code, "[i]n the absence of any controlling federal law, 'property' and 'interests in property' are creatures of state law." Barnhill v. Johnson, 503 U.S. 393, 398 (1992). Under the law of North Carolina, judicial liens are entitled to priority in the order that they are recorded. N.C. Gen. Stat. § 1-234; Moore v. Jones, 36 S.E.2d 920, 922 (N.C. 1946) ("The owner of a docketed judgment has a lien on all the real estate of his debtor within his county. This lien has priority over a subsequently recorded mortgage."). Consequently, consistent with applicable State law, when a number of judicial liens are recorded against a North Carolina debtor's real property, the determination of which of the liens impairs the debtor's exemption and may be avoided is made by first applying the formula contained in section 522(f)(2)(A) to the last or most recent of the judicial liens and then applying the formula to the other liens in the reverse order of their recordation.

Because the court is unsure about the number of judicial liens

subject to avoidance under section 522(f), their order of priority, and the extent to which each lien might have been satisfied before the Debtor filed bankruptcy, the court will set a further hearing on all of the Debtor's motions to avoid liens so that the Debtor may supplement the record with the additional information required in order to resolve the pending motions.

THEREFORE, it is ORDERED that the motions filed by the Debtor to avoid judicial liens of AAA Transmission (Document No. 70), Carolina Bank (Document No. 83), Friendly Center Flowers (Document No. 86), General Binding (Document No. 88), Michael D. Brock (Document No. 90), Mutual Graphics (Document No. 92), National Business Forms (Document No. 93), Pete Wall Plumbing (Document No. 95), Premier Color (Document No. 96), Printer's Part Supplies (Document No. 97), Rental Uniforms (Document No. 98), Rowan Business Forms (Document No. 99), Superior Business Associates (Document No. 101), Washington Mutual Finance (Document Nos. 103 and 128), Will Butler (Document No. 104), and Deal Printing (Document No. 125)² be and hereby are set for hearing at 9:30 a.m. on March 7, 2006, in the United States Bankruptcy Court, Courtroom No. 1, Second Floor, 101 South Edgeworth Street, Greensboro, North Carolina 27401.

² The Debtor also filed a motion to avoid the judicial lien of Laminated Specialities, Inc. (Document No. 89). The service list for that motion indicates that the wrong entity was served. The Clerk's office has directed the Debtor to refile that motion with the correct service address.

