

**IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF ARKANSAS
HARRISON DIVISION**

In re: MICHAEL L. OSBORN, Debtor

**No. 3:09-bk-73333
Ch. 7**

ORDER

Before the Court is a Motion to Avoid Nonpossessory Nonpurchase-Money Security Interest filed by the debtor, Michael L. Osborn, on July 28, 2009, and a Motion For Relief From the Stay and For Abandonment of Property filed by First Service Bank [FSB] on August 18, 2009. The debtor is attempting to avoid the nonpossessory, nonpurchase-money security interest held by FSB to the extent the liens impair the debtor's exemptions, and FSB is requesting relief from the automatic stay to pursue its rights as a lienholder under state law. The Court heard the motions on September 23, 2009, and at the conclusion of the trial, took the motions under advisement. For the reasons stated below, the Court grants the respective motions in part and denies them in part.

The Court has jurisdiction over this matter under 28 U.S.C. § 1334 and 28 U.S.C. § 157, and it is a core proceeding under 28 U.S.C. § 157(b)(2). The following opinion constitutes findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052, made applicable to this proceeding under Federal Rule of Bankruptcy Procedure 9014.

Prior to trial, the debtor and FSB filed a list of agreed stipulations relevant to the motions before the Court:

1. FSB has a valid, perfected security interest in a 2002 Nissan Frontier truck, a 2006 Honda ATV, a 2007 Supreme boat and trailer, a 2005 Mercury motor, and a Kubota tractor with front end loader.
2. FSB's lien has a current value of \$44,310.60.

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by L Martindale

3. FSB's interests in the collateral are nonpossessory, nonpurchase-money security interests.
4. If the items are found to be tools of the trade, the debtor is entitled to a lawful exemption in the amount of \$12,105.00 under § 522(d)(5) and (d)(6).

The debtor has been a river/fishing guide for the past seven years. According to the debtor, he performs this service full time and it is the sole source of his income. His residence is located between four miles and thirty miles from the river landing ramps, and he uses the truck to pull the trailer to those landings. Typically, he is on the river from three to seven days a week. The debtor testified he uses the tractor to lift the boat when he needs to repair the hull, but that usually occurs only once each season; the last time it was used for that purpose was a year ago. He also testified he uses the ATV to pull the boat and trailer around his farm when he needs to clean the boat, but admitted that the truck could also be used.

In this case, the debtor is attempting to exempt the tractor, the ATV, the truck, the boat and trailer, and the motor as tools of the debtor's trade under § 522(d)(6) and the (d)(5) "wild card" exemption.¹ In order for the debtor to be eligible for the claimed exemptions,

¹ It is a well-settled principle of law that a court may take judicial notice of its own orders and records in a case before the court. Fed. R. Evid. 201. A review of the debtor's schedules shows that the debtor claimed an exemption under § 522(d)(6) on Schedule C in the amount of \$2025.00; however, the parties stipulated that the "Debtor has a lawful exemption in the amount of \$12,105 pursuant to 11 U.S.C. Sec. 522(d)(5) and 522(d)(6), provided the items of collateral are classified as tools of the trade."

The Court concludes that the stipulated exemption amount of \$12,105.00 includes the § 522(d)(6) exemption in the amount of \$2025.00 and the § 522(d)(5) "wild card" exemptions in the amount of \$1075.00 and \$10,125.00 less other items for which the debtor claimed an exemption under § 522(d)(5). Presumably, the debtor will amend his Schedule C to reflect the stipulated amount of exemption under § 522(d)(5).

Section 522(d)(5) includes, "[t]he debtor's aggregate interest in any property, not to exceed in value \$1075 plus up to \$10,125 of any unused amount of the exemption
(continued...)

the Court must first determine whether the items are reasonably necessary to the debtor's trade or business and are, in fact, tools of the debtor's trade. *Production Credit Assoc. of St. Cloud v. LaFond (In re LaFond)*, 791 F.2d 623, 627 (8th Cir. 1986); *see also In re Giles*, 340 B.R. 543, 550 (Bankr. E.D. Penn. 2006)(stating the appropriate standard is whether the equipment is used by and necessary to a debtor for his work, trade, or occupation). The Court will then determine the value of the property and whether any allowed exemption is impaired by FSB's lien and, if so, the extent to which the lien may be avoided. Finally, the Court will determine whether FSB is entitled to relief from the automatic stay to pursue its state law remedies.

Tools of the Trade

For the reasons stated below, the Court finds that the truck, boat, trailer, and motor are tools of the debtor's trade, but that the tractor and ATV are not. The debtor testified he is a full time river/fishing guide. He also testified this is his sole source of income. In order to provide this service and generate income, he needs a vehicle to transport his boat to and from the river. Likewise, without the boat, trailer, and motor, he would not be able to continue to offer his services as a river/fishing guide. The debtor has been, and continues to be, engaged in a trade in which he currently and regularly uses the truck, boat, trailer, and motor. *See LaFond*, 791 F.2d at 626 (stating that the definition of a trade or occupation should take into account the past activities of the debtor, the sincerity of the debtor's intention to continue the trade, and whether the debtor is legitimately engaged in a trade in which the specific implements or tools exempted are used). As such, the Court finds that the debtor is engaged in an occupation or trade in which his truck, boat, trailer, and motor are indispensable; and that the truck, boat, trailer, and motor

¹ (...continued)
provided under paragraph (1) of this subsection.”

11 U.S.C. § 522(d)(6) includes, “[t]he debtor's aggregate interest, not to exceed \$2,025 in value, in any implements, professional books, or tools of the trade of the debtor or the trade of a dependent of the debtor.”

are properly claimed by the debtor as tools of the trade.

Under this same inquiry, the Court finds that the ATV and the tractor are not tools of the debtor's trade. The debtor testified the ATV was used to tow the boat and trailer around his farm to facilitate the washing of the boat. At best, the ATV was used as a matter of convenience; it is certainly not necessary for the debtor's profession. Further, the debtor testified the ATV was used for deer hunting and pleasure riding more than it was used for towing his boat and trailer.

Regarding the tractor, the debtor testified he used it to lift his boat so that he could repair the hull. When questioned further, the debtor admitted that he typically only used the tractor for this purpose once a year, and had last used it in this manner last year.

According to the debtor's ex-spouse, the tractor was purchased for landscaping purposes, and this testimony was not rebutted. The Court is satisfied that using the tractor to lift the boat for annual repairs is not necessary to the debtor for his work, trade, or occupation.

There are many other ways to turn over a boat to work on the hull that would not require the use of a tractor. Additionally, the debtor testified he previously sold the tractor to a third party. The third party was making the payments on the tractor and using the tractor for purposes other than lifting boats. For these reasons, the Court finds that the ATV and the tractor are not tools of the debtor's trade that are used by and necessary to the debtor's occupation as a river/fishing guide.

Value

According to the bankruptcy code, value in relation to an exemption means "fair market value as of the date of the filing of the petition . . ." 11 U.S.C. § 522(a)(2). The most credible testimony as to the value of the truck, boat, trailer, and motor was provided by the FSB senior lender, Rhonda Curtis. FSB introduced a Vehicle Summary NADA Values document that indicated a "clean retail" value of a 2002 Nissan similar to the debtor's truck in the amount of \$11,125.00. (FSB's Ex. 3.) Although the debtor did not offer his opinion as to the value of the truck, he did testify that the truck is in fair

condition and needs tires and a U-joint. Additionally, the debtor testified the truck currently has a cracked windshield and two dents caused by a falling tree. After considering the NADA values reflected in FSB's Exhibit 3 and the debtor's testimony, the Court finds that the fair market value of the truck is \$9500.00.

FSB also introduced two estimates for the value of the boat, trailer, and motor. The first estimate was provided to FSB by a local boat dealer and it valued the three items at \$8420.00. (FSB's Ex. 9.) The second estimate was provided to FSB by the boat manufacturer and it valued the three items at \$8100.00. (FSB's Ex. 10.) The debtor testified he thought the three items could be sold for between \$4200.00 and \$4500.00. The Court believes the value of the boat, trailer, and motor to be an amount equal to the difference between the two estimates provided by FSB, which amounts to \$8260.00. However, the estimates are likely based on a motor in operative condition and the unrebutted testimony of the debtor was that the motor is currently inoperative and requires repairs in the approximate amount of \$1200.00. Consequently, the Court finds that the fair market value of the boat, trailer, and motor to be \$7060.00.

With regard to the ATV, FSB introduced NADA Vehicle Pricing & Information data on a similar Honda ATV. (FSB's Ex. 4.) According to the pricing guide, an ATV like the one owned by the debtor has a retail value of \$2815.00. The debtor testified the ATV is in good condition and is worth approximately \$2250.00. The Court finds FSB's value to be more credible and finds that the fair market value of the ATV is \$2815.00.

Finally, Bryan Jefferson, a loan officer at FSB, testified that based on his knowledge of the values of tractors generally and Kubota tractors specifically, he would value the debtor's tractor between \$10,500.00 and \$11,000.00. This testimony was corroborated with an appraisal from a dealer that valued this type of tractor at \$11,171.00. The debtor testified the value of the tractor is between \$6000.00 and \$7000.00. The Court finds that Jefferson was credible and knowledgeable as to the value of the tractor and finds that the fair market value of the tractor is \$10,750.00.

Lien Avoidance

The debtor has moved to avoid the nonpossessory, nonpurchase-money security interest of FSB in the tools of the trade of the debtor to the extent the liens impair an exemption to which the debtor is entitled. *See* 11 U.S.C. § 522(f)(1)(B)(ii). With regard to the ATV and the tractor, the only exemption to which the debtor claimed entitlement on his Schedule C was under § 522(d)(6)--tools of the trade. As stated above, the Court finds that the ATV and the tractor are not tools of the debtor's trade. In the absence of any other claimed exemption for these items, an exemption is not impaired and the debtor cannot use § 522(f)(1)(B)(ii) to avoid FSB's lien in these items.

On the other hand, the truck, boat, trailer, and motor are tools of the debtor's trade and the lien avoidance statute under § 522(f)(1)(B)(ii) is applicable. The parties stipulated that FSB's liens are nonpossessory, nonpurchase-money security interest liens. Section 522(f)(2) sets forth a formula for determining 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(f)(2)(A). Under this formula, FSB's lien in the amount of \$44,310.60 plus the total exemption the debtor can claim in the amount of \$12,105.00 totals \$56,415.60.² Subtracting from this the value of the truck, boat, trailer, and motor, which is \$16,560.00, leaves \$39,855.60. This is the amount of FSB's lien that is considered to impair the debtor's claimed exemptions and the amount of FSB's lien that can be avoided. The difference between FSB's initial lien and the amount that can be avoided is

² Although the § 522(d)(6) exemption is only \$2025.00, the debtor is permitted to aggregate the unused "wild card" exemption under § 522(d)(5) with the tools of the trade exemption for purposes of lien avoidance under § 522(f)(2). *See Augustine v. United States*, 675 F.2d 582, 585-86 (3d Cir. 1982). Further, the parties in this case stipulated that the debtor is entitled to a lawful exemption in the amount of \$12,105.00 under § 522(d)(5) and (d)(6).

\$4455.00, which is the amount of the lien that remains on the debtor's truck, boat, trailer, and motor.

Motion For Relief From Stay

The final determination for the Court is FSB's motion for relief from the automatic stay to pursue its rights as a lien holder under state law. Under § 362(d)(1), the Court can grant relief from the stay for cause, including the lack of adequate protection. Under § 362(d)(2), the Court can grant relief from the stay if the debtor does not have any equity in the property and it is not necessary for the debtor's reorganization. 11 U.S.C. § 362(d)(1) and (2). Because this is a chapter 7 case, the necessity of the property for the debtor's reorganization is not a factor.

The Court has already determined that FSB's liens on the ATV and the tractor remain intact, and the parties stipulated that FSB's liens have a current value of \$44,310.60.³ The value of the ATV is \$2815.00 and the value of the tractor is \$10,750.00, for a total of \$13,565.00. Because the liens exceed the value of the ATV and the tractor, the debtor has no equity in these items and FSB's motion for relief from stay is granted as to the ATV and the tractor.⁴

Because the debtor avoided a portion of FSB's lien that relates to the truck, boat, trailer, and motor, FSB's surviving lien against these items has been reduced to \$4455.00. The

³ The lien relating to the tractor is based on a Fixed Rate Consumer Promissory Note dated August 2, 2006, in the original amount of \$16,183.00. The lien relating to the ATV is based on a Fixed Rate Consumer Promissory Note dated January 7, 2009, in the original amount of \$28,389.25. The debtor's truck, boat, trailer, and motor are included in the January 7 promissory note. (FSB's Ex. 1.)

⁴ At trial, counsel for the debtor stated that if the relief from stay was granted, the debtor would like to redeem the property. However, the debtor has not filed a motion to redeem the property as required under § 722 and Federal Rule of Bankruptcy Procedure 6008, and did not timely perform his stated intention within the time required under § 362(a)(6).

combined value of the items, as determined by the Court, is \$16,560.00. Because the lien is less than the value of the items, the debtor has equity in the property and relief from the automatic stay under § 362(d)(2) is not warranted. Further, FSB did not offer any proof that the property was depreciating or that FSB otherwise lacked adequate protection. In fact, FSB has a sufficient equity cushion and the Court finds that adequate protection is not necessary or justified.

Regardless, the Court grants FSB's motion for relief from the automatic stay for cause under § 362(d)(1) and (h)(1). Although the debtor expressed a desire to redeem the property, and filed a statement of intention that stated as much, redemption is only available for personal property intended primarily for personal, family, or household use. 11 U.S.C. § 722. By definition, tools of the trade cannot be property intended primarily for personal, family, or household use. Additionally, § 362(h)(1) states that the automatic stay is terminated with respect to personal property and such property shall no longer be property of the estate if the debtor fails (1) to file timely a statement of intention indicating the debtor will either surrender the property or retain the property and redeem the property or reaffirm the debt, and (2) to take the action specified. 11 U.S.C. § 362(h)(1). Although the debtor filed a statement of intention indicating that the property would be retained and that he intended to redeem the property, as stated above, this option is not available under the code for tools of the trade. Accordingly, the Court finds that the debtor has failed to meet the requirements of § 362(h)(1), and grants FSB's motion for relief from the automatic stay for cause.

Conclusion

For the reasons stated above, the Court finds as follows:

1. The debtor's motion to avoid FSB's liens on the ATV and the tractor is denied.
2. The debtor's motion to avoid FSB's lien on the truck, boat, trailer, and motor is granted in part. The lien survives in the amount of \$4455.00; the remainder is avoided.

3. FSB's motion for relief from stay is granted under § 362(d)(2) as to the ATV and the tractor because the debtor has no equity in the property.
4. FSB's motion for relief from stay is granted under § 362(d)(1) and (h)(1) for cause as to the truck, boat, trailer, and motor.

IT IS SO ORDERED.

October 5, 2009

DATE



BEN T. BARRY
UNITED STATES BANKRUPTCY JUDGE

cc: Charles W. Pearce, attorney for the debtor
J.R. Buzbee, attorney for First Service Bank
Jill R. Jacoway, chapter 7 trustee