

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In Re:

Court File No. 04-50231-GFK
Chapter 7

Janet Lenora Olson,
fka Janet Lenora Gross,
Debtor

**RESPONSE TO MOTION
FOR ORDER AVOIDING JUDICIAL
LIEN IMPAIRING EXEMPTION**

TO: Robert R. Kanuit, Chapter 7 Trustee; United States Trustee; Frederick A. Dudderar, Jr.,
Attorney for Debtor.

Now comes Michael T. Poupore, Judgment Creditor in this matter, by and through his
below signed attorney who, in response to the motion states and requests as follows:

1. The judgement in question is not a judicial lien subject to avoidance pursuant to 11USC Section 522(f).
2. The state court judgment constitutes and creates a constructive trust upon the real property in question not subject to avoidance.
3. The state court judgment in question constitutes an equitable lien against the real estate in question, not subject to avoidance.

WHEREFORE, Creditor respectfully requests denial of the motion.

Dated: _____

Walter W Vasil
Attorney for Michael T. Poupore,
Judgment Creditor
Attorney ID No. 112525
200 Board of Trade Building
301 West First Street
Duluth, MN 55802
(218) 722-3988

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MEMORANDUM OF LAW

STATEMENT OF FACTS

Michael Poupore, hereafter Creditor, does not dispute the Statement of Facts as contained in Debtor's Memorandum of Law or as contained in her verified Motion. Attached to Debtor's Motion is a true and correct copy of Judge Munger's Order for Judgment in the state court action. Creditor believes that the state court action is res judicata to factual issues and for the purpose of argument in this court, highlights that decision as follows:

- a. The state court judgment traces ownership of three separate homes, the third of which is the real estate before this court.
- b. The state court judgment establishes certain repairs, improvements and contribution to acquisition, all in an attempt to sort out ownership interest in the real estate subject to this court's proceedings.
- c. The state court judgment finds that Plaintiff's (Creditor herein) contribution to the property was an investment (Paragraph 20-Findings).
- d. The state court judgment finds that "Plaintiff is entitled to share in the increased value of the Fish Lake home" (Paragraph 20-Findings).
- e. The state court judgment finds that all the various contributions of the parties, whether by ownership of previous homes or otherwise, is incorporated into the equity of the real estate now the subject of this bankruptcy proceeding.
- f. The state court judgment finds that certain contributions of Creditor herein are "rolled over" into the property in question herein (Paragraph 21-Findings).
- g. The order of the court in favor of Creditor herein is based on the theory of unjust

enrichment (Paragraph 1-Order).

- h. Judge Munger's pre-trial order dismisses with prejudice Creditor's request for an order requiring sale of Debtor's homestead (Footnote 1, Page 2-Debtor's Notice of Hearing and Motion for Order Avoiding Lien).
- i. Judge Munger orders that the property be sold to satisfy the judgment (Paragraph 2-Order).
- j. The property herein is Debtor's homestead and was at the time Judge Munger ordered sale (Paragraph 8-Debtor's Notice of Hearing and Motion to Avoid Lien).
- k. In support of his decision, Judge Munger cites the *Erikson* case. *In re: Erikson* 337 NW² 671 (Minn. 1983).

LAW AND ARGUMENT

The Order Constitutes an Equitable Lien/Constructive Trust Against the Property.

Creditor respectfully states that this court is put in the unenviable position of interpreting a state court judgment which was not entered with the thought of preserving the rights and obligations of the parties should one file bankruptcy. Creditor does not dispute that if in fact this judgment constitutes a judicial lien, then it may be avoided. Creditor does not dispute that Debtor's homestead (to the extent that she has an ownership interest separate from Creditor) is exempt. Creditor does not dispute that the personal obligation is discharged. He does not dispute that if the judgment is a judicial lien, then it impairs Debtor's exemption.

Creditor's position is that the judgment entered by Judge Munger in the state court action is not a judicial lien, but rather constitutes a constructive trust or equitable lien against the property, and as such is not avoidable.

Debtor asserts that the issue of a constructive trust against the property was decided in a

pre-trial order when Judge Munger dismissed Creditor's claim with prejudice for creation of a constructive trust. That dismissal was pursuant to Defendant's (Debtor herein) motion for partial summary judgment. In that pre-trial order, not only did Judge Munger dismiss with prejudice the request for a constructive trust, he also dismissed with prejudice Plaintiff's (Creditor herein) request that the property be sold to satisfy his interest. Of course, Judge Munger overruled himself with regard to sale of the property in that the final order does compel Debtor herein to either satisfy the lien or sell the property.

It is Creditor's position that Judge Munger may overrule himself when entering the final judgment, and he did so by creating a constructive trust or equitable lien against the property. With regard to whether Judge Munger may overrule himself after having dismissed a theory of recovery with prejudice, it is Creditor's position that he may freely do so and obviously Judge Munger feels he may freely do so in that he did order sale of the property. Rule 52.02 of the Minnesota Rules of Civil Procedure allows the court to amend its findings and judgment. Rule 59.01 of the Minnesota Rules of Civil Procedure (Subd. g) allows the court to amend its findings and conclusions. Also:

An order which dismissed one claim but which did not determine that there was no just reason for delay and did not directly order entry of judgment did not terminate action and was subject to revision. *Buchman Plumbing Co. v Regents of University of Minnesota*, 196 NW² 629 (1972). Emphasis added.

...any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and rights and liabilities of all the parties. (Minnesota Rule of Civil Procedure, Rule 54.02). Emphasis added.

Judge Munger does not use the phrase "constructive trust" in his judgment, but by the

terms of the order, a constructive trust is created. Alternatively, an equitable lien is created and a fair reading of the judgment supports the conclusion that it was the intention of Judge Munger to create an equitable lien. Under Minnesota law, an equitable lien is a form of constructive trust.

In re: Morlen 182 BR 1007 (Bkrcty. D. Minn 1995).

A constructive trust arises in favor of a person equitably entitled to the property, whenever legal title is obtained through improper means such as taking improper advantage of a confidential or fiduciary relationship. *In re: Digital Resource LLC*, 246 BR 357 (8th Cir. BAP Minn. 2000). Under Minnesota law, a constructive trust is imposed to prevent unjust enrichment. *Digital* supra. Here, Judge Munger's judgment makes it readily apparent that Creditor herein is equitably entitled to a portion of the homestead. He is given an equitable lien against the homestead property to prevent unjust enrichment.

The distinction between an equitable lien/constructive trust against the property and a simple judicial lien against the property is apparent because the constructive trust/equitable recognizes an ownership interest in a particular res.

When a party attains legal title to land...in any other unconscientious manner, so that he cannot justifiably retain the property, equity will impose a constructive trust in the person equitably entitled to it. *In re: Estate of Vittorio*, 546 NW² 751 (Minn. App. 1996). Emphasis added.

Under Minnesota law, a constructive arises where the person holding title to the property is subject to the equitable duty to convey it to another on the ground that he/she would be unjustly enriched if permitted to retain it. *Hanson v FDIC*, 113 F³ 866 (C.A. 8 Minn. 1997).

A prerequisite to imposition of a constructive trust is the existence of an identifiable res and its possession by a party to be charged as constructive trustee. *Digital* supra.

Under Minnesota law, a constructive trust may be imposed only where there is some specific property identified as belonging in equity and conscience to

Plaintiff. *In re: MJK Clearing Inc.*, 286 BR 862 (Bkrcty. D. Minn. 2002).

In this case, there is an identifiable res, that being the homestead property. Judge Munger recognizes an ownership interest in Creditor herein, implicitly by ordering sale of Debtor's homestead property and more explicitly by tracing ownership interest in various previous properties, acquisition costs, repair costs, etc. Judge Munger specifically recognizes that the parties' equity in previous homes was used to purchase the current home in question, and that these equitable investments have been "rolled over" into the current asset. Equity is defined as an interest in property which a court in equity will protect (27A Am Jur² Equity §1 et. seq.).

This court is aware without Creditor's cites that a simple in personam judgment does not create any specific lien against any specific property, and certainly does not give a right of foreclosure against Debtor's homestead property. Rather, when docketed it is a lien against all real property of Debtor. Judge Munger's lien is property specific and is offered as security to Creditor herein to prevent unjust enrichment.

An equitable lien arises in equity proceedings when a person is allowed to reach the property of another and hold it as security for a claim on the ground that otherwise the latter would be unjustly enriched. *Borsgard v Elverum*, 80 NW² 604 at 610 (1957).

As stated above, Judge Munger does not specifically use the term constructive trust. However, he does cite the *Erikson* case, *supra*, with a similar fact situation. In the *Erikson* case there was cohabitation and contribution by the parties to real estate. A constructive trust was placed on the real estate in favor of the party who did not hold legal title to prevent unjust enrichment. Judge Munger afforded the same remedy in this case. He did specifically create an equitable lien in favor of Creditor herein, establishing that Creditor was entitled to restitution for his ownership interest in the property.

A court of equity may give restitution to the Plaintiff and prevent the unjust enrichment of the Defendant not only by imposing a constructive trust and compelling the surrender to the Plaintiff of the property held by the Defendant...but also by imposing an equitable lien upon the property in favor of Plaintiff. Restatement of the Law—Restitution, Section 160, at Page 650 (1937).

Where the equitable lien is upon...property, the court will ordinarily decree that unless the holder of the property pays the amount of lien the property be sold and out of the proceeds the amount of the lien paid. Restatement of the Law—Restitution, Section 160, at Page 651 (1937).

Creditor anticipates Debtor's argument that there is no fraud or wrongdoing found by Judge Munger in imposition of a constructive trust or equitable lien. Fraud need not be shown to impose a constructive trust. The only thing needed is to show that imposition is justified to prevent unjust enrichment. *Erikson* supra citing *Knox v Knox*, 25 NW² 225 (Minn. 1946). There is no unyielding formula that is necessary under Minnesota law to create a constructive trust. A court of equity may do so whenever imposition is necessary to avoid unjust enrichment. *Graphics* supra.

A Constructive Trust/Equitable Lien Is Not Avoidable. There are three categories of liens recognized by the Bankruptcy Code. They are security interests, judicial liens and statutory liens. *In re: Thompson*, 240 BR 776(10 Cir. BAP 1999). The Bankruptcy Court should look to the origin of Creditor's interest, rather than to the means of enforcement to determine the nature of the lien for purposes of avoidance. Just because a creditor resorted to a judicial process to enforce his lien, does not mean the lien is a judicial lien. *Thompson* supra.

Creditor's interest herein clearly originated from his contributions to acquisition and improvement of various properties during the time the parties lived together. Judge Munger recognized these contributions as constituting equity in the current homestead. This equitable lien is in the nature of a security interest (see *Borsgard* supra) protected by the right of

foreclosure. Creditor herein had no option, other than to resort to the judicial process, to enforce his ownership interest. The ownership interest was recognized by the judicial process.

Creditor has found no bankruptcy case in this jurisdiction specifically ruling that an equitable lien or constructive trust may or may not be avoided. By inference that they may not, please see a Judge Dreher case—*In re: Deppe*, 215 BR 743 (Bkrcy. D. Minn. 1997) wherein she declined to impose a constructive trust or equitable mortgage to protect creditor’s interest in property. For other jurisdictions, an equitable lien imposed pre-petition is not a judicial lien subject to lien avoidance. *In re: Cloud*, 215 BR 870 (Bkrcy E.D. Ark. 1997). An equitable lien is not a judicial lien. *In Re: Carpenter*, 245 BR 39 (Bkrcy E.D. Va. 2000)—affirmed 252 BR 905 and 36 FED. Appx 80.

For this jurisdiction Creditor believes that Judge Lord’s case, *Boyd v Robinson*, 31 BR 591 (D.C. 1983)—affirmed in 741 F² 1112 (8th Cir. 1984) is still good law. It distinguishes between an equitable lien and a judicial lien and states that an equitable lien predates any judgment that enforces or recognizes it, while a true judicial lien is created by the judgment. The case supports Creditor’s contention that his ownership interest in the property existed prior to Judge Munger’s judgment and the equitable lien is simply a recognition of that ownership interest.

CONCLUSION

Judge Munger’s judgment created an equitable lien/constructive trust in favor of Creditor herein. The equitable lien/constructive trust is not avoidable pursuant to 11 U.S.C. Section 522(f).

RESPECTFULLY SUBMITTED:

Dated: _____

Walter W Vasil
Attorney for Michael T. Poupore,
Judgment Creditor
Attorney ID No. 112525
200 Board of Trade Building
301 West First Street
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AFFIDAVIT OF SERVICE

STATE OF MINNESOTA

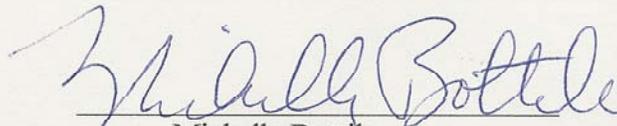
COUNTY OF ST. LOUIS

Michelle Bottila, being first duly sworn, says that hereinafter, listed are the names and addresses of the persons to whom she mailed by US Mail, postage prepaid at Duluth, Minnesota, on the 20th day of September, 2004, a copy of the Application for Discharge of Judgement and Certificate Regarding Entry of Discharge:

Frederick Dudderer
1000 US Bank Place
130 West Superior Street
Duluth, MN 55802-2094

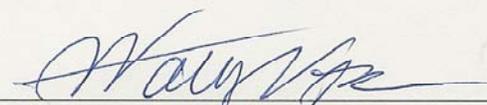
Robert Kanuit
Attorney at Law
4518 W Arrowhead Rd, Ste 230
Duluth, MN 55811

US Bankruptcy Trustee
300 South 4th Street
Suite 1015
Minneapolis, MN 55415-1329


Michelle Bottila

Subscribed and sworn to before me

this 20 day of Sept, 2004.


Notary Public

