

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:)
) Chapter 7
Janet Lenora Olson, fka Janet Lenora Gross,))
) Case No. 04-50231 GFK
Debtor.)
) **REPLY MEMORANDUM OF LAW IN**
) **SUPPORT OF MOTION FOR ORDER**
) **AVOIDING JUDICIAL LIEN IMPAIRING**
) **EXEMPTION**
)
)
)

Janet L. Olson, Debtor, respectfully submits this Reply Memorandum of Law in support of the Debtor’s Motion for Order Avoiding Judicial Lien Impairing Exemption.

INTRODUCTION

In the responsive Memorandum of Law filed by Michael Poupore, Mr. Poupore acknowledges and concedes that if the order for judgment entered by Minnesota District Court Judge Mark Munger on October 10, 2003 resulted in the creation of a “judicial lien,” then that lien may be avoided by the Bankruptcy Court pursuant to 11 U.S.C. §522(f)¹. The judgment creditor’s opposition to the Debtor’s motion is predicated exclusively upon the argument that Judge Munger declared and imposed a “constructive trust” upon the Debtor’s homestead, and that this constructive trust created an interest or equitable lien in favor of Mr. Poupore that does not constitute a “judicial lien” and, therefore, cannot be avoided under 11 U.S.C. §522(f). Debtor respectfully submits that (1) the state court dismissed Poupore’s claim for imposition of a constructive trust, and the judgment creditor’s attempt to re-litigate this claim is barred by the

¹ Poupore Memorandum of Law, page 2.

doctrine of res judicata, and (2) Judge Munger did not expressly or implicitly declare and impose a constructive trust upon the Debtor's homestead.

I. RES JUDICATA PRECLUDES PLAINTIFF MICHAEL POUPORE'S ATTEMPT TO RELITIGATE HIS CLAIM FOR IMPOSITION OF A CONSTRUCTIVE TRUST.

The doctrine of res judicata, or claim preclusion, is designed to prevent relitigation of causes of action already determined in a prior action. Under the doctrine of res judicata, parties to an action are prohibited from raising any matter in a second proceeding that was fully and fairly litigated in the first suit; the doctrine applies when parties to the two proceedings are the same, the second proceeding involves the same claim or cause of action, and the original judgment or legal determination was on the merits. Pelletier v. Thyssenkrupp Elevator Corporation, 2004 WL 1559388 (D. Minnesota 2004); Care Institute, Incorporated-Roseville v. County of Ramsey, 612 N.W.2d 443 (Minn.2000).

In his Memorandum of Law filed with the Bankruptcy Court, Mr. Poupore repeatedly refers to findings of fact made by District Court Judge Munger and then proceeds to attempt to relitigate his claim for imposition of a constructive trust upon the Debtor's homestead. This attempt comes in the form of Mr. Poupore's argument that Judge Munger *implicitly* imposed a constructive trust upon the Debtor's homestead. This specific claim, however, was fully litigated in state court and *specifically* dismissed by Judge Munger with prejudice.

The record establishes that on May 14, 2003, Debtor moved for partial summary judgment against Poupore in the State Action requesting the entry of judgment in her favor on many of the claims for relief set forth in Poupore's complaint. In his Order and Memorandum dated May 16, 2003, Judge Munger granted the Debtor's motion for summary judgment as to all claims except for plaintiff Poupore's claim for unjust enrichment. Judge Munger specifically

dismissed with prejudice the remainder of the claims set for in Pourpore's complaint, including, but not limited to, his claim for the declaration and imposition of a constructive trust. Judge Munger's May 16, 2003 Order stated, in relevant part:

ORDER

1. *Defendant's Motion to Dismiss with prejudice the portion of the Plaintiff's Complaint requesting a constructive trust be placed on the property known a 4931 Fish Lake Road (Fish Like property) is granted. Said portion of Plaintiff's Complaint is hereby dismissed with prejudice.*
2. *Defendant's Motion to Dismiss with prejudice the portion of the Plaintiff's Complaint requesting an order requiring the sale of the Fish Like property is granted. Said portion of Plaintiff's Complaint is hereby dismissed with prejudice.*
3. *Defendant's Motion for an order declaring the mechanic's lien, filed by Plaintiff on April 3, 2002 as document number 00851172, null and void is granted. Said mechanics lien is hereby ordered null and void and is no longer an encumbrance on the Fish Lake Property.*
4. *Defendant's Motion for an order declaring the notice of Lis Pendens, filed by Plaintiff on September 12, 2002 as document number 00868553, null and void is granted. Said notice of Lis Pendens is hereby ordered null and void and no longer an encumbrance on the Fish Lake Property.²*

The only claim for relief which Judge Munger left in tact and reserved for trial was the plaintiff's claim for unjust enrichment and request for entry of a money judgment. Lest there be any question or doubt, in his May 16, 2003 Memorandum Judge Munger expressly ruled that: "*Plaintiff's sole remedy is an award of a monetary judgment against Defendant.*"³ For this reason, and this reason alone, Mr. Poupore's opposition to the Debtor's motion should fail.

² Judge Munger's Order and Memorandum of Law dated and filed May 16, 2003, is attached as Exhibit B to the Debtor's NOTICE OF HEARING AND MOTION FOR ORDER AVOIDING JUDICIAL LIEN IMPAIRING EXEMPTION; emphasis in **bold** added.

³ Page 8, District Court Order and Memorandum of Law dated and filed May 16, 2003, attached as Exhibit B to the Debtor's NOTICE OF HEARING AND MOTION FOR ORDER AVOIDING JUDICIAL LIEN IMPAIRING EXEMPTION.

II. THE STATE COURT DID NOT EXPRESSLY OR IMPLICITLY DECLARE AND IMPOSE A CONSTRUCTIVE TRUST UPON THE DEBTOR'S HOMESTEAD.

Nothing appears in Judge Munger's October 10, 2003 Findings of Fact, Order and Memorandum of Law which contradicts, or is in any way inconsistent with, Judge Munger's previous May 2003 ruling that Mr. Poupore's "*sole remedy is an award of a monetary judgment against Defendant.*"⁴ Specifically, at the conclusion of trial Judge Munger found that during the period of the parties' cohabitation Poupore had contributed \$17,682 in labor and \$9,429.14 in materials toward the improvement of the Debtor's homestead. The state court then directed the entry of a money judgment for \$27,111.14 in favor of plaintiff Poupore and against the Debtor "*for unjust enrichment damages.*"⁵

Judge Munger's October 10, 2003, Findings of Fact, Order and Memorandum of Law said nothing about declaring or imposing a constructive trust, and for good reason. First, the state court had already specifically dismissed this claim with prejudice back on May 16, 2003. Second, and of equal importance, the evidence in the case simply did not support the imposition of a constructive trust against the Debtor's homestead.

Judicial imposition of a constructive trust is an extraordinary remedy. As plaintiff Poupore concedes in his memorandum of Law, a constructive trust generally arises in favor of a person equitably entitled to the property "whenever legal title is obtained through improper means such as by taking improper advantage of a confidential or fiduciary relationship. In re Digital Resource LLC, 246 B.R. 357 (8th Cir. BAP Minn. 2000)."⁶ A heightened standard of proof is required. Specifically, a court must be "persuaded by clear and convincing evidence that

⁴ Page 8, District Court Order and Memorandum of Law dated and filed May 16, 2003, attached as Exhibit B to the Debtor's NOTICE OF HEARING AND MOTION FOR ORDER AVOIDING JUDICIAL LIEN IMPAIRING EXEMPTION.

⁵ Page 6, October 10, 2003, Findings of Fact, Order and Memorandum of Law of Judge Munger.

⁶ Poupore Memorandum of Law, page 4.

the imposition of a constructive trust is justified..."In re Estate of Eriksen, 337 N.W.2d 671, 674 (Minn.1983). While a constructive trust is not limited to situations involving outright fraud, it may only be imposed when there is clear and convincing evidence that it would be "morally wrong for the property holder to retain" the property. Spieß v. Schumm, 448 N.W.2d 106, 108 (Minn.App.1989).⁷

Judge Munger's October 10, 2003 Findings of Fact, Order and Memorandum of Law are void of any findings or determinations that Janet Olson acted improperly or immorally, or took advantage of any confidential or fiduciary relationship, at the time she acquired legal title to her homestead, or, for that matter, at any other time. The facts determined in the present case by Judge Munger vary dramatically from those in the case so heavily relied upon by Poupore in the State Action, i.e., In re Estate of Eriksen, supra. In Eriksen, the Supreme Court upheld the imposition of a constructive trust where the plaintiff's claim to one half of the equity in a home in which she cohabitated with the decedent was based on an agreement between them to join in the purchase of home, each party contributed money equally toward expenses of purchasing and maintaining home, and each party contributed equally toward premiums for credit life insurance which ultimately paid \$48,334 on the mortgage when the decedent passed away.⁸ In the present case, however, Judge Munger made no finding of any kind of an ownership agreement between

⁷ Imposition of a constructive trust certainly does not follow every judicial finding that one party has been unjustly enriched. If that were the case, the common law of "constructive trusts" might very well soon supplant and render meaningless many laws which require parties to follow statutory procedures in order to create and perfect liens, such as, for example, Article 9 of the Uniform Commercial Code, or Minnesota's mechanic lien statutes.

⁸ The Minnesota Supreme Court's 1983 decision in Eriksen has since been narrowly construed by the Minnesota courts as pertaining to a very specific fact situation. See, e.g., Roatch v. Puera, 534 N.W.2d 560, 564 (Minn.App.1995) (categorizing Eriksen as a "narrow factual exception to the statutory requirement of a written contract governing finances for nonmarried couples in Minnesota"); Mechura v. McQuillan, 419 N.W.2d 855, 858 (Minn.App.1988) (distinguishing Eriksen, where both parties made equal contributions to the acquisition and maintenance of property); Tourville v. Kowarsch, 365 N.W.2d 298, 300 (Minn.App.1985) (distinguishing Eriksen because, although mortgage was executed jointly, property was not purchased jointly); Hollom v. Carey, 343 N.W.2d 701, 704 (Minn.App.1984) (distinguishing Eriksen from instant case where property was not purchased jointly, there was no clear understanding of joint ownership, and there were no extenuating circumstances justifying lack of written agreement).

the Debtor and Mr. Poupore and, in fact, specifically found that that it was the Debtor who paid all of the mortgage payments and all of the real estate taxes for her homestead property.⁹

Judge Munger's decision in the State Action to limit the plaintiff to the recovery of a money judgment against the Debtor for the value of labor and material contributed to the defendant's real estate is entirely consistent with the limited cause of action recognized by the Minnesota Supreme Court in the more recent case of In re Estate of Palmen, 588 N.W.2d 493 (Minn. 1999). In Palmen, the plaintiff brought an action for unjust enrichment seeking to recover \$48,051.03 from the estate of John Palmen for cash she allegedly expended, goods and services she allegedly provided, and improvements she allegedly made to a log cabin she and Palmen were building in Wisconsin. On appeal the Minnesota Court of Appeals affirmed the trial court's dismissal of the case ruling that the state district court lacked jurisdiction to hear the plaintiff's claim under two statutes, specifically Minn.Stat. § 513.075 and 513.076, which render unenforceable non-written contracts between unmarried cohabitants living together in contemplation of sexual relations. 574 N.W.2d 743. The Minnesota Supreme Court, however, reversed, ruling that the plaintiff's claim in Palmen could proceed because she was not making a claim against property of the decedent, i.e., a constructive trust claim, but was instead merely attempting to recover a money judgment for the value of the cash, labor and material which she had provided:

Here, Schneider's claim is based on her contributions to the construction of the log cabin on Palmen's real property, which is not the same as Schneider making a claim to Palmen's property. As we read Schneider's Statement of Claim, she is only seeking to recover the value of her direct contributions to the construction of the log cabin. She does not seek to recover the value of general contributions she made to the relationship she had with Palmen nor does she make any claim on Palmen's earnings or to his property. Further, because Schneider's claim seeks to recover her direct contributions to the construction of the log cabin, her claim is not

⁹ Page 4, October 10, 2003, Findings of Fact, Order and Memorandum of Law of Judge Munger.

based on her living together with Palmen "in contemplation of sexual relations * * * out of wedlock."

588 N.W.2d at 496. The decision issued by Judge Munger in his May 16, 2003 Memorandum, wherein Judge Munger expressly ruled that: "*Plaintiff's sole remedy is an award of a monetary judgment against Defendant,*" ¹⁰ is on all fours with the Minnesota Supreme Court's ruling in Palmen.

Notwithstanding the unequivocal findings and rulings in the State Action, and notwithstanding the fact that the findings of fact in the case did not support the imposition of a constructive trust under Minnesota law, Mr. Poupore seeks refuge in that portion of the state court's October 10, 2003 Order which stayed levy and execution on the money judgment entered in the plaintiff's favor. Based upon his unique interpretation of the language of paragraph 2 of that Order, plaintiff Poupore invites the Bankruptcy Court to find that Judge Munger *implicitly* overruled his prior Order of May 16, 2003, and *implicitly* imposed a constructive trust on the Debtor's home, a trust that Poupore argues cannot be avoided under 11 U.S.C. §522(f). Poupore's characterization of the record in the State Action is inaccurate and misguided.

Under Minnesota law, the docketing of a money judgment creates a judgment lien on all real property of the judgment debtor located in the county where docketing occurs. Minn Stat. §548.09, subd. 1. Actual enforcement of a money judgment by a judgment creditor requires that the creditor execute upon real or personal property of the judgment debtor in accordance with Minnesota statutory procedures. Minn. Stat. §550.01. Execution upon real property of the judgment debtor requires that an execution sale be conducted under a writ issued under the seal of the state court. Minn. Stat. §550.04. Pursuant to the exception recognized in Minn. Stat.

¹⁰ Page 8, District Court Order and Memorandum of Law dated and filed May 16, 2003, attached as Exhibit B to the Debtor's NOTICE OF HEARING AND MOTION FOR ORDER AVOIDING JUDICIAL LIEN IMPAIRING EXEMPTION.

§510.01, the homestead of a judgment debtor is not exempt from an execution sale where the judgment is for work or materials furnished in the construction, repair, or improvement of the homestead.¹¹ Accordingly, in paragraph number 2 of his October 10, 2003 Order, Judge Munger recognized plaintiff Poupore's right to proceed with an execution sale of the Debtor's homestead property in order to enforce the \$27,111.14 money judgment, but expressly decided to stay levy and execution on the money judgment for six months:

*Judgment shall be entered but levy and execution on the judgment shall be stayed for six months. Defendant shall, within six months of the date of the judgment entered herein, pay the sum of \$27,111.14, together with interest at the judgment rate, to plaintiff in satisfaction of said judgment. If payment is not made within said timeframe, Plaintiff may bring a motion before the Court to have the property located at 4931 Fish Lake Road sold and any equity applied to satisfy the judgment herein.*¹²

How, then, does Mr. Poupore seek to transform this portion of the state court's Order into an "implicit" declaration and imposition of a constructive trust?

Poupore argues that Judge Munger "order[ed] the property be sold to satisfy the judgment."¹³ Judge Munger did no such thing; Judge Munger did not order the sale of the Debtor's homestead to satisfy the plaintiff's money judgment. In fact, the state court did not order the sale of any property. What Judge Munger's did was just the opposite: the state court actually prohibited the sale of the Debtor's property by staying levy and execution of the money judgment for a six-month period. In accordance with Judge Munger's Order, at the conclusion of the six-month stay period, and absent payment by the Debtor, Mr. Poupore was then free to return to the state court and pursue enforcement

¹¹ Minn. Stat. 510.01 provides: "The house owned and occupied by a debtor as the debtor's dwelling place, together with the land upon which it is situated to the amount of area and value hereinafter limited and defined, shall constitute the homestead of such debtor and the debtor's family, and be exempt from seizure or sale under legal process on account of any debt not lawfully charged thereon in writing, except such as are incurred for work or materials furnished in the construction, repair, or improvement of such homestead, or for services performed by laborers or servants and as is provided in section 550.175." Emphasis added

¹² Page 6, October 10, 2003, Findings of Fact, Order and Memorandum of Law of Judge Munger.

¹³ Page 2, Poupore Memorandum of Law.

of the judgment against the Debtor's homestead.

The simple fact is that if Judge Munger had really intended to declare and impose a constructive trust upon the Debtor's homestead, he would have said so. He did not. If Judge Munger had really intended to declare and impose a constructive trust upon the Debtor's homestead he would have awarded a share of the equity in the property to Mr. Poupore. He did not. Mr. Poupore's suggestion that Judge Munger specifically recognized an identifiable and correspondingly limited "res," i.e., the Debtor's homestead, is incorrect. Notably, pursuant to the October 2003 Order, at the conclusion of the six-month stay period, and absent payment by the Debtor, Poupore was also free to pursue levy and execution upon any other non-exempt real or personal property of the Debtor.

III IMPOSITION OF A CONSTRUCTIVE TRUST CREATES A JUDICIAL LIEN UNDER MINNESOTA LAW VOIDABLE UNDER 11 U.S.C. § 522(f)

It is not necessary for the Bankruptcy Court to reach the question whether the judicial declaration and imposition of a "constructive trust" results in the creation of a "judicial lien" voidable under 11 U.S.C. § 522(f). Clearly, however, it does.

A "judicial lien" is defined in 11 U.S.C. §101(36) as "a lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding." As Mr. Poupore acknowledges in his Memorandum of Law, there are only three recognized categories of liens: (1) liens created by a consensual security interest (e.g., Article 9 security interests and real estate mortgages), (2) statutory liens, and (3) judicial liens. Clearly, the constructive trust and "equitable lien" which Mr. Poupore asks the Bankruptcy Court to *imply* in this case cannot possibly be construed as either a security interest or a statutory lien. This leaves only one category: judicial liens. Indeed, the §101(36) definition of a judicial lien as one "obtained by legal or equitable process or

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:)
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) Chapter 7
Janet Lenora Olson, fka Janet Lenora Gross,)
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) Case No. 04-50231 GFK
Debtor.)
) **UNSWORN CERTIFICATE OF SERVICE**
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Frederick A. Dudderar, Jr., employed by Hanft Fride, A Professional Association, attorneys licensed to practice law in this court, with office address of 1000 U.S. Bank Place, Duluth, Minnesota 55802, declares that on October 1, 2004, I served a **REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR ORDER AVOIDING JUDICIAL LIEN IMPAIRING EXEMPTION** upon each of the entities named below by U.S. Mail postage prepaid and depositing same in the post office at Duluth, Minnesota, addressed to each of them as follows:

United States Trustee
1015 U.S. Courthouse
300 South 4th Street
Minneapolis, MN 55415

Chapter 7 Trustee
Robert R. Kanuit
4815 West Arrowhead Road
Suite 230
Hermantown, MN 55811

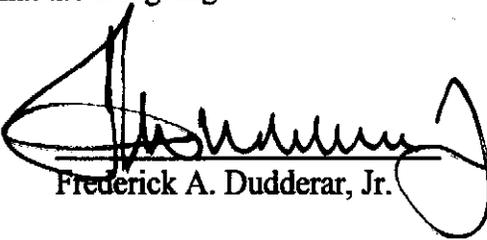
Michael T. Poupore
712 Lake Avenue South
Duluth, MN 55802

Walter W. Vasil
Attorney at Law
Suite 200, Board of Trade Building
Duluth, MN 55802

Ford Motor Credit Company
C/o Stewart, Zlimen & Jungers
430 Oak Grove Street
Minneapolis, MN 55403

And I declare, under penalty of perjury, that the foregoing is true and correct.

Executed: October 1, 2004.



Frederick A. Dudderar, Jr.