

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

In Re:

CHAPTER 7

Gregory Carr,
Debtor.

Bky. 3-92-6647

ORDER

This matter is before the Court on Debtor's lien avoidance motion, heard April 8, 1993. State Bank of New Prague, which holds the lien sought to be avoided, objects to the motion. Appearances are as noted in the record. The Court, having considered the arguments of counsel, the primary and supplemental briefs, and being fully advised in the matter, now issues this ORDER pursuant to the Federal and Local Rules of Bankruptcy Procedure.

I.

Gregory Carr, a farmer, filed for relief under 11 U.S.C. Chapter 7, on December 21, 1992. In his schedule C, filed with the petition, the Debtor claimed the following exemption regarding a pickup truck:

Property	Statute	Value
1987 Dodge 4WD LE-250 truck	M.S. Sec. 550.37 Subd. 12a.	\$3,000
1987 Dodge 4WD LE-250 truck exemption claimed under both M.S. Sec 550.37 Subd. 12a and	M.S. Sec 550.37 Subd. 5	\$5,700

Minn. Stat. Section 550.37, Subd. 12a, allows a debtor an exemption in one motor vehicle not to exceed \$3,000.00 in value. Minn. Stat. Section 550.37, Subd. 5, allows a debtor an exemption in farm machines and implements used in farming operations by a debtor principally engaged in farming. No timely objection was made to the exemption claims of the Debtor.

On March 15, 1993, the Debtor filed his motion to avoid the nonpossessory, nonpurchase-money security interest of State Bank of New Prague in the truck under 11 U.S.C. Section 522 (f) (2) (B) as a "tool of the trade."(FN1) The motion seeks to avoid the Bank's

lien

for the full value of the exemptions, \$8,700.00.(FN2) The Bank objects, arguing that a pickup truck, generally licensed for over the road use, is not a "tool of the trade" of a farmer for lien avoidance purposes. But even if it is, the Bank contends, the Debtor cannot avoid the lien to the extent of the value claimed

exempt under the general motor vehicle exemption of Minn. Stat. Section 550.37, Subd. 12a. The Debtor argues that because the exemptions were not timely objected to, the Bank cannot challenge them for lien avoidance purposes; and, that the lien clearly impairs the exemptions to which he is now entitled as a result.

II.

The Debtor basically relies upon Taylor v. Freeland & Kronz, 112 S.Ct 1644 (1992) (Failure to timely object to exemptions results in their allowance regardless of underlying merits) in support of his position on issue preclusion in this proceeding. However, a lien avoidance proceeding is not an exemption proceeding. Allowance of the exemption from the estate by default does not preclude a later challenge, by a consensual lien creditor, to the claimed nature or use of the property in a proceeding by a debtor to avoid the creditor's consensual lien. See: Morgan v. Fed. Deposit Ins. Corp., 149 B.R. 147 (BAP 9th Cir. 1993); and, In re Hahn, 60 B.R. 69, 75 (Bankr. D. Minn. 1985), discussing a creditor's right to litigate 11 U.S.C. Section 522 (f) (2) consensual personal property lien avoidance issues that overlap exemption elements. Accordingly, the Bank is not precluded from challenging the nature or use of the Debtor's truck as a "tool of the trade" in defense to this lien avoidance motion, even though the property has been finally allowed as exempt from the estate under a theory that, arguably, supports the Debtor's description of it.(FN3)

III.

To the extent that a motor vehicle is held for personal use, it cannot be considered a tool of the trade for 11 U.S.C. Section 522 (f) lien avoidance purposes. Minn. Stat. Section 550.37, Subd. 12a, provides an exemption for personal use motor vehicles. See: In re Smith, 68 B.R. 581 (Bankr. Mn. 1986). Accordingly, the Debtor cannot avoid the Bank's lien on that portion of the value of the vehicle he assigned to his personal use in claiming his Minn. Stat. Section 550.37, Subd. 12a, exemption. Therefore, the lien cannot be avoided on the \$3,000.00 value of the truck that represents the Debtor's conceded personal use.

Regarding the remaining \$5,700.00 value, the Debtor has neither alleged in his pleadings, nor otherwise produced in the proceeding, any facts that would tend to support his claim that the pickup truck is a "tool" of his trade as a farmer. This Court, in Smith, found:

Resolution of the question whether automobiles and trucks can be trade exemptions must be made upon the facts of each particular case; and the resolution should be based upon their connection with the particular trade or business, not upon their connection with an individual debtor. Thus, where the business is selling real estate, it is reasonable to conclude that an automobile is not reasonably necessary in the trade, even though it may be necessary to a salesperson in pursuing the trade. It is incidental to the trade. The business is selling real estate, not driving an automobile. [FN6 To reason otherwise would be to acknowledge a statute without parameters. For instance, can a \$1,000.00 wrist watch

constitute a trade exemption to a salesperson because he needs an accurate time piece to assure that he arrives at a scheduled appointment timely?]

On the other hand, a taxi cab might well constitute a proper trade exemption for an individual in the taxi business. The trade is driving the vehicle to transport persons from one place to another for a fee. It is not selling a fare. Regarding the taxi business, it might well be reasonable to conclude that a taxi cab is reasonably necessary in the trade. The vehicle is primary, not incidental to the business.

Smith, at 583.

Smith was not a lien avoidance proceeding, it was an objection to exemption proceeding.(FN4) However, the same considerations are necessary to the determination of whether a truck is a "tool of the trade of the debtor" for lien avoidance purposes under 11 U.S.C. Section 522 (f) (2) (B).

The Debtor has the burden of proof in the matter, and the burden has not been met. See: In re Weinbrenner, 53 B.R. 571 (Bankr. W.D. Wis. 1985).(FN5) The statute under which the Debtor claimed the trade exemption, Minn. Stat. Section 550.37, does not mention "tools." It refers to "farm machines and implements." The fact that the exemption was successfully claimed, cannot even be considered evidence that the truck is a tool of the Debtor's trade for lien avoidance purposes. The Debtor alleged no facts and offered no evidence, except that a portion of the truck's value was successfully claimed exempt by default under Minn. Stat. Section 550.37, Subd. 5, pursuant to 11 U.S.C. Section 522 (1). Accordingly, the Debtor cannot avoid the Bank's lien on that portion of the truck's value attributable to Minn. Stat. Section 550.37, Subd. 5, exemption, in the amount of \$5700.00, either.

IV.

Based on the foregoing, it is hereby ORDERED:

1) The objection of State Bank of New Prague is sustained; the Debtor is not entitled to avoid the lien of State Bank of New Prague in his 1987 Dodge 4WD LE-250 truck; and, the Debtor's motion to avoid the lien is denied.

2) The Debtor's motion to avoid the liens of State Bank of New Prague and Farmer's Home Administration on his Massey 1130 Diesel tractor with dual tires, and Massey 1455 Round Baler, is granted, and said liens are declared null and void.
Dated: June 8, 1993. By The Court:

DENNIS. D. O'BRIEN

U.S. BANKRUPTCY JUDGE

(FN1) The motion involves other property, not disputed. The other items are a Massey 1130 Diesel Tractor with dual tires, and

a Massey 1455 Round Baler. Farmer's Home Administration is named as having an avoidable interest in some of the property. FHA has not responded and makes no appearance in the proceeding.
END FN

(FN2) The statute reads, in pertinent part:

(f) Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is-

(2) a nonpossessory, nonpurchase-money security interest in any-

(B) implements, professional books, or tools, of the trade of the debtor....

END FN

(FN3) The statute under which the Debtor claimed the trade exemption, Minn. Stat. Section 550.37, Subd. 5, does not mention "tools." It refers to "farm machines and implements." Apparently, the Debtor's position is that the truck is a farm machine for exemption purposes and a tool of the trade for lien avoidance purposes.
END FN

(FN4) In Smith, the debtor claimed a truck tractor exempt under Minn. Stat. Section 550.37, Subd. 6, which allowed an exemption for "the tools, implements, machines, instruments office furniture, stock in trade, and library reasonably necessary in the trade, business, or profession of the debtor..."

(FN5) The Ninth Circuit BAP takes the position in Morgan v. Fed. Deposit Ins. Corp., supra, at 152, that, in a lien avoidance proceeding, the creditor bears the burden of proving that the exemptions are not properly filed, citing Fed. R. Bankr. P. 4003(c). However, subsection (c) of the Rule applies only to exemption hearings under Rule 4003. Lien avoidance hearings are not exemption hearings; nor are they held under Rule 4003. Regardless, whether the Debtor's exemption was properly filed is not an issue in this proceeding, since the Debtor did not claim the exemption as a "tool of the trade".
END FN