

Consumer Bankruptcy

Non-Resident Spouse Permitted to Avoid Judgment Lien with Wildcard

By Craig D. Robins

If writing the most number of decisions on lien avoidance was an Olympic sport, Chief Bankruptcy Judge Alan S. Trust would surely win the gold medal. The Central Islip Judge just issued his umpteenth decision on the subject, in which he permitted husband and wife joint debtors to avoid judicial judgment liens on a tenancy by the entirety. The two unusual twists in that case were that only one of the spouses resided in the premises, and the other spouse sought relief with the wildcard exemption. In re Joseph and Kristen A. Banfi (Bankr. E.D.N.Y. Case No. 19-77029-ast, June 9, 2021).

In Banfi, both husband and wife debtors filed for Chapter 7 relief in 2019. At the time, only the husband was living in the marital premises; the wife lived a few miles away.

The debtors claimed two separate and distinct federal exemptions in the house: the husband asserted the federal homestead exemption, pursuant to Bankruptcy Code Section 522(d)(1), but the wife used the federal wildcard exemption instead, pursuant to Section 522(d)(5). The federal homestead exemption, which the husband used, permits a debtor to exempt \$25,150 of equity in a home. The debtors then brought a motion to avoid judgment liens on the grounds that they impaired the debtors' exemptions pursuant to Section 522(f), which the respondents did not oppose.

Initially, Judge Trust had no problem with avoiding the judgment liens as they applied to the husband, but he denied relief to the wife because the property was not her primary residence on the petition date. The debtors quickly filed a motion for reconsideration, arguing that Judge Trust erred because Section 522(f) permits the avoidance of liens impairing the primary residence, and the federal wildcard exemption was a valid exemption which the wife was entitled to take against the property. The Court noted that this was an issue of first impression in this district.

Judge Trust pointed out that while the motion for reconsideration was under consideration, the Second Circuit issued an opinion holding that the term "residence" in Section 522(d)(1) "includes both primary and non-primary residences." In re Maresca, 982 F.3d 859, 863 (2d Cir. 2020). Judge Trust concluded, that "with the guidance of Maresca," the debtor can assert the 522(d)(1) exemption while a co-debtor can assert a 522(d)(5) wildcard exemp-

tion in the same property. As such, the Judge granted reconsideration and provided the debtors with the full relief they originally sought.

In reaching this result, Judge Trust made several points that should be of interest to bankruptcy practitioners seeking to bring lien avoidance motions. He noted that the debtors were correct in asserting that residency is irrelevant in evaluating the eligibility for the wildcard exemption. He also stated that Maresca has made clear that the federal homestead exemption extends to both primary and non-primary residences.

Judge Trust indicated some other important concepts applicable to lien avoidance motions. A debtor who files for relief in New York may elect to claim either all federal or all New York state exemptions, but cannot combine exemptions from both federal and state schemes. Initially, the debtors were not totally successful with their motion, even though it was unopposed. As the Judge stated, in ruling on a 522(f) motion, the Court must rely on the information provided by the debtors, who have the burden of proving by a preponderance of the evidence on every element of § 522(f). This means that a debtor must successfully establish entitlement to relief, even if there is no opposition.

To state a claim for relief under Section 522(f), Judge Trust pointed out, the debtor must establish four basic elements: (1) there must be an exemption to which the debtor "would have been entitled under subsection (b) of this section"; (2) the property must be listed on the debtor's schedules and claimed as exempt; (3) the lien must impair that exemption; and (4) the lien must be a judicial lien.

The Judge demonstrated how the wife in Banfi met these requirements: the wife's wildcard exemption is a valid exemption which she is entitled to claim; the property is listed in the schedules; she in fact did claim an exemption on Schedule C in an amount greater than zero against the property; and the liens at issue are judicial liens which impair her exemption claim.

It is important to note that to succeed with a lien avoidance motion, the debtor's Schedule C (exemptions) must indicate that the debtor claimed an exemption in a specific dollar amount; a \$0.00 exemption is not a valid exemption claim.

Of the wildcard exemption, Judge Trust stated that the Bankruptcy Code unambiguously permits the avoidance of a judicial lien which impairs a properly claimed wildcard exemption. Further, the wildcard exemption has been liberally construed to include any property of the bankruptcy estate in which the debtors have an ownership interest, whether real or personal. 🌱



Craig D. Robins Esq.

L.I. Bankruptcy Lawyer, Regular Columnist

Craig D. Robins, Esq., has offices in Melville, Coram, and Valley Stream.

(516) 496-0800.