

**2020 Mont. B.R. 219**  
**UNITED STATES BANKRUPTCY COURT**  
**FOR THE DISTRICT OF MONTANA**

In re

**TRAVIS J. SCHWEIGERT,**

Debtor.

Case No. **20-90044-BPH**

**ORDER**

At Butte in said District this 5<sup>th</sup> day of June, 2020.

In this Chapter 13<sup>1</sup> bankruptcy, after due notice, a hearing was held June 4, 2020, on Debtor's Motion to Avoid Judicial Lien ("Motion") filed April 27, 2020, at ECF No. 36. Debtor seeks to avoid a Judicial Lien held by Tamara Schweigert ("Tamara") against Debtor's homestead property.<sup>2</sup> Debtor asserts in the Motion that Tamara's judgment lien impairs his homestead exemption. In support of such assertion, Debtor alleges that the market value of the homestead property is \$170,000.00. Debtor also maintains that the homestead property is encumbered by a consensual secured obligation held by Valley Bank of Ronan ("Valley Bank") in the sum of \$147,106.00. According to the Motion, Debtor is asserting a homestead exemption in the amount of \$125,000.00.<sup>3</sup>

Tamara filed an objection to Debtor's Motion at ECF No. 46. According to Tamara's objection:

- Debtor has alleged that that "market value" of his interest in the real property described in his motion is \$170,000. Debtor has not provided any evidence that the property was appraised. Pursuant to Mont. Code Ann. § 70-32-104(1), Debtor

<sup>1</sup> Unless specified otherwise, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, all "Rule" references are to the Federal Rules of Bankruptcy Procedure, and all "Civil Rule" references are to the Federal Rules of Civil Procedure.

<sup>2</sup> Debtor claimed an exemption in his homestead and no objections to its allowance were filed.

<sup>3</sup> Mont. Code Ann. § 70-32-104(2).

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should be required to demonstrate proof of the assessed value of the home, with a qualified appraisal (the “Appraisal Objection”);

- Debtor has alleged that Valley Bank of Ronan has a first-priority lien against the property (most likely through a mortgage or indenture) in the amount of \$147,106.00. This lien is exempt from the protections of Debtor’s Homestead Declaration. Mont. Code Ann. § 70-32-202. Assuming this lien is valid, and assuming the value of the property is \$170,000, this leaves approximately \$22,894 available to satisfy Tamara Schweigert’s secured judgment lien (the “Analysis Objection”).

See ECF No. 46. The Appraisal Objection involves a legal issue, as well as a contested factual component, valuation.

The avoidance of liens, in general, is governed by 11 U.S.C. § 522(f), which provides in relevant part:

Notwithstanding any waiver of exemptions but subject to paragraph (3), 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-

- (A) a judicial lien, other than a judicial lien that secures a debt of a kind that is specified in section 523(a)(5)[.]

“If the matter is contested, the debtor generally bears the burden of proof of establishing that the requirements of section 522(f) have been met.” *In re Reynolds*, 2006 WL 6811035 (B.A.P. 9th Cir. 2006).

#### A. The Appraisal Objection.

##### 1. The legal component.

Tamara’s reliance on Mont. Code Ann. § 70-32-104(1) is misplaced. It provides:

A homestead may not exceed \$250,000 in value. In a proceeding instituted to determine the value of the homestead, the assessed value of the land with included appurtenances, if any, and of the dwelling house as it appears on the last-completed assessment roll preceding the institution of the proceeding is prima facie evidence of the value of the property claimed as a homestead.

The matter before the Court involves the avoidance of a judgment creditor’s lien under § 522(f)(1), not a “proceeding instituted to determine the value of the homestead” under Mont.

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Code Ann. § 70-32-104(1). However, to the extent Tamara is challenging Debtor's \$170,000 valuation of the property, this is a factual issue to be determined by the evidence.

Debtor's counsel argued that even if Tamara's reliance on Montana's homestead statutes was correct, those statutes also provide for the payment of the costs of proceedings under the statutes to be shouldered by the execution creditor in the first instance. Mont. Code Ann. § 70-32-215. Equally important, and overlooked by Tamara, a debtor's testimony regarding the value of property is acceptable. *In re Schmitt*, 20 Mont. B.R. 57, 75 (Bankr. D. Mont. 2002). The determination of the weight to be given a debtor's opinion of value is within the discretion of this Court.

2. The valuation issue.

The Motion and Objection establish a factual dispute: whether Debtor's homestead property is worth \$170,000 as alleged by Debtor, or something greater as suggested by Tamara. Hearings before the Court can serve many purposes, but when the pleadings reflect a factual dispute between the parties, the Court anticipates that the parties intend to introduce evidence either in the form of exhibits or witness testimony. Pursuant to Mont. Local Bankruptcy Rule ("LBR") 5074-1(c):

The parties involved in video and in-person conferences and hearings shall exchange proposed witness and exhibit lists and copies of all proposed exhibits, and file such lists and exhibits with the Court, at least three (3) business days prior to a hearing or trial.

Failure to timely exchange and file proposed witness and exhibit lists and copies of proposed exhibits in accordance with this rule may result in the Court barring any undisclosed witness testimony and denying the admission of any exhibit not disclosed or exchanged.

See Mont. LBR 5074-1(c)(1) and (3). LBR 5074-1(c) has been included in our local bankruptcy rules since at least 2001.

This local rule serves important purposes. First, it allows the parties to prepare for the

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scheduled hearing, evaluate their probability of prevailing after considering the other side's exhibits and likely testimony, and spend the next 3 business days preparing for the hearing or trial, or resolving the disputed issues set to be heard. Next, and equally important, filing of the witness and exhibits lists signals to the Court that the matter remains contested and unresolved and the Court should be prepared for a contested hearing. Based on this filing, the Court endeavors to be as prepared as counsel so that the hearing is conducted efficiently.

If after filing witness and exhibit lists, counsel resolve a matter, but are incapable of reducing the agreement to written form, counsel may appear at the hearing and advise the Court of the settlement on the consent calendar. Mont. LBR. 5070-1(a). In such cases, counsel should be prepared to outline the terms of the settlement on the record. The consent calendar is generally not an opportunity to make an oral motion for a continuance. Instead, a motion to continue may be filed, so long as it is filed at least 3 business days before the hearing. Mont. LBR. 5071-1(a). This signals to the Court that the parties are working to resolve an issue, or not ready to be heard on a matter.<sup>4</sup>

In this case, Tamara did not file a witness and exhibit list 3 business days before the hearing. As a result, at the outset of the hearing, the Court questioned how Tamara intended to refute Debtor's anticipated evidence that the value of the property was \$170,000. After explaining the applicability of LBR 5074-1(c) and the Court's prohibition on allowing

<sup>4</sup> Taken together this District's local bankruptcy rules provide a framework that generally require a filing by the parties 3 business days prior to any hearing. Counsel that are diligently handling their cases likely know even further in advance whether a scheduled hearing is likely on the date set. An exception to this general framework exists in matters involving confirmation of chapter 13 plans. Parties often appear in chapter 13 cases and the debtor concedes the plan is not confirmable, and request a continuance and time to amend the plan. Although the Local Rules Committee is contemplating alternatives to this existing practice, to date nothing has been adopted.

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undisclosed evidence, Tamara conceded that she would be incapable of refuting or controverting Debtor's testimony of value. Based on the statements of counsel, the Court adopted Debtor's valuation of the property, \$170,000. This total value for the property is consistent with Debtor's Schedules A/B. The value of Debtor's one-half ownership interest would be \$85,000.

**B. The Analysis Objection.**

Tamara has a judgment lien in the amount of \$51,026.83. This is not disputed. Valley Bank has a \$147,106.00 lien on the property. This is not disputed. Tamara argues that assuming the property is worth \$170,000.00, there remains \$22,894.00 to satisfy her judgment. Her arithmetic suggests that she deducted the full amount of the Valley Bank lien from property value and concluded that there remained \$22,894.00 available to partially satisfy her claim. Tamara's analysis of § 522(f) is flawed.

The formula set forth in § 522(f)(2)(A), determines whether a lien impairs an exemption. If the lien to be avoided, all other liens on the property, and the amount of the exemption that the debtor could claim if no liens existed on the property, exceeds the value that the debtor's interest in the property would have in the absence of any liens, the lien is avoidable. § 522(f)(2)(A). Debtor is entitled to claim an exemption up to \$125,000.<sup>5</sup> Tamara has a judgment lien in the amount of \$51,026.83. Valley Bank has a \$147,106.00 consensual lien on the property. However, at the hearing Debtor's counsel noted that Debtor's share of the Valley Bank debt attributable to his one-half ownership interest in the property is approximately \$75,000. As a

<sup>5</sup> Montana's homestead exemption is currently limited to \$250,000, which amount is limited by the proportionality rule of Mont Code Ann. § 70-32-104(2). *See also, In re Alderman*, 195 B.R. 106, 111, 15 Mont. B.R. 231 (9th Cir. BAP 1996) ("Montana law clearly provides that a claimant's homestead exemption is limited to an amount proportional to his ownership interest in the property.")

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result, the table below reflects and incorporates, a Valley Bank lien, and exemption claim that correctly correspond to a one-half ownership interest.

	<b>Calculation</b>
Tamara's judgment lien	\$51,026.83
Valley Bank's lien	\$73,553 <sup>6</sup>
Debtor's homestead exemption	\$125,000
<i>Total</i>	<u>\$240,551.50</u>
Value of Debtor's one-half ownership interest in property	\$85,000 <sup>7</sup>

The aggregate amount of the liens along with the allowed exemption amount exceeds the value that the Debtor's interest in the property would have in the absence of any liens. Tamara's lien is subject to being avoided under § 522(f).

C. Tamara's new objection at the hearing.

At the beginning of the hearing, Tamara's counsel advised the Court that a new argument had come to light that might render adjudication of this issue, "premature." Counsel noted that the objection to discharge deadline had not passed, and based on new research Tamara's debt may be excepted from discharge. The basis for this new argument is "§ 523(a)(19)(B)."

Initially, counsel was confident, if not strident that "§ 523(a)(19)(B)," was applicable suggesting that a debt that corresponded to a settlement agreement may be grounds for objecting to discharge. However, as the Court pointed out, counsel could not rely solely on, the language "any settlement agreement entered into by the debtor," but had to read the statute as a whole which describes a "debt" that:

(A) is for:

- (i) the violation of any of the Federal securities laws (as that term is defined in section 3(a)(47) of the Securities Exchange Act of 1934), any of the

<sup>6</sup> At the hearing, Debtor reduced this amount by approximately ½ to account for the other property owner's share of the debt.

<sup>7</sup> This amount corresponds to the value of Debtor's one-half ownership interest in the property valued at \$170,000.

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- State securities laws, or any regulation or order issued under such Federal or State securities laws; or
- (ii) common law fraud, deceit, or manipulation in connection with the purchase or sale of any security; *and*
- (B) results, before, on, or after the date on which the petition was filed, from
- (i) any judgment, order, consent order, or decree entered in any Federal or State judicial or administrative proceeding;
  - (ii) any settlement agreement entered into by the debtor; or
  - (iii) any court or administrative order for any damages, fine, penalty, citation, restitutionary payment, disgorgement payment, attorney fee, cost, or other payment owed by the debtor.

Ultimately, Tamara's counsel realized the language in (B)(ii) could not be read in isolation and had to be read in conjunction with subsection (A) above. To counsel's credit he apologized for wasting everyone's time and expressed embarrassment at the oversight. Although this was not counsel's best day in court, the Court reiterates that it has no interest in discouraging anyone from appearing in bankruptcy court, so long as they demonstrate a thoughtful, diligent approach informed by the Code, Rules, local rules and any other applicable authority.

Accordingly,

IT IS ORDERED Debtor's Motion to Avoid Lien under 11 U.S.C. § 522(f) filed April 27, 2020, at ECF No. 36 is granted; and pursuant to 11 U.S.C. § 522(f)(1)(A), the judicial lien held by Tamara Schweigert against Debtor's homestead property, as described below, is hereby avoided to the extent allowed by law: A portion of the S1/2NW1/4 of Section 4, Township 21 North, Range 20 West, P.M.M., Lake County, Montana further shown and described as being Tract B on Subdivision Plat No. 216, on file in the office of the Clerk and Recorder of Lake County, Montana.

BY THE COURT:



Hon. Benjamin P. Hursh  
United States Bankruptcy Court  
District of Montana