U.S. BANKRUPTCY COURT
District of South Carolina

Case Number: 07-00860

ORDER

The relief set forth on the following pages, for a total of 5 pages including this page, is hereby ORDERED.

FILED BY THE COURT
06/15/2007

US Bankruptcy Court Judge
District of South Carolina

Entered: 06/19/2007

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA

IN RE:	
	C/A No. 07-00860-DD
Willie Lee Wilson,	Chapter 13
Debtor(s).	**ORDER**

THIS MATTER is before the Court on Willie Lee Wilson's ("Debtor") confirmation of chapter 13 Plan, Motion to Establish Value Included in Chapter 13 Plan ("Value Motion"), and Motion to Avoid Judicial Lien Included in Chapter 13 Plan ("Lien Motion"). James E. Daniels ("Daniels"), a secured creditor, filed an objection to confirmation of plan, and further objected to both the Value Motion and the Lien Motion. A hearing was held on these matters on May 14, 2007. Both Debtor and Daniels appeared, by and through counsel, to present arguments. Daniels' objection makes two assertions. (1) Debtor proposed the plan in bad faith. (2) Since Daniels' judgment lien has priority to the 1st mortgage on the property under state law, Daniels asserts that after any exemption to which the Debtor is entitled is taken into account, the remaining equity should first go towards his judgment until paid in full with interest, with any balance going to the secondary lien holder (i.e., the 1st mortgage holder).

A. Bad Faith

Testimony was given at the hearing by the Debtor in response to Daniels' assertion that Debtor filed this case in bad faith. Daniels alleges that the filing is suspicious when viewed in conjunction with Debtor's wife's bankruptcy case filing history. Daniels alleges or at least insinuates that Debtor and his spouse used "tag team" filings to stave off foreclosure in state court to hinder, delay, and/or frustrate their creditors. Debtor's spouse, Vivian L. Wilson ("Mrs. Wilson"), has filed the following three bankruptcy cases since 2003.

Case Number	Chapter	Outcome
03-05334	13	Dismissed: Non-payment
04-06679	13	Dismissed: Non-payment
05-12125	7	Discharge: February 2, 2006

Debtor testified that Mrs. Wilson never informed him at anytime that she had filed any of the above referenced bankruptcy cases. He stated that he first became aware of the bankruptcy filings in February 2007 at a foreclosure hearing in state court.[1] Debtor further testified that he and Mrs. Wilson have separate bank accounts and stated that "she pays her part and I pay my part [of the bills]." Debtor gave testimony that he and Mrs. Wilson have the same mailing address, but since he "works nights," Mrs. Wilson is the one which gathers, opens, and reviews the mail that comes to their home address.

The Court agrees with Daniels that it would be unusual for one spouse to be able to hide three separate bankruptcy cases in a three year period from another. However, it is possible, and there is no evidence before the Court that contradicts Debtor's sufficiently credible testimony. The Court cannot find with the evidence presented to the Court that this case was filed in bad faith.

B. Judgment Lien Avoidance

At the hearing the parties conceded that there was no material dispute as to the facts concerning the validity of Daniels' judgment, the judgment's priority under state law, the amount of the judgment, or the judgment's attachment to the debtor's homestead. Thus, it is undisputed that under South Carolina law Daniels holds a first priority judgment lien on property located at 408 Liston Lane, Columbia, South Carolina, in the amount of $21,466.15[2] that is senior to the 1st mortgage holder. There being no factual dispute the only issue before the Court is purely a legal one in regards to the treatment of Daniels' judgment lien in the 11 U.S.C. § 522(f)(2)(A) calculation.

---

[1] It is unclear to the Court if Debtor gained knowledge of his wife's bankruptcy cases at a foreclosure hearing or at a deposition during the foreclosure proceedings. Debtor responded under cross-examination that he first learned of the bankruptcy cases during a foreclosure hearing. He then indicated that Daniel's counsel was present at the foreclosure hearing. Daniel's attorney asked if Debtor meant deposition and he acknowledged that it was a deposition where he met Daniel's counsel. Regardless, the record still reflects that Debtor did not know of Mrs. Wilson's bankruptcy filings until February of 2007.

[2] This is the original amount of the judgment as entered in the Office of the Clerk of Court for Richland County on November 28, 2000 (Judgment Roll No. 234086), excluding any amount for post judgment interest and/or other fees or add-ons.

The issue in this case appears to be whether the phrase "all other liens on the property," contained in 11 U.S.C. § 522(f)(2)(A)(ii) allows a debtor to include in the avoidance calculation consensual liens that are junior in priority to the judicial lien a debtor is seeking to avoid. While it does not appear that this District has decided this issue directly, there are two opinions that seem to indirectly answer this question, or at least give significant guidance concerning this issue. In *In re Freeman*, 259 B.R. 104 (Bankr. D.S.C. 2001), Chief Judge Waites discusses the effect of the 1994 amendments to § 522(f). The actual issues in that case were (1) whether a debtor could avoid a judicial lien even if the property was overencumbered and the debtor had no equity in the property, and second, (2) if the encumbered property was co-owned with the judgment lien being only against the debtor, should a strict or literal interpretation of §522(f)(2)(A) be used when avoiding liens attached to co-owned property, or should net equity be calculated before determining a debtor's interest in property?

The Court answered the first question in the affirmative, and declined to decide the second issue because in that particular case the lien was avoidable regardless of the method of calculation. While the issue presently before the Court was not specifically addressed, it should be noted that under both formulas that the Court added **all** liens- including consensual liens with junior priorities to the judgment lien -when performing the lien avoidance calculation and determined that the judicial lien was avoidable. This Court believes the Freeman method of calculation produces the correct result given the language and intent of Congress concerning the § 522(f)(2)(A) formula. As stated in *Cadle Co. v. Taras (In re Taras),* it would seem that

> Congress intended to treat consensual lienholders more favorably, because their contractual relationships with the bankruptcy debtor typically allow the debtor to acquire equity in the exempt property by making post-petition mortgage payments. The 1994 amendment creating the statutory formula here at issue was expressly aimed at overruling prior judicial decisions compromising that intent.

Cadle Co. v. Taras (In re Taras), 131 Fed. Appx. 167(8th Cir). *See Also In re Meincke*, 2004 Bankr. LEXIS 695 (C.D. ILL 2004); *Kolich v. Antioch Laurel Veterinary Hosp., Inc., P.C. (In re Kolich)*, 273 B.R. 199 (8th Cir. 2002); *Moldo v. Charnock (In re Charnock)*, 318 B.R. 720 (9th Cir. BAP (Cal.) 2004); In *re Weinpert*, 2007 Bankr. LEXIS 507 (Bankr. D. Ohio 2007).

The Court also in *In re Ware*, 274 B.R. 206 (Bankr. D.S.C. 2001), revisited the calculation issue concerning co-owned property and held that the equity analysis is the proper formula to use in co-owned property situations, further supporting those calculations set forth in *Freeman*. The property in question in this case is co-owned property. Based on those cases Debtor's judicial lien avoidance formula herein would be calculated in the following manner:

Name of Creditor	a) Value of Debtor's Property	-	b) Mortgage Liens on Property	=	c) Total	/	d) Divided by Debtor's Interest	-	e) Exemption	=	f) Amount. Remaining for All Liens	g) Amt. of Judicial Lien Avoided *To the extent that Lien is Greater than (f)*	h) Amt. of Judicial Lien Not Avoided
James E. Daniels	$110,000.00		$92,121.00		$17,879.00		$8,939.50		$50,000.00		($41,060.50) or $0 remaining	$21,466.15	$0

Based on this calculation Daniels' judicial lien is avoidable in full. Since this is a chapter 13 case, motions to avoid judicial liens are included in the plan pursuant to local rule. The calculation in the current filed plan in this case is incorrect, and the plan should be amended. Based on the incorrect calculation in the motion, confirmation of the plan as currently filed is denied without prejudice to amend. Daniels' objections to Debtor's Motion to Avoid Judicial Lien and Motion to Establish Value are overruled. Debtor shall file an amended plan within ten (10) days incorporating the correct calculation.

AND IT IS SO ORDERED.
Columbia, South Carolina
June 14, 2007