

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF CONNECTICUT

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IN RE:	)	CHAPTER 7
	)	
KEITH R. DULY,	)	CASE NO. 03-34017 (ASD)
	)	
DEBTOR.	)	
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KEITH R. DULY,	)	
	)	
Movant,	)	
vs.	)	
	)	
EMANUEL DRAGONE,	)	RE: DOC I.D. NO. 26
	)	
Respondent.	)	
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**MEMORANDUM OF DECISION ON MOTION TO AVOID JUDICIAL LIEN**

DABROWSKI, ALBERT S., Chief United States Bankruptcy Judge

**I. INTRODUCTION**

Through a Motion to Avoid Judicial Lien Impairing Exemption (hereafter, the “Motion”), Doc. I.D. No. 26, the Debtor, pursuant to 11 U.S.C. § 522(f), seeks to avoid a judicial lien held by Emanuel Dragone (hereafter, “Dragone”) on real property located at 275 Woodcreek Road, Bethlehem, Connecticut (hereafter, the “Property”). A hearing was held on the Motion and Dragone’s Objection to Avoidance of Judicial Lien . . ., Doc. I.D. No. 59, on May 16 and 30, 2006 (hereafter, the “Hearing”). The sole issue at the Hearing was the valuation of the Property as of Petition Date, which, pursuant to the calculus set forth hereafter, is determined to be \$452,012.00.

## **II. JURISDICTION**

The United States District Court for the District of Connecticut has jurisdiction over the instant matter by virtue of 28 U.S.C. § 1334(b); and this Court derives its authority to hear and determine the matter on reference from the District Court pursuant to 28 U.S.C. §§ 157(a), (b)(1). This is a "core proceeding" pursuant to 28 U.S.C. §§ 157(b)(2)(K),(O).

## **III. BACKGROUND**

The Debtor commenced the instant Bankruptcy Case by the filing of a voluntary petition under Chapter 7 on August 11, 2003 (heretofore and hereafter, the "Petition Date"). On the Petition Date the Property was subject to a mortgage held by People's Bank in the amount of \$273,343.71, and Dragone held a judicial lien on the Property in the approximate amount of \$600,000.00. It is undisputed that (i) the subject lien is a "judicial lien" within the meaning of Section 522(f), see 11 U.S.C. § 101(36), (ii) the Debtor is entitled to a \$75,000.00 "homestead" exemption pursuant to C.G.S. § 52-352b(t), and (iii) the Debtor enjoys a 50% ownership interest in the Property.

The Property consists of approximately 10.43 acres, improved by a single family residence and three barns. Five written appraisals by three appraisers were introduced in evidence at the Hearing. Two of those appraisers, Lawrence R. Yurdin (hereafter, the "Debtor's Appraiser"), and Charles Liberti (hereafter, the "Dragone Appraiser") testified at the Hearing.<sup>1</sup> The Debtor's Appraiser testified that he valued the Property as a unitary

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<sup>1</sup> Notwithstanding the fact that the third appraiser, Walter Kloss, did not testify at the Hearing, the Court admitted into evidence at the Debtor's request, and despite Dragone's hearsay objection, a written appraisal prepared by Walter Kloss for Dragone which estimated the value of the Property at \$335,000.00 as of October 10, 2003 (hereafter, the "Initial Dragone Appraisal"). See Trial Exhibit F. Like the Debtor's Appraisal, the Initial Dragone Appraisal valued the Property as one 10.43 acre parcel with a residence and three barns situated thereon. In the Court's determination of the Petition Date value of the Property, the Court ascribes no weight to the Initial Dragone Appraisal, and further references its value conclusion only

improved 10.43-acre parcel at \$400,000.00 as of October 8, 2003. See Trial Exhibit I (hereafter, the “Debtor’s Appraisal”).

At the Hearing, Dragone introduced three written appraisals, Trial Exhibits 1A, 1B and 1C (hereafter, the “Dragone Appraisal(s)”), each prepared by the Dragone Appraiser, which collectively estimated the value of the Property at \$715,000.00 based upon a proposed subdivision of the Property, carving two additional lots (Lots 1B and 1C) out of the Property’s 10.43 acres, with each lot “approved . . . as a building site”<sup>2</sup> and “sold”, leaving a remaining lot of 3.77 acres (Lot 1A) containing the existing residence.<sup>3</sup> At the Hearing, the Dragone Appraiser (I) acknowledged his appraisal estimates were “as of October 15, 2004, that is, more than one year after the Petition Date, (ii) admitted an error with regard to the acreage of the “3.77” acre lot, and (iii) voluntarily “adjusted” the Dragone Appraisals’ estimate as to the collective value of the three properties to approximately \$638,100.00.<sup>4</sup>

#### **IV. DISCUSSION**

##### **A. Governing Legal Principles.**

A debtor's ability to avoid the fixing of a judicial lien springs from the provisions of Section 522(f) of the Bankruptcy Code, which provides, in relevant part, that –

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in footnote 19, *infra*.

<sup>2</sup> The Dragone Appraisals’ subdivision proposal also assumes that wells and septic systems could be installed on each of the prospective subdivision lots.

<sup>3</sup> The sum of Lot 1A (Exhibit 1A, 3.77 acres with residence) valued at \$422,000.00; Lot 1B (Exhibit 1B, 4.73 acres) valued at \$175,000.00; and Lot 1C (Exhibit 1C, 1.9 acres) valued at \$118,000.00.

<sup>4</sup> The Dragone Appraiser acquiesced in a 10% reduction due to the Petition Date error (\$715,000.00 - 71,500.00 = \$643,500.00), and an acreage adjustment regarding Lot 1A, resulting in a further net reduction of \$5,400.00 (\$643,500.00 - 5400.00 = \$638,100.00).

(f) (1) . . . 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 . . . .

\* \* \* \*

(2)(A) For the purposes of this subsection, a lien shall be considered to impair an exemption to the extent that the sum of--

(i) the lien;

(ii) all other liens on the property; and

(iii) the amount of the exemption that the debtor could claim if there were no liens on the property;

exceeds the value that the debtor's interest in the property would have in the absence of any liens.

\* \* \* \*

11 U.S.C. § 522(f) (2003).

The burden of production and ultimate persuasion on all contested elements of this lien avoidance matter rests on the Debtor. E.g., In re Alessandro, 243 B.R. 611, 613 (Bankr. D. Conn. 2000); In re Corson, 206 B.R. 17 (Bankr. D. Conn. 1997).

Since it is undisputed that (i) the subject lien is a "judicial lien", (ii) the Debtor is entitled to a \$75,000.00 "homestead" exemption, and (iii) the Debtor's interest in the Property is 50% of the value of the Property on the Petition Date, it remains only for the Court to determine the Petition Date value of the Property, and then apply that value within the Section 522(f)(2)(A) formula to determine a measure of appropriate lien avoidance.

For purposes of Section 522(f), the "value" of the Debtor's interest in the Property means the "fair market value" of that interest "as of the date of the filing of the petition". 11 U.S.C. § 522(a)(2).

“Fair market value” generally means the “price which a willing seller under no compulsion to sell and a willing buyer under no compulsion to buy would agree after the property has been exposed to the market for a reasonable period of time”. In re Markowitz Building Co., 84 B.R. 484, 487 (Bankr. N.D. Ohio 1988). Adopting and applying this definition the Court determines that for purposes of Section 522(f), property should be valued at its highest and best use, provided the creditor can establish that the property is more valuable for a purpose other than its present or intended use, and that such proposed use is not speculative, but rather is conceptually sound, reasonably supported, and feasible. See, e.g., In re Ehrich, 109 B.R. 390, 392 (Bankr. D.S.D. 1989).

#### **B. Highest and Best Use.**

The Bankruptcy Court is compelled to value property in a number of different contexts, *e.g.*, the provision of adequate protection (see Code Sections 361-363); relief from the automatic stay (see Section 362(d)); determination of secured status (see Section 506); distribution in a Chapter 7 case (see Sections 725-726); redemption (see Section 722); determining a debtor’s exemptions (see Section 522); plan confirmation under Chapter 11 (see Section 1129); or, as is the case here, lien avoidance under Section 522(f). Valuation methodology in these different contexts may vary, and indeed, may be affected by specific statutory language. See, e.g., Section 506(a) (the Court’s determination of the value of collateral securing a creditor’s claim must be determined “in light of the purpose of the valuation and of the proposed disposition or use of such property. . .”).

The Debtor argues that his stated intention to continue to live on the Property in its current, undivided state, coupled with the alleged speculative nature of Dragone's subdivision proposal, compel the Court to limit its valuation to a consideration of the Debtor's Appraisal and/or the Initial Dragone Appraisal, each estimating value for the Property as one undivided 10.43 acre parcel. Dragone urges that the Property be valued in accordance with its subdivision proposal, arguing that partitioning the Property in that manner is conceptually sound, reasonably supported, feasible, and constitutes its highest and best use.

The Court believes that it must determine value by looking beyond the current use of the Property to consider the ultimate highest and best use. Determining "value" in this manner brings into play numerous factors which influence buyers and sellers, including acreage and the related potential for a property's subdivision. For example, a buyer or seller of a 50-acre parcel with 5,000 feet of road frontage located in a residential zone of, *inter alia*, two acre minimums with 200 feet of frontage per building lot, would certainly consider such a property ripe for division into, and far more valuable as, twenty-five separate parcels. See, e.g., In re Ehrich, supra; In re Sherman, 157 B.R. 987 (Bankr. E.D. Tex. 1983). Conversely, absent most unusual circumstances, a 3.5 acre lot with a residence in that same zone is not candidate for subdivision.

While the Property, at 10.43 acres, is attractive in its present use, and not an *ideal* candidate for partitioning, it nevertheless is easily subdivided in accordance with the Town of Bethlehem's few zoning requisites. Moreover, the specific Dragone subdivision proposal - creating two new lots, each with building potential - is conceptually sound, realistic, feasible, and would result in the Property's highest and best use. Notwithstanding the

Debtor's present desire and intention to retain and live on the Property in its present undivided condition, willing buyers and/or sellers of the Property would consider the potential for subdivision as part of their valuation calculus. Accordingly, the value of the Property should be determined with this potential multi-parcel use in mind.

### **C. Analysis of the Evidentiary Record**

#### ***1. The Debtor's Appraisal***

The Debtor's Appraisal is not alone capable of producing a highest and best use estimate of value. Most fundamentally it rejects the potential for subdivision, which this Court has found to be an appropriate consideration in this matter.

In addition, the Debtor's Appraisal selects three "comparable" sales of 3.13 acres, 3.0 acres, and 3.18 acres each allegedly "similar" to the 10.43 acre subject Property. Ordinarily, the fair market value of residential property can be adequately established by a comparable sales approach, comparing actual prices of sales of *similar* properties proximate in time to the petition date, with appropriate adjustments for dissimilarities. Actual similarity of comparative properties, however, is critical as significant dissimilarities will trigger substantial adjustments thereby undermining adequacy of the approach. When supposedly comparable sales require substantial and/or multiple adjustments for fundamental dissimilarities from the subject property, their analytical worth becomes severely undermined. Such is the case here where the Debtor's Appraisal applies, *inter alia*, a "Site" adjustment of \$70,000.00 to each comparable property to adjust for a significant, potential use-altering, acreage disparity.

## **2. *The Dragone Appraisals.***

Unfortunately, a reliable value for the Property cannot be derived from the Dragone Appraisals either. First, the temporal reference point for these appraisals is admittedly flawed, compelling in a \$71,500.00 downward correction. The Dragone Appraisals also suffer from an acreage mistake, prompting a further downward correction to an aggregate valuation estimate of approximately \$638,100.00.<sup>5</sup> Finally, the Court credits the testimony of the Debtor's Appraiser that the three (3) Arch Bridge Road comparables in the Dragone Appraisals (forming the entire basis of the estimate for Lot 1B, and one third of the basis for Lot 1C) are not properties comparable or "similar" to those subdivided "lots". This final consideration is alone fatal to the Dragone Appraisals' Lot 1B component estimate, and erosive of its Lot 1C component estimate. In sum, the Dragone Appraisals' errors, and the associated corrections, suggest that less than reasonable care attended the preparation of the Dragone Appraisals, ultimately impacting their credibility in the mind of the Court.

Because neither the Debtor's nor Dragone's Appraisals provide the Court with a reliable roadmap for resolution, the Court must employ its own calculus as set forth hereafter, and will rely upon the Debtor's Appraisal and Dragone's Appraisal only to the extent each is deemed credible.<sup>6</sup>

## **3. *The Court's Hybrid Analysis***

A basis for the valuation of the Property, with the potential for subdivision considered, is found in the sum of (I) the value derived from the Debtor's Appraisal of the

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<sup>5</sup> See footnote 4, *supra*.

<sup>6</sup> When confronted with conflicting appraisals, documentary or testimonial, each being credible in part and incredible in part, the Court believes it appropriate to draw upon the entire record of credible evidence to construct a fair market value.



Dragone Appraisal's proposed Lot 1A (1.97 acres with existing residence), plus (ii) the value of the Dragone Appraisal's proposed Lots 1B and 1C, with their values derived from the Dragone Appraisals, specifically from comparable properties 1 and 2 in Exhibit 1C (hereafter, "Comp 1C-1" and "Comp 1C-2, respectively).

***a. Lot 1A.***

The Debtor's Appraisal at \$400,000.00 is derived from its three "comparable" but not sub-dividable properties averaging 3.10 acres. As previously noted these 3-acre properties are not sufficiently similar to the significantly larger and sub-dividable 10.43-acre Property to be adequate as a basis for valuing the Property as a whole. Nonetheless, the 3-acre "comparable" parcels in the Debtor's Appraisal are sufficiently similar to the proposed 1.97 acre Lot 1A in the Dragone sub-division proposal to be considered persuasive in a valuation of Lot 1A. All four properties include a residence, and each property is not further sub-dividable. Engaging the Debtor's Appraisal's three "comparable" properties for this purpose, and (i) setting aside the Debtor's Appraiser's \$70,000.00 adjustment as no longer necessary, (ii) adding \$5,650.00 to compensate for the remaining 1.13 acre average variance,<sup>7</sup> (iii) accepting as valid the Debtor's Appraiser's remaining adjustments, and (iv) viewing an adjustment for the Petition Date variance as negligible and unnecessary, results in a value for proposed Lot 1A of \$335,650.00.

***b. Lots 1B and 1C.***

An evidentiary basis for estimating the value of proposed Lots 1B and 1C is found within the Dragone Appraisals, specifically comparable Comp 1C-1 and Comp 1C-2.

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<sup>7</sup> Calculated at \$5,000.00 per acre.

Consideration of Comp 1C-1 and 1C-2 – each comparable in size to proposed Lot 1C – with appropriate time adjustments,<sup>8</sup> accepting as valid the Dragone Appraisal's other adjustments, and viewing site adjustments as negligible and unnecessary, suggests \$189,600.00<sup>9</sup> as a gross estimate for the added value of those two proposed lots. However, Lot 1B is 4.73 acres warranting an the additional adjustment of \$5,000.00 per acre (\$15,000.00) for that lot resulting in a cumulative figure of \$204,600.00.

***c. General considerations.***

In addition, any buyer considering a subdivision of the Property similar to the Dragone proposal would deduct approximately \$25,000.00 for development costs, and \$10,230.00 for sales costs (at 5%). Accordingly, and pursuant to this calculus, taking \$169,370.00<sup>10</sup> for the aggregate value of proposed Lots 1B and 1C, and adding that figure to the earlier-referenced \$335,650.00 estimate for a proposed Lot 1A, results in a gross valuation figure of \$505,020.00 for the Property as a whole.

Finally, as already noted, the Property is not an *ideal* candidate for partitioning. Less than ideal circumstances for subdivision spring from, *inter alia*, the need for separate septic and well-water systems,<sup>11</sup> new driveway(s), including one lengthy driveway, and the possible relocation of an existing driveway, possible relocation or removal of barns, and

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<sup>8</sup> Plus \$4,500.00 for Comp 1C-1; minus \$9,000.00 for Comp 1C-2. The Dragone Appraisal is as of October 15, 2004, not the Petition Date. Adjustment calculated at \$750.00 per month.

<sup>9</sup>  $(\$114,900.00 + 4,500.00) + (79,200.00 - 9,000.00) = \$189,600.00$ .

<sup>10</sup>  $\$206,600.00 - (25,000.00 + 9,650.00) = \$169,370.00$ .

<sup>11</sup> The Debtor testified the additional lots would not support an already overburdened well-water system. However, the record as a whole suggests that new well-water systems might present unusual challenges which would be considered in any subdivision analysis, such systems were feasible.

potential need for open space for, *inter alia*, wetlands protection. These motivations, however, while not individually or collectively preclusive of partitioning, would be considered by a “willing seller and buyer” in negotiating a fair market price. As a result of these circumstances the Court applies a 10% reduction to the gross computation, resulting in a net Petition Date value of the Property of \$454,518.000 pursuant to this method.

***d. Other evidence of value.***

The foregoing valuation of the Property is, of course, less than perfect. However, another measure of the relevant value, also imperfect,<sup>12</sup> is found in the Dragone Appraisal’s Comparable 2, Trial Exhibit 1A (hereafter, “Comp 1A-2”). Comp 1A-2, a July 20, 2004 sale of a 10-acre parcel with a residence at \$450,000.00, is the only sale of property of similar size to the Property (10.43 acres) within the five appraisals and thirteen comparable properties in evidence. Adding back the negative \$31,150.00 acreage adjustment<sup>13</sup> applied to Comp 1A-2, accepting as valid the remaining adjustments, and reducing the estimate 10% in accordance with the previously discussed Petition Date time adjustment, results in a figure of \$417,006.00. Adding \$2,500.00 for the remaining 0.43-acre disparity and \$30,000.00 for the barns (\$10,000.00 each for three structures) completes this calculus with a value of \$449,506.00. The limited variance of approximately 1% between these two

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<sup>12</sup> Imperfect *inter alia*, as this second method uses only one comparable as opposed to the more traditional three, and the extent to which this 10 acre comparable was susceptible to sub-division is unknown.

<sup>13</sup> Exhibit 1A compared this 10 acre parcel (Comp 1A-2) against proposed Lot 1A with a 3.77 acre footprint and adjusted its sale price for comparable purposes in the amount of -\$31,150.00.

Court estimations (\$454,518.00 versus \$449,506.00)<sup>14</sup> promotes confidence in both.<sup>15</sup>

Accordingly, the Court's final Petition Date value of the Property for Section 522(f) purposes is the average of the values obtained by the two above referenced methods – or \$452,012.00.

#### **D. Application of Mathematical Formula of Section 522(f)(2)(A).**

Utilizing the Petition Date value of the Property determined herein, the calculus of Section 522(f)(2)(A) is as follows: (i) “the value that the debtor’s interest in the property would have in the absence of any liens” is \$226,006.00<sup>16</sup> (“A”); (ii) the value of “the [subject] lien”, *i.e.* the Dragone Lien, is \$600,000.00 +/- (“B”); (iii) the value of “all other liens on the property” is \$273,343.71 (“C”); and (iv) the “amount of the exemption that the debtor could claim if there were no liens on the property” is \$75,000.00 (“D”). In the parlance of Section 522(f)(2)(A), the Dragone Lien is avoidable “to the extent that the sum of” B, C, and D exceeds A. The sum of B, C and D is \$948,343.71; and that figure exceeds A (\$226,006.00) by \$722,337.71. Thus, the Dragone Lien (\$600,000.00 +/-) is subject to avoidance to the extent of \$722,337.71 +/-, that is, in its entirety.

### **V. CONCLUSION**

The Petition Date fair market value of the Property is determined to be \$452,012.00. On or before, July 21, 2006, the counsel for the Debtor shall file with the Court, and serve upon counsel for Dragone, a proposed order consistent with this valuation and, *inter alia*,

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<sup>14</sup> The subject lien would be avoided in its entirety under either figure.

<sup>15</sup> As opposed to substantial variances between the three written appraisals in evidence providing value estimates of \$335,000.00 vs. \$400,000.00 vs \$715,000.00(adjusted to \$638,100.00).

<sup>16</sup> 50% of \$452,012.00 = \$226,006.00.

reflecting the precise value of the Dragone Lien at \$600,000.00, or other figure,<sup>17</sup> if appropriate (a form of proposed order is attached hereto). Counsel for Dragone shall file any objection to the Debtor's proposed order by filing a competing order on or before July 28, 2006. In the absence of a timely-filed competing order, the Debtor's proposed order may enter without further hearing.

Dated: July 5, 2006

BY THE COURT

  
Albert S. Dabrowski  
Chief United States Bankruptcy Judge

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<sup>17</sup> The \$600,000.00 lien value assumed herein may be subject to an adjustment.

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF CONNECTICUT

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KEITH R. DULY,	)	CASE NO. 03-34017 (ASD)
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KEITH R. DULY,	)	
Movant,	)	
vs.	)	
	)	
EMANUEL DRAGONE,	)	RE: DOC I.D. NO. 26
Respondent.	)	
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**ORDER ON MOTION TO AVOID JUDICIAL LIEN  
PURSUANT TO BANKRUPTCY CODE SECTION 522(f)**

The Debtor's Motion to Avoid Judicial Lien Impairing Exemption, Doc. I.D. No. 26, having come on for hearing on May 16 and 30, 2006, after due notice; and the Court having entered its Memorandum of Decision on Motion to Avoid Judicial Lien on June 29, 2006, in accordance with which it is hereby found that:

1. On the date of the commencement of this case, the fair market value of the Debtor's interest in his residence and real property located at 275 Woodcreek Road, Bethlehem, Connecticut (hereafter, "the Property"), was \$226,006.00; and,

2. The Debtor is entitled to and "could claim", see Bankruptcy Code Section 522(f)(1) & (2)(A), an exemption with respect to the Property under Section 522(b) and Connecticut General Statutes Section 53-352(b) in the amount of \$75,000.00 (or other amount, if applicable); and,

3. The liens on the Property on the commencement date was as follows:

a. (List in order of priority mortgages first then all liens stating the holder, the type, the location, volume and page as recorded, the recording date, and amount)

b.

c.

**NOW THEREFORE IT IS HEREBY ORDERED** that the Motion is **GRANTED** in that the fixing of the following liens on the Property are **AVOIDED** pursuant to Section 522(f):

a. (Repeat lien descriptions in paragraph three above to be avoided)

b.

c. ;and,

**IT IS FURTHER ORDERED** that should this bankruptcy case be dismissed, any and all liens avoided by this Order shall be reinstated under Section 349 without further order of this Court.

BY THE COURT

DATED: \_\_\_\_\_

\_\_\_\_\_  
Albert S. Dabrowski  
Chief United States Bankruptcy Judge