

UNITED STATES BANKRUPTCY COURT
DISTRICT OF CONNECTICUT

IN RE:)
) CASE NO. 99-34647 (LMW)
)
 ROBERT LOVEJOY,) CHAPTER 7
)
) DEBTOR.) DOC. I.D. NOS. 20, 54, 63
)

)
 ROBERT LOVEJOY,)
)
) MOVANT)
)
 vs.)
)
 JOSEPH RUBBO, ROBERT RUBBO,)
 TECHNOLOGY GROUPS FEDERAL)
 CREDIT UNION, BARIBAULT OIL)
 CO., INC., MARK AUTOMOTIVE INC.)
 OF WATERBURY and ST. MARY'S)
 HOSPITAL,)
)
) RESPONDENTS.)

APPEARANCES

Peter L. Lawrence, Esq. Counsel for the Debtor
Lawrence & Jurkiewicz, LLC
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Torrington, CT 06790

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Federal Credit Union

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Counsel for Respondent Robert Rubbo

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Non-Appearing Respondent

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Attn: President

Non-Appearing Respondent

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Non-Appearing Respondent

Mark Automotive Inc. of Waterbury
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Attn: President

Non-Appearing Respondent

St. Mary's Hospital
65 Franklin Street
Waterbury, CT 06704
Attn: Controller

Non-Appearing Respondent

St. Mary's Hospital
c/o Law Offices of Howard Lee Schiff, P.C.
P. O. Box 280245
East Hartford, CT 06128

Non-Appearing Respondent

**BRIEF MEMORANDUM AND ORDER DENYING DEBTOR'S
MOTION TO AVOID LIENS AND SUSTAINING OBJECTIONS THERETO**

Lorraine Murphy Weil, United States Bankruptcy Judge

WHEREAS, this case was commenced by the above-referenced debtor (the “Debtor”) by his filing of a petition on October 20, 1999 (the “Petition Date”);¹

WHEREAS, the Debtor filed schedules and statements on the Petition Date. (*See* Doc. I.D. No. 1, the Schedules.) The Schedules stated that the Debtor had a “mortgage” in the amount of \$90,000.00 (*see* Schedule D - Creditors Holding Secured Claims) but listed no other liens on real property nor did he list any real property on Schedule A - Real Property (although he did claim an exemption in a “residence” on Schedule C - Property Claimed as Exempt). (*See* Schedules.) On November 24, 1999, the Debtor filed an amended Schedule A stating that he owned (jointly) certain real property described as 126 Citizens Avenue, Waterbury, Connecticut (the “Property”) with a stated value of \$94,000.00 and subject to a secured claim in like amount. (*See* Doc. I.D. No. 4.);

WHEREAS, this case was closed on March 1, 2000 with no lien avoidance motion having been filed;

WHEREAS, on October 30, 2007, the Debtor (*pro se*)² filed a motion to reopen this case;

WHEREAS, the case was reopened by order dated November 29, 2007. (*See* Doc. I.D. No. 17.) That order was entered “without prejudice to the rights of the affected creditor(s) to assert with respect to any Code § 522(f) Motion the defenses of laches, estoppel and the like.” (*Id.*);

WHEREAS, on June 2, 2008, the Debtor (*pro se*) filed the above-referenced Motion To Avoid Judicial Lien. (*See* Doc. I.D. No. 20, the “Motion.”) The Motion seeks to avoid judicial liens (collectively, the “Liens”) with respect to the Property held by the above-referenced respondents. The Motion also alleges the existence of a mortgage (the “First Mortgage”) in respect of the

¹ The Debtor was represented by counsel (“Prior Counsel”).

² Prior Counsel never has withdrawn his appearance in this case.

Property in the original amount of \$92,200.00 and of a second mortgage (the “Second Mortgage”) in respect of the Property in the original amount of \$4,200.00. The Motion does not list balances as of the Petition Date for either the First Mortgage or the Second Mortgage;

WHEREAS, the Motion was granted by order dated July 29, 2008. (*See* Doc. I.D. No. 32.) However, motions to vacate for lack of notice were filed (*see* Doc. I.D. Nos. 34, 41) and the order was vacated by order entered on September 11, 2008. (*See* Doc. I.D. No. 47.);

WHEREAS, Peter L. Lawrence, Esq. appeared for the Debtor on October 7, 2008. (*See* Doc. I.D. No. 57.);

WHEREAS, respondent Technology Groups Federal Credit Union (“Technology”) filed an objection (Doc. I.D. No. 54, the “Technology Objection”) to the Motion on October 1, 2008. Respondent Robert Rubbo filed an objection (Doc. I.D. No. 63, the “Rubbo Objection”) to the Motion on October 14, 2008;

WHEREAS, an evidentiary hearing (the “Hearing”) on the Motion, the Technology Objection and the Rubbo Objection was convened on March 17, 2009.³ Attorney Lawrence appeared for the Debtor and counsel for Technology and Robert Rubbo also appeared. The other respondents did not appear. The Debtor and his appraiser testified at the Hearing and the Debtor, Technology and Mr. Rubbo each introduced documentary evidence into the record;⁴

³ References to the oral record of the Hearing appear in the following form: “3/17/09 Oral Record at ____.”

⁴ References to the Debtor’s documentary evidence appear in the following form: “Debtor’s Exh. ____.”

WHEREAS, oral argument (the “Oral Argument”) was held with respect to these matters on March 25, 2009;⁵

WHEREAS, the Motion seeks to avoid the Liens pursuant to 11 U.S.C. § 522(f).⁶ Section 522(f) provides in relevant part as follows:

(1) [T]he 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 [the “Other Lien Calculation”]; 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.A. § 522(f) (West 2004). *See also* 11 U.S.C.A. § 522(a)(2) (“[V]alue’ means fair market value as of the date of the filing of the petition”);

⁵ References to the oral record of the Oral Argument appear in the following form: “3/25/09 Oral Record at ____.”

⁶ References herein to title 11 of the United States Code and/or to the Bankruptcy Code are references to the same as they existed prior to their amendment by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

WHEREAS,

[s]ubject to certain exceptions not relevant here, all determinations relevant to Section 522(f)(1) and 522(f)(2) are made as of the petition date. *In re Salanoa*, 263 B.R. 120, 123 (Bankr. S.D. Cal. 2001) (“The Court holds the petition date is the operative date to make *all* § 522(f) determinations.” (emphasis added)). That includes the date for valuing the liens relevant to a Section 522(f)(2)(A) calculation. *Salanoa*, 263 B.R. at 123. The Debtor bears the burden to prove by a preponderance of the evidence each element necessary for a Section 522(f)(1) lien avoidance. *See, e.g., Soost v. NAH, Inc. (In re Soost)*, 262 B.R. 68, 74 (B.A.P. 8th Cir. 2001) (“As the movant, the debtor bears the burden of proving by a preponderance of the evidence all the elements required to establish his entitlement to lien avoidance under section 522(f) of the Bankruptcy Code.”); *Premier Capital, Inc. v. DeCarolis (In re DeCarolis)*, 259 B.R. 467, 471 (B.A.P. 1st Cir. 2001) (“Debtor has the burden of proof on all avoidance issues.”). If the Section 522(f)(2) calculation yields a negative number as to a target lien, the lien is avoided but only to that extent. *See East Cambridge Savs. Bank v. Silveira (In re Silveira)*, 141 F.3d 34 (1st Cir. 1998); *Soost*, 262 B.R. at 74; *Tedeschi v. Falvo (In re Falvo)*, 227 B.R. 662, 666-67 (B.A.P. 6th Cir. 1998). *Accord Corson v. Fidelity and Guaranty Ins. Co. (In re Corson)*, 206 B.R. 17, 22 (Bankr. D. Conn. 1997) (Dabrowski, J.).

In re Fox, 353 B.R. 388, 393 (Bankr. D. Conn. 2006);

WHEREAS, the Debtor’s evidence as to the amount of the First Mortgage and the Second Mortgage as of the Petition Date was limited to: (a) the relevant loan documents (*see* Debtor’s Exh. 3 and 4); (b) the Debtor’s testimony that he had paid the First Mortgage and the Second Mortgage current as of the Petition Date and that he had not prepaid any such indebtedness (*see* 3/17/09 Oral Record at 11:18:54 *et seq.*); and (c) the request of Attorney Lawrence that the court calculate the unpaid amount of the relevant mortgage indebtedness by reference to the loan documents and standard actuarial tables (*see* 3/25/09 Oral Record at 2:19:36 *et seq.*; *cf.* F.R Evid. 201(b));

WHEREAS, at the Hearing there was evidence that, because of the passage of time since the Petition Date, the Debtor’s memory was not to be relied upon (at least in the absence of some corroborating evidence). (*See, e.g.,* 3/17/09 Oral Record at 11:58:36 *et seq.* (Debtor unable to recall because “that was 10 years ago.”).) Because of the foregoing, the court is not persuaded by the

Debtor's evidence with respect to the Other Lien Calculation. Because the Other Lien Calculation is a necessary part of the Debtor's proof, the Motion must be denied.

NOW, THEREFORE, for the reasons set forth above, it hereby is **ORDERED** that the Motion is denied in its entirety and the Technology Objection and the Rubbo Objection are sustained.⁷

Dated: July 2, 2009

BY THE COURT


Lorraine Murphy Weil
United States Bankruptcy Judge

⁷ Because of the disposition reached above, the court does not reach the issues of waiver and estoppel raised by the two appearing respondents.