

UNITED STATES BANKRUPTCY COURT  
For the Southern District of Iowa

In the Matter of :  
 :  
KEITH E. McCAMMANT, : Case No. 91-3633-C H  
 : Chapter 7  
 Debtor. :  
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**ORDER--MOTION TO AVOID JUDICIAL LIEN**

On December 9, 1993, a telephonic hearing was held on the Debtor's Motion To Avoid Judicial Lien and Objection thereto. The Debtor, Keith E. McCammant, was represented by his attorney, August B. Landis. The Creditors, Gene and Joan McCurry, were represented by their attorney Pat W. Brooks. On December 10, 1993, the Court overruled the Debtor's motion and reserved the right to reduce its findings and conclusions to writing upon motion of the parties. Subsequently, the Debtor filed a Motion for Entry of Written Findings of Fact and Conclusions of Law. The Court grants the Debtor's Motion for Entry of Written Findings of Fact and Conclusions of Law and enters the following findings and conclusions pursuant to Fed.R.Civ.P. 7052.

**FINDINGS OF FACT**

1. On August 28, 1987, the Debtor executed a promissory note for the sum of \$10,000 in favor of Gene and Joan McCurry.
2. On or about June 28, 1990, the Debtor purchased

certain real property which he used as a homestead.

3. Thereafter, the Debtor defaulted on the payments due under the terms of the promissory note and the McCurrys obtained a judgment against the Debtor in the Iowa District Court for Polk County on October 28, 1991.

4. The Debtor filed a petition for bankruptcy relief under Chapter 7 on December 11, 1991.

5. The Debtor listed the subject real estate on his schedules and claimed it as exempt homestead property. The McCurrys were scheduled as holding unsecured non-priority claims.

6. No objection to the Debtor's claimed homestead exemption was timely filed.

7. On February 24, 1992, the Chapter 7 trustee, Donald F. Neiman, filed a Report of Abandonment of Property-Report of Trustee in No-Asset Case. In this report, the trustee stated "that there was no property available for distribution for the estate over and above that exempted by law."

8. On March 11, 1992, the Debtor received a discharge and on March 20, 1992, the Final Decree was entered and the case closed.

9. On November 2, 1992, the Debtor closed on the sale of the homestead property. The sale resulted in \$3922.08 net proceeds to the Debtor. A warranty deed was executed by the Debtors in favor of the purchasers, Kenneth L. Burnham,

Sherrill L. Burnham and Angela S. Fleetwood. The deed warranted "that the real estate is Free and Clear of all liens and Encumbrances except as may be above stated" and did not list the McCurrys' judgment. The deed was recorded in the office of the Poweshiek County Recorder on November 10, 1992.

10. An Attorney's Certificate of Title dated October 29, 1992 notes the existence of the McCurry's lien and stated "The judgment should be paid in full."

11. On September 16, 1993, the Court entered an order granting the Debtor's Motion to Reopen the bankruptcy estate for the purpose of allowing the Debtor to assert lien avoidance rights pursuant to 11 U.S.C. § 522(f)(1).

### **JURISDICTION**

The McCurrys argue that this Court has no jurisdiction over the subject real estate because the Debtor no longer has an ownership interest in the property. The Debtor's eligibility to claim a homestead exemption and his ability to avoid a judicial lien are fixed as of the petition date. In re Dodge, 138 B.R. 602, 607 (Bankr. E.D. Cal. 1992) (citing White v. Stump, 266 U.S. 310, 45 S.Ct. 103, 69 L.Ed. 301 (1924), In re Knudsen, 80 B.R. 193 (Bankr. C.D. Cal. 1987)). At the time of the petition, the real estate was owned by the Debtor and was property of the estate. The Debtor now moves to avoid a lien pursuant to 11 U.S.C. § 522(f)(1). Therefore, despite the

fact that the property was subsequently sold, the Court finds that it has jurisdiction pursuant to 28 U.S.C. § 1334 and that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(K).

### DISCUSSION

The Debtor maintains that his homestead is exempt and that the judicial lien may be avoided pursuant to § 522(f)(1). The Debtor asserts that the McCurrys may not now object to lien avoidance because of their failure to timely object to the Debtor's claim of homestead exemption. The McCurrys object to the motion to avoid the judicial lien on the grounds that the debt was contracted prior to the acquisition of the homestead.

Pursuant to Fed.R.Bankr.P. 4003(b), objections to a debtor's claim of exemptions must be filed within 30 days after the conclusion of the first meeting of creditors. If no party in interest objects, the property claimed as exempt is exempt pursuant to § 522(1). Thereafter, a creditor may not challenge the exemption even if the debtor had no colorable basis for the claim. Taylor v. Freeland & Kronz, \_\_\_\_\_ U.S. \_\_\_, 112 S.Ct. 1644 (1992); see also Matter of Towns, 74 B.R. 563, 566-67 (Bankr. S.D. Iowa 1987).

In this case no objection was made to the Debtor's claim of exemption in the homestead. The property is, therefore,

exempt and the McCurrays clearly may not now challenge that exemption. The question is does the failure by a creditor to challenge an exemption entitle a debtor to lien avoidance? Section 522(f)(1) provides:

Notwithstanding any waiver of exemptions, 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--  
(1) a judicial lien.

(emphasis added).

The Northern District of Iowa has stated that "the entitlement to an exemption and entitlement to avoid the lien on the exempt property are separate questions." In re Streeper, 158 B.R. 783, 786 (Bankr. N.D. Iowa 1993). In Streeper, the Court held that a debtor is not necessarily entitled to avoid the lien on the exempt property, but must prove entitlement to lien avoidance under § 522(f)(1). Id; but cf. Towns, 74 B.R. 563, 567.

Therefore, to prove entitlement to lien avoidance under § 522(f)(1), the Debtor must prove that the lien impairs an exemption to which the debtor would have been entitled under subsection (b) but for the lien itself. Streeper, 158 B.R. at 786. This analysis is consistent with the U.S. Supreme Court holding in Owen v. Owen, 111 S.Ct. 1833, 1838 (1991) and this Court hereby adopts the reasoning of the Court in Streeper.

In this case, the property was deemed exempt pursuant to § 522(1) as no objections to the Debtor's claim of homestead exemption were filed. However, under Iowa Code § 561.16, the property would not have been exempt under § 522(b) to the extent the debt was contracted prior to the purchase of the property. Iowa Code § 561.16 provides in relevant part:

The homestead may be sold to satisfy debts of each of the following classes:

1. Those contracted prior to its acquisition, but then only to satisfy a deficiency remaining after exhausting the other property of the debtor, liable to execution.

In this case, the debt was acquired, by virtue of the judgment, prior to the purchase of the homestead property. It is, therefore, preacquisition debt under Iowa law and the property would not have been exempt at the date of the petition. The debtor would not, therefore, have been entitled to the exemption under § 522(b). Accordingly, while the property remains exempt under § 522(1), the Court finds that the Debtor may not avoid the judgment lien held by the McCurrys.

**ORDER**

IT IS THEREFORE ORDERED that Debtor's Motion to Avoid Judicial Lien is overruled and denied.

Dated this 15th day of April, 1994.

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RUSSELL J. HILL  
U.S. Bankruptcy Judge