

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

JOHN J. PATRILLO
SHARON D. PATRILLO

CASE NO. 97-63186

Debtors

Chapter 7

APPEARANCES:

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Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

The Court has before it a motion filed by John and Sharon Patrillo (“Debtors”) seeking to disallow an objection to their claimed exemption of certain personal property filed by Solvay Bank as Successor Trustee/Custodian of the John B. Vita HR10 Retirement Plan (“Vita”) and to avoid Vita’s alleged liens on that property pursuant to § 522(f)(1)(B) of the Bankruptcy Code (11 U.S.C. §§ 101-1330)(“Code”).

The motion initially appeared on the Court's calendar at Syracuse, New York on September 2, 1997. On that date after hearing argument, the Court adjourned the motion to September 23, 1997, to permit Debtors to file an amended Schedule C (schedule of exempt property) and to serve same on Vita.¹ On September 23, 1997, the motion was again adjourned to October 7, 1997, to permit Debtors to serve and file the amended schedule together with an appraisal of the property being claimed as exempt thereon. On October 7, 1997, Debtors requested a further adjournment as they had not yet obtained the necessary appraisal. Finally, on October 21, 1997, the Court heard the parties' concluding arguments and received Debtors' appraisal.²

JURISDICTIONAL STATEMENT

The Court has core jurisdiction of this contested matter pursuant to 28 U.S.C. §§ 1334(b), 157(a), (b)(1) and (b)(2)(B).

¹ It is not clear from the docket of this case whether the Debtors ever filed an amended Schedule C; however, on September 12, 1997, Debtors filed an itemized "List of Household Furnishings Claimed Exempt." ("List") Apparently, the itemized List had previously been served on Vita on August 26, 1997.

² On October 21, 1997, Debtors filed "Current Fair Market Value Appraisal For John & Sharon Patrillo, 4654 Antoinette Dr., Marcellus, NY 13108", prepared by Brzostek's Auction Service, Inc. ("Appraisal").

FACTS

In or about October 1992, the Debtor Sharon Patrillo, apparently doing business as “Bouquets of Skaneateles,” and Debtor John Patrillo obtained a loan from Vita in the alleged amount of \$25,000. As security for the loan, Debtors believed they granted Vita liens on the business inventory of Bouquets, as well as their real property and personal property located at 4654 Antoinette Dr., Marcellus, New York. *See* Debtors’ Response to Objections of Vita at ¶ 2 and Schedule D of Debtors’ Petition.³

Thereafter, the Debtors filed a voluntary petition pursuant to chapter 7 of the Code on May 27, 1997. In connection with their chapter 7 petition, Debtors filed Schedule C, “Property Claimed as Exempt.” Included in Schedule C are “regular non antique home furnishings” with a claimed value of \$1,000, as well as two Stickley Leather couches, two refinished antique lamps, Oriental type carpet, refinished Victorian couch and chair, and wedding bands and rings. On July 29, 1997, Vita filed “Exempt Property Objections” which objected “to the [Debtors] exemption of a major portion of the household furnishings” upon the ground that the items of personal property claimed as exempt were not ordinary, but extraordinary. *See* Exempt Property Objections, dated July 25, 1997. Vita further objected to Debtors’ attempt to exempt a “1979

³ According to Schedule D, Vita is identified as a secured creditor with a claim of \$29,425.40, secured by collateral with an estimated value of \$2,000, consisting of business inventory, home furnishings and real estate. A financing statement filed in the Onondaga County Clerk’s office grants Vita a security interest in “[a]ll existing and hereafter acquired furniture, carpeting, drapes, appliances and all personal property of every name, nature and description owned by either or both of the Guarantors [the Debtors] & utilized by the Guarantors in connection with their residential listing at 4654 Antoinette Dr. Marcellus property.” *See* Exhibit B, attached to Debtors’ Response to Objections of Vita.

MG Convertible” and “wedding bands and rings.”

On August 4, 1997, the Debtors filed the instant motion seeking an order disallowing Vita’s objections to their claimed exemptions and avoiding Vita’s lien pursuant to Code § 522(f)(1)(B). Vita then filed a cross-motion which was made returnable with the instant motion on September 2, 1997. The cross-motion sought several forms of relief: a) abandonment by the Trustee of the Debtors’ residence, business assets and household furnishings; b) a lifting of the stay to permit Vita to foreclose his liens against the Debtors’ personal and business assets; c) a turnover of Debtors’ business records; d) allowing a foreclosure action by Skaneateles Savings Bank (“Skaneateles”) to continue; e) denial of the Debtors’ discharge, and f) denial of Debtors’ motion seeking to disallow Vita’s objection. This cross-motion was argued before the Court on September 2, 1997, and was granted only to the extent of modifying the automatic stay to allow Vita to foreclose its mortgage against Debtors’ residence.⁴

On October 2, 1997, Vita filed an Amended Objection to Amended Claim To Exempt Property (“Amended Objection”) in which he identified specific items of personal property not previously identified in the Objection filed on July 29, 1997. These included ceiling fans, treadmill, back machine, four person hot tub, built-in cupboards in the laundry room and all items in the “lawn house.”

⁴ On July 9, 1997, this Court had already entered an order on motion of Skaneateles modifying the automatic stay to permit it to commence or continue a mortgage foreclosure against the Debtors’ residence.

ARGUMENTS

Debtors initially argue that Vita has an unperfected security interest in their household furnishings due to a defective financing statement (UCC-1) filed by Vita in the Onondaga County Clerk's office. Notwithstanding this assertion, however, Debtors contend that even if Vita's lien on their household furnishings is found to be valid, the lien can be avoided pursuant to Code § 522(f)(1)(B), since it is in the nature of a nonpossessory, nonpurchase money security interest. With regard to the MG convertible, Debtor John Patrillo refers the Court to an appraisal guide which values the vehicle at between \$1,100 wholesale and \$2,350 retail. Debtors also insist that the wedding rings are exempt property under § 5205(a)(6) of the New York Civil Practice Law and Rules ("NYCPLR").

Vita, while disputing both the nature and value of the items claimed by Debtors as exempt, initially challenges the Debtors' ability to exempt any of those assets in light of his prepetition security interests which generally encumber all of the Debtors' personal property. Vita posits that the Debtors cannot avail themselves of Code § 522(f)(1)(B) because they have waived their exemption rights under New York law by granting him a security interest in their personal property. In support of this position, Vita refers the Court to New York case law for the premise that a New York resident is entitled to exempt only personal property pursuant to applicable provisions of the New York Debtor and Creditor Law ("NYDCL") and the NYCPLR which has not been encumbered by a consensual lien or security interest. *See State of New York v. Avco Financial Service*, 50 N.Y.2d 383, 387-88, 429 N.Y.S.2d 181, 406 N.E.2d 1075 (1980) (indicating that a New York resident may waive the statutory exemptability of his/her property

by agreeing to encumber otherwise exempt property with a lien).

DISCUSSION

Before considering the nature and value of the personal property claimed as exempt by the Debtors, the Court believes that it must first address Vita's legal argument that Code § 522(f)(1)(B) is unavailable to the Debtors because the right to claim exemptions in their bankruptcy case is governed by New York law and the New York courts recognize and enforce a voluntary waiver of exemption through the granting of a consensual lien on otherwise exempt property.

While it is clear that New York has opted out of the federal exemption scheme pursuant to Code § 522(b) and §§ 282 and 283 of NYDCL, it does not follow that New York law controls a debtor's right to utilize the lien avoidance subsections of Code § 522, specifically Code § 522(f). *See Sanders v. David Dorsey Distributing Inc. (In re Sanders)*, 39 F.3d 258, 260 (10th Cir. 1994); *Production Credit Association of Mankato v. Thompson (In re Thompson)*, 884 F.2d 1100, 1102 (8th Cir. 1989); *In re Seltzer*, 185 B.R. 116, 118 (Bankr. E.D.N.Y. 1995).⁵

In *In re Thompson* the debtors claimed as exempt all their farm machinery and equipment which was encumbered by a creditor's lien. *See In re Thompson*, 884 F.2d at 1102. Minnesota gave the debtors the right to elect either the federal exemptions or the state exemptions. *See id.*

⁵ Both *Sanders* and *Seltzer* involved the avoidance of judicial liens on the debtors' real property, rather than consensual liens on personal property. However, the courts' legal analysis concluding that federal law determines the availability of lien avoidance under Code § 522(f)(1) is no less applicable to the matter herein.

The debtors in that case chose to exercise their rights under state law. The court in analyzing Minnesota law noted that a debtor is entitled to create a lien on what would otherwise be exempt property. *Id.* However, the court went on to indicate that “[a]lthough a state may elect to control what property is exempt under state law, federal law determines the availability of lien avoidance under section 522(f) of the Code.” *Id.* (citation omitted). This was true even though the debtor previously may have waived his/her exemption rights by allowing the creation of a lien on the property. *Id.* Accordingly, this Court rejects Vita’s contention that because the Debtors effectively waived the exemptability of their personal property by granting a consensual lien thereon, that lien cannot be avoided pursuant to Code § 522(f)(1)(B) in this bankruptcy case.

Code § 522(f)(1)(B) expressly allows the avoidance of a lien on an interest of the debtor in property “[n]otwithstanding any waiver of exemption . . . ” if such lien is a nonpossessory, nonpurchase-money security interest. Since there is no dispute that Vita’s lien represents a nonpossessory, nonpurchase-money security interest, there is no question that to the extent the personal property claimed as exempt by the Debtors is, in fact, exempt under New York law, Vita’s lien may be avoided.

Code § 522(f)(1)(B) itemizes three categories of personal property subject to lien avoidance; however, the *quid pro quo* for the application of the section is that Vita’s lien “impairs an exemption to which the debtor would have been entitled under subsection (b) of this Section.” Thus, it has been held that only those categories of property identified in Code § 522(f)(1)(B)(i)(ii) and (iii) that are also exempt under applicable State law are subject to lien avoidance. *See Leonard v. Aetna Finance Co. (In re Leonard)*, 866 F.2d 335, 337 (10th Cir. 1989). *See also*, 5 COLLIER ON BANKRUPTCY ¶ 522.11 [6][c] (15th ed. 1998). For purposes of

this discussion, Code § 522(f)(1)(B)(i) is particularly relevant in that it allows a debtor to avoid a nonpossessory, nonpurchase-money security interest in any “household furnishings, household goods, wearing apparel, appliances, books, animals, crops, musical instruments, or jewelry that are held primarily for the personal, family or household use of the debtor or a dependent of the debtor.” 11 U.S.C. § 522(f)(1)(B)(i).

Turning to an examination of Vita’s Amended Objection, he identifies six items of property listed by the Debtors which he contends are not exempt: ceiling fans, a treadmill, a back machine, a four person hot tub, built-in cupboards and all items in the “lawn house.” Vita asserts that the ceiling fans, the hot tub and the cupboards are fixtures, while the treadmill, back machine, the lawn house and its contents fall outside the four corners of NYCPLR ¶ 5205(a), making Code § 522(f)(1)(B) inapplicable.

The Court agrees that the ceiling fans and built-in cupboards constitute fixtures and, therefore, fall outside the purview of NYCPLR § 5205. *See In the Matter of Fink*, 4 B.R. 741, 744 (Bankr. W.D.N.Y. 1980), 59 NY JUR.2d *Fixtures* §2 (1987). With regard to the hot tub which Debtors contend cannot be removed without removing cellar stairs, it would appear that it too constitutes a fixture. In any event, even if the hot tub is not a fixture, it would not appear to fall within the items of personal property outlined in NYCPLR § 5205(a). While one could argue that it is an item of “household furniture,” New York courts have consistently analyzed similar exemption claims from the standpoint of whether the personal property constitutes “necessaries for ordinary day-to-day living” such that its loss would create great hardship. *See Laprease v. Raymours Furniture Co.*, 315 F.Supp 716, 722-23 (N.D.N.Y. 1970). It would not appear that a hot tub, while arguably an item of household furniture, could be construed in this

case as “necessary” for the Debtors’ day-to-day living. The Court further agrees with Vita that the treadmill and back machine, as well as the contents of the lawn house do not find a niche within NYCPLR § 5205 and, therefore, are not entitled to be exempted by the Debtors. Therefore, the Debtors may not avoid Vita’s lien on those items.

In his initial Objection to claimed exemptions, Vita focused on the Debtor’s claimed exemption of a 1979 MG Convertible. Vita alleged that the vehicle is not exempt because it is a “stored vehicle” which is not and has not been licensed. *See* Vita’s “Exempt Property Objections,” filed July 29, 1997. Under NYDCL § 282(1) a debtor domiciled in New York may exempt one motor vehicle not exceeding \$2,400 in value above all liens and encumbrances. Debtors claim the vehicle has a value of approximately \$2,000. *See* Debtors’ Motion Disallowing Vita’s Objections at ¶ 7. Conversely, Vita asserts the MG has a value of \$8,000 to \$9,000. Neither party has proffered any appraisal of the vehicle. Debtor John Patrillo (“Patrillo”) has filed an Affidavit, sworn to on August 15, 1997, in which he relies upon the “NADA Official Appraisal Guide for Older Used Cars.” (“NADA Guide”). Patrillo, in reliance upon the NADA Guide, contends that the vehicle has a retail value of \$2,350 and qualifies that value by pointing out that vehicle needs a new top and clutch which would presumably modify the retail value estimate downward.⁶ Vita, in his cross-motion, asserts that upon receiving the Patrillo Affidavit he reviewed it with a used car dealer friend, “Ray Ross,” who in turn consulted a third party who offered an opinion as to both retail value and collector’s item value. Vita provides no written opinion of value from either Ross or the third party.

⁶ Patrillo also asserts that the MG is one of three vehicles owned by Debtors that is encumbered by the lien of a secured lender.

While the Debtors have the initial burden of proving the value of claimed exemptions, that burden then shifts to the objecting creditor. *See In re Hill*, 95 B.R. 293, 297 (Bankr. N.D.N.Y. 1988); *In re deKleinman*, 172 B.R. 764, 770 (Bankr. S.D.N.Y. 1994). Here while neither party has provided anything beyond a modicum of proof as to the MG's value, the Court will rely on Patrillo's valuation and conclude that the MG is exempt pursuant to NYDCL § 282(1).⁷

Vita also singled out the Debtors' claimed exemption of their wedding rings, contending that no exemption for the rings is found in "CPLR Section 5206" [sic]. *See Exempt Property Objections*, dated July 25, 1997. Debtors, however, direct the Court to NYCPLR § 5205(a)(6), which specifically exempts a wedding ring. The Court agrees. Debtors further indicated that they did not object to an appraisal of the rings. Neither party has provided a valuation and, thus, the Court does not consider valuation an issue.

Turning to Vita's Amended Objection, he objects to Debtors' exemption of: all antiques, a cut glass collection, Oriental rugs, Stickley furniture and a doll collection. From a review of the Debtors' Schedule C - Property Claimed As Exempt, and the List filed September 12, 1997, there is no mention of a cut glass collection. The Appraisal filed by the Debtors on October 21, 1997, does reference "5 Assorted Dolles - Effanbees - \$10.00 each, but the dolls are not listed by the Debtors as exempt. Debtors do claim as exempt two antique lamps, a refinished Victorian-style couch and chair, two Stickley leather couches and an Oriental-style rug. *See Schedules C* attached to Debtors' petition and the List.

In comparing the List and itemized Appraisal to the somewhat antiquated parameters of

⁷ While arguably the MG does not even fit within the definition of motor vehicle under NYDCL § 282(1), neither party has raised that argument, and the Court will not consider it herein.

NYCPLR §5205(a) , the Court will conclude that the following items fall outside the lines of exemptability:

Basement - entire contents

Lawn House - entire contents

Family Room - VCR, Victorian-style sofa and 30 gallon aquarium with stand⁸

Living Room - 5 assorted Dolles-Effanbees

The remainder of the personal property contained in the List and itemized Appraisal, with the exception of those items considered to be fixtures as discussed herein, is deemed exempt and Vita's security interest thereon is deemed avoided.

IT IS SO ORDERED.

Dated at Utica, New York

this 7th day of May 1998

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge

⁸ The Court will allow as exempt the two leather couches in the living room. The court does not view three couches/sofas as "necessary" as required by NYCPLR § 5205(a)(5).