IT IS ORDERED as set forth below:

Date: April 26, 2012

Paul W. Bonapfel
U.S. Bankruptcy Court Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	:	
	:	**Chapter 7**
DAVID CHARLES WILMORE, JR.,	:	
	:	**Case No. 11-73964-PWB**
Debtor.	:	
	:	
	:	
DAVID CHARLES WILMORE, JR.,	:	
	:	
Movant,	:	
vs.	:	**Contested Matters**
	:	
KENNEDY UZOMBA, d/b/a KENNEDY INVESTMENTS, LLLP,	:	
	:	
	:	
Respondent.	:	
	:	

ORDER ON DEBTOR'S MOTION [61] FOR CLARIFICATION OF FINAL JUDGMENT [59] ON MOTION TO AVOID LIEN AND MOTION FOR RELIEF FROM STAY

David Charles Wilmore, Jr. (the "Debtor") owns a 2006 Ford F-150 Supercrew Pickup (the "Ford"). He is entitled to an exemption of $9,800 in the Ford and moved under 11 U.S.C.

§ 522(f) to avoid the judgment lien of Kennedy Uzomba, d/b/a Kennedy Investments, LLLP (the "Creditor") on the ground that it impairs his exemption.[1]

After a trial, the Court valued the Ford at $ 13,000 in accordance with the replacement value standard of 11 U.S.C. § 506(a)(2). Based on this value, the Creditor's judicial lien impairs the debtor's exemption in the Ford to the extent that the debt exceeds $3,200, the difference between the Ford's value and the amount the Debtor can exempt.

The Court entered a Final Judgment [59] avoiding the Creditor's judicial lien on the Ford in excess of a debt of $3,200. At the same time, the Court lifted the automatic stay of 11 U.S.C. § 362(a) to permit the Creditor to proceed to enforce the lien.

The Final Judgment includes the following with regard to enforcement of the lien to the extent that the Court did not avoid it [59 at ¶ 4]:

> [T]he Creditor is entitled to enforce his judicial lien to the extent of the principal amount of $3,200 with regard to the Ford. To the extent that the proceeds from any judicial or other sale of the Ford exceed $13,000, the Creditor is also entitled to enforce his judicial lien against such proceeds to the extent of any costs of sale and interest on the unpaid portion of the aforesaid principal amount, beginning on the date of the filing of this case, August 18, 2011. If the proceeds are $13,000 or less, the Creditor is entitled to enforce his lien only to the extent of $3,200. The Debtor has no personal liability on the judgment.

The Debtor has filed a "Motion for Clarification" [61] that asks "how the proceeds of any

[1]The Debtor also moved to avoid the judgment lien with regard to other exempt property. The values of the other items of exempt property did not exceed the amount of the Debtor's exemption, and the Court therefore avoided the judgment lien on the other exempt property.

sale of the 2006 Ford F-150 are to be paid if the vehicle sells for less than the value of $13,000 as there was an exemption allowed in the amount of $9,800."

The Final Judgment needs no clarification on this issue – it clearly states that the Creditor is entitled to enforce its lien to the extent of $ 3,200 if the proceeds of a sale are less than $13,000. So, for example, if the sale price is $11,000, the Creditor would receive $3,200 and the Debtor would receive $7,800 under the quoted provisions of the Final Judgment. But the Debtor is entitled to an explanation of why this is so and why impairment of his exemption determined with reference to replacement value occurs if a sale for less than replacement value takes place.

Section 522(f)(1)(A) permits a debtor to avoid a judicial lien on an interest of the debtor in property "to the extent that such lien impairs an exemption," and § 522(f)(2)(A)(iii) requires determination of impairment by reference to the value of the debtor's interest in the property. Section 506(a)(2) requires the Court to value personal property "securing an allowed claim" based on the "replacement value of such property as of the date of the filing of the petition without deduction for costs of sale or marketing." Because the Creditor has a lien on the Ford, it has an "allowed secured claim" and the § 506(a)(2) replacement value standard applies.

It is clear enough that, under these provisions, the result is avoidance of the Creditor's judicial lien to the extent that it exceeds $ 3,200. The necessary implication is that the lien is valid to the extent of $ 3,200.

The Debtor can pay the Creditor $3,200. Such payment will extinguish the Creditor's lien, and as a result the Debtor owns exempt property with a replacement value of $13,000 free and clear of the lien. No question of impairment of his exemption arises. The Debtor has paid

$3,200 to retain exempt property with a replacement value of $13,000, thereby realizing a net benefit from the property, based on replacement value, of $ 9,800, the amount of his exemption.

Issues arise when a debtor does not voluntarily pay the amount of a debt that remains enforceable after the partial avoidance of a judgment lien and a judicial sale of the exempt property produces less than the replacement value that determined the amount of the partial avoidance. If, as in the example, a judicial sale produces only $11,000 and the Creditor must receive $3,200, the Debtor will receive only $7,800.

The Debtor's point is that this result impairs his exemption because he receives $2,000 less than its amount. True enough, but this unfortunate result for a debtor is the necessary consequence of the policy choice Congress made when, as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, it added the provisions of 11 U.S.C. § 506(a)(2) that mandate determination of the avoidance of a lien on exempt personal property under 11 U.S.C. § 522(f) in Chapter 7 and Chapter 13 cases based on replacement value.

To the extent that a judicial lien is not avoided under § 522(f), a creditor must have the right to enforce it if a debtor does not voluntarily satisfy it. Otherwise, the retention of the lien is meaningless. A judgment creditor ordinarily enforces its lien through a judicial sale, and it is highly likely that such a sale will not result in the realization of the replacement value that determined how much of the lien that § 522(f) does not avoid.

In this situation, simple arithmetic tells us that one of the parties must suffer a loss equal to the difference between the replacement value and the actual proceeds realized at the sale. Either the creditor must get less, resulting in further avoidance of its lien, or the debtor must receive less than the amount of the allowable exemption, resulting in its impairment.

As set forth in the Final Judgment, the Court's conclusion is that a creditor is entitled to recover from the exempt property the amount of the debt that remains enforceable upon the partial avoidance of its lien. The language of § 522(f) requires this result. Section 522(f) *avoids* a judicial lien *to the extent* that the lien impairs the debtor's exempt property. The necessary consequence of *avoidance* of the lien *to the extent* that it impairs a debtor's exemption is that the lien remains valid and effective for the remaining balance.

Section 506(a)(2) directs a bankruptcy court to determine how much of the lien remains enforceable (*i.e.,* is not avoided) based on replacement value. This means that the extent of the avoidance of the lien (and, conversely, how much of it remains enforceable) becomes fixed when the bankruptcy court determines the extent to which it impairs the debtor's exemption based on replacement value.

The fact that a judicial sale, if required, does not produce enough to permit the debtor to realize the full value of the exemption does not change the analysis. Again, the problem exists because § 506(a)(2) requires the court to use a valuation standard that produces a higher valuation for exempt property than what it will bring at an involuntary sale. The use of the higher valuation standard necessarily means that, in most instances, a lien creditor will receive more than it could receive through exercise of its lien rights and that a debtor will not realize the full amount of the value of the exemption to which he is entitled.

This must be the result that Congress intended. If Congress had wanted to preserve the value of a debtor's exemption, it could have limited a creditor's lien to amounts realized in excess of the debtor's exemption, or it could have directed the bankruptcy court to determine impairment by reference to liquidation or forced sale value of exempt property (*i.e.,* what the creditor could realize through exercise of its lien rights). Instead, it directed the use of replacement value to determine the extent to which a judicial lien impairs a debtor's exemption in personal property rather than replacement value. The consequence of this Congressional choice is that the amount the debtor must pay to satisfy a lien on exempt property is based on its replacement value. Stated conversely, the choice of the replacement value standard reflects Congressional intent that a lien creditor receive payment based on replacement value.

If a creditor must use legal process to collect the amount enforceable under a partially avoided lien, the only way to accomplish the Congressional directive that a creditor be able to enforce its lien based on replacement value is to permit enforcement of the unavoided portion of the lien in full, even if the consequence is that a debtor does not recover the full value of an exemption.

In summary, once the bankruptcy court determines the extent to which a judicial lien impairs an exemption, the unavoided portion of the lien remains valid and enforceable to that extent.

The Final Judgment also addressed another issue that arises when partial avoidance of a lien on exempt property occurs: the extent to which the creditor is entitled to recover interest and costs of enforcement of the partially avoided lien. Presumably because it is unlikely that the Ford would bring more than $13,000 at a judicial sale, the Debtor's motion does not raise this issue. For the sake of completeness, the Court will also explain this aspect of its ruling.

As just discussed, sections 506(a)(2) and 522(f) collectively operate to limit a judgment creditor's lien to the amount by which the replacement value of the exempt property exceeds the amount of the debtor's exemption. This operation establishes the amount of the lien that is not avoided, *i.e.,* the amount of the debt that remains enforceable under the lien.

Section 506(a)(2) requires valuation as of the date of the filing of the petition. Because the determination is made as of the filing date, the judgment creditor effectively has a debt enforceable against the exempt property under the judgment lien in a principal amount equal to the excess of the replacement value over the amount a debtor may exempt.

A judgment creditor is entitled to recover interest and expenses of sale in connection with the enforcement of its lien. The question here is the extent to which a judgment creditor can subject the debtor's exempt property to those items when the value of the debtor's property exceeds the amount he can exempt.

By operation of § 522(f), a judgment creditor clearly cannot enforce its lien against a debtor's exempt property. Consequently, if exempt property subject to a partially avoided judicial lien does not sell for more than its replacement value, the creditor cannot recover anything beyond the principal amount that remains subject to the lien. By definition, if the property sells for less than replacement value, a creditor collecting more than the unavoided principal amount would receive proceeds from the debtor's exempt property.

This does not mean, however, that a creditor cannot recover interest or expenses of sale to the extent that proceeds from the sale exceed the replacement value. As discussed above, the creditor retains its lien to the extent that it is not avoided. The partial retention of the lien carries with it all the rights that a holder of a lien has under applicable nonbankruptcy law to the extent that the lien remains enforceable because it is not avoided.

When proceeds from the sale of exempt property subject to a partially avoided lien exceed the replacement value that determined the amount of the lien avoidance, the judgment creditor's lien rights must include the right to recover from those excess proceeds the accrued interest on the principal amount subject to the unavoidable lien and the expenses of sale. Of course, the judgment creditor cannot recover such items in excess of the available sales proceeds because the debtor's discharge eliminates any personal liability and because the creditor cannot recover proceeds attributable to the debtor's exemption (except to the extent of the principal amount, as discussed above).

This leaves the question of proper calculation of any interest that the judgment creditor may recover. Because § 506(a)(2) requires determination of the amount of lien avoidance as of the date of the filing of the petition, interest properly begins to accrue at that time. And because § 522(f) establishes the principal amount that remains enforceable against the exempt property, the interest is calculated by reference to the principal amount of the debt that remains subject to the unavoided lien.

Given the Congressional mandate that replacement value govern the determination of the extent to which a debtor may avoid a judicial lien, the foregoing results reflect an equitable resolution of competing interests. A creditor with a partially avoided judicial lien receives the benefit of the use of the replacement valuation standard as Congress intended. Although the debtor's exemption is necessarily at risk because of the required use of the replacement value standard, the exemption is protected against further reduction through the imposition of charges for interest or sales expenses unless the property appreciates in value. If the exempt property appreciates in value, the debtor retains the benefit of any appreciation in excess of the accrued interest and expenses.

The Court notes that the results are generally consistent with what happens in a Chapter 13 case. In a Chapter 13 case, a creditor with a partially avoided judicial lien has a secured claim to the extent of the unavoided portion. The debtor's plan must provide for payment of the amount of the secured claim with postconfirmation interest under 11 U.S.C. § 1325(a)(5)(B).[2]

The Court construes the Debtor's Motion for Clarification as a motion to alter or amend the Final Judgment under Fed. R. Civ. P. 59(e), *applicable under* Fed. R. Bankr. P. 9023, and a motion to amend or make additional findings of fact and conclusions of law under Fed. R. Civ. P. 52(b), *applicable under* Fed. R. Bankr. P. 7052 and 9014. For reasons set forth above, the Court is satisfied that the Final Judgment is sufficiently clear and that the findings and conclusions on which the Final Judgment is based are correct. The Court will, therefore, deny the motion.

In accordance with the foregoing, it is hereby **ORDERED and ADJUDGED** that the Debtor's Motion for Clarification [61] be, and it hereby is, **DENIED.**

[End of Order]

THIS ORDER WAS NOT PREPARED FOR PUBLICATION AND IS NOT INTENDED FOR PUBLICATION.

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[2]A Chapter 13 debtor has a slight advantage in that interest is payable only from the date of confirmation of the plan and the rate of interest may be less than the rate applicable to a judgment under nonbankruptcy law.