

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
ROOM 211
FEDERAL BUILDING AND U.S. POST OFFICE
225 SOUTH PIERRE STREET
PIERRE, SOUTH DAKOTA 57501-2463

IRVIN N. HOYT
BANKRUPTCY JUDGE

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December 20, 2004

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Subject: *In re Ricky D. Juhnke and Gwen M. Juhnke*
Chapter 7; Bankr. No. 04-41154

Dear Counsel:

The matter before the Court is Debtors' Amended Motion to Avoid Judgment Liens and Excise Tax Liens Pursuant to 11 [U.S.C. §] 522, as supplemented. This is a core proceeding under 28 U.S.C. § 157(b)(2). This letter decision and accompanying order shall constitute the Court's findings and conclusions under Fed.Rs.Bankr.P. 7052 and 9014. As set forth below, Debtors' motion will be granted in part and denied in part.

Summary. Ricky D. Juhnke and Gwen M. Juhnke ("Debtors") filed for relief under chapter 7 of the bankruptcy code on September 8, 2004. On October 8, 2004, Debtors amended their schedule of property claimed exempt to include their homestead,¹ which they valued at \$145,000.00. No creditor or other party in interest objected to Debtors' amended exemptions.

¹ Debtors did not provide a description of their homestead in their amendment. However, it appears from the record that Debtors intended to exempt the real property in Menno, South Dakota listed on their schedule of real property.

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On October 29, 2004, Debtors filed a Motion to Avoid Judgment Liens and Excise Tax Liens Pursuant to 11 [U.S.C. §] 522. In their motion, Debtors listed three "contractor excise tax liens" and twelve "civil judgments" and asked the Court to avoid those contractor excise tax liens and judgment liens.

On November 4, 2004, the Court asked Debtors to file and notice an amended motion to avoid liens that more closely comported with LBR 4003-2 and Appendix 30. In particular, the Court asked Debtors to include a calculation of the extent to which the liens described in their motion impaired their homestead exemption.

On that same date, Jeffrey L. Fritz ("Fritz"), the holder of a Sheriff's Certificate of Sale arising out of a judgment foreclosure against Debtors' real property in Turner County, filed a response to Debtors' motion. In his response, Fritz asked that any relief granted Debtors be limited to Debtors' homestead and that no relief be granted Debtors with respect to Debtors' real property in Turner County.²

On November 16, 2004, Debtors filed an Amended Motion to Avoid Judgment Liens and Excise Tax Liens Pursuant to 11 [U.S.C. §] 522. In their amended motion, Debtors listed four "contractor excise tax liens" and twelve "civil judgments" and again asked the Court to avoid those contractor excise tax liens and judgment liens. Debtors also provided a calculation of the extent to which the liens described in their amended motion impaired their homestead exemption, although Debtors' calculation still did not closely follow the sample calculation required by LBR 4003-2 and Appendix 30.

On November 23, 2004, Fritz filed a response to Debtors' amended motion, incorporating by reference its earlier response to Debtors' original motion. On December 2, 2004, Freeman Lumber Company ("Freeman"), the holder of a mechanic's lien against Debtors' homestead, filed an objection to Debtors' amended motion. In its objection, Freeman pointed out that a mechanic's lien is not a judicial lien and asked the Court to deny Debtors' motion as to its mechanic's lien.

On December 3, 2004, the Court asked Debtors to supplement their amended motion to avoid liens to state clearly the fair market value of their homestead. Debtors' provided the requested information on December 15, 2004. The matter was taken under advisement.

Discussion. Debtors have not requested any relief with

² Menno is in Hutchinson County.

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respect to their real property in Turner County. Debtors have not asked that the mechanics' liens against their homestead be avoided. That leaves only the question of whether Debtors may avoid the contractor's excise tax liens and judgment liens described in their amended motion.

Pursuant to 11 U.S.C. § 522(f)(1), a 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 judicial lien[.]" A judicial lien is a "lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding[.]" 11 U.S.C. § 101(36).

A contractor's excise tax lien, however, is a statutory, not a judicial lien.

There is imposed an excise tax upon the gross receipts of all prime contractors engaged in realty improvement contracts, at the rate of two percent.

S.D.C.L. § 10-46A-1.

All of the provisions of §§ 10-43-63 to 10-43-73, inclusive, and all amendments that may hereafter be made thereto providing for creation, recording, and enforcement of liens and collections by distress warrant shall apply to and be available for collection of the tax imposed by this chapter and said sections are by reference incorporated herein.

S.D.C.L. § 10-46A-9.

Whenever any taxpayer liable to pay a tax or penalty imposed refuses or neglects to pay the same, the amount, including any interest, penalty, or addition to such tax, together with the costs that may accrue in addition thereto, shall be a lien in favor of the State of South Dakota upon all property and rights to property, whether real or personal, belonging to said taxpayer.

S.D.C.L. § 10-43-64.

To state the obvious, the judgment liens listed in Debtors' amended motion were obtained by judgment and are thus judicial

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liens. 11 U.S.C. § 101(36). Those judgment liens impair Debtors' homestead exemption.

Value of Debtors' Interest:	\$175,000.00
Amount of Avoidable Liens:	- 149,783.11
Amount of All Other Liens:	- 165,996.48
Debtors' Allowed Exemption:	- 30,000.00
Impairment:	=(\$170,779.59)

See 11 U.S.C. § 552(f)(2)(A).³ The impairment exceeds the amount of the avoidable liens. Therefore, Debtors may avoid all twelve of the judgment liens, totaling \$149,783.11, listed in their motion. *Kolich v. Antioch Laurel Veterinary Hospital (In re Kolich)*, 328 F.3d 406, 408-10 (8th Cir. 2003).

The contractor's excise tax liens listed in Debtors' amended motion, however, were not obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding and are thus not judicial liens. 11 U.S.C. § 101(36). Therefore, while those contractor's excise liens may also impair Debtors'

³ Technically, the calculation under § 522(f)(2)(A) is made on a lien-by-lien basis, see 11 U.S.C. § 522(f)(2)(A)(I), and liens that have been avoided are not considered when making the calculation with respect to other liens. 11 U.S.C. § 522(f)(2)(B). However, where, as here, the impairment exceeds the amount of all avoidable liens, the same result is achieved - in significantly fewer steps - by considering the avoidable liens collectively.

If the impairment had not exceeded the amount of the avoidable liens, Debtors would have been able to avoid only a portion of the avoidable liens. For example, if the amount of "All Other Liens" had been only \$65,996.48, Debtors would have been able to avoid only \$70,779.59 of the listed judgment liens, in the reverse order of their priority. *Jochum v. Concord Capital, L.L.C. (In re Jochum)*, 309 B.R. 327, 329-30 (Bankr. E.D. Mo. 2004) (applying *Kolich* in a case involving multiple judicial liens).

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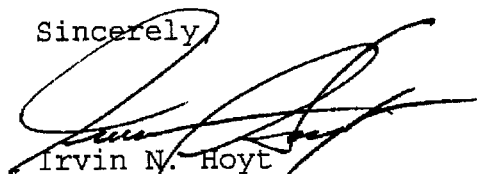
The \$79,003.52 balance of the avoidable liens would have remained as liens against Debtors' property. *In re Busby*, No. 00-20283M, 2001 WL 34106898, at *5 (Bankr. E.D. Ark. Mar. 9, 2001) (citations therein).

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homestead exemption, Debtors may not avoid them under § 522(f)(1).

Accordingly, Debtors' motion will be granted in part and denied in part. The Court will enter an appropriate order.

Sincerely



Irvin N. Hoyt
Bankruptcy Judge

INH:sh

cc: case file (docket original; serve parties in interest)


NOTICE OF ENTRY
Under F.R. Bankr.P. 9022(a)
Entered

DEC 20 2004

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota

I hereby certify that a copy of this document was electronically transmitted, mailed, hand delivered or faxed this date to the parties on the attached service list.

DEC 20 2004

Charles L. Nail, Jr., Clerk
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By 

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