

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

In re Case No. 03-66110 :
Price J. Kruse, :
Debtor. :
Price J. Kruse, :
Plaintiff, : Adv. Pro. No. 04-02134
v. : Chapter 7 (Judge Caldwell)
Bank One, N.A., :
Defendant. :

Order Regarding the Plaintiff's Motion for Summary Judgment and the Defendant's Cross-Motion for Summary Judgment

This matter is before the Court on the Motion for Summary Judgment filed by Price J. Kruse ("Plaintiff") and the Cross-Motion for Summary Judgment filed by Bank One, N.A. ("Defendant"). Based upon a review of the pleadings, stipulations and statements of counsel, the Court has concluded that there are no genuine issues of material fact, and that the Plaintiff may avoid the subject transfer to the extent that his exemptions are impaired, under Section 522(f)(1)(A),(2)(A) and (h) of the United States Bankruptcy Code ("Code") in the amount of \$16,086.77. The Defendant may retain \$16,675.78 of its judgment lien.

The Plaintiff was an officer and shareholder of Creative Landscape Solutions, Inc. ("CLS"). On March 26, 1998, CLS received a loan from the Defendant, in the amount of \$35,000.00. The Plaintiff defaulted on his obligations as guarantor, and on March 12, 2003, the Defendant obtained a judgment in the amount of \$32,762.55, plus interest, fees, and costs. On July 25, 2003, the Defendant obtained a lien against the Plaintiff's residential property, that is owned in joint survivorship with his non-debtor spouse. The Plaintiff's non-filing

spouse has no liability to the Defendant.

On October 22, 2003, eighty-nine (89) days after the Defendant obtained the lien, the Plaintiff filed for Chapter 7 relief. The appraisal obtained by the Plaintiff indicates that the fair market value of the property was \$140,000.00 as of the petition date. Wells Fargo Mortgage holds a first mortgage in the amount of \$117,924.22. The Plaintiff has a \$5,000.00 homestead exemption, pursuant to Ohio Revised Code (“O.R.C.”) Section 2329.66(A)(1). He also has a \$400.00 “wild card” exemption, pursuant to O.R.C. Section 2329.66(A)(18). The chapter 7 trustee declined to challenge the lien as a preference. On April 8, 2004, the Plaintiff filed the present adversary proceeding to avoid the lien.

Since the Court took this matter under advisement, the Sixth Circuit Court of Appeals has issued an opinion that this Court views as dispositive. Brinley v. LPP Mortgage, Ltd. (In re Brinley), 403 F.3d 415 (6th Cir. 2005), *cert. filed* 74 USLW 3013 (June 20, 2005). In Brinley, the Sixth Circuit considered whether a debtor could avoid a judgment lien, as impairing the homestead exemption in property that he owned as a tenant by the entirety with his non-debtor spouse under Kentucky law. When determining the appropriate calculation under the Code, the Sixth Circuit held that the debtor must be charged with the full fair market value of the property, and could not reduce that value by half based on the fact that he owned the property with his non-debtor spouse. In re Brinley at 420. The Court concluded that a tenancy by the entirety is property owned by a husband and wife, in which, “The survivor takes the entire estate at the death of the deceased co-tenant not by virtue of that death, but because, in law, each was viewed to own the entire estate from the time of its creation.” In re Brinley at 420.

The Sixth Circuit further held that the judgment lien was avoidable only to the extent that it impaired the debtor’s exemptions. In re Brinley at 421-422. Impairment is determined by including all of the liens on the debtor’s property and the value of the exemptions claimed and then subtracting the value of the property. In re Brinley at 421.

Applying the Brinley formula to the present adversary proceeding, the Court finds that the Defendant's lien may only be avoided in the amount of \$16,086.77. This amount is determined by adding all of the liens on the Plaintiff's property, including the Defendant's lien of \$32,762.55, the Wells Fargo first mortgage in the amount of \$117,924.22, and the Plaintiff's exemptions in the amount of \$5,400.00, for a total of \$156,086.77. The stipulated full value of the Plaintiff's residence in the amount of \$140,000.00, that is held by a survivorship deed under Ohio law, was then subtracted from \$156,086.77, for a difference of \$16,086.77. Given the characteristics of a survivorship deed in Ohio, including the equal rights of each party to the full use of the property, the entire value must be utilized. O.R.C. § 5302.20(C)(1). The sum of \$16,086.77 is the amount that the Plaintiff may avoid, as it represents the extent of the impairment, under Section 522(f)(2)(A) of the Code. As a result, the amount of the lien that the Defendant may retain is the difference between the lien amount and the sum by which the Plaintiff's exemption is impaired (\$32,762.55- \$16,086.77), or \$16,675.78.

Accordingly, the Court concludes that there are no genuine issues of material fact. The Plaintiff may avoid the transfer to the extent that his exemptions are impaired, under Section 522(f)(2)(A) of the Code in the amount of \$16,086.77, and the Defendant shall retain \$16,675.78 of its lien.

IT IS SO ORDERED.

Dated: _____

Charles M. Caldwell
United States Bankruptcy Judge

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