

**UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI**

IN RE:

**RANDY F. HARRISON,

DEBTOR.**

**CASE NO. 06-51387-NPO

CHAPTER 7**

**ORDER GRANTING IN PART AND DENYING IN PART MOTION TO AVOID
NONPOSSESSORY, NONPURCHASE MONEY SECURITY INTERESTS
AND
DENYING IN PART MOTION TO LIFT
AUTOMATIC STAY AND FOR TRUSTEE'S ABANDONMENT**

On April 3, 2007, this matter came on for hearing (the "Hearing") on the Motion to Avoid Nonpossessory, Nonpurchase Money Security Interests (the "Motion to Avoid") (Dk. No. 19) filed by Randy F. Harrison (the "Debtor") and the Objection to Motion to Avoid Nonpossessory, Nonpurchase Money Security Interests (the "Objection to Motion to Avoid") (Dk. No. 25) filed by Pikco Finance, Inc. ("Pikco"), as well as the Motion to Lift Automatic Stay and for Trustee's Abandonment (the "Motion to Lift") (Dk. No. 11) filed by Pikco and the Response to Motion to Lift Automatic Stay and for Trustee's Abandonment (the "Response to Motion to Lift") (Dk. No. 18) filed by the Debtor. Edmund J. Phillips, Jr., represented the Debtor, and C. Ashley Atkinson represented Pikco. Having considered the evidence adduced at the Hearing, together with the post-trial briefs submitted by the parties, the Court finds that the Motion to Avoid should be granted in part and denied in part, and that the Motion to Lift should be denied in part.

Jurisdiction

This Court has jurisdiction of the subject matter and the parties to this proceeding pursuant to 28 U.S.C. § 1334 and 28 U.S.C. § 157. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(A), (B), (G), and (O). Notice of the Motion to Avoid and the Motion to Lift was proper

under the circumstances.

Facts

1. On April 14, 2006, the Debtor executed a Note and Security Agreement in the amount of \$1,669.42 in favor of Pikco. The Debtor pledged as collateral personal property consisting of two (2) garden tillers, one (1) chainsaw, one (1) Maketa skihl saw, and one (1) 7x10 utility trailer (the “Pledged Collateral”). (Dk. No. 11, attached Exh. 1).

2. On December 11, 2006, the Debtor filed a voluntary petition pursuant to chapter 7 of the Bankruptcy Code (the “Petition”). (Dk. No. 1).

3. On Schedule B of his bankruptcy schedules, the Debtor disclosed his interest in personal property consisting of “machinery, fixtures, equipment, and supplies used in business” as a “zero turn John Deere Lawnmower and Trailer (tools of the trade).” (Dk. No. 3).

4. On Schedule C of his bankruptcy schedules, the Debtor claimed as exempt pursuant to Mississippi Code Annotated § 85-3-1(a) the “zero turn John Deere Lawnmower and Trailer (tools of the trade).” (Dk. No. 3).¹

5. The Debtor failed to list the debt to Pikco on Schedule F of his bankruptcy schedules. (Dk. No. 3).

6. On Schedule I of his bankruptcy schedules, the Debtor described his occupation as “cuts grass in summer,” for which he earns an average monthly income of \$437.67. He further disclosed that he receives monthly income in the amount of \$823.00 from Social Security or

¹ Pikco notes that the Debtor has not amended his Schedule C exemptions to specifically identify the Pledged Collateral as household goods or tools of the trade. While the Debtor could have been more precise in his description, he nevertheless generally claimed as exempt “tools of the trade” such that the Court will treat the Pledged Collateral as having been properly claimed as exempt property.

government assistance. (Dk. No. 3).

7. On his Statement of Financial Affairs, the Debtor declared “income from employment or operation of business” in the amount of \$5,252 for the years 2004, 2005, and 2006 derived from “cutting grass during summer months.” (Dk. No. 3).

8. On February 15, 2007, Pikco filed its Motion to Lift seeking to recover the Pledged Collateral.

9. On March 5, 2007, the Debtor filed Amended Schedule F, disclosing the debt to Pikco. (Dk. No. 14).

10. On March 5, 2007, the Debtor filed the Response to Motion to Lift, asserting that the Motion to Lift should be denied on the basis that the Pledged Collateral is exempt and the Debtor is entitled to avoid the lien on the Pledged Collateral as either tools of the trade or household goods pursuant to Mississippi Code Annotated § 85-3-1. (Dk. No. 18).

11. Also on March 5, 2007, the Debtor filed the Motion to Avoid, again maintaining that the Pledged Collateral consists of household goods and tools of the trade that the Debtor claimed exempt in his bankruptcy schedules and, moreover, that Pikco’s lien impairs the exemptions to which the Debtor is entitled pursuant to Mississippi Code Annotated § 85-3-1.

12. On March 26, 2007, Pikco filed its Objection to Motion to Avoid, denying that the Pledged Collateral is exempt property.

13. On April 26, 2007, an Order was entered granting the Motion to Lift as to one (1) garden tiller and one (1) Maketa skihl saw. (Dk. No. 31), which the Debtor conceded at the Hearing were not tools of the trade nor household goods entitled to exemption. Thus, the remaining items of the Pledged Collateral consist of one (1) garden tiller, one (1) chainsaw, and one (1) utility trailer (collectively, “the Remaining Three Items”).

Discussion

The issue before the Court is whether the Remaining Three Items are tools of the trade pursuant to Mississippi Code Annotated § 85-3-1(a)(iii).² Mississippi Code Annotated § 85-3-1 states as follows:

There shall be exempt from seizure under execution or attachment:

(a) Tangible personal property of the following kinds selected by the debtor, not exceeding Ten Thousand Dollars (\$10,000.00) in cumulative value:

. . . .

(iii) Implements, professional books or tools of the trade;

Miss. Code Ann. § 85-3-1(a)(iii).

In the case of In re Aurelio, 252 B.R. 102 (Bankr. N.D. Miss. 2000), Judge David W. Houston, III, determined that restaurant equipment utilized by the debtor in that case qualified as tools of the trade for exemption purposes under Mississippi law. Judge Houston began his analysis by acknowledging that “[c]ase law in crucial important tools of the trade is scarce” In re Aurelio, 252 B.R. at 104. He further recognized that the “leading authority dealing with tools of the trade in Mississippi is over one hundred years old and construed Mississippi Code § 468 which is not similar to the current statute.” Id. Thus, he concluded that “the court must look to other jurisdictions and analyze the various tests that have been formulated concerning tools of the trade in order to develop an appropriate application of the exemption in Mississippi.” Id.

After conducting a thorough analysis of the different approaches courts have used in

² Pursuant to 11 U.S.C. § 522(b)(1), Mississippi has elected to opt out of the federal exemption scheme. Consequently, this Court will conduct its analysis in accordance with the exemptions provided under Mississippi law.

interpreting the tools of the trade exemption, Judge Houston applied the “function” test, which focuses on “whether the claimed property is truly necessary for the debtor to carry on his or her particular trade or profession.” Id. at 104. He then employed a four-part test which had been utilized in In re Nipper, 243 B.R. 33, 36 (Bankr. W.D. Tenn. 1999), noting that the Tennessee exemption statute contains basically the same operative language found in the Mississippi statute.

The four elements are as follows:

1. Exemption laws are to be liberally construed in order to preserve the exemption.
2. The determination of whether personal property is a tool of the trade must be made on a case by case basis.
3. The debtor must demonstrate that he practiced a particular trade or occupation at the time of the filing of his bankruptcy petition or that he had engaged in the particular trade or occupation in the past and intended to resume it.
4. The debtor must demonstrate that the property that he seeks to exempt is reasonably necessary to the performance of his chosen trade or occupation.

In re Aurelio, 252 B.R. at 106. Judge Houston also was guided by the reasoning set forth in the case of In re Baldowski, 191 B.R. 102 (N.D. Tex. 1996), where that court “focused on whether the items claimed as exempt were necessary for the debtor to successfully operate” his business. In re Baldowski, 191 B.R. at 105.

Applying the In re Aurelio rationale to the case currently at bar, this Court is persuaded that the Remaining Three Items are tools of the trade used in the Debtor’s trade of landscaping and grass mowing. The Debtor demonstrated at the Hearing that at the time of the filing of the Petition he previously had engaged in the trade of landscaping and grass mowing and intended to continue it. He further testified that he uses the tiller when installing flower bed timbers, the chainsaw when cutting limbs, and the utility trailer in hauling trash. Therefore, applying the exemption statute

liberally and to this case only, the Court finds that the Remaining Three Items are necessary for the Debtor to operate successfully his landscaping and grass mowing business, and that the Debtor is entitled to exempt the Remaining Three Items and to avoid the lien thereon.

Although not essential to the above analysis, the Court also will address the position taken by Pikco that because the Debtor receives two sources of income, primarily from Social Security and secondarily from his landscaping and lawn mowing business, he may claim the tools of the trade exemption only in regard to his primary occupation which produces his primary source of income. Some courts have adopted a primary occupation test. See, e.g., In re Cooper, 324 B.R. 133 (Bankr. Kan. 2004); In re Samuel, 36 B.R. 312, 314 (Bankr. E.D. Va. 1984). However, the Court is unaware of any cases interpreting the Mississippi statute which have adopted such a test. Moreover, the plain language of the Mississippi statute, which requires only that the tools be “tools of the trade,” does not limit the exemption to a primary occupation. Rather, the Court is persuaded that, as stated in South Atlantic Production Credit Assoc. v. Jones (In re Jones), 87 B.R. 738, 741 (Bankr. M.D. Ga. 1988), the debtor “only needs to prove that he is legitimately in the trade using those tools.” See also In re Myers, 56 B.R. 423, 425 (Bankr. S.D. Iowa, 1985), citing In re La Fond, 45 B.R. 195, 200 (Bankr. D. Minn. 1984) (court did not follow primary occupation test, stating that the debtor was required only “to prove he is legitimately engaged in a trade which currently and regularly uses the specific implements or tools exempted”). The Debtor’s uncontradicted testimony at the Hearing established that he uses the Remaining Three Items in his trade of landscaping and grass mowing. The Court, accordingly, rejects the position taken by Pikco that the Debtor is not entitled to exempt the Remaining Three Items and to avoid the lien thereon based on the fact that he receives his primary source of income from Social Security.

Based on the foregoing, the Court concludes that the Motion to Avoid should be and hereby

is granted in part as to the Remaining Three Items. All other relief requested in the Motion to Avoid is denied. The Court further concludes that the Motion to Lift should be and hereby is denied in part as to the Remaining Three Items.³

A separate final judgment consistent with this Order will be entered by this Court in accordance with Federal Rule of Bankruptcy Procedure 9021.

SO ORDERED, this the 15th day of May, 2007.

/s/ Neil P. Olack
NEIL P. OLACK
UNITED STATES BANKRUPTCY JUDGE

³ As noted previously, on April 26, 2007, an Order was entered granting the Motion to Lift as to one (1) garden tiller and one (1) Maketa skihl saw. (Dk. No. 31).