

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION**

IN RE:

**FRANKIE LEE SHARP, JR.,

DEBTOR.**

**CASE NO. 97-21740-L
CHAPTER 13**

**MEMORANDUM OPINION AND ORDER RE
OBJECTION TO CONFIRMATION
FILED BY AMERICAN GENERAL FINANCE, INC.
AND MOTION TO AVOID LIEN UNDER 11 U.S.C. § 522(f)
HELD BY AMERICAN GENERAL FINANCE, INC.**

On March 10, 1997, American General Finance, Inc. ("American General") filed an objection to confirmation of the debtor's proposed plan. On April 10, 1997, the debtor filed a motion seeking to avoid a nonpossessory, nonpurchase-money lien held by American General. This Court conducted a hearing on both of these matters on June 10, 1997, pursuant to Fed. R. Bankr. P. 9014. This is a core proceeding. 28 U.S.C. § 157(b)(2). The following shall serve as this Court's findings of fact and conclusions of law. Fed. R. Bankr. P. 7052.

I. Findings of Fact

On October 31, 1996, the debtor obtained a loan from American General in the amount of \$1,500. In return, the debtor allowed American General to take a lien on his 1987 Honda Civic, a 27" Magnavox television set, a Sharp tape deck, and an Infiniti stereo receiver. The debtor used the loan to pay outstanding traffic tickets and to reinstate his driver's license. Pursuant to the terms of the loan agreement, the debtor was to have paid approximately \$100 per month to pay off the loan; however, the debtor failed to make any payments to American General.

On February 5, 1997, the debtor filed his petition for relief under chapter 13. The debtor included American General in Schedule F “Creditors Holding Unsecured Nonpriority Claims” of his petition in the amount of \$800. The debtor testified that he surrendered the 1987 Honda Civic to American General in May. According to the debtor, the vehicle did not run at the time of the surrender or on October 31, 1997, the date of the loan. The debtor testified that he disclosed this to American General at the time the loan was made. There is no evidence in the record to the contrary. The debtor, therefore, seeks to avoid the lien on the television set, the tape deck and the stereo receiver.

On direct examination, the debtor admitted that in January 1997 he sold the Sharp tape deck and the Infiniti stereo receiver, as well as a set of speakers upon which American General did not have a lien, for \$400. The debtor testified that he sold this collateral because he needed money to attend his father’s funeral in Cleveland, Ohio.

When questioned by the Court about the value of the Magnavox television set, the debtor testified that the television set was worth \$100.

The debtor contends that American General did not file a UCC-1 financing statement in order to perfect its lien on the collateral. American General failed to enter any proof that it filed the UCC-1.

American General contends that the debtor filed his petition in bad faith because he failed to make any payments on the loan. The debtor contends that he filed his petition in good faith as evidenced by his making his plan payments through payroll deduction.

II. Issues Presented

1. Whether the debtor may avoid American General's lien on household goods, including a 27" Magnavox television set, a Sharp tape deck, and an Infiniti stereo receiver, even though the debtor sold the tape deck and stereo receiver without the permission of American General prior to filing his bankruptcy petition.
2. Whether the debtor failed to file his plan in good faith, thus requiring the court to deny confirmation of the debtor's plan.

III. Conclusions of Law

A. *Lien Avoidance Under § 522(f)*

Section 522 (f) states the following:

(f)(1) Notwithstanding any waiver of exemptions but subject to paragraph (3), the 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 —

* * * *

(B) a nonpossessory, nonpurchase-money security interest in any —

(i) 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;

* * * *

(2)(A) For purposes of this subsection, a lien shall be considered to impair an exemption to the extent that the sum of —

(i) the lien;

(ii) all other liens on the property; and

(iii) the amount of the exemption that the debtor could claim if there were no liens on the property;

exceeds the value that the debtor's interest in the property would have in the absence of any liens.

11 U.S.C. § 522(f).

According to the language of § 522(f), the debtor may avoid a lien only to the extent that it impairs the debtor's exemption.¹ When the debtor obtained the loan from American General on October 31, 1996, he pledged the 1997 Honda Civic, the 27" Magnavox television set, the Sharp tape deck, and the Infiniti stereo receiver. These pledged items can be placed in three different categories: (1) the 1987 Honda Civic; (2) the 27" Magnavox television set; and (3) the

¹ Tennessee has opted out of the federal bankruptcy exemptions. Tennessee Code Annotated § 26-2-102 allows a debtor to exempt \$4,000 of personal property for purposes of bankruptcy.

Sharp tape deck and the Infiniti stereo receiver, which the debtor sold prior to the filing of the bankruptcy petition.

Automobiles generally are not considered household goods² and, as a result, are not subject to lien avoidance pursuant to § 522(f). *See Johnston v. Barney*, 842 F.2d 1221 (10th Cir. 1988); *In re Langley*, 21 B.R. 772 (Bankr. D. Me. 1982). Further, the debtor properly surrendered the 1987 Honda Civic to American General pursuant to § 1325(a)(5)(C). Thus, the court need not consider further the automobile in its § 522(f) analysis.

The 27" Magnavox television set clearly falls within § 522(f) as the lien held by American General impairs the debtor's exemption in the television set. The debtor properly claimed as exempt his household goods in Schedule B "Property Claimed as Exempt." A television set is a household good. *In re French*, 177 B.R. 568 (Bankr. E.D. Tenn. 1995) (adopting the Fourth Circuit's definition of household goods: personal property that is normally found in or around today's average household that is used by the debtor or the debtor's dependents to support and facilitate day-to-day living within the home, including maintenance and upkeep of the home itself. *McGreevy v. ITT Fin. Svcs. (In re McGreevy)*, 955 F.2d 957 (4th Cir. 1992)). The \$1,500 lien plus any exemption that the debtor could claim in the television set

² In some instances, automobiles may be tools of the trade and exempt on that ground. *See, e.g., In re Graettinger*, 95 B.R. 632 (Bankr. N.D. Iowa 1988); *Nazarene Federal Credit v. McNutt (In re*

if there were no liens on the television set exceeds the \$100 value that the debtor's interest in the television set would have in the absence of American General's lien. 11 U.S.C. § 522(f)(2). As a result, the debtor is entitled to avoid the lien on the 27" Magnavox television set.

The court next turns to the question of whether American General's lien on the Sharp tape deck and the Infiniti stereo receiver is subject to avoidance pursuant to § 522(f). Based on the following analysis, the court concludes that these items are not subject to lien avoidance under § 522(f).

In order for a debtor to avoid a lien under § 522(f), the debtor must have a right to exempt the property in question if no such lien existed. In this case, the debtor has no such right as he no longer had possession of the Sharp tape deck or the Infiniti stereo receiver at the time he filed his bankruptcy petition on February 5, 1997. According to the debtor's testimony, he sold the tape deck and stereo receiver in January 1997 to get money so that he could attend his father's funeral in Ohio. Without the right to claim an exemption in the property, the debtor may not invoke § 522(f). *See* 2 DAVID G. EPSTEIN ET AL., BANKRUPTCY § 8-26 (1992).

The debtor argued at the hearing that had he not sold the items, he would be entitled to lien avoidance. While this may be true, the fact remains that the debtor did not have the property

McNutt), 87 B.R. 84 (Bankr. 9th Cir. 1988). *But see In re Trainer*, 56 B.R. 21 (Bankr. S.D. Tex. 1985).

at the time he filed his bankruptcy petition. There is no evidence before the court that the debtor retained the \$400 he received from the sale of these items. In fact, the inference from the evidence is that the debtor spent that money to travel to Ohio for his father's funeral. The proceeds from the sale are not identifiable, and at the time the debtor filed his bankruptcy petition, there was nothing to which American General's lien could attach. As a result, there is no lien regarding the Sharp tape deck and the Infiniti stereo receiver for this court to avoid. Thus, the debtor's argument must fail.

The court, therefore, concludes that the lien may not be avoided as to the Sharp tape deck and the Infiniti stereo receiver.

B. Good Faith Analysis

In its objection to confirmation, American General alleges that it holds a claim in the amount \$1,981.99 secured by the debtor's personal property. The objection also contends that the debtor listed the claim of American General as unsecured and that the debtor failed to make a payment on the claim prior to filing for bankruptcy. Nowhere in the objection to confirmation did American General state that the basis of its objection was lack of good faith. In his statements to the Court at the hearing, however, the attorney for American General asserted that the debtor filed his petition in bad faith. Thus, the Court considers the basis of the objection to confirmation to be lack of good faith.

The Court of Appeals for the Sixth Circuit has established the totality of circumstances standard for determining whether a debtor proposed his plan in good faith. *Metro Employees Credit Union v. Okoreeh-Baah (In re Okoreeh-Baah)*, 836 F.2d 1030, 1033-34 (6th Cir. 1988). The *Okoreeh-Baah* court concluded that the debtor's pre-bankruptcy conduct is one of many factors for a bankruptcy court to consider when making a good faith determination. *Id.* at 1033. Additionally, a finding of good faith on the debtor's part is within the discretion of the bankruptcy court. *Id.* Finally, "[t]he party who seeks a discharge under Chapter 13 bears the burden of proving good faith." *Hardin v. Caldwell (In re Caldwell)*, 895 F.2d 1123, 1126 (6th Cir. 1990).

After reviewing the totality of circumstances, the court concludes that the debtor proposed his plan in good faith. This court confirmed the debtor's plan without prejudice as to American General's objection to confirmation on March 25, 1997. Based on the debtor's schedules, it appears that the debtor is devoting all his disposable income to the plan. While the time has not yet passed for the chapter 13 trustee to set the percentage to be paid to the unsecured creditors, this court has no doubt that the percentage will reflect the full amount that the debtor is able to pay to his unsecured creditors. Further, the debtor's payments are being made through payroll deduction, the preferred method of payment in this district.

The court also considers the debtor's pre-bankruptcy conduct. The debtor admitted on direct examination that he did not make a payment on this loan prior to filing bankruptcy. The

debtor testified that after obtaining the loan proceeds he began having financial difficulties and could not make the loan payments. The attorney for American General stated in his closing arguments that after obtaining the loan the debtor disappeared. However, American General presented no evidence that the debtor purposefully evaded collection efforts made by American General. As a result, the only evidence before the court regarding the debtor's failure to make any payments on the loan is the debtor's testimony that he began having financial difficulties and could not make the payments. The court finds the debtor to be a credible witness. As a result, the court concludes that the debtor's failure to make a payment does not rise to the level of bad faith.

American General also contends that the debtor acted in bad faith when he sold the Sharp tape deck and the Infiniti stereo receiver in January. The court finds the debtor's testimony regarding the motivation for the sale of the tape deck and stereo receiver credible. The debtor's father passed away, and the debtor needed money to pay for his trip to Cleveland to attend his father's funeral. American General produced no evidence that the debtor engaged in pre-bankruptcy planning when he sold the tape deck and stereo receiver. There is nothing before the court that relates the sale of these items to the proposal of the plan. While the court does not condone the debtor's actions, the court does not find that the debtor's conduct equates to the bad faith proposal of his plan.

It appears to the court that American General contends that the sale of the tape deck and the stereo receiver might render its debt nondischargeable under Bankruptcy Code § 523(a)(6), and that this is an additional basis for finding that the debtor proposed his plan in bad faith. Even if American General could establish that these debts would be nondischargeable in a Chapter 7 case, debts for willful and malicious injury are dischargeable in a Chapter 13 case. In the event the debtor's case is converted to chapter 7, American General may file an adversary proceeding at that time.

Finally, American General also contends that the debtor lacked good faith when he listed American General in Schedule F rather than Schedule D of his bankruptcy petition. No evidence was produced at the hearing regarding why the debtor listed American General as an unsecured creditor in Schedule F rather than a secured creditor in Schedule D. The court agrees with American General that the debtor would have made a better choice by listing American General as a secured creditor in Schedule D. There is no evidence that the debtor intended to conceal anything from the court or defraud American General, however.

The court, therefore, concludes that American General's objection to confirmation is denied.

IV. Order

In re Frankie Lee Sharp, Jr.
Case No. 97-21740
Memorandum Opinion and Order re Objection
to Confirmation and Motion to Avoid Lien

It is therefore **ORDERED** that the motion to avoid the lien as it affects the 27" Magnavox television is **GRANTED** and the motion to avoid the lien as it affects the Sharp tape deck and the Infiniti stereo receiver is **DENIED**. It is **FURTHER ORDERED** that American General's objection to confirmation is **DENIED**.

Jennie D. Latta
United States Bankruptcy Judge

Date: July 1, 1997

In re Frankie Lee Sharp, Jr.
Case No. 97-21740
Memorandum Opinion and Order re Objection
to Confirmation and Motion to Avoid Lien

cc:

Irving S. Zeitlin
Attorney for Debtor
100 N. Main, Suite 2005
Memphis, TN 38103

Benjamin T. Wages, Jr.
Attorney for American General
147 Jefferson Avenue, Suite 300
Memphis, TN 38103

George Stevenson
Standing Chapter 13 Trustee
200 Jefferson Avenue, 11th Floor
Memphis, TN 38103