

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE**

In re:

**Bk. No. 99-10642-JMD
Chapter 7**

**Ivan E. Dore,
Debtor**

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Attorney for Debtor*

*Donald R. Routhier, Esq.
Creditor*

MEMORANDUM OPINION

I. BACKGROUND

This matter came before the Court for a hearing on Ivan E. Dore's (the "Debtor") motion to avoid a lien held by Donald R. Routhier (the "Creditor") pursuant to 11 U.S.C. § 522(f)(2).¹ The Creditor holds a judicial lien against the Debtor's residential property located in Milton, New Hampshire, in the amount of \$5,000.00. At the hearing, the Creditor stated that his attachment secured a judgment in the amount of \$4,107.49 (the "Creditor's Lien"). Accordingly, the amount of the Creditor's Lien for purposes of this proceeding shall be \$4,107.49. In addition to the amount of the Creditor's Lien, the parties agree that the sum of all other liens against the subject property equals \$23,149.47 and that the Debtor may claim a \$30,000.00 homestead exemption. These facts define all but one necessary variable in the § 522(f)(2) equation; namely the value of the Debtor's residence.

¹ Unless otherwise noted, all section references hereinafter are to Title 11 of the United States Code.

The value of the Debtor's residence constitutes the heart of the present controversy. At the hearing held on July 14, 1999, the parties offered a variety of evidence regarding the value of the subject property. The Debtor offered an appraisal of the property, which values the property at \$52,000.00 as of April 10, 1989. See Ex. 1, Appraisal dated April 4, 1989. He also offered evidence of a sale of what he alleges is a comparable property, located in the same town as the subject property, which sold for \$50,000.00 within the 60-day period preceding the hearing. See Ex. 2, Listing of 6068 Northeast Pond Rd., Milton, New Hampshire. The Creditor argues that both of these pieces of evidence should be afforded little weight on the ground that the appraisal is roughly 10 years old and the \$50,000.00 sale concerns property that is not comparable to the Debtor's residence. The Creditor offered his own evidence of value at the hearing. He first offered a property assessment record of the property, compiled by the Town of Milton, New Hampshire for property tax purposes (the "Assessment"). See Ex. 101, Residential Assessment Records. The Assessment provides that the total value of the property is \$59,900, which includes value components as of both 1996 and 1999. The Creditor also offered a comparative market analysis of the subject property, dated July 9, 1999, which averages the value of three allegedly comparable properties. This market analysis yields an average value of \$68,906.00. See Ex. 102, Comparative Market Analysis prepared by John Diamond. Not surprisingly, the Debtor argues that the properties used in the Creditor's market analysis are not comparable and therefore are deficient as evidence of value.

The parties offered no expert testimony and none of the evidence proffered by the parties would have been admissible under the Rules of Evidence for United States Courts and Magistrates. However, the parties stipulated and agreed at the hearing that all of the above evidence may be admitted and considered by the Court for purposes of establishing the value of the Debtor's residence. Whether, and to what extent, the Debtor may avoid the Creditor's Lien turns entirely on the value of the Debtor's residence.

The Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the "Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire," dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

II. DISCUSSION

A. Section 522(f)

Section 522(f) establishes a mechanism by which a debtor may avoid certain liens against property. It first states generally that a debtor may avoid certain liens “to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section” See § 522(f)(1). It then determines when a lien “impairs” an exemption by way of a simple equation. Section 522(f)(2)(A) provides:

For the 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.

Section 522(f)(2)(A). Thus, the extent to which a lien may be avoided may be easily computed once four variables are determined: (1) the amount of the lien in question; (2) the sum of all other liens on the property; (3) the amount of the debtor’s exemption; and (4) the value of the subject property. As noted, the only question in this matter is the value of the Debtor’s residence.

B. Fair Market Value

The word “value” as used in § 522 has a special meaning. Section 522(a)(2) provides, in pertinent part, that for purposes of § 522, “‘value’ means fair market value as of the date of the filing of the petition” Section 522(a)(2) (emphasis added). Thus, determining the last variable in the § 522(f)(2)(A) equation requires computing the fair market value of the subject property as of the petition date. Fair market value is generally defined as the “price which a willing seller under no compulsion to sell and a willing buyer under no compulsion to buy would agree after the property has been exposed to the market for a reasonable amount of time.” In re Sumerell, 194 B.R. 818, 827 (Bankr. E.D. Tenn. 1996) (quoting In re Markowitz Building Co., 84 B.R. 484, 487 (Bankr. N.D. Ohio 1988)). See also BFP v.

Resolution Trust Corp., 511 U.S. 531, 538 (1994) (“The market value of . . . a piece of property is the price which it might be expected to bring if offered for sale in a fair market . . . as between a vendor who is willing . . . to sell and a purchaser who desires to buy”) (quoting Black’s Law Dictionary 971 (6th ed. 1990)). All of the evidence offered by the parties goes to fair market value as so defined. Appraisals, comparative market analyses, and property assessment records all are designed, to some extent, to determine the price a willing buyer and seller would agree to, based upon prevailing market conditions. The Court finds, however, that the different pieces of evidence offered by the parties are not equally valuable from an evidentiary perspective. The question thus becomes how each should be treated in arriving at the fair market value of the Debtor’s residence.

C. Computing Fair Market Value

For the purpose of considering a piece of evidence to compute value (i.e., fair market value) in the context of § 522(f)(2)(A), this Court adopts a two-part standard. First, the proffered evidence must be sufficiently reliable and credible to be used in determining the value of the subject property as of the petition date. In other words, it must be determined that the proffered evidence is credible and useful in showing the fair market value of the relevant property. If this question is answered in the negative, then the proffered evidence will not be considered in establishing value. The Court finds that all of the evidence presented by both parties passes this test; each piece is both credible and useful in determining the fair market value of the Debtor’s residence.

Second, if there are multiple pieces of evidence, it must be determined whether they should be weighted equally and if not, how they should be weighted. All evidence of value may not deserving of equal weight. It is often the case that particular pieces of evidence are comparatively more probative of value than others. Consequently, they deserve more weight in arriving at fair market value. The actual weight assigned to a piece of evidence is a determination that turns on the particular facts and circumstances of the case at hand.

The Creditor offers two pieces of evidence of value: (1) the town’s tax assessment; and (2) a comparative market analysis based on three properties. The Court noted at the hearing that the value

established by the town's tax assessment cannot be taken at face value. It is computed for property tax purposes and reflects a value at an unknown point in the past rather than a current value. It cannot be used in the fair market value calculus without adjustment using the town's equalization ratio established by the New Hampshire Department of Revenue Administration, a ratio that reflects assessment values through the lens of recent market conditions. See N.H. RSA 21-J:3(XIII). Because the Creditor conceded this point at the hearing, the Court requested that he submit an affidavit concerning the Town of Milton's equalization ratio on the petition date, March 1, 1999. Taking this directive too literally, the Creditor filed an affidavit with this Court stating that he had spoken with the Town of Milton's tax collector, who informed the Creditor that the equalization ratio for January 1999 has yet to be determined. While the tax collector is technically correct, the Department of Revenue Administration has established an equalization ratio that applies to the Town of Milton as of the petition date. In order to determine the town's most recent equalization ratio, the Court obtained from the New Hampshire Department of Revenue Administration its 1998 Equalization Ratios (the latest figures available), and takes judicial notice of the fact that the Town of Milton's latest equalization ratio is 1.24, a ratio that was applicable as of the petition date.² Thus, the town's tax assessment offered by the Creditor (\$59,900.00) must be adjusted by dividing it by the relevant equalization ratio (1.24), thus producing an equalized assessed value of \$48,306.45. The Court finds that because this equalized assessed value is determined from the town's tax assessment and recent valuation surveys by the New Hampshire Department of Revenue Administration,³ it is equally probative of fair market value as the Creditor's offered comparative market analysis and the Debtor's offered comparable sale valuation and will therefore be weighted accordingly.

² Fed. R. Evid. 201(b) provides that a court may take judicial notice of adjudicative facts that are not subject to reasonable dispute and that are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). The latest equalization ratio of the Town of Milton is such a fact. See Reiner v. Washington Plate Glass Co., Inc., 711 F.2d 414, 416 (D.C. Cir. 1983) (taking judicial notice of a corporation's date of incorporation after the court, on its own initiative, consulted the relevant official records). Judicial notice may be taken at any stage of a proceeding. See Fed. R. Evid. 201(f).

³ See N.H. RSA 21-J:3(XIII) and N.H. RSA 75:1.

The Creditor's comparative market analysis uses three properties that the Creditor alleges are comparable to the subject property. The Debtor, of course, argues otherwise. The market analysis is dated as of July 9, 1999, a date close in time to the petition date. Such timeliness bears well on its probative value and, therefore, the Creditor's comparative market analysis will be weighted equally with the Debtor's offered comparable sale evidence, which also bears badges of timeliness.

The Debtor offers two pieces of evidence: (1) a comparable sale that occurred within the 60-day period preceding the petition date; and (2) an appraisal dated April 10, 1989. As noted, the timeliness of the comparable sale reflects well on its evidentiary import. The Court sees no reason why this piece of evidence should be weighted differently vis-a-vis the Creditor's evidence. Consequently, it will be weighted equally with the Creditor's evidence.

The appraisal offered by the Debtor, however, lacks significant indicia of current market conditions. The Court shares the Creditor's concern that the appraisal is roughly 10 years old. Such datedness decreases the probative value of the evidence. The New Hampshire real estate market has experienced significant fluctuations, both up and down, in the past 10 years. The Debtor made an offer of proof that these fluctuations have balanced out and that the property is worth today what it was 10 years ago. The Court notes that, in general, many properties in New Hampshire have recently recovered some or all of the values lost in the real estate recession of the early 1990's. Consequently, although not of recent origin, the Debtor's 1989 appraisal still offers some evidentiary value. However, due to its age, it will be weighted less than the remaining evidence. The Court finds it appropriate to assign the appraisal a weight of one-third vis-a-vis each other piece of evidence. Accordingly, in determining the fair market value of the Debtor's residence, the 1989 appraisal will be assigned a weight of 10 percent, while the remaining pieces of evidence will each be assigned a weight of 30 percent. Applying the appropriate weights, the Court finds that the fair market value of the Debtor's residence as of the petition date was \$55,363.74, as follows:

<u>Evidence</u>	<u>Valuation</u>	<u>Weight</u>	<u>Weighting Factor</u>
Ex. 1: 1989 Appraisal	\$52,000.00	0.10	\$ 5,200.00
Ex. 2: Comparable Property	\$50,000.00	0.30	\$15,000.00

<u>Evidence</u>	<u>Valuation</u>	<u>Weight</u>	<u>Weighting Factor</u>
Ex. 101: Equalized Assessed Valuation	\$48,306.45	0.30	\$14,491.94
Ex. 102: Comparative Market Analysis	\$68,906.00	0.30	\$20,671.80
		<u>Weighted Final Value</u>	<u>\$55,363.74</u>

D. The § 522(f)(2)(A) Analysis

Having determined the value of the Debtor's residence as of the petition date, the § 522(f)(2)(A) analysis may be made. The sum of the Creditor's Lien, all other liens, and the debtor's exemption equals \$57,256.96.⁴ This exceeds the value of the debtor's interest in the property in the absence of any liens by \$1,893.22.⁵ Accordingly, pursuant to § 522(f)(2)(A), the Debtor may avoid the Creditor's Lien to the extent of \$1,893.22; the remaining \$2,214.27 may not be avoided. See East Cambridge Savings Bank v. Silveira (In re Silveira), 141 F.3d 34, 36 (1st Cir. 1998) (holding that § 522(f)(2)(A) allows a debtor to avoid only so much of a lien that impairs his or her exemption and nothing more).

III. CONCLUSION

For the reasons stated above, the Court grants the Debtor's motion insofar as it allows him to avoid \$1,893.22 of the Creditor's lien. Therefore, the Creditor's judicial lien shall be reduced to \$2,214.27. A separate order shall be entered. This opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052.

DONE and ORDERED this 5th day of August, 1999.

J. Michael Deasy

⁴ \$4,107.49 + \$23,149.47 + \$30,000.00 = \$57,256.96.

⁵ \$57,256.96 - \$55,363.74 = \$1,893.22.

Bankruptcy Judge