

## **STATEMENT OF BASIS OF APPELLATE JURISDICTION**

The case at bar is on appeal, as a matter of right, pursuant to Rule 8001 of the Federal Rules of Bankruptcy Procedure, to this Court from a final order of the U.S. Bankruptcy Court for the Western District of Kentucky.

## **STANDARD OF APPELLATE REVIEW**

It is the contention of the Appellants that the applicable standard of appellate review is that the prior order of the Bankruptcy Court in the case at bar is an error of law and thus should be overturned.

## **STATEMENT OF ISSUES PRESENTED**

I. LIEN AVOIDANCE IS ITSELF SUFFICIENT REASON TO REOPEN A CASE, AS LONG AS A CREDITOR IS NOT PREJUDICED BY REOPENING.

A. CREDITOR TERRY SIMPSON D/B/A S&S VINYL SIDING & GUTTERS WILL NOT BE PREJUDICED IN REOPENING THIS CASE.

B. THIS LIEN AVOIDANCE GRANTS RELIEF TO THE DEBTORS AND THUS IS SUFFICIENT CAUSE TO REOPEN THE CASE.

II. WHILE IT HAS BEEN RULED THAT THE REOPENING OF A CASE IS WITHIN THE SOUND DISCRETION OF THE COURT, THE CURRENT PRINCIPAL APPLIED IN THE WESTERN DISTRICT OF KENTUCKY, PURSUANT TO *IN RE HUNTER*, 164 B.R. 738, (BANKR. W.D. KY. 1994) IS ERRONEOUS IN THAT IT PREVENTS THE COURT FROM USING DISCRETION BY DISALLOWING EVER OPENING A CASE FOR LIEN AVOIDANCE AND FURTHER ATTEMPTS TO CREATE A RULE FOR WHICH THERE IS NO BASIS IN THE BANKRUPTCY CODE OR RULES.

A. THE RULING IN *IN RE HUNTER*, 164 B.R. 738 WOULD DISALLOW A COURT FROM EVER USING THE DISCRETION TO REOPEN A CASE.

\_\_\_\_B. THE CURRENT RULING APPLIED IN THE WESTERN DISTRICT OF KENTUCKY IS ERRONEOUS BECAUSE IT HAS NO BASIS IN THE BANKRUPTCY CODE OR RULES AND SHOULD BE OVERTURNED.

## **STATEMENT OF CASE**

### **INTRODUCTION**

On December 11, 1997, Appellants filed a Chapter 7 bankruptcy petition in the Western District of Kentucky, Bowling Green Division. (Designation of Record 3j, hereinafter referred to as D.O.R.) Appellants listed Terry Simpson d/b/a S & S Vinyl Siding & Gutters as an unsecured creditor in Schedule F with a balance due of \$2,800.00. (D.O.R. 3g) On March 25, 1998, Debtors were discharged of their debts, including that with Terry Simpson d/b/a S & S Vinyl Siding, and said case was closed. (D.O.R. 3e) Unbeknownst to Debtors, due to the mailing of notice to an incorrect address, a judgment lien was obtained by Terry Simpson d/b/a S & S Vinyl Siding and said judgment lien remained on Debtor's property after their bankruptcy case was closed. (D.O.R. 3a) Debtors attempted to reopen their case by motion and have the lien avoided; however, the Motion to Reopen Case to Avoid Lien was denied by the Bankruptcy Court. (D.O.R. 1 and D.O.R. 2)

### **STATEMENT OF THE FACTS**

On July 23, 1997, Creditor Terry Simpson d/b/a S&S Vinyl Siding & Gutters obtained a judgment in Adair Circuit Court, Civil Action No. 94-CI-207 against

Appellants Steve Harvey and Angela Harvey in the amount of \$2,542.00 plus interest at 12% per annum from July 23, 1997. (D.O.R. 3a) A notice of judgment lien was served by Attorney Theodore H. Lavit on Appellants Steve Harvey and Angela Harvey on October 20, 1997 at the following address: 2445 Milltown Church Road, Milltown, KY 42761. (D.O.R. 3a) However, as Debtors had left that address in 1994, they did not receive notice of the judgment lien. It should also be pointed out that Terry Simpson d/b/a S&S Vinyl Siding, on approximately the same date as the filing of the judgment lien, attempted a wage garnishment on Appellant Steve Harvey listing their correct, current address. (D.O.R. 3h)

On December 11, 1997, Debtors Steve Mitchell Harvey and Angela Renee Harvey filed a Chapter 7 Bankruptcy Petition with the United States Bankruptcy Court, Western District of Kentucky. (D.O.R. 3j) In the Statement of Affairs, Appellants Steve and Angela Harvey listed the judgment in Adair Circuit Court under question 4a. and noted the garnishment on Steve Harvey's wages. (D.O.R. 3f) They further listed the debt with Terry Simpson d/b/a S&S Vinyl Siding & Gutters under Schedule F as an unsecured debt in the amount of \$2,800.00. (D.O.R. 3g) Both Terry Simpson and Theodore H. Lavit received notice of the bankruptcy filing. Appellants Steve Harvey and Angela Harvey also listed their house and lot, located at 170 Bliss Road, Columbia, Kentucky 42728 under Schedule A as real property with a value of \$27,000.00 and a secured claim to Bank of Columbia was listed under Schedule D in the amount of \$18,000.00. (D.O.R. 3b and D.O.R. 3d) The unsecured value of the home, \$9,000.00, was exempted in Schedule C citing the Appellants homestead

exemption under KRS §427.060. (D.O.R. 3c) Thus, the claim of Terry Simpson d/b/a S&S Vinyl Siding & Gutters would impair the homestead exemption of Appellants.

The wage garnishment of Terry Simpson d/b/a S&S Vinyl Siding & Gutters was ceased by Order of the Adair Circuit Court following a hearing on January 27, 1998.

(D.O.R. 3i) Appellants were discharged of their debt with Terry Simpson d/b/a S&S Vinyl Siding & Gutters on March 25, 1998 by Order of Judge Henry H. Dickinson.

(D.O.R. 3e)

Appellants Steve Harvey and Angela Harvey discovered after applying for a refinance of their home loan in September, 1998 that a Judgment Lien from Terry Simpson d/b/a S&S Vinyl Siding remained on their home. Appellants then filed a Motion to Reopen Case to Avoid Lien on September 25, 1998 pursuant to Bankruptcy Code, 11 U.S.C.A. §350 and §522(f). (D.O.R. 1) This Motion was denied by Order of Judge David Stosberg on October 9, 1998, citing the court's prior ruling of *In Re Hunter*, 164 B.R. 738, (Bankr. W.D. Ky. 1994). (D.O.R. 2)

### **ARGUMENT**

Steve Harvey and Angela Harvey are appealing the denial of their Motion to Reopen Case to Avoid Judgment Lien.

I. LIEN AVOIDANCE IS ITSELF SUFFICIENT REASON TO REOPEN A CASE, AS LONG AS A CREDITOR IS NOT PREJUDICED BY REOPENING.

A. CREDITOR TERRY SIMPSON D/B/A S&S VINYL SIDING & GUTTERS WILL NOT BE PREJUDICED IN REOPENING THIS CASE.

In *In Re Cummings*, 172 B.R. 268 (Bankr. W.D. Ark. 1994), the court ruled that the motion to reopen case to avoid a lien would be granted because, “The creditor has not incurred any expenses in reviving its lien, or commencing foreclosure.” *Rheinbolt v. Credit Thrift of America, Inc.*, 24 B.R. 167 (Bankr. S.D. Oh. 1982) also found similarly in that “..it does not appear that the creditors have been harmed in the instant case.” and “Mere disappointment at losing a security interest is not sufficient to constitute harm to creditors in the present action.” In the case at bar, the creditor has taken no steps to enforce its lien and thus would suffer no prejudice at the avoidance of the lien.

A third case, *First National Bank of Park Falls v. Maley*, 126 B.R. 563 (W.D. Wisc. 1991), also found that, “Appellant First National has not suggested that it was prejudiced in any specific way by the reopening of Maley’s case. It cannot show prejudice just by the fact that it hoped Maley would forget about seeking lien avoidance until after her case was closed.” The Creditor Terry Simpson d/b/a S&S Vinyl Siding would not be prejudiced in the reopening of this case in that, if this case was remanded to allow the Debtor to reopen the case to file a Motion to Avoid Lien, the Creditor would then have opportunity to object to this lien avoidance.

\_\_\_\_\_B. THIS LIEN AVOIDANCE GRANTS RELIEF TO THE DEBTORS AND THUS IS SUFFICIENT CAUSE TO REOPEN THE CASE.

Bankruptcy Code, 11 U.S.C.A. §350(b) specifically reads, “A case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause.” “The overwhelming majority of courts which have considered

the issue have held that a debtor may seek to avoid a lien after the entry of the discharge order and may even reopen a closed case...in order to do so.” *In Re Quackenbos*, 71 B.R. 693, at 695 (Bankr. E.D. Penn. 1987).

*In Re Quackenbos*, *id.* also refers, in Footnote 1 of the opinion, to the legislative history of the Bankruptcy Code which refers to reopening cases for lien avoidance:

FN1. See S. Rep. No. 95-989, 95th Cong., 2d Sess. 49 (1978); H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 338 (1978), U.S. Code Cong. & Ad. News 1978, p. 5787.

*In Re Ricks*, 89 B.R. 73, (B.A.P. 9th Cir. 1988) cited this same reasoning in their decision that to allow a case to be reopened for lien avoidance. Another issue in *Ricks* is whether or not the debtor had notice that a lien existed on their property. The court found that failure to list the creditor as secured was indicative of the fact that the debtor was unaware of the lien on the debtor’s property and while this does not necessarily grant the debtor the right to later reopen the case to avoid the claim, it does suggest that the failure to file a lien avoidance is more excusable if the debtor did not know of the existence of the lien. The court further stated that “if the appellant would have communicated the character of its claim, then the argument that the failure to avoid the lien was due to excusable negligence would be less persuasive.” *Id* at 76.

II. WHILE IT HAS BEEN RULED THAT THE REOPENING OF A CASE IS WITHIN THE SOUND DISCRETION OF THE COURT, THE CURRENT RULE APPLIED IN THE WESTERN DISTRICT OF KENTUCKY, PURSUANT TO *IN RE HUNTER*, 164 B.R. 738, IS ERRONEOUS IN THAT IT PREVENTS THE COURT FROM USING DISCRETION BY DISALLOWING EVER OPENING A CODE FOR LIEN AVOIDANCE AND FURTHER

ATTEMPTS TO CREATE A RULE FOR WHICH THERE IS NO BASIS IN THE BANKRUPTCY CODE OR RULES.

A. THE RULING IN *IN RE HUNTER*, 164 B.R. 738 WOULD DISALLOW A COURT FROM EVER USING THE DISCRETION TO REOPEN A CASE.

It is generally held that the decision to reopen a bankruptcy case to avoid liens is within the sound discretion of the bankruptcy court. However, as the Bankruptcy Court of the Western District of Kentucky is required to apply the rule imposed by *In Re Hunter*, 164 B.R. 738, this does not allow any judge the discretion to reopen a case in any instance. The order in this case reads, “Hereinafter, all motions to avoid liens shall be filed not later than sixty (60) days following the first date set for the meeting of creditors held pursuant to §341(a). This ruling shall apply prospectively to all cases filed in this District on or after April 1, 1994.” *Id.* As bankruptcy cases are generally closed on their discharge date, approximately sixty days after the 341 Meeting of Creditors, this infringes on the bankruptcy court’s ability to use their discretion by disallowing a case to ever be reopened for lien avoidance.

\_\_\_\_\_It should also be noted that many courts have used that discretion to deny the reopening of a case; however, this usually involved an inordinate delay in bringing the motion to reopen or when paired with prejudice to the creditor. For example, in *In Re Bianucci*, 4 F.3d 526 (7th Cir. 1993), the court held that the Debtors, the Bianuccis, would not be able to reopen their case. However, that was due to the following reasons: 1) PCA, the creditor, had already incurred expenses to revive its judgment in the state court and 2) the Bianuccis had actual knowledge for five months of the judgment lien before bringing

a motion to avoid the lien. In *In Re Caicedo*, 159 B.R. 104 (Bankr. D. Conn. 1993), the court found that it was unreasonable to reopen a case nearly eight years later stating, “I do not believe it is an unfair burden on a debtor who expects to exempt and retain her homestead to require that she...seek to remedy the omission of such liens sooner than eight years after the closing of the case.”

Another reason for denying these motions has been when the same relief could be obtained in state court. In both *In Re Raskin*, 78 B.R. 343 (Bankr. S.D. Flor. 1987) and *In Re Bearden* 204 B.R. 73 (Bankr. N.D. Flor. 1996), the courts refused to reopen cases with the following reasoning “Where the relief sought by reopening the bankruptcy case is equally available under state law, there is no compelling reason to reopen the bankruptcy case for according the same relief.” *Id* at 74.

\_\_\_\_\_ A third and final reason given by the courts for denying the reopening of cases for lien avoidance was that the case had already been reopened once. Both *Busch v. Union Bank & Trust Co.*, 40 B.R. 591 (Bankr. W.D. Penn. 1984) and *Serafini v. Union Bank & Trust Company*, 41 B.R. 880 (Bankr. W.D. Penn. 1984) denied the reopening of cases on the grounds that the debtors had previously reopened their case to add debtors and the court felt that they should be unable to do so a second time.

None of the reasons apply to the case at bar. The Appellants moved to reopen their case as soon as they discovered the judgment lien, the Creditor in this case has incurred no new expenses to enforce this lien, it had not been an extraordinary long time since the closing of the case, there is no similar relief to be accorded in state court, and this case has not previously been reopened.



B. THE CURRENT RULING APPLIED IN THE WESTERN DISTRICT OF KENTUCKY IS ERRONEOUS BECAUSE IT HAS NO BASIS IN THE BANKRUPTCY CODE OR RULES AND SHOULD BE OVERTURNED.

In support of its holding, the court in *In Re Hunter*, 164 B.R. 738 cited the Supreme Court ruling in *Taylor v. Freeland & Kronz*, 503 U.S. 638, 112 S. Ct. 1644 (1992) in which the court strictly enforced a thirty (30) day time limit on objecting to exemptions. The Court in *In Re Hunter* interpreted this to mean that all pleadings in a bankruptcy case must be filed in a timely manner. However, we respectfully disagree and hold the position that the Supreme Court ruling in *Taylor v. Freeland & Kronz*, *id.* was based on the fact that Bankruptcy Rule 4003(b) sets forth a thirty (30) day time limit on objections and the Supreme Court did not intend their ruling to be construed to create time limits that are not supported in the Bankruptcy Code or Rules.

*In Re Hunter*, 164 B.R. 738, at 740 further states, “In order to fulfill the chief purpose of the bankruptcy laws which is to effectuate the prompt administration of every bankruptcy case, we hereby...set a time limit on all lien avoidance motions filed in the Bankruptcy Court in the Western District of Kentucky.” We disagree and cite *In the Matter of Hart*, 16 B.R. 78 at 81 (Bankr. D. Neb. 1981) in support of our position:

...there is nothing in the Bankruptcy Code or Rules or legislative history of either to indicate that §522(f) could be invoked only prior to discharge. The imposition of an artificial deadline for filing a §522(f) complaint in fact runs counter to the congressional intent of the section, that of protecting the debtor’s exemption as well as his discharge...

It would be inconsistent with the congressional scheme of fresh start to deprive an individual filing under the new Code the opportunity to regain his exempt property. The language of the exemption statute should, therefore,

be read to allow the fullest application of its provisions. Accordingly, post-discharge use of the exemptions through lien avoidance will be permitted.

Thus, while it is important to effectuate the prompt administration of bankruptcy cases, this interest is outweighed by the overarching purpose of the Bankruptcy Code to grant the debtor a fresh start.

\_\_\_\_\_ Finally, we urge this court to follow the rule adopted by Bankruptcy Court Judge Joe Lee in the Eastern District of Kentucky in *In Re Lynch*, 187 B.R. 536 (Bankr. E.D. Ky. 1995) and allow Debtors to reopen their case to file a Motion to Avoid Lien on their real estate property. In the court's opinion, Judge Lee cited the Sixth Circuit rule that "...exemption statutes are to be liberally construed in favor of the debtor." *Id* at 550, citing *Doethlaff v. Penn Mut. Life Ins. Co.*, F. 2d 582 (6th Cir. 1941).

### CONCLUSION

Appellants respectfully contend the current rule applied in the Western District of Kentucky is erroneous and is in direct violation of the plain meaning of 11 U.S.C.A. §350, inconsistent with the congressional intent and scheme of a fresh start under the Code, and inconsistent with the majority of bankruptcy decisions in this area of the law. Therefore, we ask that the currently governing ruling of *In Re Hunter* and Judge Stosberg's Order dated October 9, 1998 in this case be overturned and Appellants be permitted to reopen their case in order to move to avoid the lien by Terry Simpson d/b/a S&S Vinyl Siding & Gutters. \_\_\_\_\_

Respectfully submitted,

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## ADDENDUM