

**UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF NEW YORK**

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**In re:**

**Gerry L. & Loretta A. Hartsock,**

**Debtor.**

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**CASE NO. 97-22473**

**DECISION & ORDER**

**BACKGROUND**

On June 30, 1997, Gerry L. Hartsock, Sr. and Loretta A. Hartsock (the "Debtors") filed a petition initiating a Chapter 7 case. On their Schedule B of personal property, the Debtors set forth that Loretta A. Hartsock was the owner of 1990 Grand Voyager van (the "Grand Voyager"), which they valued at \$7,000.00. On their schedule of exemptions, the Debtors: (a) once again listed the Grand Voyager as having a value of \$7,000.00; (b) indicated that they were aware that there was an exemption for a motor vehicle available to them under Section 522 of the Bankruptcy Code and New York Debtor & Creditor Law, Section 282; and (c) claimed an exemption of zero in the Grand Voyager. On their Schedule D, the Debtors indicated that the Grand Voyager was subject to a purchase money security and lien interest in favor of Corestates Bank, which was owed approximately \$7,000.00 on the underlying obligation secured by the purchase money security interest.

The minute report of the Section 341 meeting of creditors conducted by the Debtors' trustee (the "Trustee") on August 29, 1997 indicated that there were possible assets in the estate and that he was investigating whether the lien on the Grand Voyager was properly perfected or subject to avoidance. Thereafter, on November 4, 1997, the Court entered an Order approving the employment of an attorney by the Trustee to investigate and pursue any and all appropriate legal action in

connection with the lien on the Grand Voyager.

On December 12, 1997, the Trustee filed a motion (the "Turnover Motion") requesting that the Court enter an order directing the Debtors to turn over the Grand Voyager to him, as Trustee. The Turnover Motion alleged that: (1) Corestates Bank had conceded to the Trustee that its lien on the Grand Voyager was unperfected and that in lieu of the Trustee commencing an adversary proceeding to avoid the lien, the bank had agreed to waive its lien; (2) the Trustee had demanded that the Debtors surrender the Grand Voyager so that it could be auctioned off in the furtherance of the Trustee's duties pursuant to Section 704(1); (3) the Debtors had refused to surrender the vehicle to the Trustee, now asserting that its fair market value was only \$1,800.00 and that they wished to claim a \$2,400.00 exemption in the vehicle pursuant to the New York Debtor & Creditor Law now that the Corestates Bank lien had been waived and the van was otherwise free and clear of liens; and (4) it was the Trustee's position that the Debtors could not claim an exemption in the Grand Voyager because of the provisions of Section 522(g)<sup>1</sup>, in that: (a) the Trustee's actions in negotiating a waiver

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<sup>1</sup> Section 522(g) provides:

Notwithstanding sections 550 and 551 of this title, the debtor may exempt under subsection (b) of this section property that the trustee recovers under sections 510(c)(2), 542, 543, 550, 551, or 553 of this title, to the extent that the debtor could have exempted such property under subsection (b) of this section if such property had not been transferred, if—

(1) (A) such transfer was not a voluntary transfer of such property by the debtor; and

(B) the debtor did not

of the Corestates Bank lien was the equivalent of avoiding it in an adversary proceeding pursuant to Sections 544 and 550; (b) the Debtors' granting of a purchase money security interest and lien to Corestates Bank was a voluntary transfer within the meaning of Section 522(g)(1)(A); and (c) the Debtors could not have avoided the granting of the security interest and lien to Corestates Bank under Section 522(f)(2).

### DISCUSSION

This Court has previously held in *In re Smith*, 105 B.R. 217 (Bankr. W.D.N.Y. 1989), (J. Hayes) that: (1) a debtor cannot claim an exemption in an asset or the proceeds of an asset to the extent of the value of any lien on the asset which has been avoided by the trustee; and (2) a debtor cannot avoid a non-purchase money security interest in a motor vehicle pursuant to Section 522(f), since a motor vehicle is not one of the enumerated assets set forth in that subsection.<sup>2</sup>

In addition, the Court in *In re Ulrich*, 203 B.R. 691 (Bankr. C.D.Ill. 1997), has, in my view, correctly held that it is not necessary for a Chapter 7 trustee to actually commence a formal adversary proceeding or obtain a final judgment of avoidance in order to prevail on an objection to a debtor's claim of exemption pursuant to Section 522(g). All that is necessary is that the trustee, as in this

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conceal such property; or

- (2) the debtor could have avoided such transfer under subsection (f)(2) of this section.

<sup>2</sup> In this case there was a purchase money security interest granted to Corestates Bank which clearly cannot be avoided pursuant to Section 522(f).

case, be instrumental in the recovery of the property free from a lien which could otherwise have been avoided through a formal proceeding.

**CONCLUSION**

The Trustee's Turnover Motion is in all respects granted. The 1990 Grand Voyager is to be surrendered by the Debtors to the Trustee or his representative within 24 hours of the Debtors' receipt of a copy of this Decision & Order, or at such later time as the Trustee arranges for a surrender of the vehicle, in his sole discretion. The Debtors' claim of an exemption in the 1990 Grand Voyager is in all respects denied.

**IT IS SO ORDERED.**

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/s/  
**HON. JOHN C. NINFO, II**  
**U.S. BANKRUPTCY JUDGE**

**Dated: January 15, 1998**