

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

Michael J. Hofmann

Case No. 94-11781K

Debtor

MEMORANDUM AND ORDER

Debtor here seeks to avoid three judgment liens, pursuant to 11 U.S.C. § 522(f)(1), claiming that they impair his homestead exemption. Two of these judgment liens however, to wit, the ones in favor of Paul E. Rudnicki and Donald Pressing, Jr., were entered prior to the Debtor giving a second mortgage on his house in favor of Jack and Josephine Carpenter in the amount of \$10,000. Pursuant to this Court's ruling in *In re Webber*, No. 93-13294 slip op. (Bankr. W.D.N.Y. Jan. 26, 1994), the Court finds that a debtor who voluntarily grants a second mortgage on her home, subsequent to the entry of judgment liens has, in effect, transferred away her homestead exemption to the extent that that mortgage still exists on the date the bankruptcy petition was filed.¹ (A copy of that decision is attached.)

This Court is aware of the decision, also from this district, of *In re Koehler*, 167 B.R. 773 (Bankr. W.D.N.Y. 1994), holding that where an unavoidable tax lien was entered subsequent to judgment liens, the judgment liens were avoidable to the extent that they impaired the homestead exemption. That decision, however, specifically left open the question presently before the Court, where the subsequent junior lien is a voluntary mortgage, as opposed to an involuntary tax lien. *Id.* at 776. The Court is also aware that the result of this issue might be different in cases filed after October 22, 1994, due to the recent amendments to § 522(f).

¹The *Webber* decision, in fact, stated that the critical amount is the initial face amount of the junior mortgage. Upon further reflection, it is now held that a debtor should be free to pay down the junior mortgage prior to bankruptcy in order to re-acquire § 522(f) (1) rights as to senior judgment liens.

It is ORDERED, that up to the payoff balance of the second mortgage as of the bankruptcy filing date, the motion is denied as to the judgment liens entered prior to the second voluntary mortgage; but the motion is granted to the extent that the Rudnicki and Pressing judgments exceed the said payoff balance. The motion is granted in full as to the subsequent judgment lien taken by the New York State Department of Motor Vehicles.

Dated: Buffalo, New York
December 12, 1994

/s/Michael J. Kaplan

U.S.B.J.