

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

BK. No. 94-21948

In Re:

JOSEPH C. PLANO, JR.,

Debtor.

DECISION & ORDER

BACKGROUND

On September 15, 1994, Joseph C. Plano, Jr. (the "Debtor"), filed a petition initiating a Chapter 7 case. On his schedules the Debtor listed his ownership of a residence at 3320 1/2 E. Lake Road, Livonia, New York ("Lake Road") and indicated that the property had a value of \$76,500.00 and was subject to the following mortgages: (1) a first mortgage in favor of U.S. Mortgage in the amount of \$10,000.00; (2) a second mortgage in favor of Security Norstar Bank in the amount of \$16,245.00; and (3) a third mortgage in favor of Clair P. Sandrock in the amount of \$30,000.00. In addition, on his Schedule F the Debtor listed numerous creditors with the designation of "judgment."

The Debtor claimed a \$10,000 homestead exemption in Lake Road pursuant to Section 522(b) and New York Civil Practice Law & Rules Section 5206. An Order discharging the Debtor was entered on January 4, 1995.

On January 6, 1995 the Debtor filed a motion under Section 522(f)(1) to avoid certain liens (the "Lien Avoidance Motion"). The Motion indicated that the Lake Road property had an appraised value of \$74,000.00; the present balance due on the three mortgages aggregated to approximately \$57,110.00; there were unavoidable federal tax liens of \$43,174.64; and the Debtor claimed a homestead exemption of \$10,000.00. The Motion sought to avoid the following liens:

<u>Lien Creditor</u>	<u>Docket Date</u>	<u>Amount</u>
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Hanrahan Gas & Oil, Inc.	4/27/87	\$1,110.00
Lakelands Concrete	5/15/87	599.85
James & Jocelyne Mahler	7/23/87	1,432.97
R.C.I. Corp.	12/3/87	302.41
Alside Supply Center	12/8/87	4,826.55
New York Commissioner of Labor	1/28/88	5,852.39
Sloan & Company, Inc.	3/23/88	3,115.34
Marine Midland Bank, N.A.	5/26/88	4,766.95
Marine Midland Bank, N.A.	5/26/88	3,130.39
Beverly Plano	7/11/88	18,075.00
Chase Lincoln First Bank	7/15/88	4,835.12
Key Bank of New York	8/23/88	1,428.44
Richard A. Burke, Inc.	8/23/93	5,688.27
New York State Tax Commission	6/28/93	4,240.68

The Lien Avoidance Motion was filed under the default procedure authorized by a Standing Order of the United States Bankruptcy Court for the Western District of New York, dated April 13, 1993, and had a return date of February 1, 1995.

The Motion was unopposed. However, as in the case of all of the Court's default procedures, the Court reserves the right to deny the relief requested, when appropriate, notwithstanding the absence of opposition.

DISCUSSION

Section 522(f)(1) allows the Debtor to avoid judicial liens to the extent an exemption is

impaired.¹ For Title 11, "judicial lien" is defined in Section 101(36).² Pursuant to that definition, the liens the Debtor sought to avoid are judicial liens, with the exception of the liens in favor of the New York State Tax Commission and the New York Commissioner of Labor. These liens are statutory liens.

New York State tax liens arise through the application of warrants, which are provided for statutorily. *See* N.Y. TAX LAW Sections 692(d), 1141(b) and N.Y. LAB. LAW Section 573(2).³ Such liens, therefore, are statutory, not judicial liens, and are not avoidable under Section 522(f)(1).⁴

This Court has specifically held that New York State tax liens are not avoidable under Section 522(f)(1) in *In re Sechrist*, 9 B.R. 862 (Bankr. W.D.N.Y. 1981).⁵

Similarly, a lien in favor of the New York Commissioner of Labor is an unavoidable statutory lien since New York law specifically provides for the issuance of warrants for unpaid amounts due to the Commissioner of Labor, and no judicial intervention or action is required to issue and file the

¹ With the amendments which became effective October 22, 1994, this provision is designated as Section 522(f)(1)(A).

² Section 101(36) reads:

"judicial lien" means lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding.

³ For a comparative discussion of a withholding income tax lien created pursuant to N.Y. TAX LAW Section 692(d), a sales tax lien created pursuant to N.Y. TAX LAW Section 1141(b), and an unemployment tax lien created pursuant to N.Y. LAB. LAW Section 573(2), *see Corrigan v. United States Fire Ins. Co.*, 427 F.Supp. 940, 942-43 (S.D.N.Y. 1977).

⁴ H.R. REP. NO. 595, 95th Cong., 1st Sess., 312 (1977) "In general, the concept of lien is divided into three kinds of liens: judicial liens, security interests, and statutory liens. Those three categories are mutually exclusive and are exhaustive except for certain common law liens."

⁵ *See also 2 Collier on Bankruptcy* ¶101.53 (15th ed. 1995) "Good examples of statutory liens are: tax liens of the United States and local governments."

warrant which results in a lien against real property.⁶

CONCLUSION

The Lien Avoidance Motion is denied as to the liens in favor of the New York State Tax Commission docketed June 28, 1993 in the amount of \$4,240.68 and the New York Commissioner of Labor docketed January 28, 1988 in the amount of \$5,852.39. In all other respects the Lien Avoidance Motion is granted.⁷

⁶ N.Y. LAB. LAW Section 573(2) provides, in pertinent part:

Warrants. In addition and as an alternative to any other remedy provided by this article . . . the commissioner may issue a warrant under his official seal, directed to the sheriff of any county, commanding him to levy upon and sell the real and personal property which may be found within his county of an employer who has defaulted in the payment of any sum determined to be due from such employer for the payment of such sum together with interest, penalties, and the cost of executing the warrant. . . . The sheriff shall within five days after the receipt of the warrant file with the clerk of his county a copy thereof, and thereupon such clerk shall enter in the judgment docket the name of the employer mentioned in the warrant and the amount of the contribution, interest, and penalties for which the warrant is issued and the date when such copy is filed. Thereupon the amount of such warrant so docketed shall become a lien upon the title to and interest in real property and chattels real of the employer against whom the warrant is issued in the same manner as a judgment duly docketed in the office of such clerk.

⁷ The judicial liens are avoided pursuant to the formula set forth in Section 522(f) in the amendments which became effective October 22, 1994. The formula elevates unavoidable statutory liens over judicial liens notwithstanding when the liens were perfected and what might otherwise be state law priorities. When there is equity over unavoidable mortgages and a debtor's exemption, and there are unavoidable statutory liens perfected after various judicial liens, this formula is not consistent with the prior decisions of this Court or the decision of at least one other Bankruptcy Judge in this District. *See In re Kohler*, 167 B.R. 773 (Bankr. W.D.N.Y. 1994). However, Congress has now made its intent clear, none of the judgment creditors in this case objected to the relief requested in the Lien Avoidance Motion, which was filed after the amendment, and the Court elects to exercise its discretion to implement the intent of Congress in this case.

IT IS SO ORDERED.

/s/

HON. JOHN C. NINFO, II
U.S. BANKRUPTCY JUDGE

Dated: May 30, 1995