

**United States Bankruptcy Court
District of New Mexico**

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:
CARLOS LA BADIE,
Debtor.

No. 7-99-14860 S

**MEMORANDUM OPINION ON DEBTOR'S
MOTION TO REMOVE AND AVOID LIEN
OF ZIA CREDIT UNION**

This matter came before the Court for hearing on the Motion to Remove and Avoid Lien of Zia Credit Union filed by the debtor. The debtor appeared through his attorney Douglas Booth. Debtor did not attend the hearing. Zia Credit Union ("Zia") appeared through its attorney James Jurgens. This is a core proceeding. 28 U.S.C. § 157(b)(2)(A) and (K).

Having considered the motion, the file, the stipulated facts filed in the case and the testimony and arguments of counsel, the Court makes the following findings of fact:

1. Debtor filed a chapter 7 petition on August 24, 1999.
2. The first meeting of creditors was scheduled for September 29, 1999. The trustee concluded the meeting on that date and filed a report of no distribution on October 7, 1999.
3. Debtor's spouse, Darlene Labadie, is not a joint debtor in the case.
4. As of the filing, Debtor owned a 1/2 interest in certain real property ("the property") in Alcalde, New Mexico. Darlene Labadie is the other 1/2 owner.

5. Debtor listed the property on his bankruptcy Schedule A as being 50% owned, with a market value of the debtor's interest of \$30,000.
6. There were no mortgages against the property.
7. Debtor claimed his 1/2 interest exempt; no objections were filed to the claimed exemptions.
8. Zia holds a judicial lien against the property by virtue of a transcript of judgment recorded on March 26, 1998 in the amount of \$23,964.68, plus interest. As of August 24, 1999, the amount of the lien was \$27,169.04.
9. Debtor did not appear at the trial of this matter and presented no witnesses on his behalf.
10. Zia's exhibit 1 is an appraisal of the property dated June 17, 1997, which valued the property at \$82,000 using a sales comparison approach. Although the appraisal was not based on a cost approach, the appraisal noted a site value of \$25,000.
11. Zia's exhibits 2 through 6 are credit applications completed by debtor and submitted to Zia with dates ranging from July 1996 through June 1997. The July 1996 application lists the property with a value of \$109,000. The subsequent applications list it at \$100,000. The Court does not find the debtor's property valuations, submitted in a bid to obtain financing, particularly credible or likely to be

accurate.

12. Zia's exhibit 7 is an "Evidence of Property Insurance" for the property showing a dwelling value of \$82,000 for an insurance policy effective July 10, 1997 through July 10, 1998.
13. Mr. Jose Quintana, the appraiser, testified as an expert witness for Zia. In his opinion, the value of the property as of August, 1999 was over \$100,000. This opinion was based on his original appraisal, a recent review of the property, other appraisals that he had done in the area over the last three years, and his general understanding of what the real estate market had done to values in the area since the date of the original appraisal. The Court finds his testimony largely credible, although it also finds that the proposed increase in value over that two-year period (about 25%) is somewhat high.
14. For the purposes of this motion, and as an alternative finding (as discussed below) the Court finds the value of the land and improvements to be at approximately \$95,000, which represents about a 20% increase in value.

The Court makes the following conclusions of law:

1. Debtor failed to meet his burden of proof that he is entitled to avoid Zia's lien: he provided no evidence on

value of the property or the extent to which Zia's lien impaired his homestead. Although the Court can, and did, take judicial notice of the file, the debtor's listing of the property on Schedule A at \$60,000 is not admissible evidence¹, and, based on other testimony and documentary evidence, is also not credible. At the close of Debtor's case, Zia orally moved for a directed verdict, and the Court took the motion under advisement in order to hear the testimony of witnesses that had traveled to Albuquerque. The Court finds that the motion for directed verdict is well taken and should be granted.

The Court also makes the following additional and alternative conclusions of law:

¹See Job v. Calder (In re Calder), 907 F.2d 953, 955 n.2 (10th Cir. 1990)("[T]he bankruptcy court, consistent with Rule 201(b)(2), simply took judicial notice of the contents of Calder's Statement of Financial Affairs and Schedule B-1 and not the truthfulness of the assertions therein."); Leslie v. Leslie (In re Leslie), 181 B.R. 317, 322 (Bankr. N.D. Oh. 1995)("[T]he actual truth of the assertions contained in a Debtor's bankruptcy schedules cannot be ascertained and such assertions are not the proper subject of judicial notice.")(citation omitted); Annis v. First State Bank of Joplin (In re Annis), 78 B.R. 962, 966 (Bankr. W.D. Mo. 1987)("If a fact is in issue in the trial of a case, a court is not permitted judicially to notice it unless it is so manifestly common knowledge or so accurately and readily ascertainable that no reasonable mind could fail to believe it. Under this standard, the bankruptcy court could take judicial notice that the debtors had made certain contentions in the schedules, but that is far from saying that the contentions themselves may be judicially noticed as proof of their truth.")(footnote omitted.)

2. Debtor has a valid homestead exemption in the amount of \$30,000.

3. Bankruptcy Code Section 522(f) provides:

(1) [T]he debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is-

(A) a judicial lien.

(2)(A) 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.

4. In Zeigler Engineering Sales, Inc. v. Cozad (In re Cozad), the United States Bankruptcy Appellate Panel of the Tenth Circuit construed section 522(f)(2)(A) in a case involving joint ownership of a homestead and stated:

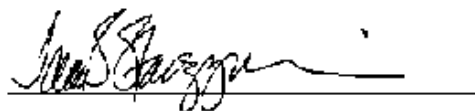
The plain meaning requires that the lien and all other liens on the property be added to the exemption that the debtor would be entitled to, if there were no liens on the property... The statute plainly provides that these items are to be deducted from the debtor's interest "in the absence of any liens." The Bankruptcy Court was correct in deducting the liens from one-half of the fair market value of the property as set forth in the statute.

Cozad, 208 B.R. 495, 498 (10th Cir. B.A.P. 1997).

5. Section 522(f) avoids liens "to the extent" they impair an exemption. The obvious inference from this language is that a lien will be partially avoided if only a portion of the lien impairs the exemption. See Parsons v. Investment Company of the Southwest (In re Parsons), 233 B.R. 176, 1999 WL 41835 at 4 (10th Cir. B.A.P. 1999)(unpublished opinion)(Applying section 522(f)(2), Court adds liens and exemption, subtracts debtors' interest, and reduces lien by the excess.)
6. Had debtor presented a prima facie case, and had the Court still found the value of the property to be \$95,000, the Court would have found that Zia's lien impairs the debtor's exemption in the amount of \$9,669.04 and should have been avoided in that amount, computed as follows:

Mortgages	\$	0.00
Zia's lien		27,169.04
Exemption		<u>30,000.00</u>
Subtotal	\$	57,169.04
Less: Debtors interest		<u>(47,500.00)</u>
Extent of impairment	\$	9,669.04

The Court will enter an Order denying the relief requested in the Motion to Remove and Avoid Lien.



Honorable James S. Starzynski
United States Bankruptcy Judge

I hereby certify that, on the date stamped above, a true and correct copy of the foregoing was either electronically transmitted, faxed, delivered or mailed to the listed counsel and parties.

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