

**2005 BNH 017 Note: This is an unreported opinion. Refer to AO 1050-1 regarding citation.**

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**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEW HAMPSHIRE**

In re:

Bk. No. 03-10934-JMD  
Chapter 13

Mark R. Gagnon and April D. Gagnon,  
Debtors

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**MEMORANDUM OPINION**

**I. INTRODUCTION**

The Court has before it Mark and April Gagnon’s (the “Debtors”) Notice of Amendment to Schedule C (Doc. No. 89) (the “Amendment”) “stacking” the state wildcard exemption under NH Rev. Stat. Ann. § 511:2(XVIII) (“NH RSA”) on top of the homestead exemption and the Debtors’ Motion to Avoid Lien Pursuant to 11 U.S.C. 522(f)(2) (Doc. No. 31) (the “Motion”). Northern Building Supply, Inc. (“Northern Building”) objects to the lien avoidance motion challenging the Debtors’ valuation of the property as well as the stacking of the wildcard exemption.

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the “Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire,” dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

## **II. PROCEDURAL HISTORY**

On December 9, 2002, approximately three months prior to bankruptcy filing, Northern Building obtained an attachment on the Debtors’ homestead in the New Hampshire state district court in the amount of \$6,000.00. The Debtors filed for protection under chapter 13 of the United States Bankruptcy Code on March 21, 2003 (the “Petition Date”). The Debtors listed their homestead on Schedule A (the “Residence”) at a value of \$240,000.00. Schedule C listed a first and second mortgage on the Residence totaling \$133,367.94. Northern Building was listed in the petition as an unsecured creditor but filed a secured proof of claim asserting a \$6,000.00 lien on the Residence.

On January 16, 2004, the Debtors filed the Motion seeking to avoid the Northern Building lien under 11 U.S.C. § 522(f)(2). In the Motion, the Debtors allege the value of the Residence is \$200,000.00, although they have not amended their bankruptcy schedules to reflect that lower value. Northern Building filed an objection to the motion challenging the Debtors’ valuation of the Residence. The parties are in agreement regarding all other numbers in the lien avoidance calculation. After several continuances, an evidentiary hearing was scheduled for December 20, 2004.

The day before the hearing, the Debtors filed a notice of amendment to schedule C, seeking to stack a portion of their unused state wildcard exemption on top of the homestead exemption previously claimed on the Residence. At the hearing, the Court heard evidence on the value of the Residence and allowed additional time for Northern Building to file a written objection to the Amendment with the Debtors having ten days to respond to the objection. Northern Building filed its objection to the Amendment (Doc. No. 92) on January 13, 2005 and the Debtors filed their response (Doc. No. 93) on January 20, 2005. The Court then took both matters under advisement.

### **III. DISCUSSION**

#### **A. Objection To The Amendment**

The Court must first determine whether the Debtors may split their state wildcard exemption to protect multiple items of real and personal property or, as Northern Building argues, they must chose one piece of property for the wildcard exemption. New Hampshire law provides an exemption for:

The debtor's interest in any property, not to exceed \$1,000 in value, plus up to \$7,000 of any unused amount of the exemptions provided under paragraphs III, VI, VIII, IX, XVI and XVII of this section.

NH RSA 511:2(XVIII). In essence, Northern Building argues that "any property" is singular and not plural.

When interpreting a statute, the Court will rely on the plain meaning of the words in the context of statute as a whole. Vaillancourt v. The Granite Group (In re Vaillancourt), 260 B.R. 66, 69 (Bankr. D.N.H. 2001). Looking at the exemption statute as a whole, the Court notes the

New Hampshire legislature used numerically limiting language in eight of the nineteen listed exemptions including one cook stove, one heating stove and one refrigerator (NH RSA 511:2 IV); one sewing machine (NH RSA 511:2 V); one hog and one pig (NH RSA 511:2 X); six sheep (NH RSA 511:2 XI); one cow, a yoke of oxen or a horse (NH RSA 511:2 XII); one pew in any meetinghouse (NH RSA 511:2 XIV); one lot or right of burial (NH RSA 511:2 XV); and one automobile (NH RSA 511:XVII). In contrast, the wildcard exemption was designated to apply to “any” property. If the legislature meant to limit the wildcard to a single piece of property, they would have chosen language that clearly stated their intention. As a general matter, this Court has consistently interpreted exemption statutes broadly. Specifically, this Court has found the legislative history of the amendment creating the wildcard exemption reflected an intent to interpret the exemption broadly. In re Vaillancourt, 260 B.R. at 69. For these reasons, the Court holds the Debtors may use the wildcard exemption to protect multiple items of real and personal property in the bankruptcy estate.

### **B. Valuation of the real property**

The next matter before the Court is the dispute over the value of the Residence. The proper valuation in the context of a motion to avoid lien is the fair market value on the petition date. In re Vokac, 273 B.R. 553, 557 (Bankr. N.D.Ill. 2002).

The fair market value of an asset is “the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of relevant facts.” United States v. Cartwright, 411 U.S. 546, 551 (1973). For obvious reasons, the best evidence of the fair market value of any property

would be the actual sale price between a willing buyer and a willing seller. However, in the context of a chapter 13 bankruptcy proceeding, where the ultimate goal of a debtor is to retain the homestead, not sell it, such evidence will not be offered. Consequently, the Court must rely on valuation methodologies other than actual sale to decide fair market value. However, by definition, all alternative methods of valuation are based on a subjective evaluation of the amount that *could* be obtained in an actual sale. Not surprisingly, in the absence of a comparable sale of identical properties in terms of size, condition, and location, reasonable minds may, and often do, vary regarding the fair market value for a particular property. Variance in opinion of value often results in conflicting testimony by owners and appraisers over the actual value of the property in question. This Court has previously resolved conflicting valuation testimony in the context of a motion to avoid a lien under section 522(f)(2)(A) by examining the testimony and resolving the differences in a weighted average analysis of all reliable and credible evidence presented by the parties. In re Dore, 1999 BNH 028 (adopting an weighted two-part analysis to determine fair market value under section 522(f)(2)(A)).

At the hearing, the Debtors offered no appraisal evidence. Instead, the Debtors presented testimony and written evidence of their attempt to sell the Residence in 2003. The Debtors listed the Residence with a sales broker on May 30, 2003, for \$239,000.00, less than ten days after filing their petition. On August 14, 2003, the Court approved the retention of the broker (Doc. No. 23). Mr. Gagnon testified the Residence was on the market with the broker and listed in the multiple listing service (“MLS”) through December 31, 2003. Mr. Gagnon testified that he determined the listing price after taking into account the actual cost to build the Residence and the amount of proceeds needed pay tax obligations to the Internal Revenue Service. He

testified there were several showings of the house but no offers were received. He also testified that during the period the Residence was on the market several homes in the neighborhood sold at prices ranging from \$169,000.00 to \$189,000.00. No evidence was offered to suggest the Residence was not properly marketed or was not exposed to the market for a sufficient period of time. The Court found the testimony of Mr. Gagnon to be reliable and credible. However, that testimony viewed in the light most favorable to the Debtors does not establish a value for the Residence, but merely the fact that the Residence was likely worth less than the \$239,000.00 listing price on the Petition Date.

Northern Building offered the testimony of a real estate appraiser and his written report. The appraiser testified that the fair market value of the Residence, as of April 13, 2004, was \$246,000.00. The obvious problem with that testimony is the fact that the valuation date is over a year (389 days) after the Petition Date. The Court takes judicial notice that the real estate market for single family residences in New Hampshire between early 2003 and the spring of 2004 was robust due to low mortgage interest rates and a demand which exceeded the supply. However, general market conditions do not form a basis on which the Court can adjust Northern Building's evidence to provide an estimate of the value of the Residence as of the Petition Date.

The appraisal report submitted by Northern Building's appraiser also raised another issue affecting the use of the Report to determine the value of the Residence. Although the Debtors' home is located in a subdivision, the appraiser did not use any home sales in that neighborhood as comparable sales in his analysis of value. Instead, he chose to use houses of comparable quality outside the subdivision in other neighborhoods and made qualitative adjustments to their

sales prices in order to determine a value for the Residence.<sup>1</sup> The neighborhood where the Residence is located is a mixed value subdivision. The appraiser testified that, although there were recent sales in the Debtors' neighborhood, they could not be used to determine the value of the Residence because the quality and size of the homes sold were not comparable to the Residence, even after adjustment. The fact that the Residence is unique or unlike any of the homes sold in its neighborhood in the past year, calls into question a valuation of the Residence which does not take this factor into account. The Court otherwise found the appraiser's testimony reliable and credible regarding the value of the Residence.

The Court finds the Debtor's evidence of an upper limit on the value of the Residence to be entitled to greater weight than the appraiser's testimony for several reasons. First, the Debtors' evidence is based upon actual exposure to the market. Second, that evidence was closer in time to the Petition Date than Northern Building's evidence of value. Finally, the appraiser's valuation of \$246,000.00 for the Residence 389 days after the Petition Date is only 2.93% higher than the Debtors' listing price of \$239,000.00 during the seven month period immediately after the Petition Date. Since several homes in the same neighborhood as the Residence were sold during that period, the evidence suggests that the Residence was worth less than the listing price on the Petition Date.

It is possible that the Debtors and Northern Building have no actual difference between them in their determination of the value of the Residence. If Northern Building's appraisal evidence was subject to a downward adjustment of only three percent to account for the

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<sup>1</sup> The Court notes Mr. Gagnon testified, in his current job, he visits those other neighborhoods on a daily basis, and they are not similar to the neighborhood where the Residence is located.

existence of a generally rising real estate market during the nearly thirteen months between the Petition Date and the date of its appraisal evidence, the difference in value by the parties would be eliminated. However, the appraiser would not give any opinion on the likely change in value of the Residence during that thirteen month period because he had not studied comparable sales around the Petition Date. While the appraiser was correct in not speculating on changes in value in the Residence without data to back up his opinion, the fact remains his testimony of value on April 13, 2004, at best, is the right answer to the wrong question. The factual issue for the Court is the value of the Residence on the Petition Date, not a date thirteen months later.

Similarly, the Debtors' evidence of value presents problems of its own. Testimony regarding the asking price of the Residence when placed on the market for sale is not evidence of the actual value of the home. It does suggest that the value of the house is less than the asking price but nothing more. Again, the issue before the Court is the actual value of the Residence on the Petition Date, not estimated value or range of value.

While the record before the Court is not especially helpful in making the necessary determination of value, it is the only record available. The Court has no choice but to use \$239,000.00 as the Debtors' valuation of the Residence and \$246,000.00 as Northern Building's valuation of the Residence. The Court determines that the Debtors' valuation is entitled to greater weight than Northern Building's valuation because it is closer in time to the Petition Date, is based upon actual exposure to the market, and is offered as a value outside the high range of what the value should be on the Petition Date.



Accordingly, the Court determines the value of the Residence as of the Petition Date as follows:

Debtors' Valuation	\$239,000.00	x	3=	\$717,000.00
Northern Building's Valuation	\$246,000.00	x	<u>1=</u>	<u>\$246,000.00</u>
	Total		4	\$963,000.00
	Weighted Average			\$240,750.00

**C. Application of Section 522(f)(2)(A)**

Based upon the exemptions claimed by the Debtors, the value of the Residence and the agreed upon values for the liens on the Residence, the formula under section 522(f)(2)(A) of the Bankruptcy Code results in the following:

First Mortgage	\$ 73,367.94
Second Mortgage	\$ 60,000.00
Northern Building Attachment	\$ 6,000.00
Homestead Exemption	\$100,000.00
Unused Wildcard Exemption	<u>\$ 8,900.00</u>
Total	\$248,267.94
Less Value of Residence	<u>\$240,750.00</u>
Amount of Impairment	\$ 7,517.94

The impairment of the Debtors' exemptions is \$7,517.94 which exceeds the amount of Northern Building's lien of \$6,000.00, Accordingly, pursuant to §522(f)(2)(A), Northern Building's lien shall be avoided in its entirety.

**III. Conclusion**

For the reasons stated above the Court shall enter a separate order granting the Motion to avoid Northern Building's lien in its entirety. This opinion constitutes the Court's findings of

fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052.

The Court will issue a separate judgment consistent with this opinion.

DONE and ORDERED this 1st day of June, 2005.

/s/ J. Michael Deasy  
J. Michael Deasy  
Bankruptcy Judge