

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

IN RE:)	
)	
PAUL EDWARD HAMPEL,)	Case No. 99-14917
)	Chapter 13
)	
Debtor.)	
_____)	

ORDER DENYING IRS' MOTION FOR SUMMARY JUDGMENT

The United States, acting through the Internal Revenue Service, moves for summary judgment on debtor Paul Edward Hampel's objection to its claim. The IRS appears by Donald N. Dowie, Tax Division, United States Department of Justice, Washington, D.C. Debtor appears by William S. Woolley, of Redmond & Nazar, L.L.P., Wichita, Kansas.

FACTS

Debtor filed his Chapter 13 petition on December 30, 1999. Debtor's schedules reflect a sizeable non-priority unsecured debt owed to the IRS for unpaid income taxes. The IRS filed a secured proof of claim on February 8, 2000, asserting an amount due and owing of \$208,054.89 and a security interest in all of the debtor's property by virtue of a filed Notice of Federal Tax Lien. The IRS asserts that the Notice of Federal Tax Lien was recorded in the office of the Sedgwick County Register of Deeds on April 22, 1993 as provided by 26 U.S.C. §6323. Debtor objected to the IRS proof of claim by filing a Combined Objection and Motion To Determine Nature and Extent of Secured Claim Pursuant to 11 U. S. C. §506. In response to that objection, the IRS filed this motion for partial summary judgment overruling the debtor's objection and

allowing the IRS' secured claim in an amount of "at least \$192,445.00."¹ Debtor timely objected to the IRS' motion for partial summary judgment.

JURISDICTION

The Court has jurisdiction over this proceeding. 28 U.S.C. § 1334. This is a core proceeding. 28 U.S.C. § 157 (b)(2)(K).

ANALYSIS

At issue here is whether the Court can find from the uncontroverted facts and the record before it that the IRS is entitled to summary judgment allowing its secured claim in the amount of \$192,445.00 or more as a matter of law.

Rule 56 of the Federal Rules of Civil Procedure governs summary judgment and is made applicable to adversary proceedings by Rule 7056 of the Federal Rules of Bankruptcy Procedure. Rule 56, in articulating the standard of review for summary judgment motions, provides that judgment shall be rendered if all pleadings, depositions, answers to interrogatories, and admissions and affidavits on file show that there are no genuine issues of any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Fed. R. Bankr. P. 7056. In determining whether any genuine issues of material fact exist, the Court must construe the record liberally in favor of the party opposing the summary judgment. McKibben v. Chubb, 840 F.2d 1525, 1528 (10th Cir. 1988) (citation omitted). An issue is "genuine" if sufficient evidence exists on each side "so that a rational trier of fact could resolve the issue either way" and "[a]n issue is 'material' if under the substantive law it is essential to the proper disposition of the claim." Adler v. Wal-Mart Stores, Inc., 144 F.3d 664, 670 (10th Cir. 1998).

¹United States' Memorandum, p. 4.

Debtor's claim objection asserts that the IRS' secured claim should be allowed in the amount of \$6,642.00. In his detailed response to the government's motion, the debtor sets out a series of allegations concerning the extent of debtor's holdings, the degree to which they are encumbered, and debtor's evaluation of them. The government responds that its secured claim should be allowed in an amount equal to the scheduled value of the debtor's assets and seeks summary judgment to that effect.

The government's claim is presumed valid under 11 U. S. C. §502 and Fed. R. Bankr. P. 3001(f). The objecting party (here the debtor) bears an initial burden of proof to overcome that presumption. In re Schaumburg Hotel Owner Limited Partnership, 97 B.R. 943, 950 (Bankr. N. D. Ill. 1989). As numerous courts have held, that burden is easily borne and if the objector makes such a case, the ultimate burden of persuasion falls upon the claimant to demonstrate by a preponderance of the evidence both the extent of its lien and the value of its collateral. See In re Roberts, 210 B.R. 325 (Bankr. N. D. Iowa. 1997); In re Robertson, 135 B.R. 350 (Bankr. E. D. Ark. 1992) (citing In re Schaumburg, 97 B.R. at 950); In re Buick, Inc., 126 B.R. 840, 851 (Bankr. E.D. Pa. 1991) ("Throughout the [Bankruptcy] Code, the burden of proving the 'validity, priority, and extent' of security interests lies upon the creditors asserting such interests.")

The amount owed to the IRS by the debtor does not appear to be in dispute. However, there remains a considerable and material dispute over the extent and value of the IRS' "collateral." At trial, the debtor would be charged with bringing forth evidence sufficient to rebut the presumption of validity attributed to the government's claim that it holds a lien on all of debtor's assets to the extent of the value IRS attributes to them. Once debtor did so, the IRS would be required to prove by a preponderance of the evidence the values it asserts as to debtor's property. On summary judgment, however, the Court is required to construe the record liberally

in favor of the debtor. In so doing, the Court finds material disputes as to the extent of debtor's assets and their values. For instance, debtor states that although he conveyed out to his non-debtor wife certain real property at 1063 Stratford in Wichita, Kansas, in 1991 (before the Notice of Federal Tax Lien was recorded), he listed this property on his schedules to disclose his "forced share" in same.² As debtor claims no present interest in the property other than his "forced share," he believes this asset to be without value.³ The IRS, on the other hand, asserts that the value of debtor's "forced share" should be set at the amount put forth in the schedules.⁴ The IRS apparently believes that the "forced share" is a presently tangible and realizable interest in the debtor's property to which its lien may attach. The facts bearing on this issue are far from uncontroverted and IRS itself concedes that the value of debtor's property remains in issue for trial.⁵

Both IRS' memorandum and debtor's response speak at length concerning the effect of exemptions on the allowance of the government's secured claim. Since neither party has filed any pleadings placing these exemptions squarely at issue, the Court declines further consideration of this issue until the time of trial on the claims objection and confirmation of debtor's plan.

In summary, substantial controversy surrounds the value of debtor's assets and even the

² The Court assumes the debtor is referring to his right of intestate succession or elective share to which he is entitled under the Kansas Probate Code. See Kan. Stat. Ann. 59-504 et seq. and 59-6a202.

³ Debtor's Memorandum, Statement of Material Facts, ¶ 1.

⁴ United States' Memorandum in Support, p. 3. The Court need not rule at this point on the probative weight of *scheduled* values as the schedules themselves are not yet in evidence. The Court is intrigued by the debtor's allegation in the first instance that he has no interest in the Stratford property while describing same on his Schedule A and attributing substantial value thereto.

⁵ United States' Memorandum, p. 3.

movant concedes that the issue remains open. Therefore, the Court finds that genuine issues of fact and law remain and the government is not entitled to judgment as a matter of law overruling debtor's claims objection. The Court further finds that debtor has borne its preliminary burden to rebut the presumptive validity of the IRS claim and that, at trial, the IRS will have the burden to demonstrate by a preponderance of the evidence both the extent and the value of its "collateral." The United States' partial motion for summary judgment is DENIED and the parties are instructed to proceed with any necessary discovery as this matter will be set for pretrial conference at the Court's early convenience.

Dated at Wichita, Kansas, this 1st day of August, 2000.

ROBERT E. NUGENT
UNITED STATES BANKRUPTCY JUDGE

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the **ORDER DENYING IRS' MOTION FOR SUMMARY JUDGMENT** was deposited in the United States mail, postage prepaid on this 1st day of August, 2000, to the following:

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