

11 USC 101(36)	ORS 107.105(1)(f)
11 USC 101(37)	ORS 23.170(2)
11 USC 522(f)	29 USC 1056(d)(1)
11 USC 523(a)(5)	29 USC 1056(d)(3)

In re Hyman Case No. 391-32030-S7

12/12/91

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Unpublished

The debtor's motion to avoid his former wife's interest in his pension was denied. The interest created by the divorce court was not a judicial lien subject to avoidance under §522(f). The pension was accumulated during the marriage, and was a marital asset subject to division.

The circuit court decree was a qualified domestic relations order excepted from the anti-alienation provisions of ERISA.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re:) Bankruptcy Case No.
) 391-32030-S7
GODFREY ARTHUR HYMAN,)
)
Debtor.) MEMORANDUM SUPPORTING ORDER
) DENYING DEBTOR'S MOTION TO
) AVOID NANCY HYMAN'S INTEREST
) IN U.S. WEST RETIREMENT PLAN

The debtor filed a motion to avoid what he characterized as a judicial lien in favor of his former wife against his U.S. WEST retirement account. The motion should be denied because Nancy Hyman's interest in the pension is not a judicial lien avoidable under § 522(f). My reasons follow.

In October 1989, the Multnomah County Circuit Court entered an order of dissolution and a Qualified Domestic Relations Order awarding Nancy Hyman 72% of the debtor's pension benefits from U.S. WEST. Debtor alleges that these orders are judicial liens which he can avoid as impairing the exemption in his retirement plan granted by O.R.S. 23.170(2). Debtor's motion alternatively alleges that the order

constituted a preferential transfer and is avoidable under 11 U.S.C. § 548.

Nancy Hyman contends that her interest is not a judicial lien, and alternatively, if it is a lien, it was created for spousal support and is not dischargeable under 11 U.S.C. § 523(a) (5). Neither party filed a complaint which is normally required to avoid a preferential transfer or fraudulent conveyance under 11 U.S.C. §§ 547 or 548, or to determine the dischargeability of a debt under 11 U.S.C. § 523.

Nancy Hyman's interest in the debtor's U.S. WEST pension is not a judicial lien subject to avoidance under § 522(f). A pension accumulated during the marriage is a marital asset that is subject to division. O.R.S. 107.105(1) (f), In re Teichman, 774 F.2d 1395 (9th Cir. 1985), In re Wood, 96 Bankr. 993 (Bankr. 9th Cir. 1988), Maidel and Maidel, 108 Or. App. 702, 816 P.2d 1206 (Or. App. 1991). Normally, a person's interest in a pension plan may not be assigned or alienated. 29 U.S.C. § 1056(d) (1). Congress excepted from this prohibition transfers by a qualified domestic relations order of a state court concerning the division of marital property, or for child support or alimony. 29 USC § 1056(d) (3). According to the letter attached as Exhibit A to the debtor's memorandum filed October 8, 1991, U.S. WEST determined that the Circuit Court's Order met the

PAGE 2 - MEMORANDUM

requirements for assignment of retirement benefits as a qualified domestic relations order.

The Bankruptcy Code, § 522(f)(1), allows the debtor to avoid the fixing of a lien on an interest of the debtor in property, to the extent that the lien impairs an exemption, if the lien is a judicial lien. A judicial lien is defined as a "lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding." 11 USC § 101(36). A lien is a "charge against or interest in property to secure payment of a debt or performance of an obligation." § 101(37). The Circuit Court's Order does not constitute a lien against the debtor's property. It was not granted to secure the payment of a debt or performance of an obligation. The Circuit Court judge divided the marital property between the parties and awarded Nancy Hyman 72% of the U.S. WEST pension. The effect of the order was more in the nature of a property division which awarded the wife two lamps and the husband one lamp, than it was a transfer of title of a house to the husband and entry of a judgment for the wife against the house for payment of her share of the equity.

The award to the wife of her own property is not a preferential transfer or a fraudulent conveyance. Further, the dissolution decree effecting the transfer was entered more than one year before the bankruptcy petition was filed, and is not

subject to avoidance under §§ 547 or 548.

Alternatively, and to the extent that the dissolution decree resulted in an obligation by the debtor and a lien against his retirement plan rather than a property division, the obligation is for spousal support. The Circuit Court judge was quite clear in her reasons for awarding 72% of the pension to Nancy Hyman. Anything beyond an equitable property settlement was for permanent spousal support under O.R.S. 107.105(1)(d). Such an obligation is not dischargeable under 11 U.S.C. § 523(a)(5).

To the extent that Nancy Hyman's interest in the U.S. WEST retirement account constitutes a lien for the obligation to pay support, it is not an avoidable lien. The lien did not attach to an interest of the debtor which was unencumbered by Nancy Hyman's interest under Farrey v. Sanderfoot, 500 U.S. ___, 111 S.Ct. 1825 (1991). The pension is a marital asset, and subject to division under O.R.S. 107.105(1)(f) and 29 U.S.C. § 1056, so Nancy Hyman had an interest in the pension before the entry of the dissolution decree which creates the lien. In addition, a person's interest in a retirement plan is not exempt from execution or other process arising out of a support obligation. O.R.S. 23.170(3)(b). To the extent Nancy Hyman's interest in the U.S. WEST fund is a lien, it is for a support obligation and the exemption does not protect the

debtor.

The debtor's motion to avoid Nancy Hyman's interest in the U.S. WEST pension should be denied. A separate order will be entered.

DATED this _____ day of December, 1991.

DONAL D. SULLIVAN
Bankruptcy Judge

cc: Joseph W. Maylie
Charles D. Gazzola
U. S. Trustee
Donald H. Hartvig

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re:) Bankruptcy Case No.
) 391-32030-S7
GODFREY ARTHUR HYMAN,)
)
Debtor.) ORDER DENYING DEBTOR'S
) MOTION TO AVOID NANCY
) HYMAN'S LIEN

After a hearing on October 15, 1991, a review of the post-hearing submissions of the parties, and for the reasons set forth in a separate memorandum,

IT IS ORDERED that:

(1) The debtor's motion to avoid Nancy Hyman's interest in his U.S. WEST retirement plan is denied.

2) To the extent Nancy Hyman's interest in the retirement plan is an obligation and lien rather than a property division, the obligation is in the nature of spousal support, and is not dischargeable in bankruptcy under 11

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U.S.C. § 523(a)(5).

DATED this _____ day of December, 1991.

DONAL D. SULLIVAN
Bankruptcy Judge

cc: Joseph W. Maylie
Charles D. Gazzola
Donald H. Hartvig
U. S. Trustee