U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

IN RE:	§	
	§	
KENNETH MICHAEL ROBERSON and PAULA CARTER ROBERSON	§	**BANKRUPTCY CASE NO. 03-70750 HDH-7**
	§	
DEBTORS	§	
KENNETH MICHAEL ROBERSON and PAULA CARTER ROBERSON	§	
	§	
Plaintiffs	§	**ADVERSARY PROCEEDING NO 03-7018**
	§	
v.	§	
	§	
VIVIAN SWEARINGIN	§	
	§	
Defendant	§	
VIVIAN SWEARINGIN	§	
	§	
Plaintiff	§	**ADVERSARY PROCEEDING NO. 04-7001**
	§	
v.	§	
	§	
KENNETH MICHAEL ROBERSON and PAULA CARTER ROBERSON	§	
	§	
Defendants	§	

MEMORANDUM OPINION

Before the Court is an adversary proceeding wherein Debtors seek to avoid a lien on their alleged homestead. Defendant Mrs. Swearingin, the alleged secured creditor, through counterclaims and a separate adversary proceeding, seeks to except from discharge her claims against the Debtors for monies obtained by false pretenses and also to bar the Debtors' discharge,

claiming that Debtors' made a false statement in their schedules and statement of affairs filed with the bankruptcy case. The adversary proceedings were consolidated for trial purposes.

On May 19, 2004, this Court conducted the trial of the these adversary proceedings in Wichita Falls. The Defendant is now living in a care facility and was unable to testify regarding the facts of her case. Defendant's nephew, who is now handling her legal affairs, testified briefly. Debtors both testified and Mr. Roberson's father testified. An attorney who prepared some of the loan documents in question testified via deposition.

After reviewing the testimony and documents offered into evidence, the Court makes the following findings and conclusions.

Homestead Claim

The Debtors seek to avoid Mrs. Swearingin's lien on a 1.79 acre tract on which sits a house and a store. The home and store, which is attached to the home, had been the Debtors' homestead for several years before the loan in question was entered into. One or both of the Debtors occupied the house and ran the store at least since 1995. Mrs. Swearingin visited the house and store on several occasions and witnessed the Debtors' use of the property. When she made the loan in question, she was aware of the Debtor's use of the property for homestead purposes. At the time of the loan, neither of the Debtors owned, occupied or claimed any other tract of land as a homestead, and the homestead had not been abandoned. The loan documents in question do not disclaim the property as homestead property.

The Lien

The Deed of Trust lien in question was filed of record after the Debtors began to use the property as homestead and just after the Debtors acquired title to the property. The Deed of Trust

lien, therefore, was placed on the homestead of the Debtors. The lien is not purchase money, nor does it otherwise qualify as a valid lien against homestead property under Texas law. Therefore, it may be set aside under the Bankruptcy Code.

Dischargeability

Mrs. Swearingin did not show by a preponderance of the evidence that the Debtors obtained the loan under false pretenses. In fact, the evidence shows that she made the loan in question to the Debtors with full knowledge that the Debtors were living on the 1.79 acre tract and using it as a homestead. In addition, the record suggests that Mrs. Swearingin was in the business of making somewhat risky loans. Until she became incapacitated, she made a number of loans, such as the present one, to borrowers like the Debtors. She was fully aware of the property upon which she sought a lien. She had the advice of a banker, who also apparently gave her financial advice.

Discharge

Debtors omitted from their schedules a mention of an RV. Some time in May of 2002, the Debtors became unable to pay for the RV. The lienholder sent a repossession company to repossess the RV sometime between May and early September. To avoid the repossession of the RV, Mr. Roberson's father entered into an agreement with the lienholder pursuant to which the lienholder agreed to release his lien on the RV in exchange for $30,000.00 to be paid by the elder Mr. Roberson. Mr. Roberson's father subsequently paid the $30,000.00 as agreed, and the lienholder released his lien on the RV. In early September, 2002, some time after the agreement was entered into between the lienholder and Mr. Roberson's father, the Debtors transferred the title to the RV to Mr. Roberson's father. Although the title was transferred within one year of the

filing of the bankruptcy petition, the Debtors believed that they had given up the RV when Mr. Roberson's father struck the deal with the lienholder, which occurred outside the one year period covered by the schedules and statement of affairs for transfers of property. The RV appears to have little, if any, equity value and therefore the omission of the vehicle from the schedules was, in this case, not material. The Debtors' default and the elder Mr. Roberson's arrangement with the lienholder on the vehicle were more than one year before the instant case was filed. Technically, title transferred within the one year period, but it is understandable that the Debtors did not make that legal distinction. To them, they lost the vehicle outside the one year period. Finally, the RV sits on the property line between Debtors' and Mr. Roberson's father. The openness with which the vehicle is displayed is evidence that the Debtors are not attempting to hide the vehicle or its transfer from any person. Having observed the Debtors testify, this fact finder does not believe that the Debtors omitted the mention of the RV with the intent required under Bankruptcy Code Section 727 to bar Debtors' discharge.

Equitable Subrogation

Mrs. Swearingin's claim for equitable subrogation is based upon her claim that her loan proceeds were used, in part, to pay off a valid mechanics lien against Debtors' property. The evidence offered at trial indicated that the funds were placed into Debtors' hands and that Debtors then decided whom to pay. Debtors' testimony on this point was not refuted by any evidence offered on behalf of Mrs. Swearingin. There was no express agreement in the loan documents to retire any of the claims against Debtors or their property.

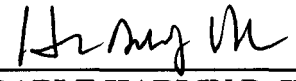
Evidence

Mrs. Swearingin's case was difficult to prove because she is incapacitated and was not

able to testify at trial. Her nephew's testimony supported her positions, but since he was not present when the loans were made, his testimony has less persuasive effect than a witness who had first hand knowledge. The Debtors were credible. Their testimony persuaded this fact finder to believe their version of the events in question. Their version was further supported by the testimony of Mr. Roberson's father. The preponderance of the evidence is in favor of the Debtor on the claim of homestead, discharge, dischargeability and subrogation.

Accordingly, judgment will be entered in favor of the Debtors.

Signed this 15 day of June, 2004.



HONORABLE HARLIN D. HALE
UNITED STATES BANKRUPTCY JUDGE