IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA ROANOKE DIVISION

) CASE NO. 05-70933) CHAPTER 7
)
) MEMORANDUM DECISION and ORDER
)
) upon
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) MOTION FOR RELIEF FROM STAY
)
and
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MOTION TO AVOID LIEN
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The Motion for Relief came on for hearing before the Court on May 17, 2005.

The Debtors failed to file a response to the Motion but appeared in Court to contest the same and filed a Motion to Avoid Lien. The Motion for Relief was filed on April 21, 2005 and the Court in accordance with its standard procedures issued a pre-hearing order on April 22, 2005 directing, among other things, that the Movant file a certification of various information pertinent to such Motion. Although some of the information required by such pre-hearing order was included in the Motion for Relief, not all of it was and the Movant failed to file at any time the certification required by such pre-hearing order. Accordingly, it is ORDERED that the Motion for Relief is DENIED on procedural grounds for failure to comply with this Court's order. Such Denial is without prejudice to the Movant's right to file such certification and a new notice of hearing upon its Motion.

With the consent of counsel for Southeastern Lending, the Debtors' Motion to

Avoid Lien was also heard on May 17 although it had just been filed on May 16. Counsel for Southeastern Lending filed an Objection to such Motion. The Debtors have claimed that their Nissan truck is exempt on varying grounds, initially to the extent of \$4,000 by Va. Code § 34-26(8), next by claiming a portion of its value exempt by means of a homestead deed filed pursuant to Va. Code § 34-4, and lastly after the hearing on the basis of the assertion made during the hearing that time that the truck was necessary for the male Debtor's occupation as a minister and therefore exempt to its full indicated value of \$7,850 under the exemption provided by Va. Code § 34-26(7). The exemption pursuant to § 34-26(8) is not properly claimed because the creditor has a perfected security interest in such vehicle as evidenced by the copy of the certificate of title filed with its Motion for Relief from the Stay, an exception provided by such Code section to that exemption. The exemption pursuant to §34-4 is not properly claimed because the homestead deed was not timely filed within five days of the date originally set for the 341 meeting of creditors as mandated by § 34-17(A). Insufficient proof has been offered to support a claim of exemption pursuant to § 34-26(7) because, as counsel for Southeastern points out, the Debtors' Schedule I reports the male Debtor's occupation as that of electrical field engineer, from which he earns a gross salary of \$4,000 per month, and their Statement of Affairs reports no additional source of income for him for either the current year or the preceding two years. Accordingly, his contribution, apparently, of his services as a minister of the gospel, while no doubt commendable, cannot be deemed an occupation or trade within the meaning of § 34-26(7) and no evidence was offered that he needed his truck for his principal occupation of electrical field engineer for anything other commuting to and from work, again an exception to the exemption provided bu such subsection. While the failure of the Trustee or any other party in interest to object to the various exemption claims may result in the claim of exemption being

valid against the Trustee and general creditors pursuant to Federal Rule of Bankruptcy Procedure 4003, it does not affect the right of a perfected lien creditor to contest a motion to avoid its lien on the ground that the exemption claimed by the debtor does not apply. *See Crowell v. Theodore Bender Accounting (In re Crowell)*, 138 F.3d 1031 (5th Cir.), *mandamus denied*, 552 U.S. 807 (1998). Accordingly, it is ORDERED that the Motion to Avoid Lien is DENIED without prejudice to the Debtors' right to file an amended motion and notice of new hearing if they be advised that some other proper legal ground for avoidance of Southeastern Lending's security interest is proper under the applicable facts and law.

The Clerk is directed to serve this Memorandum Decision and Order upon the Debtors, their counsel, counsel for Southeastern Lending, the Chapter 7 Trustee, and the Office of the United States Trustee for this District.

ENTER this 27th day of May, 2005.

UNITED STATES BANKRUPTCY JUDGE