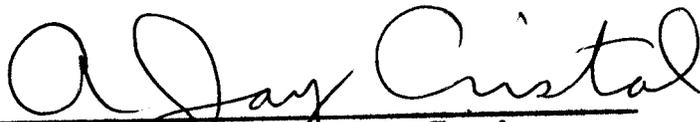


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ORDERED in the Southern District of Florida on October 24, 2006.




A. Jay Cristol, Chief Judge Emeritus
United States Bankruptcy Court

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

In re: Case No. 05-41909-BKC-AJC
Chapter 7
JUAN CASTRO,
Debtor.

**ORDER SUSTAINING IN PART AND OVERRULING IN PART
TRUSTEE'S OBJECTION TO DEBTOR'S CLAIMED EXEMPTIONS**

THIS CAUSE came before the Court for hearing on the 16th day of August, 2006 at 2:00 p.m., upon the Trustee's Objection to Debtor's Claimed Exemptions. The Court, having reviewed the record and Trustee's Exhibits, heard argument of counsel, and being otherwise duly-advised in the premises, makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

Debtor, JUAN CASTRO, filed a voluntary bankruptcy petition under Chapter 7 of Title 11 of the United States Code on October 5, 2005. Barry E.

Mukamal is the duly-appointed and acting Chapter 7 Trustee of the bankruptcy estate.

The Debtor has listed the following personal property in Schedule "B" of his bankruptcy schedules:

- a. Cash valued at \$5;
- b. Washington Mutual Bank Account #xxx-xxx120-1 valued at \$25.00;
- c. Total Bank, checking account xxxxxx5106 (Proceeds from Sale of Homestead) valued at \$34,455.00;
- d. Sofa, 2 side chairs, Dining Table w/4 chairs, 19" T.V., Stereo, Cooking Utensils, Coffee Maker valued at \$200.00;
- e. Used Clothing valued at \$25.00; and,
- f. 1994 Toyota Camry LE Sedan 4D valued at \$1,200.00.

The Debtor has declared as exempt the entire value of the: Cash; Used Clothing; Sofa, 2 side chairs, Dining Table w/4 chairs, 19" T.V., Stereo, Cooking Utensils, Coffee Maker; 1994 Toyota Camry; Washington Mutual bank account; and the Total Bank account.

The Debtor's Rule 2004 Examination, *duces tecum*, was conducted by the Trustee on the 21st day of March, 2006.

The Debtor is a Dominican National who, although holding a Dominican Passport, is a permanent resident alien of the United States.

In July 2005, pursuant to a pre-petition marital settlement agreement, Debtor quit-claimed his interest in his former residence to his former spouse

(Inocencia Pichardo) for the sum of \$40,000.00. In August 2005, the Debtor received \$37,000.00 of the \$40,000.00, after his former spouse setoff a balance of an alleged debt owed to her at the time of the closing on the refinancing of the former marital home.

Debtor placed the \$37,000.00 sale proceeds ("Sale Proceeds") into a segregated bank account on September 12, 2005, at Total Bank shortly before filing bankruptcy. Pre-petition, Debtor dissipated \$2,165.85 of the Sale Proceeds, and as of the October 5, 2005 petition date, Debtor held the sum of \$34,834.15 in the Total Bank account. Since the filing of the petition commencing this case, the Debtor has dissipated the sum of \$9,910.00 ("Dissipated Sale Proceeds"), leaving the sum of \$24,924.15 ("Remaining Proceeds") in the Total Bank Account.¹

Debtor has stated that he intends to use the Sale Proceeds to purchase a new homestead and has claimed the Sale Proceeds as exempt. The Trustee disputes the Debtor's intentions and has filed an objection seeking the following relief: 1) surrender and turnover of the Remaining Proceeds (\$24,924.15) in the Total Bank Account, after allowing the Debtor a "reasonable time" to reinvest same into a new homestead as Debtor argues he wants to do; and, 2) payment and turnover to the Trustee of the sum of \$9,910.00 – representing the post-petition Dissipated Sale Proceeds that the Trustee argues were not intended to be reinvested in a new homestead. (The Trustee also seeks surrender and

¹ Debtor and Trustee have stipulated that none of the Dissipated Proceeds have been used for the purchase of a new homestead, but have been used for items such as: food, clothing, furnishings, emergency repair of Debtor's automobile, payment of bankruptcy counsel's fees and costs, and school expenses for Debtor's child.

turnover of the Debtor's 2005 United States income tax refund, received post-petition. However, at the hearing, the Court addressed only the Trustee's objection to exemptions and advised the parties to either resolve the tax refund issue or set the matter for hearing.)

CONCLUSIONS OF LAW

The proceeds from the sale of homestead property may be exempt under the Florida Constitution as long as the Debtor intends to reinvest same within a reasonable period of time subsequent to the sale of his interest in the former residence. See, e.g., *In re Binko*, 258 B.R. 515, 518 (Bankr. S.D. Fla. 2001) (only that portion of proceeds from the sale of debtor's homestead that debtor intends to reinvest in another homestead are exempt). To claim sale proceeds as exempt, the Debtor must show that: 1) he has a good faith intention, prior to and at the time of the sale, to reinvest the proceeds in another homestead within a reasonable time; 2) the funds must not be commingled with other monies; and, 3) the proceeds must be kept separate and apart and held for the **sole** purpose of acquiring another home. See *Orange Brevard Plumbing & Heating Co. v. La Croix*, 137 So.2d 201, 206 (Fla. 1962) (emphasis added).

The Trustee disputes the Debtor's intention to reinvest the Sale Proceeds in a new homestead. The Trustee contends the Debtor does not have the good faith intent to reinvest the Sale Proceeds in a new homestead because he has bad credit and will not qualify for financing. Though the Trustee may be correct in his assessment of the Debtor's credit worthiness, such a fact does not meet the burden of proof necessary to overcome the Debtor's stated intention. It is the

obligation of the objecting party to make a strong showing that the debtor is not entitled to the claimed exemption. See *In re Harrison*, 236 B.R. 784, 786 (Bankr. M.D. Fla. 1999); *In re Imprasert*, 86 B.R. 721, 722 (Bankr. M.D. Fla. 1988). The Trustee has made no such showing.

Notwithstanding the Debtor's good faith intention, the Trustee further objects to the claimed exemption on the basis that the Debtor did not, and has not reinvested the Sale Proceeds within a reasonable period of time. The Court finds the basis of this objection to be well founded. Much time has passed since the Debtor sold his homestead and he has yet to reinvest the Sale Proceeds in another home. However, as discussed at the hearing on the record, the Court agrees that a reasonable amount of time to reinvest sale proceeds may sometimes be as long as 2 years. See, e.g., *In re Kalynych*, 284 B.R. 149, 151 (Bankr. M.D. Fla. 2002). It has been about 1 year since the Debtor received the Sale Proceeds and the Court believes that additional time may reasonably be needed to reinvest the Sale Proceeds, particularly in today's housing market. An approximate two-year period to reinvest the Remaining Proceeds in a new homestead seems a fair and equitable resolution. Accordingly, the Court will afford the Debtor until October 30, 2007 within which to reinvest the Remaining Proceeds in a new homestead which will be exempt. If the Debtor is unable to reinvest the Remaining Proceeds by that date, then upon the filing of an appropriate motion, the Court may consider whether granting additional time [to reinvest the Remaining Proceeds] is reasonable, so as to maintain the exempt status of the proceeds.

As for the Dissipated Sale Proceeds, no good faith intention can be argued as the proceeds were spent on matters that were clearly not intended for the acquisition of a new homestead. See *Rossano v. Britesmile*, 919 So.2d 551 (Fla. 3rd DCA 2005) (only the proceeds of the sale which are intended to be reinvested in another homestead may be exempt; any surplus over and above that amount should be treated as general assets of the debtor) quoting *La Croix*, 137 So.2d at 206; *SunTrust Bank Miami v. Papadopoulos*, 740 So.2d 594 (Fla. 3rd DCA 1999) (exemption protecting proceeds of voluntary sale of homestead from claims of creditors applies only if vendor intends to reinvest the proceeds in another homestead, and only applies to the net and not the gross proceeds). Although Debtor's stated intent is to reinvest the Sale Proceeds in a new homestead, he obviously, and objectively, had no such "abiding good faith" intent regarding the Dissipated Sale Proceeds. See *La Croix*, 137 So.2d at 206.

Property of the estate under 11 U.S.C. §541 is very broad and includes all forms of assets, including real property, beneficial, legal and equitable interests; lawsuits and claims, and inchoate rights. See, e.g., *Jones v. Harrell*, 858 F.2d 667 (11th Cir. 1988) (personal injury claim is property of the estate); *Miller v. Shallowford Community Hospital*, 767 F.2d 1556 (11th Cir. 1985) (trustee succeeds to all causes of action held by debtor as of petition date); *Matter of Doan*, 672 F.2d 831 (11th Cir. 1982) (tax refund is property of estate); *In re Harrison*, 216 B.R. 451 (Bankr. S.D. Fla. 1997). Under the expansive definition of estate property in the Code, the Court concludes the Dissipated Sale Proceeds are property of this estate, subject to turnover, as the Debtor did not

use them to acquire a new homestead. See, e.g., *Rossano* 919 So.2d at 552 (proceeds not used for the purchase of a new homestead after closing on purchase are to be left to the judgment lien creditor who executed on same).

The Dissipated Sale Proceeds were not kept for the sole purpose of acquiring a new homestead, as evidenced by the fact that the Debtor dissipated same post-petition on items unrelated to the acquisition of a new homestead. Therefore, the Dissipated Sale Proceeds are an asset of this estate and are not exempt.

The Debtor's reliance on the *Binko* case, *supra*, is misplaced. *Binko* is factually distinguishable from this matter as the debtor in *Binko* did not use any of the sale proceeds from his former homestead post-petition, leaving same alone in his isolated account pending the Bankruptcy Court's ruling – which found that debtor's pre-petition dissipation of proceeds was not evidence of his post-petition intentions with regard to the acquisition of a new homestead. In the matter before the Court, the Trustee is not seeking surrender of monies dissipated pre-petition, but rather monies spent post-petition prior to a ruling by the Court on the Debtor's entitlement to claim same as exempt. Unlike *Binko*, this Debtor has dissipated the Sale Proceeds post-petition. Accordingly, the Dissipated Sale Proceeds are property of this bankruptcy estate and not exempt; and, the Debtor must turnover same to the Trustee for the benefit of the estate. It is

ORDERED and ADJUDGED that the objection to Debtor's claimed exemption of the Sale Proceeds is **SUSTAINED** in part and **OVERRULED** in part, as follows:

1. The objection to the Debtor's claim of exemption in the Remaining Proceeds is OVERRULED without prejudice, and the Debtor shall have until October 30, 2007 within which to reinvest the Remaining Proceeds in a new homestead in order to maintain the exempt status of those proceeds. If the Debtor does not reinvest the Remaining Proceeds within the time allowed, and he can show good cause exists as to why he has been unable to reinvest same, then the Debtor may file and serve an appropriate motion seeking an extension of time to reinvest the Remaining Proceeds. If the Court finds insufficient cause exists, then the Remaining Proceeds may lose their exempt status and be subject to turnover.
2. The objection to the Debtor's claim of exemption in the Dissipated Sale Proceeds is SUSTAINED, and the Debtor shall surrender and turnover the Dissipated Sale Proceeds, or the amount thereof, to the Trustee within thirty (30) days of the entry of this Order.
3. The parties are directed to meet within 10 days from the entry of this order to resolve the issue of the turnover of the federal income tax refund. If the parties fail to resolve the issue within 10 days, the Trustee is directed to request the matter be set for hearing.

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Submitted by and copies to:

James B. Miller, PA
Trustee's counsel
19 West Flagler Street, Suite 416
Miami, FL 33130

(Attorney James Miller shall serve a conformed copy of this Order on all interested parties immediately upon receipt of same and shall file a certificate of service of same.)