

Tagged Opinion



ORDERED in the Southern District of Florida on January 16, 2007.

**Paul G. Hyman, Chief Judge
United States Bankruptcy Court**

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION**

IN RE:

**CASE NO.: 05-36921-BKC-PGH
CHAPTER 7**

Geoffrey Schlakman

Debtor.
_____ /

**ORDER SUSTAINING CREDITOR'S RENEWED OBJECTION TO DEBTOR'S CLAIM
OF EXEMPTIONS**

THIS MATTER came before the Court for evidentiary hearing on December 6, 2006, upon Joanne Schlakman's (the "Creditor") *Renewal of Objection to Debtor's Claimed Exemptions Pursuant to Bankruptcy Code § 522 and Rule 4003 of the Federal Rules of Bankruptcy Procedure* (the "Objection"). Geoffrey Schlakman (the "Debtor") appeared *pro se* at the hearing. The Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

The Debtor and the Creditor were married in New York on April 17, 1982.¹ Over the course of the marriage, the Debtor and Creditor had three children, the youngest of which is currently thirteen years old. In August 1991, the Debtor and Creditor moved from a home located in Old Bethpage, New York to a home located in St. James, New York (the "Real Property"), which they owned as tenants by the entirety.

The Debtor and Creditor experienced irreconcilable marital differences in 2000 that resulted in the Debtor moving out of the Real Property in July 2000. The Debtor first moved to a rental apartment in Smithtown, New York before moving to Boca Raton, Florida in October 2001.

On November 15, 2002, the Debtor and Creditor entered into a Settlement Agreement (the "Settlement Agreement") to resolve certain issues related to their pending divorce, and to fix their respective financial and property rights. A Judgment of Divorce was entered on January 9, 2003 by the New York Supreme Court for Suffolk County, New York, which dissolved the marriage between the Debtor and the Creditor. The Creditor has not remarried. The Debtor testified at the December 6, 2006 evidentiary hearing that the Settlement Agreement governs the treatment of the Real

¹All facts are taken from the undisputed portions of each parties' unilateral stipulation of facts unless noted otherwise.

Property.

The Settlement Agreement set forth that the Creditor would maintain exclusive occupancy of the Real Property until: 1) the Creditor was remarried; or 2) the youngest unemancipated living child of the parties reached the age of 22. Upon either of these two conditions being met, the Real Property was to be placed upon the market for sale. The Real Property was subject to three liens: a first existing mortgage held by Countrywide for \$170,000; a home equity loan held by Countrywide for \$40,000; and an obligation to the Debtor's mother for the sum of \$52,500.

The Settlement Agreement further provided that upon the sale of the Real Property, the net proceeds would be divided between the parties equally. The Debtor would pay the Creditor \$25,000 out of his share of the proceeds. The Debtor testified at the December 6, 2006 evidentiary hearing that he intends to use his portion of the net proceeds to buy a home in the State of Florida or to reinvest the proceeds into the home that his current wife owns.

On October 13, 2005, the Debtor filed a Chapter 13 bankruptcy case. On Debtor's Schedule A, the Debtor lists that he has a fee simple interest in the Real Property, which has a current market value of \$445,000.00 with secured claims of \$300,342.36. On Debtor's Schedule C, the Debtor claims the Real Property as exempt pursuant to Florida Statute § 222.01, with a

value of \$445,000.00

On September 14, 2006, the Creditor filed the Objection. After a hearing on October 18, 2006, the Court entered an *Order Setting Briefing Schedule on Movant's Objection to Debtor's Claim of Exemptions* (the "Briefing Order"). The Briefing Order instructed the parties to submit a joint stipulation of facts and provided a schedule in which the parties could provide a memorandum of law and/or citation of authorities. The parties could not agree on a joint stipulation of facts, and both parties instead submitted unilateral stipulations of fact. The Court determined that the differences between the two stipulations of fact required an evidentiary hearing and entered an *Order Specially Setting Evidentiary Hearing*.

The Creditor's Objection asserts that the Florida homestead exemption is only applicable to homesteads located within the State of Florida. The Creditor alternatively argues that the Debtor's claim must be denied as he has no present right to use or occupy the Real Property, and he has no intent to use the Real Property in the future.

The Debtor argues that Florida's homestead exemption should apply to homesteads located outside the State of Florida. The Debtor further argues that the Debtor has not abandoned the Real Property and that his involuntary absence from the Real Property should not strip him of his right to assert that the Real

Property is exempt. Finally, the Debtor argues that the Real Property is in forced escrow until his youngest child is emancipated or reaches the age of 22, and should be considered as proceeds of exempt property that will be invested into a Florida homestead once the Real Property is sold.

CONCLUSIONS OF LAW

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334(b) and 28 U.S.C. § 157(b). This is a core proceeding under 28 U.S.C. § 157(b)(2)(B).

Article X, Section 4 of the Florida Constitution provides in pertinent part that:

There shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, except for the payment of taxes and assessments thereon, obligations contracted for house, field, or other labor performed on the realty, the following property owned by a natural person:

1) a homestead, if located outside a municipality, to the extent of one hundred sixty acres of contiguous land and improvements thereon, which shall not be reduced without the owner's consent by reason of subsequent inclusion in a municipality; or if located within a municipality, to the extent of one-half acre of contiguous land, upon which the exemption shall be limited to the residence of the owner or the owner's family;

...

Art. X, § 4(a)(1), Fla. Const. The homestead exemption is to be

liberally construed in favor of protecting the family home. See *Englander v. Mills (In re Englander)*, 95 F.3d 1028 (11th Cir. 1996). "The purpose of Florida's homestead provision is to protect families from destitution and want by preserving their homes." *Kellogg v. Schreiber (In re Kellogg)*, 197 F.3d 1116, 1120 (11th Cir. 1999). The homestead exemption provision contains only three explicit limitations: 1) an acreage limitation; 2) an ownership requirement; and 3) a requirement that an owner and/or his family reside at the homestead. See *Quraeshi v. Dzikowski (In re Quraeshi)*, 289 B.R. 240 (S.D. Fla. 2002). The plain language of Article X, Section 4 of the Florida Constitution does not address whether or not the homestead to be claimed as exempt must be located within the State of Florida.

The Debtor argues that the Court should adopt the position of a substantial minority of states that have construed their homestead exemption statutes to apply to homesteads located outside of the state.² However, Florida courts have construed the Florida Constitution to require that a homestead be located within the State of Florida for the Florida homestead exemption to be applicable. See *In re Sanders*, 72 B.R. 124 (Bankr. M.D.

² See, e.g., *Arrol v. Broach (In re Arrol)*, 170 F.3d 934, 936-937 (9th Cir. 1999); *In re Grimes*, 18 B.R. 132 (Bankr. D. Md. 1982); *Drenttel v. Jensen-Carter (In re Drenttel)*, 403 F.3d 611 (8th Cir. 2005); *In re Stratton*, 269 B.R. 716 (Bankr. D. Oregon 2001); *In re Weza*, 248 B.R. 470, 473 (Bankr. D.N.H. 2000); *In re Heater*, 189 B.R. 629, 632 (Bankr. E.D. Va. 1995).

Fla. 1987). In doing so, Florida adopts the majority view that in order to utilize a state's homestead exemption, the property claimed must be located within that state.³ Holding that the Florida homestead exemption has no extraterritorial effect discourages debtors from forum shopping to take advantage of Florida's generous homestead exemption. See, e.g., *In re Peters*, 91 B.R. 401 (Bankr. W.D. Tex. 1988); *In re Dicks*, 341 B.R. 327, 332 (Bankr. M.D. Fla. 2006).⁴ This position also recognizes that state exemption laws are drafted to protect the homes of families located within the state and should not be applied with extraterritorial force. See *Matter of Cooke*, 412 So. 2d 340 (Fla. 1982); *Juarrero v. McNayr*, 157 So. 2d 79, 81 (Fla. 1963). The Court agrees with *Sanders* and finds that the Florida homestead exemption only applies to homesteads situated within the State of Florida.

The only remaining argument not disposed of by the Court's

³See, e.g., *In re Halpin*, 1994 WL 594199 (Bankr. D. Idaho 1994); *In re Ginther*, 282 B.R. 16, 20 (Bankr. D. Kan. 2002); *State Bank v. Dougherty*, 66 S.W. 932 (Mo. 1902); *In re Owings*, 140 F. 739, 741-42 (D.N.C. 1905); *In re Peters*, 91 B.R. 401, 403-04 (Bankr. W.D. Tex. 1988).

⁴The Creditor urges that *Dicks* should be a controlling precedent in this case. However, unlike in the instant case, *Dicks* involved an out-of-state resident filing for bankruptcy in Florida and attempting to avail herself of a Florida homestead exemption for her Georgia residence. *Dicks*, 341 B.R. at 332. After disposing of the merits of the case through an 11 U.S.C. § 522(b)(2)(A) analysis, the court in *dicta* wrote that "even in those cases the Florida homestead law would only protect the homestead acquired in Florida." *Id.*

determination that the Florida homestead exemption is only applicable to Florida property is whether the Real Property should be considered exempt as proceeds that the Debtor intends to invest in a Florida homestead. "The homestead exemption extends to funds obtained as proceeds from a sale of a homestead, where the debtor intends in good faith to reinvest the proceeds in a new homestead, but only as to the amount of proceeds intended to be reinvested." *In re Quraeshi*, 289 at 243. The Debtor testified at the evidentiary hearing that he intends to reinvest the proceeds from the eventual sale of the Real Property into a Florida homestead. However, for the homestead exemption to extend to the proceeds from the sale of a homestead, the original homestead must be exempt under Florida law. Since the Real Property is located in New York, there is no basis for which to claim that the proceeds are protected by the Florida homestead exemption. *Sanders* supports this conclusion. In *Sanders*, the debtor sought to exempt fire insurance proceeds from the destruction of her mobile home while she lived in Tennessee. *Sanders*, 72 B.R. at 125. The *Sanders* court held that while a mobile home and fire insurance proceeds could be claimed as exempt under Florida law, the mobile home itself must qualify as homestead property before the exemption would be valid. *Id.* The *Sanders* court then sustained the trustee's objection to the debtor's claim of a homestead exemption for the fire insurance

proceeds because the mobile home was not located within the State of Florida. *Id.* *Sanders* is especially persuasive because the Florida Supreme Court decision establishing that proceeds from the voluntary sale of a homestead are exempt was based in part on the rationale of an earlier decision establishing the exemption for fire insurance proceeds. *See Orange Brevard Plumbing & Heating Co. v. La Croix*, 137 So. 2d 201, 203 (Fla. 1962). The Court holds that the extension of the Florida homestead exemption to proceeds from a sale of a homestead is only applicable if both the homestead that is sold and the homestead to be purchased are located within the State of Florida.

ORDER

The Court having considered the Objection, the Debtor's Memorandum of Law and Citation of Authorities, the applicable law, the arguments of counsel, and being otherwise fully advised in the premises hereby **ORDERS AND ADJUDGES:**

1) The Creditor's Renewed Objection to Debtor's Claim of Exemptions is **SUSTAINED**. The claim of exemptions as to the Real Property is disallowed.

2) The Debtor is directed to file an amended Schedule C to reflect personal property of a value not to exceed that permitted by applicable exemptions within twenty days of the entry of this Order.

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Copies Furnished to:

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