

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA**

IN RE:

RENA O. WAGSTAFF,

Debtor.

CASE NO. 05-32096- BKC-SHF
Chapter 7 Proceeding

**ORDER PARTIALLY SUSTAINING AND PARTIALLY OVERRULING TRUSTEE'S
OBJECTION TO THE DEBTOR'S CLAIM OF EXEMPT PROPERTY**

THIS CAUSE came before the Court on August 1, 2005, upon the Trustee's Objection to the Debtor's Claim of Exempt Property (C.P. 12), filed by Patricia Dzikowski, chapter 7 trustee ("trustee"). Subsequently, on August 15, 2005, the debtor filed her Memorandum of Law in Support of Debtor's Claimed Homestead and Tenancy by the Entireties Exemption (C.P. 19) ("Memorandum of Law"). Having considered the record before the Court, arguments of counsel and for the reasons set forth below, the Court **partially sustains and partially overrules** the trustee's objection.

The trustee has timely objected to the debtor's claimed exemptions of: (1) personal property in excess of \$1,000.00; and (2) the residential real property located at 8857 Marlamoor Lane, West

Palm Beach, Florida 33412 and described as Lot 8, Plat No. 1, Stonewall Estates, according to the Plat thereof, recorded in Plat Book 47, Page 12, of the Public Records of Palm Beach County, Florida. The real property has been claimed as exempt under Article X, section 4 of the Florida Constitution and 11 U.S.C. § 522(b)(2)(B). At the time of filing, the debtor jointly owned the aforementioned property with her non-filing spouse. The debtor has scheduled the property at a value of \$800,000.00. The debtor submits that a mortgage encumbers the property in the amount of \$457,551.77.¹ It is undisputed that the property was purchased on September 20, 2002, less than forty (40) months pre-petition. Therefore, the trustee contends that the debtor is only entitled to a homestead exemption to the extent of \$125,000.00 in equity, pursuant to 11 U.S.C. § 522(p)(1).

With the passage of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, the extent of the homestead exemption available to Florida residents prior to April 20, 2005 has been significantly reduced under certain circumstances. More specifically, 11 U.S.C. § 522(p)(1) provides that a debtor may not exempt any amount of an interest in real property in excess of \$125,000.00, if the property was acquired within 1215 days of the debtor's petition date. *Sub judice*, the debtor argues that 11 U.S.C. § 522(p)(1) does not apply to her because, as a Florida resident, she does not have the ability to "elect" state exemptions. Rather, she may invoke only the exemptions available pursuant to Florida Statute § 222.20. As of the date of this hearing, the issue of whether a Florida resident possessed the ability to "elect" state exemptions had not been addressed in the Southern District of Florida. However, since the hearing on the instant controversy, opinions have been published by Florida bankruptcy judges finding that 11 U.S.C. § 522(p)(1) does apply to Florida

¹ The debtor indicates, in her Memorandum of Law, that a mortgage encumbers the afore-described real property, securing repayment of a debt equal to \$457,551.77. However, the debtor lists no mortgage holder either in her bankruptcy schedules, or in her amendments thereto.

debtors. *In re Wayrynen*, 332 B.R. 479 (Bankr.S.D.Fla. 2005); *In re Kaplan*, 331 B.R. 483 (Bankr.S.D Fla. 2005). In *Wayrynen*, this Court found that the phrase “as a result of electing”, as used in 11 U.S.C. § 522(p)(1), could not be interpreted so as to limit the homestead cap only to debtors who reside in states that have not opted out of the federal bankruptcy exemptions. *Wayrynen* discusses the legislative history behind the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“Reform Act”) revealing that the intent of the drafters was to close the “mansion loophole”:

The Bill also restricts the so-called “mansion loophole.” Under current bankruptcy law, debtors living in certain states can shield from their creditors virtually all of the equity in their homes. In light of this, some debtors actually relocate to these states just to take advantage of their “mansion loophole” laws.

Wayrynen at 483, *citing* H. R. REP. NO. 109-31, pt. 1, at 102 (2005).

To exclude Florida residents from the limitations contained in § 522(p)(1) would be contrary to the intention of the Reform Act's drafters. Additionally, this Court explained in *Wayrynen* that a Florida resident “elects” Florida exemptions “...by virtue of **(1)** having chosen to reside in the State of Florida; **(2)** having chosen to purchase a residence in the State of Florida; **(3)** having chosen to make the residence his/her permanent residence; and **(4)** having availed himself/herself of the relief available under Title 11, United States Code...” *Id.* at 484., *Contra In re McNabb*, 326 B.R. 785 (Bankr.D.Ariz. 2005) (holding that the Bankruptcy Code’s \$125,000 homestead cap, as added by the Reform Act, applies only in non- “opt out” states). In the instant controversy, the Court finds that the \$125,000.00 cap placed on the homestead exemption pursuant to 11 U.S.C. § 522(p)(1) applies.

The debtor also contends that, notwithstanding the \$125,000.00 homestead cap, she is

entitled to exempt the entire value or equity in her homestead by application of the tenancy by the entirety exemption or immunity. Courts have recognized that 11 U.S.C. § 522(b)(2)(B) precludes a debtor from exempting entirety property, or a portion thereof, if there exist joint creditors as of the petition date. *Peppenella v. Life Ins. Co. of Georgia*, 103 B.R. 299, 301 (M.D. Fla. 1988); *In re Planas*, 1998 WL 757988 (S.D.Fla. 1998). Under Florida law, entirety property is exempt from process to satisfy debts owed to individual creditors of either spouse. *Neu v. Andrews*, 528 So.2d 1278, 1279 (Fla. 4th DCA 1988). However, entirety property is not exempt from process to satisfy joint debts of both spouses. *Stanley v. Powers*, 123 Fla. 359, 166 So. 843, 846 (1936); *In re Monzon*, 214 B.R. 38 (Bankr.S.D.Fla. 1997); *In re Droumtsekas*, 269 B.R. 463 (Bankr.M.D.Fla. 2000). Thus, the Court finds that the trustee may administer the tenancy by the entirety property to the extent of the joint debts for the benefit of the joint creditors.

Upon a review of the record, the Court has determined that a total of eleven claims, all filed as general unsecured claims, in the aggregate amount of \$82,105.36, have been timely filed. Pursuant to the Notice Deadline to File Claims (C.P. 21), the claims bar date was set as January 6, 2006. Pursuant to Bankruptcy Rule 3001(f), each claim constitutes prima facie evidence of the validity and amount of the claim. None of the claims evidences a joint obligation of the debtor **and** her husband, Bevan G. Wagstaff. However, pursuant to Schedule H of the debtor's second amended schedules (C.P. 11), which schedules were verified by the debtor, creditor Gemb/brandsmart is listed as a joint creditor. This creditor filed Claim Number 9 in the amount of \$3,766.80. Schedule H, contained within the debtor's second amended schedules, constitutes an admission that the debt owed to Gemb/brandsmart is a joint obligation. *UMC Electronics Co. vs. U.S.*, 43 Fed. Cl. 776, 807 (Fed. Cl.1999); *In re Campbell*, 336 B.R. 430 (Bankr. 9th Cir. BAP 2005).

In addition, the trustee objected to the debtor's claimed exemption as to personal property to the extent that its value exceeds \$1,000.00, as provided by Article X, section 4 of the Florida

Constitution. The debtor asserts that her tangible personal property is exempt because it is owned jointly with her husband by way of a tenancy by the entireties. The trustee has presented no evidence that would vitiate the tenancy by the entireties claim. Accordingly, it is

ORDERED that Trustee's Objection to the Debtor's Claim of Exempt Property is **sustained**, to the extent of \$3,766.80, plus accrued interest pursuant to 11 U.S.C. § 726(a)(5), and is **overruled** with regard to the debtor's interest in tangible personal property.

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The Clerk of Court is directed to provide a copy of this Order to all parties in interest.