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signed 6-10-02

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF KANSAS**

**In re:**

**KENNETH M. CARDWELL,**

**DEBTOR.**

**CASE NO. 00-41099-7  
CHAPTER 7**

**ORDER ON OBJECTIONS TO HOMESTEAD EXEMPTION**

This matter is before the Court on objections to the debtor's claimed homestead exemption. Debtor Kenneth M. Cardwell ("the Debtor") appears by counsel Eric C. Rajala, Overland Park, Kansas. Creditor The Mission Bank ("the Bank") appears by counsel Robert A. Andrews of Andrews & Fowler, Chartered, Leawood, Kansas. Chapter 7 Trustee Darcy D. Williamson ("the Trustee") appears by counsel Patricia A. Reeder of Woner, Glenn, Reeder & Girard, P.A., Topeka, Kansas. After reviewing the relevant materials, the Court is ready to rule. Although the Trustee and the Bank have objected to other parts of the Debtor's exemptions, this order addresses only the homestead exemption.

**FACTS**

The following facts are not controverted. The Debtor owns a home in joint tenancy with his wife. When he filed a chapter 7 bankruptcy, he claimed the home as exempt. Not quite a month before, he had liquidated various non-exempt assets and used nearly all of the proceeds, about \$76,400, to substantially reduce a first mortgage on the home and pay off a second mortgage. At one time, the Debtor testified that he had provided all the money to obtain those non-exempt assets, but he

has since decided that some of the money came from his wife's income, inheritance, and savings. This possibility will have no impact on this order. The Debtor and his wife were jointly liable on the mortgages. The Debtor's wife has not filed for bankruptcy.

The Trustee objected to the Debtor's homestead exemption claim, among other things. She alleged that the Debtor's prepetition payment on the mortgages constituted a transfer that she could avoid under 11 U.S.C.A. §548(a)(1) and (2) because the Debtor's wife and their joint tenancy benefitted from the payment but gave nothing to the Debtor in return. She also alleged that: (1) the transfer was avoidable under §547; (2) the transfer was avoidable under §544(b) because it was void as a fraudulent conveyance under K.S.A. 33-101 and -102, and under the Uniform Fraudulent Transfer Act, K.S.A. 33-201, *et seq.*; (3) peculiar equities were present in favor of existing creditors so the exemption could be defeated under Kansas law as described in *In re Barash*, 69 B.R. 231 (Bankr.D.Kan. 1986); and (4) the Debtor should not be permitted to enhance his exemption when the transfer was an avoidable transfer or fraud upon his creditors, so the Court should impose an equitable lien on the homestead. The Bank also objected to the homestead exemption, asserting that it should be denied to the extent that the Debtor's money was used to increase the value of his wife's interest in the home. The Debtor opposed both objections.

In a scheduling order, the Court directed the Trustee and the Bank to file briefs on the legal issue of joint tenancy homestead, and gave the Debtor time to file a response. In the ensuing brief that she filed in support of her homestead objection, the Trustee argued that the Debtor's payment on the mortgages by liquidating his non-exempt assets constituted a fraudulent transfer under 11 U.S.C.A. §548(a) or otherwise because he did not receive a reasonably equivalent value in return for the

payment. She did not suggest that any additional evidence existed that might show the Debtor had converted the non-exempt assets to exempt home equity in order to defraud his creditors. To support her legal theory, she relied completely on the bankruptcy court's decision in *Shaia v. Meyer (In re Meyer)*, 206 B.R. 410 (Bankr. E.D. Va. 1997). The Bank adopted the Trustee's argument, and added only some comments about the relative interests of joint tenants in their jointly-owned property. Consequently, the Court understands the Trustee and the Bank to have abandoned the other bases they had asserted for objecting to the Debtor's homestead exemption. Shortly after the Trustee and the Bank filed their briefs, the *Meyer* decision was reversed by the Fourth Circuit. *See* 244 F.3d 352 (4th Cir. 2001), *cert. denied*, \_\_\_ U.S. \_\_\_, 122 S.Ct. 212, 151 L.Ed.2d 150 (2001).

#### DISCUSSION AND CONCLUSIONS

The Trustee's and the Bank's argument makes a thorough analysis of the *Meyer* decisions necessary. That case involved a Virginia statute providing that a voluntary transfer by an insolvent person (or one rendered insolvent by the transfer) for consideration not "deemed valuable in law" was void as to the transferor's existing creditors. 206 B.R. at 415. About sixteen months before he filed a chapter 7 bankruptcy, at a time when he owed a variety of debts that he still owed when he filed for bankruptcy, debtor Meyer used a bequest from his father's estate to pay off two mortgages on the home he and his wife owned as tenants by the entireties; both Meyer and his wife were liable on the mortgages. *Id.* at 413-14. He claimed the home as exempt in his bankruptcy case. *Id.* at 414. The chapter 7 trustee sued Meyer and his wife, claiming Meyer's use of the bequest was a void transfer under the Virginia statute. *Id.* at 414-15. The bankruptcy court found that Meyer's payment of each mortgage constituted two separate transfers—one to the bank that held the mortgage and another from

himself to the separate legal entity of the tenancy by the entirety. *Id.* at 415-16. While the transfer to each bank was probably for reasonable consideration, the court held that each bank's release of its lien had no bearing on the second transfer, and that the transfer to the tenancy by the entirety was simply a gift not supported by "consideration deemed valuable in law." *Id.* at 416-17. The court found that Meyer was rendered insolvent by the transfers, and that when he paid off the mortgages, he had creditors who had unsecured claims that were allowed in his bankruptcy case. *Id.* at 417-19. These findings, according to the court, made the transfer to the tenancy by the entirety void under the Virginia statute and 11 U.S.C.A. §544(b). *Id.* Finally, the court granted the trustee an equitable lien on the home for the amount paid on the mortgages, and ruled that the trustee could sell the home unless the Meyers were able to satisfy the lien within thirty days. *Id.* at 419-20. The district court affirmed the bankruptcy court, apparently in an unpublished decision. *See* 244 F.3d at 354-55.

As the Debtor correctly points out, Kansas law does not recognize tenancies by the entirety. Neither the Trustee nor the Bank has cited any Kansas authority describing a joint tenancy as a legal entity separate from its members. The Court doubts that it would be correct under Kansas law to say that any transfer that the Debtor might be considered to have made to the joint tenancy was a transfer to a separate legal entity. This distinction might be sufficient to convince the Court to decline to follow the bankruptcy and district court analysis in *Meyer*, but the Fourth Circuit's decision reversing in that case provides an even more compelling reason to reject the lower courts' analysis.

The Fourth Circuit indicated that the lower courts had relied on three decisions in concluding that Meyer's prepetition payment of the mortgages was void, but declared that all three cases were distinguishable. 244 F.3d at 356-57. One had involved a transfer of real property from a man to his

wife, and the other two had involved transfers from a man's own name to himself and his wife as tenants by the entireties. *Id.* Payment of the mortgages, however, involved only transfers from Meyer to the banks, the Circuit declared, supported by the release of the mortgages as consideration, and not any second transfer to the tenancy by the entireties. *Id.* at 357. As a result, there was no transfer that was void under the Virginia statute. *Id.*

The Court agrees with the Fourth Circuit that a debtor's payment of a mortgage on jointly-held property is a single transfer supported by satisfaction of the mortgage to the extent of the payment, at least so long as the debtor was liable for the mortgage debt. Therefore, the payment is not a transfer for less than reasonably equivalent value, and would not be avoidable as a fraudulent conveyance under 11 U.S.C.A. §548(a)(1)(B) or any other law making a transfer fraudulent without regard to the debtor's intent. In addition, the Court notes, as it has many times in the past, that Kansas law permits an insolvent debtor to exempt property even though the property was purchased with non-exempt funds, unless the complaining creditor had a "peculiar equity" in the assets that were converted to exempt property, or the debtor's actual intent to defraud can be shown. *See In re Barash*, 69 B.R. 231, 232 (Bankr.D.Kan. 1984). Furthermore, when it adopted the new Bankruptcy Code in 1978, Congress indicated that a similar rule should apply under §548: "As under current law, the debtor will be permitted to convert nonexempt property into exempt property before filing a bankruptcy petition. The practice is not fraudulent as to creditors, and permits the debtor to make full use of the exemptions to which he is entitled under the law." H.R. Rep. No. 595 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6317; S. Rep. No. 989 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5862. Since the Trustee and the Bank have not suggested that any evidence exists to show that any creditor had a

“peculiar equity” in the assets the Debtor liquidated or that the Debtor made the payment on the mortgages with the intent to defraud his creditors, the Court’s rejection of the lower courts’ reasoning in *Meyer* compels the Court to reject the objections to the Debtor’s homestead exemption.

In light of this conclusion, the Court need not consider the parties’ arguments concerning the exact parameters of the Debtor’s and his wife’s relative interests in their homestead. The objections to the Debtor’s homestead exemption are hereby overruled.

IT IS SO ORDERED.

Dated at Topeka, Kansas, this \_\_\_\_\_ day of June, 2002.

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JAMES A. PUSATERI  
CHIEF BANKRUPTCY JUDGE