



SO ORDERED.

SIGNED this 01 day of June, 2006.


JANICE MILLER KARLIN
UNITED STATES BANKRUPTCY JUDGE

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

In re:)
)
GLEN GEORGE HAMBLETON,) **Case No. 04-42681**
) **Chapter 7**
Debtor.)
_____)

**ORDER SUSTAINING TRUSTEE'S OBJECTION
TO DEBTOR'S HOMESTEAD EXEMPTION**

This matter is before the Court on the Trustee's objection to Debtor's claimed exemption of the proceeds from the sale of his homestead.¹ The Court conducted an evidentiary hearing on this matter and is now ready to rule. This matter constitutes a core proceeding,² and the Court has jurisdiction to decide it.

¹Doc. 32.

²28 U.S.C. § 157(b).

I. FINDINGS OF FACT

Debtor sold his Lenexa, Kansas home on July 22, 2004 and received \$31,112.74 in net proceeds from the sale. He did not purchase another homestead at that time, and as of the date of the hearing, had still not purchased another homestead. Instead, Debtor moved into a home that his then girlfriend, K. Crawford (Crawford), owned in Meridan, Kansas. Nine weeks later, on September 28, 2004, Debtor filed a petition seeking relief under Chapter 13.

Debtor became unemployed in June, 2004 and was still unemployed at the time he closed on the sale of his house, at the point he moved to Meridan, at the point he filed his Chapter 13 petition,³ at the point he sought conversion to a Chapter 7, at the point he sought re-conversion to a Chapter 13, and at the time of the trial. His only source of funds to live on, therefore, were the proceeds received from the sale of his home.

Schedules A and C, which he signed under penalty of perjury, listed no interest in any real property on the date of filing. He still owned no real property as of the trial date, over twenty months post-filing. His schedules did indicate, however, that, as of the date of filing, he had \$30,000 in "Checking/Savings Proceeds from sale of homestead Debtor intends to reinvest in new homestead." Debtor's original Schedule C sought to exempt only \$15,000 of the proceeds from the sale of his homestead.

The Chapter 13 Trustee did not object to the claimed exemptions,⁴ and the Chapter 13 Plan was confirmed. Less than four months after the case was originally filed, however, on January 13,

³To be eligible to be a Chapter 13 debtor, one must have "regular income." 11 U.S.C. § 109(e).

⁴Instead, the Trustee apparently required Debra Aubchon, Debtor's sister, to sign a Waiver of Statute of Limitations, dated November 24, 2004, wherein she agreed "not to plead the statute of limitations as a defense to any action by Jan Hamilton, Chapter 13 Trustee, or his agent to recover funds paid to Debra Aubchon by the Debtor ... and hereby waives the statute of limitations as to any and all claims that the Trustee or his agent may assert against Debra Aubchon to recover funds paid to Debra Aubchon by the Debtor, Glen George Hambleton." Doc. 17.

2005, Debtor converted his Chapter 13 case to a Chapter 7 proceeding.⁵ After the case was converted, the Chapter 7 Trustee timely objected to Debtor's exemption of the proceeds from the sale of the homestead. Four months after conversion, Debtor filed an amended Schedule B, then listing \$31,112.74 as "[p]roceeds from sale of homestead. Debtor intends to reinvest in new homestead," and claiming the entire \$31,112.74 as exempt, although evidence at trial reflected that as of the date of filing, that amount had already been spent down to approximately \$25,804. Debtor also amended Schedule C on the same date to further indicate his intent to claim the full \$31,112.74 as exempt.

By the time Debtor filed the amended Schedule B on May 24, 2005, the entire \$31,112.74 had been spent, and Debtor still had no ownership interest in any real property. Although Debtor amended Schedule B in May 2005, and amended Schedule C in May 2005 and again in February 2006, Debtor never amended Schedule A to reflect that he had any ownership interest—even an equitable interest--- in any real property as of the date of filing.

When Debtor moved in with Crawford, he intended to use at least a portion of the proceeds from the sale of his house to make improvements on Crawford's house. He also intended to use a portion of the money to pay one-half of her mortgage payments and one-half of her utilities, as if he was renting from her, since his name was not on either note or mortgage for the house. Debtor did use a portion of the money he received from the sale of his house to make improvements to Crawford's house, including building a retaining wall and finishing at least part of her basement. Debtor also used a portion of the money to help pay utility bills and mortgage payments for Crawford's house, as well as to purchase items to be used or consumed in the house such as

⁵Doc. 15.

groceries, a freezer, a refrigerator, a printer, furniture, a television, a DVD/VCR, a pressure washer and a barbeque grill.

Debtor also used a large portion of the money to pay for items wholly unrelated to the house, such as legal fees related to his bankruptcy filing (\$1,765), purchases at liquor and clothing stores, car insurance, car payments on Crawford's car and on a car he purchased for himself, prescription drugs, Christmas gifts, car repairs, veterinary bills, and restaurant bills. Debtor's original schedules also reveal that he used \$3,000 to repay a debt to his sister, Debra Aubchon, the day after he closed on the sale of his Lenexa home.⁶

Debtor and Crawford discussed marriage, but no wedding date was ever set and no wedding or engagement ring ever purchased. Neither Crawford nor Debtor testified that as of the date he sold his house, or at any other time, was there any kind of discussion, let alone agreement, that she would put his name on the deed to her home at any point in the future. Some time after the bankruptcy was filed, they did visit a lawyer to discuss writing a will for Crawford, and she indicated at that time she intended to bequeath one-third of the proceeds of her house to him upon her death. That will, however, was never executed. As of the date of trial, Crawford said she now has no intention of bequeathing the house, or any portion of it, to Debtor, and that she does not believe he has or ever had any equitable interest in the house.

⁶See Statement of Financial Affairs, question 3, where he indicates that the day after closing on his Lenexa house, he gave \$3,000 to his sister. He admitted at trial that the source of some or all of those funds was from the closing on the house. He then testified that this statement was false; he now says that the amount was actually \$3,300, and that the money was repaid to his sister after he filed the bankruptcy, not before. Trustee's Exhibit 4 corroborates a \$3,300 payment to debtor's sister on September 24, 2004, and Debtor testified at trial that this was to repay his sister for having purchased an El Camino for him. The El Camino is not listed in Debtor's schedules. See Schedule B filed on date of petition, showing the only vehicle owned as a 1998 Ford F150, and Amended Schedule B, question 23, which lists no automobile at all.

II. CONCLUSIONS OF LAW

Section 522(b) of the Bankruptcy Code⁷ specifies that a debtor can take the exemptions enumerated in § 522(d) unless applicable state law specifically provides otherwise. Kansas has opted out of the federal exemptions, and has enacted its own set of exemptions.⁸ “When determining the validity of a claimed state law exemption, bankruptcy courts look to the applicable state law.”⁹ Under Kansas law, the party claiming homestead protection has the burden of proving the establishment of the homestead.¹⁰ In bankruptcy, however, Federal Rule of Bankruptcy Procedure 4003 governs exemptions, and subsection (c) of that Rule provides: “In any hearing under this rule, the objecting party has the burden of proving that the exemptions are not properly claimed.” This means that the claimed exemption is presumed to be valid, and the Trustee then has the burden of producing evidence to rebut the presumption. If he does so, thereafter the burden shifts back to Debtor to come forward with evidence to demonstrate that the claimed exemption is proper.¹¹

The Kansas Constitution provides for a homestead exemption, *see* Art. 15, §9, but the legislature has somewhat expanded that exemption in K.S.A. 60-2301, which provides, in pertinent part:

A homestead to the extent of 160 acres of farming land, or of one acre within the limits of an incorporated town or city, or a manufactured home or mobile home, occupied as a residence *by the owner* or by the family *of the owner*, or by both *the owner* and family

⁷This case was filed before October 17, 2005, when most provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 become effective. All statutory references to the Bankruptcy Code are to 11 U.S.C.A. §§ 101 - 1330 (2004), unless otherwise specified. All references to the Federal Rules of Bankruptcy Procedure are to Fed. R. Bankr. P. (2004), unless otherwise specified.

⁸*See In re Lampe*, 331 F.3d 750, 754 (10th Cir. 2003) (citing K.S.A. 60-2312).

⁹*In re Urban*, 262 B.R. 865, 866 (Bankr. D. Kan. 2001).

¹⁰*See Beard v. Montgomery Ward & Co.*, 215 Kan. 343, 344 & 349 (1974); *Bellport v. Harder*, 196 Kan. 294 (1966).

¹¹*In re Robinson*, 295 B.R. 147, 152 (10th Cir. B.A.P. 2003).

thereof, together with all the improvements on the same, shall be exempted from forced sale under any process of law, and shall not be alienated without the joint consent of husband and wife, when that relation exists. . . .

(Emphasis added). The Kansas courts have equitably extended the homestead exemption to protect the proceeds from the sale of a homestead, provided the owner intends to use the proceeds to purchase another homestead within a reasonable time, and that such intent is formed at or before the time of the sale.¹²

Debtor contends that at or before the time of the sale, he formed the intent to use the proceeds from the sale of his homestead to make improvements to Crawford's residence, which he intended to make his permanent residence at the time he filed his bankruptcy petition. Debtor testified that Crawford helped him prepare his house for sale, and knew he intended to come live in her home when it sold. The Trustee claims that Debtor cannot claim any of the money he spent on Crawford's residence as exempt, since he was not acquiring any type of ownership or other equitable interest in the real property as a result of the money he spent on that house. Alternatively, the Trustee contends that even if some of the money spent by Debtor might qualify for an exemption, he spent well over one-half of the home proceeds to purchase items wholly unrelated to Crawford's house, and the exemption should be denied at least as to those transactions.

The Court finds that Debtor's intent to reinvest the proceeds from the sale of his homestead in Crawford's residence does not fall within the judicially created extension to the Kansas homestead exemption, and that Debtor's claimed exemption must therefore be denied in its entirety. The Kansas homestead exemption found in both the Kansas Constitution and Kansas statute clearly

¹²*In re Ginther*, 282 B.R. 16, 19 (Bankr. D. Kan. 2002) (citing *First Nat'l. Bank v. Dempsey*, 135 Kan. 608, 609 (1932), *In re Daniels*, 65 B.R. 703, 705 (Bankr. D. Kan. 1986), and *Smith v. Gore*, 23 Kan. 488, 490 (1880) (holding that the intent to use the proceeds to obtain another homestead must be formed at or before the time of the sale)).

indicates that the exemption is available to the title owner of the property and the owner's family.¹³

The Debtor never obtained, nor intended to obtain, an ownership interest in Crawford's home, with the exception that at one time, post-petition, Crawford considered leaving a portion of the house to Debtor in her will, which will was never executed.

The Kansas Supreme Court, in *First Nat. Bank v. Dempsey*,¹⁴ quoted, with approval, the language in *Smith v. Gore*,¹⁵ that suggests Debtor's hope of acquiring some partial interest at some undetermined point in the future, if Crawford later decided to bequeath to him, is simply insufficient:

“But we think the intention to use the proceeds in procuring another homestead should be formed at or before the time of the sale, and the intention should be to procure another homestead with the proceeds immediately. It would not do to form the intention two years after the sale, nor would a present intention to procure the homestead two years afterward be sufficient.”

Accordingly, Debtor's intent to obtain some ownership interest in this real estate by bequest from a very live person who could change her will at any time (or decline to execute one, as here), is insufficient. An interesting question, with which this Court is not today faced, is whether Debtor would have been able to exempt all or portion of these funds if the parties had agreed, at the time of the Lenexa house sale, that Crawford would immediately deed to Debtor a one-half interest. Again, both parties testified no such intent existed here.

¹³See *In re Stroble*, 2005 WL 3844208, *2 (Bankr. D. Kan. 2005) (holding that word “homestead” itself “represents the dwelling house where the family resides,” and citing *Anderson v. Shannon*, 146 Kan. 704, 711 (1937). See also *Smith v. Gore*, 23 Kan. 488 (1880) (holding that Smith never purchased or owned any land after selling his homestead; and there is nothing in the record that shows, or tends to show, that he at any time had any desire or wish to purchase, or any expectation of purchasing, any more land) (emphasis added); *Monroe v. May, Weil & Co.*, 9 Kan. 466 (1872) (holding that the “proceeds of that sale he may reinvest in a homestead, and though he do not [sic] actually occupy until after he has completed his purchase and secured his title, still, if he purchase it for a homestead, and enter into occupation within a reasonable time thereafter, no lien of existing judgments will attach”) (emphasis added).

¹⁴11 P.2d 735, 736 (1932).

¹⁵23 Kan. at 490 (emphasis added).

Debtor was essentially a tenant in Crawford's home. He paid rent, helped with utility bills, provided some upkeep, and paid for some improvements to the property. None of this created any type of ownership interest in the property that would allow him to claim a homestead exemption in it. The Court accepts as true that Debtor intended, at the time he sold his home, to use at least some of the proceeds from the sale of his house to make improvements to Crawford's home. However, the Court finds that this intent is legally insufficient for the proceeds to qualify for the homestead exemption under Kansas law because there was never any intent for him to become an owner of the real property within a reasonable period of time in the future.

Having found that Debtor is not entitled to claim a homestead exemption in property in which he never had an ownership interest, and did not have the intent of acquiring an ownership interest at the time he sold his house or at the time he filed his bankruptcy petition, the Court does not need to address the issues surrounding each expenditure made by Debtor, and whether such expenditures were for the purpose of investing in a new homestead. In addition, the Court does not need to address the issue of whether Debtor is entitled to claim the entire \$31,112.74 from that sale of his homestead exempt, or just the \$15,000 that was claimed as exempt in his original bankruptcy schedules.

That said, even if the Court had found that Debtor had the requisite intent at the time he sold his house to obtain an ownership interest in Crawford's house, and even if the Court had found that he had obtained some sort of equitable interest in her house, the Court finds that Debtor never intended, either at the time he closed on the sale of his Lenexa home, or at the time he filed his bankruptcy, to invest anywhere close to the \$31,112 received from his house to purchase, or improve, a new home for himself. First, he never obtained another job from the time he was laid off in June 2004 (before he closed on his house) through the date of the trial, freely admitted at trial that

most of the money was used for items unrelated to the home, and testified “no one told me I couldn’t use this money to live off of.” The Court finds that he clearly intended to use the money to live on at the time he sold the house, because he did not have other money saved from which he could live, was not entitled to any kind of a pension from his prior employer when he was laid off, and was not old enough to receive any kind of Social Security benefits.

Second, there was no arrangement between him and Crawford for her to pay his day-to-day living expenses, so it is further clear that he was going to have to use some of the proceeds for those living expenses—not to reinvest in a new home. Third, when he filed his Chapter 13 petition, he had no other means to make the required \$308 trustee payment, or to pay the living expenses he reflected on Schedule J, other than the money received from the sale of his Lenexa home. The bankruptcy was filed about two months after he sold the house, and the Court finds that this is yet another piece of evidence showing that Debtor did not, and could not, have had the intent to reinvest all the proceeds.

Fourth, Debtor swore under oath in his bankruptcy schedules that he “repaid” a debt to his sister one day after the closing on his home. Either that statement was incorrect, or the statement at trial that he really did not pay her this money until September (post-petition) and that he instead used it to buy a car (which was also not disclosed to the Trustee or creditors), is incorrect. If his bankruptcy schedules are true, it is absolutely clear that he could not have intended to reinvest all of the proceeds in a new home, since the very day after the sale, he used a portion of the proceeds for something unrelated to purchasing another home. If his trial statement is true—that he used a portion of the money to buy himself a used car—it is also absolutely clear that he could not have intended to invest all of the proceeds into a new home. So even if Debtor really thought he was going to end up with some kind of ownership interest in Crawford’s home that would enable him

to “reinvest” the proceeds from his homestead into her home—which the Court finds the evidence does not show—at most the evidence would show that he had the intent to invest maybe 35-40% of those proceeds into Crawford’s home, while using the rest for normal living and similar expenses.

Finally, the issue of what amount of the proceeds from the sale of Debtor’s house constitutes property of the Chapter 7 estate was also tangentially addressed at the evidentiary hearing on this matter due to the fact that Debtor converted this case from Chapter 13 after he had spent all but \$596 of the sale proceeds. The Court is not persuaded by Debtor’s belated argument, not contained within the Pretrial Order, that because the estate can only recover \$596 from the \$31,112.74 net proceeds, (because of the operation of § 348(f)(1)),¹⁶ that the Trustee’s objection to exemption must necessarily be denied because of the *de minimis* recovery potentially available to the estate.

The Court notes the Trustee has not filed any demand for turnover at this time, and indicated at trial that he seeks to avoid the exemption, at least in part, to allow him to also pursue any preference actions or fraudulent transfers that may exist.¹⁷ Whatever the Trustee’s purpose for

¹⁶This statute provides that when a Chapter 13 case is converted, property of the estate in the converted case only consists of property of the estate, as of the date of filing of the petition, that remains in the possession of or is under the control of the debtor on the date of conversion (unless it was converted in bad faith). Although the Trustee did not raise this argument, the evidence certainly reflects that might have been the case. Debtor had no regular income when he filed the Chapter 13 Plan, and has never had regular income in the 20 months since filing this case, making the Court wonder how he was going to make the required \$308 plan payments (Doc. 3) if his intent at the time of filing the Chapter 13 was to invest the entire proceeds of the house sale into a new house. He certainly did not testify, and Crawford never testified, that there was any agreement that she make his plan payment. In light of the provisions of § 348(f)(1), it is certainly suspicious that Debtor elected to wait until after he had spent essentially all the proceeds from the sale of the Lenexa house (leaving none left to make the plan payment) before he chose to convert. It is also odd that, even though Debtor had no job or other visible means of support in March of 2005, and had spent down the house sale proceeds to zero by this time, he nevertheless moved to re-convert to a Chapter 13 on March 2, 2005 (Doc. 29), just two weeks after the meeting of creditors was held with the newly appointed Chapter 7 trustee. At the trial, Debtor’s new counsel orally withdrew that motion, so the Court denies it, as moot.

¹⁷When Debtor filed for bankruptcy, all his property--even property like the house proceeds that he claimed as exempt--became property of the bankruptcy estate. While Debtor had the right to attempt to exempt property from that estate, his exemption claims were not effective until the time to object to them had passed and any objections were resolved. The Trustee's strong-arm power was fixed “as of the commencement of the case,” pursuant to § 544(a), before Debtor’s exemptions became effective. Thus, Debtor’s exemption claims could not affect the Trustee's strong-arm power, even though property claimed as exempt may cease to be property of the estate once the exemption claims become final. Furthermore, exemptions are for the benefit of debtors, and a creditor has no standing to assert the debtor's exemption as a defense to an avoidance action. *In re Haberman*, 2004 WL 2035341 *4 (Bankr. D. Kan. April 14, 2004). See also

bringing this action, the issue of what amount of the proceeds remains property of the estate, subject to a turnover order, is not presently before the Court at least in part because Debtor did not raise this defense in the Pretrial Order.¹⁸

III. CONCLUSION

Based upon a careful review of the entire record, including judging the credibility of the testifying witnesses, the Court finds that the Trustee met his burden of rebutting Debtor's claimed homestead exemption and, even applying a liberal construction of exemption laws, Debtor did not demonstrate a right to the claimed exemption under Kansas law. Instead, the Trustee proved, by a preponderance of the evidence, that Debtor did not have the requisite intent to reinvest these proceeds into a homestead in which he would have an ownership interest within a reasonable time period after the sale of his Lenexa home.

The rule of statutory construction that exemption laws are to be liberally construed in favor of debtors may not be used to expand the statutory homestead exemption.¹⁹ Because the Court finds that Debtor did not have the requisite intent to reinvest the proceeds from the sale of his homestead into property in which he would simultaneously—or even within a reasonable period of time—obtain some ownership interest, none of the proceeds are exempt.

IT IS, THEREFORE, ORDERED that the Trustee's Objection to Exemption is sustained in its entirety, and none of the \$31,112.74 that Debtor received from that sale of his homestead is exempt.

In re Taylor, 226 B.R. 284 (Table, Text at 1998 WL 123027) (10th Cir. B.A.P. 1998).

¹⁸*Youren v. Tintic School Dist.*, 343 F.3d 1296, 1304 (10th Cir. 2003) (holding that pretrial order entered pursuant to Fed. R. Civ. P. 16(e) supersedes the pleadings and governs the issues to be litigated at trial).

¹⁹*Nohinek v. Logsdon*, 6 Kan.App.2d 342, 345 (1981) (A liberal construction does not mean that courts may enlarge the exemption or read into the exemption provisions which are not there).

IT IS FURTHER ORDERED that Debtor's Motion to Re-Convert to a Chapter 13 was withdrawn at trial, and it is therefore denied as moot.

IT IS SO ORDERED.

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