



SO ORDERED.

SIGNED this 14 day of June, 2005.

Dale L. Somers

Dale L. Somers
UNITED STATES BANKRUPTCY JUDGE

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

In Re:

**GEORGINA ELZA SNODGRASS,

DEBTOR.**

**CASE NO. 03-43504
CHAPTER 7**

**DARCY D. WILLIAMSON, Chapter 7
Trustee for the Bankruptcy Estate of
Michael Ray Snodgrass, Case No. 02-
40008-7,**

PLAINTIFF,

v.

ADV. NO. 03-7132

**GEORGINA ELZA SNODGRASS,

DEFENDANT.**

**MEMORANDUM AND ORDER
DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

This adversary complaint was filed by Darcy D. Williamson, Trustee of the Bankruptcy Estate of Michael Ray Snodgrass (Michael), Case No. 02-40008. Michael is the husband of Debtor Georgianna Elza Snodgrass (Debtor or Gina). The Plaintiff seeks an order under 11 U.S.C.A. § 363(h)¹ to sell the real property which the Debtor claims as her exempt homestead. The specific matter before the Court is the Plaintiff's Motion for Summary Judgment. The Plaintiff, also referred to as the Trustee, appears by Darcy D. Williamson. The Debtor appears by Teague H. Pasco, the Law Offices of John M. Knox, Chartered. There are no other appearances.

I. UNCONTROVERTED FACTS.

The Court finds upon review of the Trustee's motion, the Debtor's response in opposition, the affidavit of Debtor, and the dockets of Michael's and this bankruptcy proceeding, including the Order Granting Leave to Amend or Withdraw Deemed Admissions, filed in this case on June 6, 2005, that the following facts are uncontroverted:

1. Michael filed a chapter 7 bankruptcy petition on January 1, 2002, in the United States Bankruptcy Court for the District of Kansas, Case No. 02-40008.

2. Darcy D. Williamson is the duly appointed and acting Trustee in Michael's bankruptcy case. A 341 hearing was held or recorded on February 4, 2002.

3. Prior to the 2002 bankruptcy filing and on December 23, 1997, Michael and Gina purchased a residence located at 633 Maple Street, Lawrence, Kansas and moved into it with their two children.

¹ Future references to the Bankruptcy Code in the text shall be to the section number only.

4. On or about December 23, 1997, Michael and Gina executed and delivered a promissory note and mortgage to Countrywide Home Loans, Inc. to purchase the realty located at 633 Maple Street, Lawrence, Kansas.

5. On or about November 14, 1997, Michael and Gina executed and delivered a note and mortgage to United Companies Lending Corporation, relating to realty located at 207 1st Street, Winchester, Kansas.

6. The deeds of record at the time of commencement of Michael's bankruptcy case showed that Michael and Gina were owners, as joint tenants with right of survivorship, of 207 1st Street, Winchester, Kansas and 633 Maple Street, Lawrence, Kansas.

7. Michael's Bankruptcy Schedule A listed 633 Maple Street, Lawrence, Kansas, having a market value of \$45,000 and encumbered by secured claim of \$27,365.47, and 207 1st Street, Winchester, Kansas, having a market value of \$30,000 and encumbered by a secured claim of \$22,343.63.

8. The Douglas County Appraiser's Office reported to the Trustee in February of 2002 that the fair market value of 633 Maple Street was \$55,800 and the fair market value of 201 1st Street was \$30,000. No other appraisals have been done.

9. Michael's address as listed in his Bankruptcy Petition is 207 1st Street, Winchester, Kansas.

10. Michael's Statement of Financial Affairs reflects that from 1997 through July, 2000 Michael resided at 633 Maple Street, Lawrence, Kansas. Gina's Objection to the Trustee's Objection to Debtors Homestead Exemption states that Michael moved from 633 Maple Street residence in 2001.

11. Michael testified at his 341 hearing that he had been separated from his wife for more than a year on the date he filed for bankruptcy.

12. Michael claimed the Winchester property as his exempt homestead.

13. On February 11, 2002, Darcy D. Williamson, Chapter 7 Trustee in Michael's bankruptcy proceeding, objected to Michael's homestead exemption on the basis that Michael was claiming as exempt the one acre located in Winchester, when his wife resided in the 633 Maple Street property. The Trustee alleged that Kansas did not permit separated parties to claim separate homesteads and argued in the alternative, that Michael could exempt only his one half interest in the Winchester property and that Michael's estate succeeded to his undivided one half interest in 633 Maple Street.

14. The homestead objection was not served upon Gina, and there is no indication that she participated in this portion of Michael's bankruptcy, even though her interest in property was placed in issue.

15. On March 5, 2002, Creditor EMC Mortgage moved for relief from stay to collect the debt secured by 207 1st Street, Winchester, because of pre-petition default and lack of adequate protection. The Trustee filed a written objection, but Michael did not. The motion was not served on Gina.

16. The Trustee's objection to Michael's homestead was resolved by an Order Denying Trustees Objection to Debtor's Exemptions, filed May 17, 2002. The order, drafted by the Trustee, denied the Trustee's objection to the debtor's Winchester homestead, finding that Michael had resided there for approximately a year and had been separated from his wife. As to 633 Maple Street, the order stated, "The debtor has an undivided one half interest in real estate located at 633 Maple Street,

Lawrence, KS. This property is co-owned with the debtor's wife. The Estate can and is free to pursue the debtor's interest in this nonexempt property."

17. After entry of the order on May 17, 2002, the Trustee of Michael's bankruptcy corresponded with counsel for Gina.

18. On May 24, 2002, EMC Mortgage Corporation, the holder of the mortgage on the Winchester property, obtained an Agreed Order Granting Relief From Stay Should the Trustee Fail to Sell Property. Stay relief was granted as to the Winchester property, and on September 12, 2000, a foreclosure action was commenced in the District Court of Jefferson, County, Kansas, Case No. 002C131.

19. On December 9, 2003, Gina filed this Chapter 7 bankruptcy. On Schedule C she exempted the entire fee title at 633 Maple Street, which she valued at \$61,500.

20. As of June, 2004 Michael and Gina were separated. No divorce action had been filed, and there had was no court-approved division of property.

21. On April 28, 2002, Gina obtained relief from stay in this bankruptcy proceeding to obtain a divorce, bifurcated from property settlement.

22. Robert Baer, the Chapter 7 Trustee in Gina's bankruptcy, and Darcy D. Williamson, Trustee of Michael's bankruptcy, filed separate timely objections to Gina's homestead exemption on various grounds. These objections are unresolved.

23. On January 5, 2004, Darcy D. Williamson as Trustee of Michael's bankruptcy estate commenced this adversary, seeking authority to sell the Maple Street property pursuant to subsection 363(h).

II. POSITIONS OF THE PARTIES.

The basis for the Trustee's claim of authority to sell 633 Maple Street, which Gina claims as her homestead, is the assertion that Michael's bankruptcy estate has an undivided one half interest in the property. She relies primarily upon the deed, the order of the Court denying her objection to Michael's homestead exemption, Gina's failure to timely respond to requests for admissions, and alleged deficiencies in Gina's answer to the complaint. In reliance upon this ownership interest, she asserts that the Kansas homestead exemption does not prevent the Trustee from selling the one half interest in 633 Maple Street.

Gina responds that she is an owner of 100% of the equity in 633 Maple Street by virtue of an informal separation agreement with Michael whereby he gave her all of his interest in the Lawrence residence. She therefore asserts that she is entitled to the Kansas homestead exemption in the entire property and that Michael's bankruptcy estate has no interest in her residence. She further argues that the limitations of subsection 363(h) preclude the Trustee's proposed sale of the property.

III. ANALYSIS AND CONCLUSIONS OF LAW.

The Court cannot determine the issues presented absent a determination of the ownership interest of Michael in the Maple Street property. Each of the rationale relied upon by the Trustee to sustain her position that Michael's estate owns a one half interest in the Maple Street property has deficiencies which preclude summary judgment in her favor.

The most important is the factual controversy concerning the separation agreement between Michael and Gina. Gina's affidavit states that although there was no judicial division of property, Michael and Gina did divide their property informally when Michael moved out of the family residence.

Pursuant to that agreement, she states, Gina retained as her separate property the family home located at 633 Maple Street and Michael retained as his separate property the residential real estate located in Winchester. In Kansas post-nuptial agreements, freely and understandingly made, settling property rights between husband and wife are binding whether or not an action for divorce is instituted.² Further, the Court notes that the Trustee's objection to Michael's homestead in the Maple Street property on grounds similar to those asserted in this case in opposition to Gina's homestead was overruled. Given the current record, the Court cannot hold that the deed establishes equal ownership of Michael and Gina. A trial will be necessary to determine the terms of this agreement and whether Michael retained any interest in the Maple Street property which became property of his bankruptcy estate.³

To establish Michael's claim to 50% of the Maple Street property, the Trustee also relies upon the portion of the order denying her objection to Michael's homestead exemption which addresses the Maple Street property. The order is ambiguous. It was drafted by the Trustee. Does it mean that the Trustee is free to pursue a claim to a portion of the Maple Street property, as she is doing in this action, or does it mean the Court adjudicated the interests of Michael and Gina? The Trustee appears to take the later position, arguing that the order is res judicata. The Court rejects this position. Even if the rights of Michael and Gina were determined, such a ruling cannot be binding upon Gina in this action because the elements of res judicata are not satisfied.⁴

² *Matter of Loughmiller's Estate*, 229 Kan. 584, 629 P.2d 156 (1981).

³ *See Purma v. Stark*, 224 Kan. 642, 585 P.2d 991 (1978). (holding that presumption of equal ownership of joint bank account is rebuttable).

⁴ In the 10th Circuit, issue preclusion requires the showing of four elements as follows:
(1) the issue previously decided is identical with the one

The Trustee's reliance upon Gina's failure to timely respond to requests for admissions has been rejected by this Court's entry of its order on June 6, 2005, granting leave to Gina to amend or withdraw her deemed admissions. Finally, the Court finds that Gina in her answer to the Trustee's complaint adequately raised her defenses to the Trustee's position that Michael has a 50% ownership interest in the Maple Street property.

Until the ownership interest is determined, the Court finds it unnecessary to address the issues raised by the parties concerning subsection 541(d), subsection 363(h), and the Kansas homestead exemption.

IV. CONCLUSION.

For the foregoing reasons, the Court denies the plaintiff's Motion for Summary Judgment. There are disputed issues of material fact which preclude judgment for the Trustee.

IT IS SO ORDERED.

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presented in the action in question; (2) the prior action has been fully adjudicated on the merits; (3) the party against whom the doctrine is invoked was a party, or in privity with a party, to the prior adjudication; and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.

Adams v. Kinder-Morgan, Inc., 340 F.3d 1083, 1093 (10th Cir. 2003) quoting *United States v. Botefahr*, 309 F.3d 1263, 1282 (10th Cir. 2002). These elements reflect the "basic premise of preclusion . . . that parties to a prior action are bound and nonparties are not bound." 18 Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice and Procedure* § 4449 (2d ed. 2002). The presumption that nonparties are not bound "draws from the due process right to be heard." *Id.*