



SO ORDERED.

SIGNED this 07 day of February, 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.)
_____)

**MEMORANDUM AND ORDER DENYING TRUSTEE'S
MOTION FOR SUMMARY JUDGMENT AND
SETTING CASE FOR TRIAL**

This matter is before the Court on the Motion for Summary Judgment¹ by Robert L. Baer (“Trustee”), the Chapter 7 panel trustee. The Trustee is seeking summary judgment on his objection to Debtor’s claimed exemption of the proceeds from the sale of his homestead. The parties have fully briefed this matter, and the Court is now ready to rule. This matter constitutes a core proceeding,² and the Court has jurisdiction to decide it.

The Motion for Summary Judgment is denied, and this matter will be set for trial.

¹Doc. 74.

²28 U.S.C. § 157(b).

I. FINDINGS OF FACT³

Debtor sold his homestead on July 22, 2004 and received \$31,112.74 from that sale. Two months later, on September 28, 2004, Debtor filed a petition seeking relief under Chapter 13, at which time Debtor owned no real estate. In his bankruptcy schedules, Debtor clearly disclosed 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, claiming K.S.A. 60-2304 as the statutory basis for this exemption. The Chapter 13 Trustee did not object to any exemption, and the Chapter 13 Plan was confirmed.

Thereafter, on January 13, 2005, Debtor converted his Chapter 13 case to a Chapter 7 proceeding. The Trustee promptly objected to Debtor’s exemption of the proceeds from the sale of the homestead, noting that the claimed statutory basis for the exemption, K.S.A. 60-2304, did not support the exemption. Debtor filed an amended Schedule B on May 24, 2005 listing \$31,112.74 as “[p]roceeds from sale of homestead. Debtor intends to reinvest in new homestead,” claiming the entire \$31,112.74 as exempt. Debtor also amended Schedule C on the same date to further indicate his intent to claim the full \$31,112.74 as exempt. His new counsel also referenced K.S.A. 60-2304 as the statutory basis for the exemption.

II. STANDARD FOR SUMMARY JUDGMENT

³Debtor contends that the Trustee’s memorandum in support of his motion for summary judgment contains a “fatal error” in that the factual allegations are not supported by an affidavit, as D. Kan. LBR 7056.1(c) appears to require. The Trustee’s factual allegations are all based upon facts that were stipulated to by Debtor in the Pretrial Order entered on December 8, 2005 (Doc. 72). The Court, frankly, does not know why this Court’s own rules require parties to take a step beyond that which is required by the Federal Rules of Civil Procedure or the district court’s local rules. Those rules clearly allow a summary judgment motion to be supported by facts stipulated to by the parties in a pretrial order, without the need for a separate affidavit that merely references the stipulation and then attaches a copy of that pretrial order to the affidavit. Out of an abundance of caution, the Trustee did file an affidavit at the time he filed his reply brief in support of the motion for summary judgment, and the Court will consider that affidavit to be timely filed to support the motion for summary judgment. That said, this Judge intends to seek amendment to D. Kan LBR. 7056.1(c) because she believes it is simply incorrect.

Summary judgment is appropriate if the moving party demonstrates that there is “no genuine issue as to any material fact” and that it is “entitled to a judgment as a matter of law.”⁴ In applying this standard, the Court views the evidence and all reasonable inferences therefrom in the light most favorable to the nonmoving party.⁵ An issue is “genuine” if “there is sufficient evidence on each side so that a rational trier of fact could resolve the issue either way.”⁶ A fact is “material” if, under the applicable substantive law, it is “essential to the proper disposition of the claim.”⁷

The moving party bears the initial burden of demonstrating an absence of a genuine issue of material fact and entitlement to judgment as a matter of law.⁸ In attempting to meet that standard, a movant who does not bear the ultimate burden of persuasion at trial need not negate the other party's claim; rather, the movant need simply point out to the court a lack of evidence for the other party on an essential element of that party's claim.⁹

If the movant carries this initial burden, the nonmovant who would bear the burden of persuasion at trial may not simply rest upon his pleadings; the burden shifts to the nonmovant to go beyond the pleadings and “set forth specific facts” that would be admissible in evidence in the event of trial from which a rational trier of fact could find for the nonmovant.¹⁰ To accomplish this, sufficient evidence pertinent to the material issue “must be identified by reference to an affidavit,

⁴Fed. R. Civ. P. 56(c). Fed. R. Civ. P. 56(c) is made applicable to adversary proceedings pursuant to Fed. R. Bankr. P. 7056.

⁵*Lifewise Master Funding v. Telebank*, 374 F.3d 917, 927 (10th Cir. 2004); *Loper v. Loper (In re Loper)*, 329 B.R. 704, 706 (10th Cir. BAP 2005).

⁶*Thom v. Bristol-Myers Squibb Co.*, 353 F.3d 848, 851 (10th Cir. 2003) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

⁷*Id.* (citing *Anderson*, 477 U.S. at 248).

⁸*Id.* (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)).

⁹*Id.* (citing *Celotex*, 477 U.S. at 325).

¹⁰*Id.* (citing Fed. R. Civ. P. 56(e)).

a deposition transcript, or a specific exhibit incorporated therein.”¹¹ Finally, the Court notes that summary judgment is not a “disfavored procedural shortcut;” rather, it is an important procedure “designed to secure the just, speedy and inexpensive determination of every action.”¹²

III. ANALYSIS

Although the Trustee has raised and preserved, in the Pretrial Order,¹³ additional substantive bases for challenging Debtor’s claimed exemption to the proceeds from the pre-petition sale of his home, he has limited his request for summary judgment to only one issue. The Trustee summarized in his reply brief what was not at issue:

Debtor’s intent, whether *In re Semmel*¹⁴ limits how much the Debtor can claim as exempt, [and] how much the Trustee can recover from the Debtor or from the persons receiving avoidable transfers from the sales proceeds are all interesting questions but their answers are not necessary for the court to address in reviewing the Trustee’s Summary Judgment Motion.

The Trustee also then made it clear what was at issue:

The questions presented by the Trustee’s Motion are simple and straightforward. First, what is the basis for the claimed exemption in the Schedule C and Pretrial Order presently on file with this Court? Second, is that a proper basis for the exemption? The answers are equally easy. In regard to the first question, the answer is K.S.A. 60-2304. In regard to the next question, the answer is clearly no.

In other words, the Trustee contends that Debtor is prohibited from claiming an exemption in the proceeds from the sale of his homestead, on the basis that he purports to intend to reinvest those proceeds in another homestead within a reasonable time, simply because his original bankruptcy

¹¹*Diaz v. Paul J. Kennedy Law Firm*, 289 F.3d 671, 675 (10th Cir. 2002).

¹²*Celotex*, 477 U.S. at 327 (quoting Fed. R. Civ. P. 1).

¹³Doc. 72.

¹⁴Case No. 01-14433 (Bankr. D. Kan. December 16, 2004).

attorney cited the wrong statutory basis for the exemption in his schedules, notwithstanding the provisions of a signed final Pretrial Order raising other bases for the claimed exemption.

In Kansas, the source of the homestead exemption is both statutory and constitutional, with a debtor's right to claim the homestead exemption found both in the Kansas Constitution, Art. 15, § 9 and at K.S.A. 60-2301. The statutory provision and the constitutional provision provide essentially the same homestead protection, with any differences in wording being inconsequential for the purposes of this case. Most other exemptions a Kansas debtor is entitled to claim are found in K.S.A. 60-2304, which statute includes such items as household goods and furnishings, jewelry, automobiles, burial plots, and tools of the trade.

For reasons unknown to the parties, Debtor's original bankruptcy attorney indicated that Debtor was claiming his homestead exemption in the proceeds to be reinvested under K.S.A. 60-2304, rather than K.S.A. 60-2301 or Art. 15, § 9 of the Kansas Constitution. As K.S.A. 60-2304 does not contain a provision for exempting a homestead, and in fact only relates to personal property, the Trustee contends that Debtor's homestead exemption must therefore, and without further inquiry, be disallowed in its entirety.

In support of the Trustee's position, he claims that "[t]he Trustee, as well as creditors and the Court, are entitled to rely upon statements contained within the Schedules and are not required to guess at what Debtor really meant to say."¹⁵ The Trustee relies upon *In re Dickson*,¹⁶ to support this position.

In *Dickson*, the debtor's schedules claimed a retirement account as exempt, but did not list the statutory basis for the claim (other than a vague, catch-all phrase that debtors were claiming

¹⁵Trustee's Reply to Debtor's Memorandum in Opposition to Motion for Summary Judgment filed by Trustee at 3, Doc. 79.

¹⁶114 B.R. 740, 742 (Bankr. N.D. Okla. 1990).

everything they could claim as exempt under applicable state and federal law) and did not list the value of the retirement account. The court noted, as pointed out by the Trustee herein, that “a claim of exemption as vague and incomplete as the present one is an improper and insufficient claim and may be denied and disallowed on that ground alone.”¹⁷ However, the *Dickson* court went on to recognize, in the sentence immediately following the section quoted by the Trustee in his reply brief here, that “denial of any exemption is a severe penalty, especially where Debtor’s attorney rather than Debtors themselves may be at fault . . .” and proceeded to evaluate the exemption on its merits.

The Court finds that the errors by Debtor’s bankruptcy attorneys provide no basis for disallowing Debtor’s homestead exemption. Debtor’s schedules clearly indicated that the money in his bank account was derived from the sale of his homestead, and that he intended to re-invest those proceeds into a new homestead. The Trustee in this case is well qualified, and very experienced in bankruptcy law, including the exemptions allowing in Kansas. The Court has little doubt that the Trustee was not “required to guess” what Debtor intended to exempt when reading his Schedules. This is especially true given the fact that Kansas has opted out of federal exemptions, meaning the Trustee was not forced to figure out if Debtor was claiming some federal exemption or a state exemption. In Kansas, the only homestead exemption allowed is the one under state law, and the Court finds Debtor’s Schedule C was sufficiently clear as to remove any reasonable doubt as to what he was claiming as an exemption.

The Trustee also claims that the first time Debtor ever raised or suggested that he might be able to exempt these proceeds, relying on the homestead exemption, is in Debtor’s response to his

¹⁷*Id.*

summary judgment motion. The Trustee argues it was not raised in the Pretrial Order.¹⁸ The Court agrees that if the issue was not raised in the Pretrial Order, Debtor cannot rely on it, pursuant to Fed. R. Civ. P. 16(a) and D. Kan. Rule 16.2(c).

The Court has reviewed the Pretrial Order in this case and finds that both Trustee and Debtor preserved the issue whether Debtor can exempt the proceeds from the pre-petition sale of his home under the Kansas homestead laws. First, at the end of Section 6, “Stipulations,” the parties agree that the law governing the case is that of the State of Kansas and the United States Bankruptcy Code. Secondly, in Section 7.1(A) of the Pretrial Order, Trustee asserts that for him to prevail on his objection to the exemption, he must prove “Debtor did not intend to reinvest the homestead sale proceeds into another homestead or has not reinvested the homestead sale proceeds into another homestead within a reasonable time.” (Emphasis added). Similarly, in Section 7.2(A), setting forth Debtor’s defenses to the objection to exemption, Debtor asserts he must “prove he has the right under Kansas law to claim the \$31,112.74 as homestead. The Debtor claims that the Trustee must prove that Debtor has no right to claim the proceeds as homestead under Kansas law. (Emphasis added).

Similarly, in Section 7.2(B) of the Pretrial Order, Debtor asserts that an issue of fact the Court must resolve at trial is “Whether Debtor has properly preserved his homestead claim by investing the said funds into the residence on NE Silver Road where he has resided since July, 2004.” (Emphasis added). Debtor further asserts the Kansas homestead exemption, admittedly not providing the statutory or Constitutional cite therefor, in Section 7.2(C) and 7.2(D), by indicating

¹⁸“As a result, some 16 months after filing the bankruptcy and claiming the exemption, an amended Schedule C, two attorneys, and a stipulated pretrial order, only now, in response to a summary judgment motion, does Debtor stumble upon a basis for exemption that arguably may be correct...” Trustee’s Reply to Debtor’s Memorandum in Opposition to Motion for Summary Judgment filed by Trustee at 3, Doc. 79.

in both subsections that an issue for the Court to decide is “Whether Debtor has properly preserve his homestead claim by investing the said funds into the residence.....”

The summary of anticipated testimony included at the back of the Pretrial Order again discusses the “homestead” and Debtor’s intent to reinvest the proceeds. Therefore, the Trustee’s assertion that the Debtor waited until after the final pretrial conference, and after the summary judgment motion was filed, to indicate the basis for the claimed exemption, is simply untrue. It probably would have been a better practice had this Court required Debtor’s counsel to include the statutory or constitutional citation in the Pretrial Order. That said, the Court was never confused about the fact Debtor was claiming a homestead exemption, and finds it surprising that the Trustee claims to have been confused, given the repetitive use of the term “homestead” throughout the Pretrial Order, which was combined with the mention of “Kansas Law,” even if no specific citation was included.¹⁹

Furthermore, and contrary to the Trustee’s assertion that the issue of whether K.S.A. 60-2304 (the personal property exemption statute) exempts these proceeds was “carried into the Pretrial Order,” a careful reading of the Pretrial Order reveals that Debtor clearly abandoned any reliance on K.S.A. 60-2304 in favor of the Kansas homestead exemption in that document. As early as May 24, 2005, when Debtor amended his Schedules B and C, it seems clear that Debtor, however

¹⁹This Judge’s notes from this final pretrial conference demonstrate that she did here what is her normal practice at those conferences, which is to go through each section with counsel, giving each side the opportunity to ask questions of opposing counsel if he does not believe the factual contentions or legal theories are clearly enough articulated. This procedure is followed because a main purpose of the pretrial conference is to make sure everyone clearly understands what the issues are for trial. This is critical since the Pretrial order supersedes the pleadings. The Court required the draft Pretrial Order be amended and re-uploaded after that conference, because the Court believed that certain additional information should be included (and the Trustee did then include it). *See* Pretrial Order §§ 7.1(D), 7.2(D), and 14.3, Doc. 72. Had the Trustee requested that Debtor’s counsel more clearly enunciate the statutory or constitutional basis for the exemption, because he was confused about whether Debtor was still relying on K.S.A. 60-2304, the Court would likely have required it. The Trustee was certainly given the opportunity to ask those kinds of questions. At the conclusion of that pretrial conference, the Court did not think either party was confused that the homestead exemption was the relevant issue.

clumsily, was attempting to raise a homestead exemption, and the Court thus will not grant summary judgment on the basis that if Debtor cannot prevail under K.S.A. 60-2304, he cannot win under the other theory he raised clearly enough in the Pretrial Order. The Pretrial Order supersedes the pleadings, and governs the future course of these proceedings.²⁰

Although the Court has found that no party was harmed by the citation to the incorrect statute in Debtor's Schedule C, and that the Pretrial Order clearly enough raises the Kansas homestead exemption as the basis for Debtor's defense to the Trustee's Objection to Exemptions, the Court does find that such error should be corrected. Therefore, Debtor is ordered to amend Schedule C within **10 days** to reflect an appropriate basis for claiming the funds from the sale of Debtor's homestead exempt.

Although the Court must deny summary judgment on the very narrow issue before it, as the Trustee correctly notes, there are numerous serious issues surrounding Debtor's claimed homestead exemption, including whether Debtor will ultimately be allowed to claim a larger exemption than he initially sought and whether Debtor truly intended to reinvest the proceeds from the sale of his homestead into another homestead (in which he apparently has no ownership interest) within a reasonable time, as required by Kansas law. The Court will thus reserve ruling on those issues until a later date.

IT IS, THEREFORE, BY THIS COURT ORDERED that the Trustee's Motion for Summary Judgment is denied.

IT IS FURTHER ORDERED that Debtor shall file an amended Schedule C within **10 days** that reflects an appropriate legal basis for claiming the funds from the sale of Debtor's homestead

²⁰*Youren v. Tintic School Dist.*, 343 F.3d 1296, 1304 (10th Cir. 2003).

exempt. Further, if the Debtor has decided to withdraw his Motion to Reconvert,²¹ he shall also do that within **10 days**.

IT IS FURTHER ORDERED that because there are no other pending dispositive motions, Debtor's Objection to Exemptions, as well as Debtor's Motion to Reconvert, are set for trial on this Court's stacked evidentiary docket, **April 5-6, 2006**.

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²¹Debtor's summary judgment response indicates he does not know why his former counsel filed the Motion to Reconvert (Doc. 29). *See* Debtor's Memorandum in Opposition to Motion for Summary Judgment Filed by Trustee at 5 (¶ 22). If he does not still wish to pursue that Motion, he should withdraw it within 10 days.