



SO ORDERED.

SIGNED this 03 day of November, 2009.

ROBERT E. NUGENT
UNITED STATES CHIEF BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

IN RE:

BRUCE EARL ANDERSON,

Debtor.

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Case No. 05-19222
Chapter 7

PROCEDURAL ORDER ON REMAND

This matter comes before the Court on remand from the District Court’s decision on appeal, reversing this Court’s decision on the trustee’s objection¹ to debtor’s claimed homestead exemption under 11 U.S.C. § 522(p)(1).² This Court ruled, on the trustee’s motion for summary judgment, that debtor did not acquire an interest in his homestead during the 1,215 day lookback period and § 522(p)(1) did not apply to a debtor who purchased his homestead outside the 1,215 day period

¹ Creditors Central Plains Steel Co. (Central Plains) and Salina Steel Supply, Inc. (Salina Steel) joined in the trustee’s objection.

² *Parks v. Anderson*, 406 B.R. 79 (D. Kan. 2009).

preceding the bankruptcy filing but paid down the home mortgage in excess of the \$125,000 cap during the 1,215 day lookback period.³ The District Court disagreed and held that debtor acquired an interest in the homestead by paying down the mortgage during the 1,215 day lookback period, triggering the statutory homestead exemption cap and application of § 522(p)(1). The District Court concluded:

. . . the term “interest,” as used within § 522(p), refers to equity acquired by a debtor within the 1,215-day period prior to filing bankruptcy. As a result, a debtor may not exempt equity acquired in a homestead during the 1,215-day period prior to filing bankruptcy that exceeds in the aggregate \$125,000.⁴

The District Court then remanded the case back to this Court “for further proceedings consistent with this Order.”⁵

This Court convened a status conference with the litigants on May 28, 2009 to address the status of issues remanded by the District Court. At that conference, debtor advised of his intent to move to amend the pretrial order and in fact did so as a precautionary measure to ensure that the manner of calculating the equity acquired by the debtor during the 1,215 day lookback period was encompassed by the original pretrial order.⁶ The Court allowed the parties to file memoranda commenting on their respective positions regarding the issues and proceedings on remand. After several extensions of the briefing deadline, each of the parties filed submissions.⁷ The Court has reviewed those submissions and is now prepared to rule on the procedural posture of this case and

³ *In re Anderson*, 374 B.R. 848 (Bankr. D. Kan. 2007).

⁴ 406 B.R. at 95.

⁵ *Id.* at 97.

⁶ Dkt. 345. *See also*, Dkt. 245, the Final Pretrial Order filed July 3, 2007.

⁷ *See* Dkt. 343, 344, 345, 346, and 347.

the remand issues.⁸

Analysis

This Court is bound to follow the mandate of the District Court and it controls all matters within its scope.⁹ If the further proceedings are specified in the mandate, this Court is limited to holding those proceedings as are directed.¹⁰ When the remand is general, however, the district court is free to decide anything not foreclosed by the mandate.¹¹ The Court must therefore first determine the scope of the District Court's mandate.

As this Court reads the District Court's opinion, it determined that § 522(p) encompasses equity acquired by the debtor during the 1,215-day lookback period and triggers application of the \$125,000 statutory homestead exemption cap. The District Court reversed this Court on an issue of statutory interpretation – a pure issue of law. While it held that § 522(p) applies in a situation where the debtor purchases his home outside the 1,215 day period and pays down the mortgage

⁸ On September 11, 2009, debtor's wife, Lana Anderson (a non-filing debtor) filed a motion seeking to intervene in the proceedings on remand ("contested matter concerning Debtor's exemption of real property"). Lana represents that she and debtor are parties to a pending divorce proceeding filed in 2008 in state court, during the pendency of the appeal. Dkt. 349. The motion to intervene is scheduled to be heard on November 12, 2009 and the Court makes no determination today on the intervention motion.

⁹ See *Procter & Gamble Co. v. Haugen*, 317 F.3d 1121, 1126 (10th Cir. 2003) (The mandate consists of the appellate court's instructions to the trial court at the conclusion of the opinion, and the entire opinion that preceded those instructions.); *United States v. Hicks*, 146 F.3d 1198, 1200 (10th Cir. 1998) (The mandate rule is a discretion-guiding rule that generally requires trial court conformity with the articulated appellate remand.).

¹⁰ *Britton v. Dowell, Inc.*, 243 F.2d 434 (10th Cir. 1957) (On remand from an appellate court with a specific mandate, defendant could not amend answer to allege a new affirmative defense; trial court had no jurisdiction to vary or extend the mandate.).

¹¹ *Hicks v. Gates Rubber Co.*, 928 F.2d 966, 971 (10th Cir. 1991) (The district court was free to hold any hearings necessary to make revised findings addressing the theory of hostile work environment sexual harassment).

within the 1,215 day period, neither this Court nor the District Court made any determination or findings concerning the “amount of interest that was acquired by the debtor during the 1,215 day period” exceeding in the aggregate the statutory cap. The Court construes the District Court’s instruction “for further proceedings consistent with this Order” as a general remand, not specifically directing how this Court should proceed nor expressly limiting remand to certain issues. This Court concludes that its task on remand is to determine the aggregate amount of equity “acquired” by the debtor during the 1,215-day lookback period and calculate the amount of equity that exceeds the \$125,000 statutory cap. The sum in excess of the statutory cap may not be exempted as debtor’s homestead and is property of the estate.

Having determined the issue on remand, the Court next considers whether an evidentiary hearing is necessary to make these findings and calculations.¹² Because the trustee’s objection to the homestead exemption was determined on motions for summary judgment, the Court first looks to the summary judgment papers filed in this case to ascertain whether the uncontroverted statements of fact establish the amount of equity acquired during the 1,215 day period.¹³ The Court concludes that they do not. The key facts are found in the trustee’s statement of uncontroverted facts as ¶s 10

¹² See *Cleveland By and Through Cleveland v. Piper Aircraft Corp.*, 985 F.2d 1438 (10th Cir. 1993) (A trial court’s broad discretion over its control and management of trials extends on remand to all areas not covered by the appellate court’s mandate; trial court may deny party use of new witnesses and evidence in new trial, noting that a remand for new trial is “not an invitation to reopen discovery,” and to enlarge trial time unnecessarily through addition of new exhibits and testimony.); *United States v. Bell Petroleum Services, Inc.*, 64 F.3d 202 (5th Cir. 1995) (Where further proceedings are contemplated by an appellate opinion, the trial court retains discretion to admit additional evidence); *United States v. Wilson*, 322 F.3d 353 (5th Cir. 2003) (On remand for evidentiary hearing, the trial court is not limited to the summary judgment record before it and has discretion to admit additional evidence.).

¹³ Dkt. 249, 250, 258,

and 11.¹⁴ There, she states that mortgage payments during the 1,215 day period reduced the principal by \$74,989.79 and that the lump sum payment of \$240,000 on July 18, 2005 reduced the principal by \$239,025, for a total reduction of principal in the amount of \$314,014.79. In response, the debtor disputes both the calculation of the 1,215-day lookback period and that all the payments on the mortgage are attributable to him.¹⁵ He contends that the principal payments that effected a \$74,989.79 reduction in principal were made by his non-filing wife and that his non-filing wife also had a partial interest in the funds used to pay the \$240,000 lump sum payment. In short, while there are some facts from the summary judgment papers that can be deemed established for purposes of the remand hearing, the amount of equity acquired by the debtor during the 1,215-day period is not one of them.¹⁶ The Court will therefore set this remand matter down for an evidentiary hearing.

The Court comments briefly on the scope of that evidentiary hearing so that the parties may plan their trial preparation accordingly. The Court has previously addressed the trustee's complaint that debtor's injection of the source of payments as a defense to the trustee's exemption objection under § 522(p)(1) is untimely asserted. In its summary judgment ruling of October 2, 2007, the Court stated:

¹⁴ Dkt. 250.

¹⁵ Dkt. 258-1. Debtor attaches his affidavit as support for the controversion. It appears to the Court to be based upon personal knowledge.

¹⁶ As noted in its ruling on the summary judgment motion, the Court stated: “. . . the facts in this case are uncontroverted except for the source of some payments made on the mortgage against the homestead. Because the source of payment is not a genuine issue of material fact necessary to the Court's determination of the applicability of § 522(p)(1), this factual dispute is disregarded.” Dkt. 273, p. 4. The Court has also reviewed the Final Pretrial Order entered in this matter on July 3, 2007 and notes that there are no stipulations of fact therein that enable the Court to simply make a calculation of the aggregate equity acquired during the 1,215 day period. *See* Dkt. 245, p. 3.

With respect to the debtor's defense to the trustee's summary judgment motion concerning the source of the payments applied to the mortgage, the Court has reviewed the final pretrial order and concludes that debtor has not previously raised these matters in defense to the objections to the homestead exemption. While the source of the payments is not a genuine issue of material fact necessary to the Court's ruling on the applicability of § 522(p)(1) and was not considered by the Court in deciding the trustee's summary judgment motion, it is relevant and material to the trustee's remaining objection to homestead exemption under § 522(o). Because this newly raised defense is not preserved in the final pretrial order, the Court will permit the trustee, as well as Central Plains Steel Co. and Salina Steel Supply, Inc., to conduct discovery on this defense prior to trial on the § 522(o) objection to homestead exemption. Debtor shall make himself and his non-debtor wife available for deposition, and produce all relevant documents pertaining to this defense, within ten (10) days of entry of this order. If he does not do so within the allotted time, debtor will be barred from introducing evidence on this defense at [the § 522(o)] trial.¹⁷

The Court cannot determine whether the precedent conditions it imposed on debtor's offering Lana Anderson's testimony were met. Ms. Anderson did not testify at the § 522(o) trial.

Given that this Court's summary judgment ruling essentially foreclosed issues of calculation of the amount of interest acquired and the sources of the debtor's payments made within 1,215 days and that the District Court has reversed that ruling, the Court will allow otherwise admissible testimony and exhibits pertaining to the extent of Ms. Anderson's contribution, if any, to the payments made within the look-back period. The Court grants a 21-day discovery period commencing on the date this order is entered for discovery pertaining to that issue (and that issue alone). Debtor shall have 7 days from the date of this order to file their his list of exhibits on the source of payments defense and serve the same on the opposing parties. The trustee shall have 7 days thereafter to object to any such exhibits that have not been previously produced by debtor.

The Court notes that Kansas law is clear that joint tenants in real estate are presumed to each

¹⁷ Dkt. 273, p. 21.

hold an undivided one-half equitable interest in same.¹⁸ The Court also notes that the execution by a judgment creditor upon one joint tenant's interest effects a severance of the joint tenancy, and that either tenant may rebut the presumed one-half division by bring competent evidence forward.¹⁹ Who provided payment for the parties' respective interests is relevant to that inquiry. What is before the Court in this hearing is what interest Mr. and Mrs. Anderson may have had *at the date of the petition*.

Accordingly, the Court will entertain evidence concerning what Mr. and Mrs. Anderson respectively contributed to the paying down of the mortgage during the 1,215 period. Because the District Court's mandate effectively rebuts, at least in part, the prima facie validity of debtor's claimed exemption, the burden has shifted to the debtor to prove that his exemption is proper and what extent.²⁰ The Court notes here that Mrs. Anderson may have claimed some interest in the homestead as of the date of the petition, the operative date for determining the extent of the exemption. Because this is not an adversary proceeding and because she is, at present, not a party to this contested matter, this Court lacks jurisdiction to determine the extent of her "separate" interest in the homestead in this matter. Should the Court determine at trial that Anderson acquired an interest in the homestead of more \$125,000 during the look-back period, the Trustee will first need to commence such an adversary proceeding under § 363(h) to determine the respective interests of Anderson's bankruptcy estate and Mrs. Anderson as of the petition date. Then she will need to

¹⁸ *Walnut Valley State Bank v. Stovall*, 223 Kan. 459, 574 P.2d 1382 (1978). *See also*, KAN. STAT. ANN. § 58-501 (2005).

¹⁹ *Walnut Valley State Bank*, *supra* at 463-64 (the party challenging the presumption of equal ownership has the burden of proof).

²⁰ *See In re Hodes*, 308 B.R. 61 (10th Cir. BAP 2004); *see also* Hon. Barry Russell, BANKR. EVID. MAN., 2008-2009 Ed., § 301.57 (Thomson/West, 2008).

seek an order granting her leave to sell the homestead and to release and distribute the parties' respective equity, if any, under § 363(j). How Mr. and Mrs. Anderson's *marital* interests should be divided under KAN. STAT. ANN. § 60-1610 as of the date of their divorce filing (well after this case was initially decided) is the proper subject matter of the domestic court once stay relief is granted by this Court to allow that determination to go forward.²¹

Apart from the limited discovery allowed by the Court above with respect to the source of payments defense, the parties completed discovery on the trustee's objection to debtor's homestead exemption in 2007 and the Final Pretrial Order was entered July 3, 2007.²² It shall govern the evidentiary hearing on remand and the parties will be limited to the exhibits and witnesses listed therein, except as provided in this Order. Because this Court has previously allowed debtor to assert his "source of payments" defense and permitted discovery of the same, the Court finds that it is unnecessary to formally amend the Final Pretrial Order. Accordingly, debtor's motion to amend the final pretrial order is DENIED.

After the remand status conference held in late May, the Trustee renewed her motion for summary judgment on the calculation issue and her motion to strike debtor's source of payments

²¹ Upon the commencement of a dissolution of marriage case, a married couple's property becomes a "marital estate" to be divided by the domestic court, *see* KAN. STAT. ANN. § 23-201 and § 60-1610.

²² Dkt. 245. In fairness to debtor, the final pretrial order arguably preserved all calculation-related issues under § 522(p)(1). The final pretrial order identified as an issue of fact: "(1) the total amount *paid by the Debtor* on his homestead in the 1215-day period preceding the Filing Date" Dkt. 245, p. 4 (Emphasis added). It is not clear to this Court that defending the trustee's objection on the basis that debtor did not make the payments on the homestead constitutes an affirmative defense that must be timely raised by the debtor. In short, the issue of fact stated in the pretrial order necessarily implicates the source of those payments, as does the statutory language that speaks to the interest "acquired by the debtor" during the 1,215-day period.

defense.²³ As noted previously herein, debtor's opposing affidavit to the original summary judgment motion²⁴ is based upon personal knowledge and is sufficient to create a genuine issue of material fact whether debtor acquired equity in the property during the look-back period in excess of the statutory cap. The Court has decided to conduct an evidentiary hearing on the merits of the calculation issues before the Court on remand. Accordingly, the Trustee's renewed summary judgment motion and motion to strike debtor's payment source defense are DENIED.

IT IS THEREFORE ORDERED that an evidentiary hearing on remand from the District Court on the trustee's objection under § 522(p)(1) to debtor's claim of homestead exemption, will be held in the United States Bankruptcy Court for the District of Kansas on **December 15, 2009 at 9:00 a.m.** or as soon thereafter as the Court can reach the case at the United States Courthouse, 401 N. Market, Wichita, Kansas. The Court will reserve four trial hours for this hearing.

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²³ Dkt. 343.

²⁴ Dkt. 258-1. There is no suggestion here that this is a case of a sham affidavit offered by debtor that contradicts previous deposition testimony. *See Franks v. Nimmo*, 796 F.2d 1230, 1237 (10th Cir. 1986).