

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)
)
BONNIE J. MCGINNIS,) CASE NO. BK99-82753
) CH. 13
DEBTOR(S))

MEMORANDUM

Hearing was held on April 6, 2000, on Objection to Claim of Exemptions by Trustee. Appearances: Kathleen Laughlin as Chapter 13 Trustee and Philip Kelly as attorney for debtor. This memorandum contains findings of fact and conclusions of law required by Fed. Bankr. R. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(B).

Background

This matter is before the court on debtor's claim of a Nebraska homestead exemption in a 1997 Hitchhiker 5th Wheel Trailer("Trailer") and the Trustee's objection thereto. The Trustee claims that the Trailer is not the type of dwelling place entitled to a homestead exemption because the Trailer is not permanently annexed to real estate in Nebraska. The debtor in turn argues that the Trailer is a sufficient dwelling place because, at the time of filing, the Trailer was annexed to real estate, as the debtor leased a lot on a month-to-month basis, and the Trailer was connected to city water, sewer and electricity services.

Facts

The debtor is a 26-year old electrician. She has been employed by the same company for several years and her job requires that she travel from state to state to perform electrician duties as needed. She uses the Trailer while traveling from place to place. The debtor hooks the Trailer up to a pickup truck, drives to the work-site and detaches the Trailer. She lives in the Trailer while she works instead of renting a motel room or temporary apartment.

The debtor's mother resides in Kimball, Nebraska, and the debtor returns to Nebraska upon completion of her jobs at various other places. The debtor lists a Kimball address on

her schedules and, at the time of filing, maintained checking accounts in both Kimball and Grand Island, Nebraska.

Although single on the petition date, prior to filing the debtor had been married and both she and her former spouse resided in the Trailer in Nebraska. The Trailer contains a refrigerator, television, VCR, stove, shower and microwave.

The debtor resided in Nebraska for the six months prior to filing while she was between jobs. During that time, she was leasing the real property upon which the Trailer stood. The lease was on a month-to-month basis. While the Trailer was on the leased property, it was not hooked up to any vehicle. It was held in place by various braces and supports, and was connected to utilities.

The Trailer has an estimated value of \$40,000.00. Norwest Bank of Minnesota South, N.A. holds a lien on the Trailer of \$28,500.00 leaving the debtor with equity of \$11,500.

Law

Nebraska Revised Statute § 40-101 defines the homestead exemption under Nebraska law. Neb. Rev. Stat. § 40-101. Section 40-101 states "[a] homestead not exceeding twelve thousand and five hundred dollars in value shall consist of the dwelling house in which the claimant resides, its appurtenances, and the land on which the same is situated." Neb. Rev. Stat. § 40-101. Further, Nebraska law requires that the homestead claimant either be married or a "head of family." Neb. Rev. Stat. §§ 40-102, 40-115. In re Roberts, 219 B.R. 235, 237 (8th Cir. BAP 1998); Brusha v. Phipps, 86 Neb. 822, 126 N.W. 856 (1910). The homestead character, once acquired, continues as long as the residence is on the premises. Palmer v. Sawyer, 74 Neb. 108, 103 N.W. 1088 (1905).

The general rule is that the right to exemptions is determined by the facts as they existed on the original date of filing the bankruptcy petition. See, Alexander v. Carter (In re Alexander), 238 B.R. 911, 916 (8th Cir. BAP 1999); Lowe v. Sandoval (In re Sandoval), 103 F.3d 20 (5th Cir, 1997), In re Beshirs, 236 B.R. 42 (Bankr. D. Kan. 1999); In re Ferretti, 230 B.R. 883 (Bankr. S.D. Fla. 1999); In re Weed, 221 B.R. 256 (Bankr. D. Nev. 1998). However, it has been held that, in a

case converted from Chapter 13 to Chapter 7, the date of conversion, not the date of the original Chapter 13 filing, is the date on which exemptions are determined. In re Wegner, 243 B.R. 731 (Bankr. D. Neb. 2000) (Minahan, J.,). In this case, no conversion is sought, therefore, the date of filing the bankruptcy petition is an appropriate date to utilize as it provides a "line of cleavage for determining exemptions." In re Heater, 189 B.R. 629 (Bankr. E.D. Va. 1995) (quoting In re Shoonover, 147 B.R. 430, 431 (Bankr S.D. Ohio 1992).

Nebraska courts have taken a liberal view of the type of improvements which will satisfy the dwelling house requirement of the Nebraska Homestead Exemption Statute. In re Buzzell, 110 B.R. 440, 442 (Bankr. D. Neb. 1990).

In In re Foley, 97 F.Supp.843, 844 (D. Neb. 1951), the United States District Court for the District of Nebraska held that a glider house trailer situated on land which was leased on a month-to-month basis could qualify for the Nebraska homestead exemption if the trailer is permanently annexed to the land. In Foley, the debtor owned a glider house trailer on property that was leased on a month-to-month basis. In re Foley, 97 F.Supp. at 844. The court in Foley, although not describing or defining what a "glider house trailer" was, articulated a three-prong test to establish the right to a homestead exemption. Id. at 844. First, the person claiming the exemption must be a "head of family." This prong of the test has been modified to require either that the debtor be married or "head of family." In re Roberts, 219 B.R. at 237. Second, the claimant must have an interest in the real estate concerning which the exemption is claimed. Finally, the claimant must occupy the same as a family residence. Id.

The debtor in Foley satisfied the first and third prong of the test as he was married with dependent children, thus satisfying the "head of family requirement," and his family occupied the trailer, satisfying the occupation requirement. Id. The only issue left to be resolved in Foley concerned the nature of the interest in real property required to claim the homestead exemption. Id.

The court noted that a debtor is not required to be the absolute fee owner of real property in order to establish the homestead exemption in Nebraska. Rather, any interest in land coupled with occupancy by the debtor and his family is sufficient to allow a homestead exemption. Id. at 845.

Although a tenant at will does not have a sufficient interest in the property to assert a homestead privilege, according to Nebraska law a month-to-month tenancy is a periodic tenancy and not a tenancy at will. Id. at 845. Because the Nebraska Supreme Court had previously stated that any estate or interest in land which includes the right to the occupancy or possession would be sufficient to entitle a person to the benefits of the homestead provision, the Foley court held that a tenant from month-to-month holds a sufficient interest in property to support a homestead exemption. Id. at 845.

Finally, the court in Foley attempted a determination of what "permanent annexation" requires. The court stated that valid factors might include; 1) whether the dwelling place had been placed on blocks, 2) whether a connection to electricity was present, and 3) whether a connection with plumbing and water service was present. Id. At 847. The court also noted "that courts should be very liberal in determining that a sufficient attachment to realty has occurred." Id.

The present case is directly analogous to In re Foley and the debtor is, therefore, granted a homestead exemption in the Trailer. The debtor has satisfied the first and third prong of the Foley test as the debtor, while married, resided in the Trailer with her husband. Although at the time of filing the debtor's former husband did not reside in the Trailer with her, a homestead, once acquired, stays attached to the property. Palmer v. Sawyer, 74 Neb. 108, 103 N.W. 1088 (1905). On the petition date, the debtor did reside in the Trailer. The only issue remaining, the nature of the interest in real property necessary to establish the homestead exemption, was decided in Foley.

In the present case, the debtor lived in the Trailer on a lot which was leased on a month-to-month basis. According to Foley, a month-to-month tenancy is considered a periodic tenancy in Nebraska and this leasehold interest is sufficient to support the claim to homestead exemption.

The Trustee argues that the Trailer is not the "type" of dwelling that could qualify for a homestead exemption because it was not permanently annexed to the property. However, under the case law, the "type" of dwelling seems to be irrelevant. A "glider trailer" qualified in Foley and a mobile home qualified in In re Buzzell. There, it was held that a "mobile home," placed upon leased property, could

satisfy the homestead exemption as long as it was permanently annexed to the property. In re Buzell, 110 B.R. at 442.

The Trailer in the present case was permanently annexed to the land following the liberal construction encouraged in Foley. The Trailer was held in place by braces to the land and was connected to electricity, plumbing, sewer and water service. Therefore, according to the analysis in Foley, the Trailer was permanently annexed to the land.

Therefore, because the case is analogous to In re Foley in all aspects and the Trailer was annexed to the land at the time of filing, the debtor has a right to claim a Nebraska homestead exemption.

The exemption is granted. The objection is denied.

Separate journal entry to be filed.

DATED: May 25, 2000

BY THE COURT:

/s/Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

Copies faxed by the Court to:

51 KELLY, PHILIP

Copies mailed by the Court to:

Kathleen Laughlin, Trustee
United States Trustee

Movant (*) is responsible for giving notice of this journal entry to all other parties (that are not listed above) if required by rule or statute.

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FOR THE DISTRICT OF NEBRASKA

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BONNIE J. MCGINNIS,) CASE NO. BK99-82753
) A

DEBTOR(S))
) CH. 13
) Filing No. 5, 8
Plaintiff(s))
vs.) JOURNAL ENTRY
)
)
)

Defendant(s)) DATE: May 25, 2000
HEARING DATE: April 6,
2000

Before a United States Bankruptcy Judge for the District of Nebraska regarding Objection to Claim of Exemptions by Trustee and Resistance by Debtor.

APPEARANCES

Philip Kelly, Attorney for debtor
Kathleen Laughlin, Chapter 13 Trustee

IT IS ORDERED:

The exemption is granted. The objection is denied. See Memorandum entered this date.

BY THE COURT:

/s/Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

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51 KELLY, PHILIP

Copies mailed by the Court to:
Kathleen Laughlin, Trustee
United States Trustee

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