

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:)
)
SHARON MICHAEL,) CASE NO. BK99-80789
)
DEBTOR.) CH. 13

MEMORANDUM

Hearing was held on September 14, 1999, on the Amended Plan. Appearances: Kristen Mickey for the debtor, Brenda Bartels for Scottsbluff Federal Credit Union, and Kathleen Laughlin as Chapter 13 Trustee. 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).

Facts

This matter comes before the court on an amended plan by the debtor, Sharon Michael, and resistance by creditor Scottsbluff Federal Credit Union ("SFCU"). At issue is debtor's claim of a Nebraska Homestead Exemption and SFCU's resistance thereto. On April 7, 1999, Sharon Michael filed for Chapter 13 relief in the United States Bankruptcy Court for the District of Nebraska. On her schedules, Michael listed her address as 170360 Spring Creek Road, Mitchell, Nebraska, and thereby claimed a Nebraska Homestead Exemption. SFCU, however, claims that Michael resided not in Nebraska, but rather in Colorado, for the 180 days preceding bankruptcy and is, therefore, not qualified for the Nebraska Homestead Exemption.

Long prior to the bankruptcy filing, Michael and her now deceased husband purchased and lived in the Nebraska residence and qualified for the homestead exemption. However, because of her recent employment history, her continuing eligibility has been called into question.

Michael is a registered nurse and was employed at various places in Colorado from 1997-1999. At the time she filed for bankruptcy, she was employed at Box Butte General Hospital in Alliance, Nebraska, but at the present time is employed in Colorado. While working in Colorado, Michael maintains an apartment in Denver where she lives while working. She returns home to the Mitchell, Nebraska, address on her off

days and sleeps there when not working. Michael maintains her home in Mitchell, Nebraska. The power is left on. The phone is in working order. She has lawn maintenance done. She gets her hair done in the community. She attends church, pays taxes, and conducts business there as well.

Legal Issue Presented by Parties

SFCU alleges that, because Michael maintained an apartment in Colorado, worked in Colorado and spent the work week in Colorado, she cannot claim a Nebraska homestead exemption because her home was in Colorado for the 180 days preceding the filing of her bankruptcy. Conversely, Michael alleges that, because she returned to her home in Nebraska when off work and carried on her business in the Nebraska community, she is entitled to claim the Nebraska Homestead Exemption.

Held

Michael may claim the Nebraska Homestead Exemption

Analysis and Conclusions of Law

Nebraska has opted out of the federal exemption laws and, according to 11 U.S.C. § 522(b), Nebraska state exemption law applies. Pursuant to Neb. Rev. Stat. § 40-101, a homestead exemption of \$12,500.00 is provided for the dwelling house in which the claimant *resides* (emphasis added). Residence or occupancy is generally required in order to claim the homestead exemption in Nebraska and it has been held that a person cannot have two places either of which he may elect to claim as a homestead. *Travelers Indemnity Co. v. Heim*, 218 Neb. 326, 352 N.W.2d 921 (Neb. 1984); *Berggren v. Bliss*, 122 Neb. 801, 241 N.W. 544 (Neb. 1932); *Hair v. Davenport*, 74 Neb. 117, 103 N.W.2d 1042 (1905). However, a departure from the homestead for work, medical reasons or pleasure does not constitute an abandonment of the homestead. *In re Hall*, Neb.Bkr. 95:63; *Blumer v. Albright*, 64 Neb. 249, 89 N.W. 809 (Neb. 1902). Rather, the test to determine abandonment of the homestead, according to Nebraska law, is 1.) physical departure and 2.) intent not to return. *Horn v. Gates*, 155 Neb. 667, 53 N.W.2d 84 (Neb. 1952); *Phifer v. Miller*, 153 Neb. 748, 45 N.W.2d 907 (Neb. 1951); *National Bank of Commerce v. Chamberlain*, 72 Neb. 469, 100 N.W. 943 (Neb. 1904); *Blumer*, 64

Neb. at 249; *Edwards v. Reid*, 39 Neb. 645, 58 N.W. 202 (Neb. 1894); *Mallard v. First National Bank*, 40 Neb 784, 59 N.W. 511 (Neb. 1894).

Nebraska courts have held that, once a homestead as defined by statute has been established, it is presumed to continue and the burden of proving abandonment is upon the party asserting abandonment. *Sanne v. Sanne*, 167 Neb. 683 (Neb. 1959); *Karls v. Nichols*, 148 Neb 712, 28 N.W.2d 595 (Neb. 1947). The burden of the party asserting abandonment of a homestead is a preponderance of the evidence. *Karls*, 148 Neb. at 712.

SFCU has not shown that Michael abandoned her homestead by a preponderance of the evidence. At the time of filing the bankruptcy, Michael was living only at the Mitchell, Nebraska, address and was working at Box Butte General Hospital in Alliance, Nebraska. The time of filing and 180 days preceding filing are the relevant time periods for determining a homestead exemption. SFCU's allegation that Michael resided in Colorado prior to the filing because she maintained a rental apartment there, received service of process there, and worked there is not enough. All of the evidence presented by SFCU may prove physical absence from the homestead but such evidence fails to show that Michael intended to abandon the homestead.

Michael bought the Mitchell, Nebraska, property with her husband who is now deceased. Although she may not be physically present at the address during the week, she evinced her intent to maintain the homestead right by returning to the homestead on her days off, continuing to have a phone and electricity supplied to the home, attending church in the community, and participating in, and considering herself a member of the community. These actions show that Michael considers the Mitchell, Nebraska, address as her home for homestead purposes and she may, therefore, claim the Nebraska Homestead Exemption.

Objection to plan/homestead exemption denied.

Separate journal entry to be filed.

DATED: November 16, 1999

BY THE COURT:

/s/Timothy J. Mahoney
Chief Judge

Copies faxed by the Court to:

BARTELS, BRENDA	51
MICKEY, KRISTEN	308-632-5536

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.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:)
)
SHARON MICHAEL,) CASE NO. BK99-80789
) A
DEBTOR(S).)
) CH. 13
) Filing No. 28, 36, 37
Plaintiff(s))
vs.) JOURNAL ENTRY
)
)
)
Defendant(s)) DATE: November 16, 1999
HEARING DATE: September
14, 1999

Before a United States Bankruptcy Judge for the District of Nebraska regarding Amended Plan, Resistance by Trustee, and Resistance by Scottsbluff Federal Credit Union.

APPEARANCES

Kristen Mickey, Attorney for debtor
Brenda Bartels, Attorney for Scottsbluff Federal Credit Union
Kathleen Laughlin, Chapter 13 Trustee

IT IS ORDERED:

Objection to plan/homestead exemption denied. See memorandum entered this date.

BY THE COURT:

/s/Timothy J. Mahoney
Chief Judge

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MICKEY, KRISTEN 308-632-5536

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