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UNITED STATES
BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

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UNITED STATES BANKRUPTCY COURT
DISTRICT OF ARIZONA

In Re) Chapter 7
)
MICHAEL NEWTON and) No. 03-13924-PHX-GBN
ELLEN NEWTON,)
)
Debtors.) FINDINGS OF FACT,
) CONCLUSIONS OF LAW
) AND ORDER

The objection of Chapter 7 bankruptcy trustee Anthony H. Mason to the homestead exemption claim of debtors Michael W. and Ellen K. Newton was tried to the court as a bench trial on December 18, 2003 and January 27, 2004.

The court has considered the parties' legal briefs, sworn witness testimony, admitted exhibits and the facts and circumstances of this case. An interim order was entered on February 13, 2004 announcing the court's decision. The following findings and conclusions are now entered:

FINDINGS OF FACT

1. Mr. and Mrs. Newton have owned a residence located at 6040 East Harvard Avenue in Scottsdale, Arizona since the mid 1970's. In 1988 the Newton family moved into a rental residence at 4126 North 58th Place in Phoenix. The move was accomplished to obtain a better school district for their children and avoid the

1 perceived harassing actions of the Harvard homeowners'
2 association toward the family. Debtors retained ownership of the
3 Harvard property and rented it to tenants, the last being Donald
4 D. and Marge Glenn. After the children were grown, debtors did
5 not move back to Harvard. Mrs. Newton was still uncomfortable
6 with the association and the couple had made friendships at the
7 58th Place property. The Glenns, who had been tenants since 1993,
8 agreed to vacate in late 2002, following state court litigation.
9 Testimony ("test.") of Michael W. Newton of December 18, 2003
10 and January 27, 2004.

11 2. The present case is debtors' third bankruptcy
12 filing since 1995 in either Phoenix or Tucson. All three filings
13 contain factual inaccuracies or omissions, many concerning
14 debtors' residence. The 1995 Tucson filing incorrectly lists
15 debtors' residence as the Harvard address, although they resided
16 at 58th Place at the time. The lease of 58th place was not listed
17 in the schedule of unexpired leases. Admitted exhibits ("exs.")
18 12-14, test.

19 The 1996 Phoenix bankruptcy case again incorrectly
20 listed debtors' residence as on Harvard. That property was
21 claimed exempt as a homestead, even though the family did not
22 reside there. Although the Glenns were tenants at the time,
23 their lease was not identified as an estate asset. Exs. 15-17.
24 Mr. Newton attributes these errors to himself and to his former
25 counsel. Test.

26 3. Despite the two previous bankruptcies, debtors'
27 financial problems continued, due to a failed restaurant
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1 business. After a September 6, 2002 settlement of the
2 litigation, the Glenns left the Harvard residence. Debtors
3 repaired the residence and allowed Mr. Newton's brother to move
4 in. After he left, the property was listed for sale on June 5,
5 2003. The broker's listing agreement reflects that debtors were
6 already independently working with three potential purchasers at
7 the time. Mr. Newton met with his father-in-law on June 18, 2003
8 and thereafter consulted an attorney regarding debtors'
9 deteriorating finances.

10 The next day, acting on counsel's advice, debtors
11 filed a homestead declaration on the Harvard property. Mr.
12 Newton moved to the property to establish the homestead, again on
13 advice of counsel. A temporary residence was intended only,
14 until the property sold. He then intended to return to 58th
15 Place. Debtor moved a bed, chair, clothing, a television set,
16 his medications, a computer, some documents and sheets to cover
17 the windows into the vacant residence. The rest of his personal
18 belongings remained at the 58th Place rental property, where his
19 wife continued to live. He had his breakfast and dinner at
20 Harvard every day, eating on the kitchen counter top. Debtor
21 would return to the property by 8:00 p.m. each night. He used a
22 cell phone at the premises. Debtors paid for water and
23 electricity service. He received visitors and mail at the
24 premises, although some bills for Harvard utilities were sent to
25 the 58th Place address. Exs. 2-3, 4 at P.3, paragraph 30; Exs. B
26 and K; test.

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1 4. Mrs. Newton continued to reside at the 58th Place
2 rental property, debtors' marital property and the rest of Mr.
3 Newton's belongings remained there, because (1) Mr. Newton only
4 intended to live at the Harvard residence until it was sold, (2)
5 debtors lacked the funds to move all their belongings and Mrs.
6 Newton and (3) their dogs would have soiled the Harvard carpets,
7 making the property harder to sell. Sale of the home for
8 \$208,000 closed on August 5, 2003. Debtors received \$50,451.31
9 from the sale as homestead proceeds,¹ which was placed in a
10 separate homestead account. Debtors' intent was to live on these
11 exempted funds until they both obtained employment. Mr. Newton
12 immediately moved back to the 58th Place rental, where debtors
13 resided at the time of this trial. Ex. 9, test.

14 5. Two days after the sale on August 7, 2003, debtors
15 filed their present chapter 7 case, with the assistance of
16 bankruptcy counsel. Debtors' schedules and statements again
17 contain errors and omissions. Although debtors were residing in
18 the rental premises, they failed to schedule the 58th Place lease
19 as an executory contract or unexpired lease in Schedule G. They
20 failed to list the sale of the Harvard home, which closed days
21 before, in their Schedule of Financial Affairs ("SFA") at item
22 10. They failed to list the Glenn litigation involving the
23 Harvard property as litigation pending within one year of their

24
25 1 Debtors also claim as homestead proceeds \$4,500 on deposit
26 with the title company that closed the sale. Test. The trustee's
27 objection extends to these funds as well. Trustee's trial brief
28 at 3, fn. 2, Administrative docket item ("dkt") 39. See debtors'
amended Schedule C at P.1.

1 bankruptcy filing in SFA item 4. SFA item 15-listed Mr. Newton's
2 prior residence at the Harvard address, but incorrectly listed
3 his residence at beginning in April of 2003, instead of June.
4 The schedules also contain errors and omissions regarding other
5 items, such as a failure to report loan repayments of \$2,000 made
6 to Mr. Newton's brother within the preference period. Debtors
7 will correct the latter problem by recovering the payment for the
8 estate. Mr. Newton takes personal responsibility for all
9 deficiencies in his bankruptcy papers. Test., Ex. 11.

10 6. Debtors' began expending homestead proceeds for
11 their personal support. The first check written on the homestead
12 account, check 101 dated August 8, 2003, was a rent payment check
13 for 58th Place. The trustee filed a timely objection to the
14 homestead exemption on October 8, 2003. At the trustee's
15 request, this court entered an October 14, 2003 order prohibiting
16 debtors from spending the homestead proceeds. The Newtons were
17 required to turn the remaining proceeds over to the trustee or
18 their attorney pending further order. Ex. 5 at p. 5110955, dkts
19 23, 25.

20 7. The requisite intent to establish an Arizona
21 homestead residence at Harvard is not apparent to this fact
22 finder, based on the above facts.

23 8. To the extent any of the following conclusions of
24 law should be considered findings of fact, they are hereby
25 incorporated by reference.

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1 **CONCLUSIONS OF LAW**

2 1. To the extent any of the above findings of fact
3 should be considered conclusions of law, they are hereby
4 incorporated by reference.

5 2. Pursuant to 28 U.S.C. §1334(a) (1994), jurisdiction
6 of debtors' bankruptcy case is vested in the United States
7 District Court for the District of Arizona. That court has
8 referred all cases under Title 11 of the United States Code and
9 all adversary proceedings arising under Title 11 or related to a
10 bankruptcy case to the United States Bankruptcy Court for the
11 District of Arizona. 28 U.S.C. §157(a) (1994), Amended District
12 Court General Order 01-15. This contested matter having been
13 appropriately referred, this court has core jurisdiction to enter
14 a final order resolving trustee's objection to debtors' homestead
15 exemption and determining whether to order turnover of estate
16 property. 28 U.S.C. §157(b) (2) (B), (E). No party has challenged
17 the court's jurisdiction.

18 3. This court's conclusions of law are reviewed *de*
19 *novo* and its factual findings are reviewed for clear error. *Hanf*
20 *v. Summers (In re Summers)*, 332 F. 3d 1240, 1242 (9th Cir. 2003).
21 The appellate court accepts the bankruptcy court's findings,
22 unless upon review, it is left with the definite and firm
23 conviction that a mistake has been committed. *Ganis Credit Corp.*
24 *v. Anderson (In re Jan Weilert RV, Inc.)*, 315 F. 3d 1192, 1196
25 (9th Cir.), *amended by* 326 F. 3d 1028 (9th Cir. 2003).

26 4. The burden of proof in an exemption objection
27 rests with the objector. Rule 4003(c), Fed. R. Bk. P., *Shelley*

1 v. *Kendall (In re Shelley)*, 184 B.R. 356, 360 (9th Cir. Bankr.
2 1995), *aff'd and adopted* 109 F. 3d 639 (9th Cir. 1997).
3 Objector's standard of proof is the preponderance of the
4 evidence. *Kelley v. Locke (In re Kelley)*, 300 B.R. 11, 17
5 (B.A.P. 9th Cir. 2003). The applicable Arizona homestead statute
6 allows exemption of up to \$100,000 in equity in residential real
7 property in which the claimant resides. A.R.S. § 33-1101A. The
8 exemption continues in identifiable cash proceeds for eighteen
9 months from sale of the homestead or until claimant establishes
10 a new homestead with the proceeds, whichever period is shorter.
11 § 33-1101C. Arizona law requires that the homestead exemption be
12 liberally construed in favor of debtors. *Garcia v. Garcia (In re*
13 *Garcia)*, 168 B.R. 403, 408 (D. Ariz. 1994). *Also see, Coughlin*
14 *v. Cataldo (In re Cataldo)*, 224 B.R. 426, 428 (B.A.P. 9th Cir.
15 1998).

16 5. In this case, the dispute concerns what
17 constitutes "resides" for purposes of § 33-1101. Since the
18 statutory usage of the term "resides" primarily connotes a state
19 of mind, even a temporary absence from a home will not defeat a
20 homestead claim, **if the party intends that home to be his**
21 **residence.** *Garcia, Id.* (emphasis added), (citing *St. Joseph's*
22 *Hospital and Medical Center v. Maricopa County*, 142 Ariz. 94, 688
23 P. 2d 986, 991 (1984)). If the requisite state of mind is simply
24 to exempt a homestead amount from creditors, clearly these
25 debtors would qualify. However, more is required. The factors
26 a court should consider in determining residency for homestead
27 purposes are physical occupancy of the property and the intention
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1 for which the property is occupied.² *Kelley*, 300 B.R. at 21
2 (applying California law). Acting on advice of counsel on the
3 eve of a 2003 bankruptcy filing,³ Mr. Newton established temporary
4 occupancy with minimal furnishings in premises where debtors had
5 not resided since 1988. Factual findings 1,3-4 *id.* His intent
6 was for a temporary stay, lasting only until the property,
7 already on the market, was sold. His wife, dogs and the
8 remainder of the family possessions remained at the 58th Place
9 rental, awaiting his return. Factual findings 3-4.

10 6. This is not a case such as *Garcia*, involving a
11 temporary absence from an established residence. 168 B.R. at
12 407-08. Nor is this a case like *In re Elia*, 198 B.R. 588, 591
13 (Bankr. Ariz. 1996) where debtor **continued** her established
14 residence at a home, with minimal possessions, until the sale
15 closing and move to a new residence. Here there was mere
16 temporary occupancy with no intent to establish a residence.
17 Rather, debtors' residence at 58th Place continued undisturbed,
18 regardless of Mr. Newton's temporary absence. The requisite

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21 2 Again, as noted in *Garcia*, mere physical day-to-day
22 residence is not determinative. *Id.* at 408.

23 3 In the Ninth Circuit, a debtor may convert non-exempt
24 property into exempt property, even on the eve of bankruptcy. The
25 Code presumes creditors know the law and bear the risk that
26 debtors will position their property to their best advantage. *Ho*
27 *v. Dowell (In re Ho)*, 274 B.R. 867, 876 fn. 11 (B.A.P. 9th Cir.
28 2002), *Cataldo Id.* at 429, *Murphey v. Crater (In re Crater)*, 286
B.R. 756, 761-64 (Bankr. Ariz. 2002) (Objection to discharge
litigation).

1 legal intent to establish a residence at Harvard for homestead
2 purposes has not been established.

3 7. Trustee has met his legal burden by a
4 preponderance of the evidence, largely on Mr. Newton's own
5 testimony.

6 **ORDER**

7 The Court finds for the trustee and against debtors.
8 The objection to debtors' claimed homestead is sustained.
9 Debtors and their counsel will forthwith turn over to trustee the
10 homestead proceeds. Trustee is authorized to collect the
11 additional funds on deposit with a title company as property of
12 this bankruptcy estate.

13 DATED this 23rd day of February, 2004.

14 
15 _____
16 George B. Nielsen, Jr.
United States Bankruptcy Judge

17 Copy mailed the 23rd day
18 of February, 2004, to:

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26 By 
Deputy Clerk