

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

ANTHONY DE BENEDETTO
SHIRLEY DE BENEDETTO

CASE NO. 91-02839

Debtors

APPEARANCES:

ARTHUR I. SELD, ESQ.
Attorney for Debtor
P.O. Box 354
Seneca Falls, New York 13148-0354

MARY E. LEONARD, ESQ.
Trustee
12 Groton Avenue
P.O. Box 762
Cortland, New York 13045

STEPHEN D. GERLING, U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

This contested matter comes before the Court on the Trustee's Objection to Debtors' claimed exemption of cash in the sum of \$1,795.00, stock certificates and savings bonds based on their claimed homestead exemption in equity in their real property located at 39 Barber Street, Auburn, New York. Debtors filed an Answer to the Objection on December 5, 1991 and an Amended Answer on December 9, 1991.

A hearing was held before the Court at Syracuse, New York on December 17, 1991, with both parties appearing.

JURISDICTIONAL STATEMENT

The Court has jurisdiction of this contested matter pursuant to 28 U.S.C. §§1334(b), 157(a), (b)(1) and (2)(B).

DISCUSSION

Section 522(b) of the Bankruptcy Code (11 U.S.C. §101-1330) ("Code") enacted in 1978, permitted states to "opt out" of the Federal exemption scheme found in Code §522(d).

In 1982, New York State opted out of the exemptions permitted under Code §522(d) by enacting Article 10A (§§282, 283 and 284) of the Debtor and Creditor Law ("NYD&CL").

Section 282 of the NYD&CL sets forth the types of property, both personal and real, which may be claimed as exempt in a bankruptcy proceeding filed by a New York State domiciliary (§284 of NYD&CL). Section 283(1) of NYD&CL limits the amount of personal property that a debtor may exempt generally to \$5,000. Section 283(2) provides for a "contingent alternative bankruptcy exemption". The contingent alternative exemption allows the debtor to exempt "cash" which is defined in that section up to a maximum of \$2,500.

Use of the "cash exemption" found in §283(2) of the NYD&CL is conditioned on the existence of three factors, only one of which is pertinent here. In order to claim the "cash exemption" under §283(2) of NYD&CL, the debtor must not have claimed a homestead exemption under §5206 of the New York Civil Practice Law and Rules ("NYCPLR"). Thus, a New York debtor may not exempt both cash and the equity in his or her home.

Debtors here contend that they can utilize §283 to exempt \$1794 in "cash" by utilizing the unused portion of their homestead exemption, plus the unused portion of their \$5,000 personal property exemption.

It appears that Debtors are relying partially on Code §522(d)(5) and misreading §283(2) of the NYD&CL to reach their conclusion.

Clearly, Code §522(d)(5) has no application to a bankruptcy case filed by a domiciliary of New York State and there is no language comparable to Code §522(d)(5) found in §§282 and 283 of the NYD&CL or §§5205 and 5206 of the CPLR. Thus, the fact that the Debtors have underutilized the maximum homestead exemption is of no relevance here. See In re Kleist, 114 B.R. 366 (Bankr. N.D.N.Y. 1990).

Furthermore, §283(2) of the NYD&CL conditions the use of a cash exemption in any amount on the debtor's election to not claim a homestead exemption.

Finally, there is no other provision of either §§282 or 283 of NYD&CL or §5205 and 5206 of NYCPLR which allow a cash exemption.

Here the Debtors have claimed both a homestead exemption and a cash exemption and the Trustee has properly objected. The Trustee further objects to Debtors' claim of exemption for savings bonds and stock certificates.

Savings bonds are defined in §283(2) as "cash" and, therefore, are subject to the same limitation as the \$1,795. Stock is not exemptible under any provision of NYD&CL or the Code. In re Bartley, 33 B.R. 768 (Bankr. E.D.N.Y. 1983).

Thus, the Court will sustain the Trustee's Objection and allow the Debtors' twenty days from the date of entry of this Order to file and serve upon the Trustee an amended schedule claiming as exempt either Debtors' equity in the property at 39 Barber Street, Auburn, New York

or the cash and savings bonds to the extent allowable under §283(2) of the NYD&CL.

Within the same period, Debtors shall surrender to the Trustee the stock certificates.

IT IS SO ORDERED.

Dated at Utica, New York

this day of December, 1991

STEPHEN D. GERLING
U.S. Bankruptcy Judge