

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

KEITH J. GONYOU,

CASE NO. 88-01927

Debtor

APPEARANCES:

MARK SWIMELAR, ESQ.
Trustee
The Woolworth Building
Suite 247
Watertown, New York 13601

ROBERT H. HALLIDAY, ESQ.
Attorney for Debtor
21 Market Street
Potsdam, New York 13676

STEPHEN D. GERLING, U.S. Bankruptcy Judge

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

On December 16, 1988, Keith J. Gonyou ("Debtor") filed a voluntary petition under Chapter 7 of the Bankruptcy Code, 11 U.S.C.A. §§101-1330 (West 1979 and Supp. 1989) ("Code"). Within that petition, the Debtor claimed a homestead exemption on property located on Sand Hill Road in Norfolk, New York to which the Trustee filed an Objection on February 16, 1989. Both parties appeared at the hearing on the Trustee's objection to Debtor's exemption in Utica on May 22, 1989.

ARGUMENTS

The Debtor claims as exempt, under New York Debtor and Creditor

Law ("NYD&CL") §282 (McKinney Supp. 1989) and New York Civil Practice Law and Rules ("NYCPLR") §5206 (McKinney Supp. 1989), his lot on Sand Hill Road as his principal residence. While the house on the property burned down in 1982, Debtor argues that the property is exempt by virtue of him residing in his "home on wheels" which, he further asserts, has been occupying the subject property intermittently since the 1982 fire.

The Trustee objects to the Debtor's claimed homestead exemption for the property located on Sand Hill Road. The Trustee alleges: 1) the claimed homestead is actually a storage house for business purposes; 2) the property does not qualify for the homestead exemption pursuant to §282 of the NYD&CL and §5206 of the NYCPLR; and 3) the alleged homestead does not qualify as a residence under local laws.

FINDINGS OF FACT

It is undisputed that the Debtor bought the property in question 1972 and resided there with his wife and family until October 1981, when Debtor and his wife separated. Thereafter, the Debtor continued to reside on the property until October 1982. At that time the last of a series of fires destroyed what was left of any permanent above ground structures on the property. All that remains, according to the Debtor's testimony, are a well, an unused septic tank, and the cellar foundation. Where the Debtor has maintained his principal residence subsequent to that time is the point of contention between the parties.

The Debtor alleges that after the fire of October 1982, he used a 1953 Ford Step Van, located on the subject property, as his principal residence. The Debtor testified that he converted the van into a mobile home so that it would accommodate his living needs.

In 1982 or 1983, according to his testimony, the Debtor purchased a 1962 Chevrolet Motor Home ("1962 vehicle"), similar in appearance to a small school bus. The Debtor's estranged wife, testified that the Debtor placed the 1962 vehicle on the subject property two or three years ago. The Debtor testified that he has been living in the 1962 vehicle since he purchased it. He claims he sleeps there five to six nights per week. He also testified that this "house on wheels", as described by the New York State Department of Motor Vehicles (Debtor's Exhibit E), contained a stove, a self-contained toilet, beds, a sink, a refrigerator, a furnace, a fifty-gallon water tank, and an outside patio. Photographs introduced into evidence support this contention. (See Debtor's Exhibits F and G).

At the hearing, the Debtor and his estranged wife testified that the 1962 vehicle was often driven to flea markets where he sold objects gathered from his trash hauling route. He then drove back to the subject property. The Debtor testified that he has resided on the Sand Hill property since 1972, his shelter being his actual house before the fire in 1982, then his 1953 van for a short period and his 1962 vehicle thereafter. According to his testimony, in October 1988, after attending a flea market, the Debtor had his 1962 vehicle towed back to the Sand Hill property

because his registration had expired. He asserts that it has remained on the property ever since.

A former Code Enforcement Officer for the Town of Norfolk, Ronald Emlaw, testified that he inspected the Sand Hill property in November 1988. He testified that the property contained a well and septic tank and that the Debtor had obtained permission to build on the property. He also testified that during the years from 1986 to 1989 he had never seen a "residence or dwelling" on the property.

The Trustee asserts that subsequent to the fire in October 1982, the Debtor did not reside on the Sand Hill property.

In support of his assertion, the Trustee cites the testimony of three neighbors of the Sand Hill property.

One witness, Geneth Tarallo, testified that she and her husband have lived next door to the subject property for the past eleven years. She claimed that the Debtor has not resided on the property for a number of years and that the Debtor first placed the 1962 vehicle on the property in January 1989. She further alleged that the Debtor lives with his estranged wife on Sober Street in the Village of Norfolk, New York. She also admitted that she is "very interested" in purchasing the property from the bankruptcy estate. (See Affidavit of Nicholas and Geneth Tarallo sworn to February 10, 1989 and attached to Trustee's Objection).

Nicholas Tarallo testified that the Sand Hill property is scattered with various items of trash collected by the Debtor. He agreed with his wife, the prior witness, that the 1962 vehicle was towed onto the property in January 1989. He asserted that he has

observed the Debtor spend ten to fifteen minutes there occasionally, but never had he seen the Debtor spend a night there. He claimed that the Debtor stays either with his wife or another friend. He admitted he does not like the condition of the property, but denies he wants the Debtor's ownership to terminate, contrary to his earlier sworn affidavit. Id.

Another neighbor to the subject property, Wendall Barkley, testified that the property is littered with trash.

JURISDICTION

Sections 1334 and 157 of Title 28 (West Supp. 1989) give rise to the Court's jurisdiction over the subject matter. The instant core proceeding, 28 U.S.C.A. §§1334 and 157(b)(1), (2)(B) (West 1979 Supp. 1989), is governed by Bankruptcy Rules ("Bankr.R.") 4003, 7052 and 9014.

DISCUSSION

Pursuant to Bankruptcy Code §522(b)(1) ("Code"), New York has opted out of the federal exemptions set forth in Code §522(d). See NYD&CL §284. Therefore, the homestead exemption available to a New York debtor in bankruptcy proceedings is exclusively controlled by NYCPLR §5206(a), made applicable through NYD&CL §282.

The Court must decide whether, as a matter of New York State Law, the Sand Hill Road property was the Debtor's principal

residence within the meaning of NYCPLR §5206(a) on December 16, 1988 and, therefore, exempt from the property of the estate. See Mather Memorial Hospital v. Pearl, 723 F.2d 193, 194 (2d Cir. 1983).

The New York homestead exemption is "granted on grounds of public policy for a humane and generous purpose." Wyoming County Bank & Trust v. Kiley, 430 N.Y.S.2d 900, 802 (N.Y.App.Div. 1980)(citing 22 N.Y.JUR. Exemptions, ¶1). This Court has in the past recognized that the purpose of the homestead exemption is to protect a debtor-homeowner and his immediate family from losing their family dwelling because of economic adversity. See In re Miller, Case No. 88-01766, slip op. at 4 (Bankr. N.D.N.Y. May 31, 1989)(and authorities cited therein).

Generally, in order for a debtor to utilize the New York homestead exemption, the subject property must be occupied as a principal residence by the debtor or his family. NYCPLR §5206. See In re Miller supra at 4; In re Warren, 38 B.R. 290, 292 (Bankr. N.D.N.Y. 1984).

This exemption is determined and evaluated as of the date the bankruptcy petition is filed. See In re Hager, 74 B.R. 198, 200-201 (Bankr. N.D.N.Y. 1987), aff'd. 90 B.R. 584 (N.D.N.Y. 1988); In re Costello, 72 B.R. 841, 843 (Bankr. E.D.N.Y. 1987). Any attempt by a debtor to create a homestead exemption subsequent to the petition date is a nullity because the debtor has no interest in the real property to protect at the time of filing. In re Myers, 17 B.R. 410, 411 (Bankr. E.D.Calif. 1982).

It should be noted that in determining the existence of a

debtor's homestead, a court should construe the exemption statutes liberally in favor of the debtor and protect his opportunity for a fresh start. See In re Miller, supra at 5; In re Hager, supra 74 B.R. at 201; 59 N.Y.JUR.2d Exemptions ¶57 (1987)(and cases cited therein).

In a bankruptcy proceeding the burden of proof is on the party objecting to the exemption. Bankr.R. 4003(c); In re Woodford, 73 B.R. 675, 678 (Bankr. N.D.N.Y. 1987). Therefore, the burden falls upon the Trustee in the instant case. The quantum of proof necessary is a preponderance of the evidence. See id. at 679. That is, the Trustee must present evidence which when taken as a whole, shows that it is more probable than not that the subject property is not the Debtor's principal residence. The Court finds that the Trustee has not met his burden in this case.

The Trustee makes three arguments. He first asserts that if the "main purpose" of the property is to engage in business, then the Debtor's homestead exemption should be denied. The Trustee cites no authority for this proposition other than a 1928 California case which he admits is "extremely different" from the instant case. While not cited by the Trustee, the Court considered the use of a claimed homestead for business use in In re Hager, supra 74 B.R. 198. In Hager this Court made particularized findings with regard to the percentage of a debtor's claimed homestead which was used for debtor's business purposes. Those detailed findings were based upon the testimony of an expert witness who appraised the debtor's property.

In the instant case, the Trustee relies upon photographs and lay

testimony to support his allegation that the property is used primarily for business. These photographs show trash accumulated from the Debtor's business strewn across the property and pipes being stored in the Debtor's vehicle sitting on the unlandscaped property. The Trustee also cites the testimony of the witnesses' statements that the property was littered with trash. This evidence cannot be accorded the same weight as the well-researched, expert testimony in Hager regarding the percentage of the subject property given to business use. Assuming, arguendo, that a so called "main purpose" rule exists in the Second Circuit, the evidence offered fails to show that it is not the Debtor's "main purpose" to reside on the subject property, but merely that it is littered with trash from his business and is unsightly.

The Trustee next asserts that the Debtor has not had his principal residence on the subject property since several years prior to the petition date.

In New York, a person's place of principal residency is dependent upon where he intends to make his home indefinitely. See Sarraf v. Szunics, 132 Misc.2d 97, 100, 503 N.Y.S.2d 513, 515-516 (N.Y.City Civ.Ct. 1986). Also, in State of New York v. Collins, 78 A.D.2d 295 (N.Y.App.Div. 1981) the court stated that where a statute prescribes "residence" as a qualification for the claiming of a privilege or the enjoyment of a benefit, "the word is equivalent to 'domicile' and that the use of the additional word 'legal' in defining residence merely reinforces the conclusion." Id. at 297. Thus, the term "primary residence" is properly construed to mean "domicile" rather than merely

"residence". It is a matter of settled law that intention is central to the determination of "domicile". See e.g. Sarraf, 132 Misc.2d at 100. Other jurisdictions have held similarly with regard to a debtor's alleged abandonment of the principal residence which is claimed as an exemption. See In re Winter, 90 B.R. 516, 518 (Bankr. M.D.Fla. 1988) (homestead depends on actual intent and actual residence); In re Niland, 825 F.2d 801, 806-807 (5th Cir. 1987) (same); In re Brent, 68 B.R. 893 (Bankr. D.Vt. 1987) (abandonment of homestead determined by debtor's intention to return); Matter of Neis, 723 F.2d 584, 588 (7th Cir. 1983) (homestead based primarily on owner's intent).

A court must infer a debtor's intent from evidence of his past actions and relevant circumstances. In the instant case, the Court is faced with conflicting evidence as to the Debtor's past actions. The Trustee has presented what is clearly interested testimony from neighbors of the Debtor. The same witnesses who testified that the property had trash scattered over it also expressed an interest in purchasing the property if and when it were to be sold. Also, the testimony of those same witnesses that the Debtor was actually living with his estranged wife was subsequently refuted by the testimony of the Debtor's estranged wife who stated that Debtor had been living on the subject property for the past three years. No other evidence was offered by the Trustee suggesting that the Debtor resided at another location.

The Debtor testified that the property was vacant for a short period while he attended flea markets and has been his principal

residence since the time of purchase. He also acquired a building permit for the subject property during November, 1988 but claims that he was unable to build due to financial distress. While the Debtor has not established his continual occupancy of the subject property, it is unnecessary that he do so as that burden rests upon the Trustee. Accordingly, the Trustee has failed to provide sufficient evidence showing that either the Debtor actually resided elsewhere or intended to abandon the property as his principal residence at any time prior to his filing.

The Trustee's final argument is that the vehicle itself fails to qualify as a residence. It is, however, irrelevant whether the vehicle is a "mobile home" for purposes of §5206(a)(4) because it is not the vehicle which is claimed as the exemption, but rather the land upon which the vehicle rests. Clearly, the Debtor is asserting that the subject property with his vehicle thereon qualifies only as a "lot of land with a dwelling thereon" under NYCPLR §5206(a)(1).

Section 5206 does not define a "dwelling". This Court, in In re Miller supra at 5, implied that a trailer or boat can be a dwelling. The United States District Court in In re Foley, 97 F.Supp. 843, 846 (D.Neb. 1951), in interpreting a statute similar to NYCPLR §5206(a)(1), was required to determine whether a glider trailer on its own wheels constituted a dwelling house within the meaning of the Nebraska homestead exemption statute. The court found that whether a home trailer can be moved easily to another location did not alter its homestead character. The Foley court also cited Professor Haskins, who stated in Homestead Exemptions,

63 HARV.L.REV. 1289, 1295, that in construing homestead legislation "it should be immaterial whether the home is a mere chattel, or has achieved the dignity of an estate in land or a chattel real." In re Foley, supra at 846. See also Annotation, Interests Subject to Homestead Claim, 74 A.L.R.2d ¶22, p. 1379-1380 (1960) (court should not be concerned with particular shelter, structure or device nor whether it is or is not attached to land). The Court is not persuaded by the Trustee's argument that physical attachment and the presence of modern conveniences are determinative of the issue of when a "dwelling" exists for the purposes of the homestead exemption.

CONCLUSION

The Court finds the Debtor occupied the Sand Hill property as his "principal residence" within the meaning of NYD&CL §282 and NYCPLR §5206 as of the date he filed his petition. To hold otherwise would ignore the Code's intention of allowing a fresh start for the Debtor pursuant to Chapter 7 of the Code. Therefore, Trustee's objection to Debtor's claimed homestead exemption is denied.

IT IS SO ORDERED.

Dated at Utica, New York
this day of October, 1989

STEPHEN D. GERLING
U.S. Bankruptcy Judge