

(Cite as: 1987 WL 19489 (Bankr.D.Vt.))

In re Idalo Carlo MASI, a/k/a Charlie Masi, Debtor.

Bankruptcy No. 86-256.

United States Bankruptcy Court, D. Vermont.

Sept. 29, 1987.

G. Belcher, Barre, Vermont, for Robert and Suzanne Cassavoy, co-judicial lien creditors (Cassavoy).

P. Elliott, Barre, Vermont, for trustee, Joseph C. Palmisano.

C. Martin, Barre, Vermont, for Martin & Paolini, P.C. and Gallagher Lumber Co., judicial lien creditors.

W. McKee, and J. Riley, Montpelier, Vermont, for debtor.

D. Otterman, Barre, Vermont, for mortgagee, Lomas and Nettleton.

ORDER ON OBJECTION

TO CLAIM OF EXEMPTION

UNDER 11 USC § 522(d)(1)

FRANCIS G. CONRAD, Bankruptcy Judge.

***1** This matter [FN1] is before us on the Debtor's motion to avoid five liens filed against property the debtor has claimed as exempt under 11 USC § 522(b)(1). The Cassavoy, successors in interest to a lien held by Averill's Plumbing and Heating Co., object to this motion on three grounds. Specifically, the Cassavoy argue that the lien they possess is a statutory one under the laws of Vermont and is therefore not avoidable under 11 USC § 522(f)(1). Second, the Cassavoy allege that the Debtor has abandoned the property he claims as his homestead and may not claim this property as exempt under Section 522(d)(1) of the Bankruptcy Code. Finally, the Cassavoy claim that the lien that they hold does not impose upon the Debtor's equity in the property. The remaining four lien holders did not join in the

Cassavoys' objection, nor did they participate in the motion. We agree with the Cassavoys that the Debtor has abandoned his claimed homestead and, thus, has legally forfeited his right to claim an exemption in the property under 11 USC § 522(d)(1). The Debtor, however is entitled to exempt proceeds from any sale of the property in the amount of \$4,150 under 11 USC § 522(d)(5).

The Debtor filed a voluntary Chapter 7 petition on December 31, 1986 under Title 11 of the United States Code. In his petition, the Debtor claimed as exempt \$7,500 in real property located on Phelps Road in the town of Barre, Vermont, under 11 USC § 522(d)(1). Alternatively, the Debtor claimed a \$4,150 interest in the property as exempt, under Section 522(d)(5) of the Code, if he was deemed to have abandoned the property.

On September 16, 1986 the Debtor entered into a purchase and sales agreement to sell the Phelps Road property for \$42,000. Relying on the executory sales agreement the Debtor left the premises in October of 1986 and moved to an apartment in Barre, Vermont. The purchasers to the sales agreement subsequently refused to execute their end of the bargain because the Debtor was unable to convey marketable title to them. The sales agreement fell through. The Debtor did not return to the Phelps Road property, rather, he remained at the apartment in Barre and presently resides there.

The property is encumbered by a valid first mortgage held by Lomas and Nettleton in the amount of \$32,399.18 plus per diem interest as of October 31, 1986. On July 10, 1987, we permitted the Trustee to employ a real estate broker to facilitate sale of the disputed property. Finally, on August 27, 1987 we authorized the Trustee to abandon the Phelps Road property under 11 USC § 554(a) but preserved the lien avoidance matter for decision.

We first turn to the argument advanced by the Cassavoys that the Debtor has abandoned the Phelps Road property and is therefore precluded from claiming it as a homestead for the purpose of obtaining an exemption under 11 USC § 522(d)(1). The sustaining of this argument is dispositive of the Debtor's motion.

It is well established that the burden of proving that the Debtor is not entitled to a claimed homestead exemption lies with the objecting party. *In re Brent*, 68 BR 893, 894 (Bkrtcy.D. Vt.1987); Rules of Practice and Procedure in Bankruptcy, Rule 4003(c). Since the Debtor has opted for the Federal homestead exemption which is not notably different from Vermont's homestead exemption, 27 Vt.Stat.Ann. § 101; See *In re Brent*, *id.*, at 895, (Bkrtcy.D. Vt.1987), we look to Vermont law to determine if the Debtor abandoned his homestead.

***2** In Vermont, an individual is deemed to have acquired a homestead interest in real property if the premises are used or kept as a domicile coupled with a present right to use them as such. *In re Estate of Wolff*, 108 Vt. 54 (1936); *In re White*, 18 BR 95 (Bkrtcy.D. Vt.1982). Here, the Debtor has voluntarily removed himself from the Phelps Road property in

anticipation of selling it. The Debtor is living in an apartment in Barre and although he is free at any time to return to the home which he intends to sell until it is sold, it is apparent that he does not plan to exercise that right. We said in *In re Bernstein*, 62 BR 545 (Bkrtcy.D. Vt.1986), a "clear intention to sell in the future, without more, cannot establish a present abandonment of [a] homestead." *In re Bernstein*, id., at 549. In this case we think that the threshold requiring more than merely the debtor's intention to sell his homestead at some future date has been crossed. We determine whether the debtor is entitled to a homestead exemption by looking to the date on which the petition is filed. *In re White*, 18 BR 95, 96. (Bkrtcy.D.Vt.1982) It is on that date that all interests the debtor has in any property of the estate vests for the purpose of administering the estate. 4 Collier on Bankruptcy, 15th Edition, § 541.04, page 541-22. The petition was filed on December 31, 1986. The Debtor voluntarily moved out of his home on Phelps Road and into the apartment in Barre some time in October of 1986. When the Debtor moved he ceased using and keeping the Phelps Road property as a homestead. Of course, the Debtor retained an interest in the property that entitled him to move back when the purchase and sales agreement fell through, but he remained in the apartment in Barre and continued his efforts to sell the property on Phelps Road.

We think that this case falls in line with our holding in *In re Brent*, 68 BR 893 (Bkrtcy.D. Vt.1987). In that case we stated that the debtor's abandonment of his homestead must not only be voluntary but there must be no intention to return to the premises as a homestead. *In re Brent*, id., at 896. In the Debtor's reply to the Cassavoys' objection to his motion he states in paragraph eight: "it is possible that funds may remain after payment of the first mortgage, costs of sale and the debtor's exemption ...," with regard to the disposition of the Phelps Road property, (emphasis added). If any doubts possibly existed concerning the Debtor's intentions as they relate to the disputed property this statement from the debtor offers us a conclusive answer to this lien avoidance motion. There is no question in our mind that the Debtor plans to sell the Phelps Road property and has intended to do so from the time he moved into his Barre apartment. We find that the Phelps Road property has been abandoned by the Debtor and hold he is not entitled to claim an exemption in the property under 11 USC § 522(d)(1).

To ensure the completeness of our decision we address the Cassavoys' statutory lien argument.

***3** The Cassavoys' lien was originally obtained by Averill's Plumbing and Heating Co. when it installed a new well pump into the Debtor's residence on the Phelps Road property. Under Vermont's lien laws, an individual who has contracted to furnish labor or materials, for the purpose of repairing a building, must complete a statutory mandated procedure in order to perfect his or her interest in that property. 9 Vt.Stat.Ann. §§ 1921-1924 (1987). Section 1923 requires the lienor to file a memorandum with the clerk's office in the town where the Debtor's real property is located. Mere performance of this recording and notice requirement, however, is not sufficient to secure the lienor's interest in the property. Within three (3)

months of the time of such filing and within three (3) months from the time that the debt becomes due, if it is not due at the time of such filing, the lienor must obtain a writ of attachment or a judgment on the debt in order for the lien to be perfected. 9 Vt.Stat.Ann. § 1924 (1987).

The Cassavoys state in their objection that the memorandum of their lien was filed in the Clerk's Office in Barre on October 19, 1981. No further action was taken to perfect the mechanic's lien until February 25, 1983, when judgment was rendered against the Debtor on the claim. Although judgment was obtained regarding the obligation owed by the Debtor to Averill's, it can not be said that a creditor may perfect its statutory right to a claimed interest, by simply reducing that claim to judgment, unless such judgment is obtained in a timely manner and in accordance with statutory procedure. After the three month period for acquiring a writ of attachment on the mechanic's lien had passed, Averill's right to claim a statutory interest in the Phelps Road property lapsed. *Filter Equipment Co. v. International Business Machine Corp.*, 142 Vt. 499 (1983); *In re Bernstein*, 62 BR 545 (Bkrtcy.D.Vt.1986). The interest in the Debtor's property that Averill's subsequently obtained in the Vermont District Court was nothing more than a judicial lien as that term is defined in 11 USC § 101 (30). As such, the lien may be avoided under 11 USC § 522(f)(1) if it impairs a valid claimed exemption. We think the facts of this matter, however, do not require us to avoid the Cassavoys' lien.

Because the Debtor has opted for the Federal exemptions under 11 USC § 522(b), rather than the exemptions he would otherwise be entitled to take under the laws of Vermont, he may claim an exemption in the Phelps Road property under 11 USC § 522(d)(1). More commonly referred to as the "wild card" exemption, this section of the Bankruptcy Code allows a debtor to claim an interest of up to \$400 in any property plus an additional \$3,750 of any unused portion of the homestead exemption. [FN2] The Debtor may use the entire amount even if he has no homestead. [FN3]

The amount due on the first mortgage was calculated as of October 31, 1986 to be \$32,399.18, plus per diem interest. As the Debtor notes in his reply, the interest that has subsequently accrued on the mortgage and reasonable attorney's fees incurred by the mortgagee to recover the mortgage are all part of the secured claim. The fair market value of the Phelps Road property is evinced by the purchase price of \$42,000 found in the September 16, 1986 contract for sale entered into by the Debtor. Even with the accruing per diem interest and attorneys fees, the secured mortgage claim does not compromise the Debtor's equity in the property to the extent that it would impair an exemption under 11 USC § 522(d) (5).

***4** We conclude therefore that the Debtor is entitled to an exemption of \$4,150 under 11 USC § 522(d)(5). Accordingly,

IT IS ORDERED that upon sale of the Phelps Road property the Debtor is entitled to claim \$4,150 of the proceeds of that sale.

FN1. We have jurisdiction to hear this matter under 28 USC § 1334(b). This Order shall constitute findings of fact and conclusions of law.

FN2. 11 USC § 522(d)(5) provides: "(d) The following property may be exempted under subsection (b)(1) of this section: (5) The debtor's aggregate interest in any property, not to exceed in value \$400 plus up to \$3,750 of any unused amount of the exemption provided under paragraph (1) of this subsection."

FN3. In re Smith, 640 F.2d 888, 3 CBC.2d 827 (CA 7th Cir.1981) (General exemption may be applied to any property that is property of the estate).

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