UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT

In re:
Sarah Culver Pierce,
Debtor.

Chapter 7 Case
 # 02-11671

Sarah Culver Pierce,
Plaintiff,
v.

Adversary Proceeding
 # 03-01013

Russell Pierce and Raymond Leggett,
Defendants.

Appearances: *Gregg M. Meyer, Esq.*
Hinesburg, VT
For the Plaintiff/Debtor

Gordon C. Gebauer, Jr., Esq.
Essex Junction, VT
For the Defendant Russell Pierce

Douglas J. Wolinsky, Esq.
Burlington, VT
For the Defendant Raymond Leggett

MEMORANDUM OF DECISION
DENYING DEBTOR'S MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANT LEGGETT'S CROSS-MOTION FOR SUMMARY JUDGMENT

On September 22, 2003, Sarah Culver Pierce (hereafter, "the Debtor") filed a Motion for Summary Judgment (doc. #23). On October 14, 2003, Raymond Leggett (hereafter, "the Defendant") filed a Cross-Motion for Summary Judgment and Opposition to Debtor's Motion for Summary Judgment (doc. # 26).

This Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§ 157(b)(2)(B) and 1334.

For the reasons set forth below, the Debtor's Motion for Summary Judgment is denied, and Defendant Leggett's Cross-Motion for Summary Judgment is granted.

I. ISSUE PRESENTED

The first issue presented is whether the Debtor has a homestead interest in certain Starksboro, Vermont, real property pursuant to 27 V.S.A. § 101, and, if so, whether she can void the conveyance from her husband, Defendant Pierce, to Defendant Leggett under 27 V.S.A. § 141. The second issue presented is whether the Debtor has a cognizable interest in the Starksboro property, and if so, whether she can claim that interest exempt notwithstanding the fact that she has already claimed other residential real property to be exempt under the federal homestead exemption on her bankruptcy schedules.

II. PROCEDURAL CONSIDERATIONS

A. The Summary Judgment Standard

Summary judgment is proper only if the record shows that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. See FED. R. CIV. P. 56(c); FED. R. BANKR. P. 7056. A genuine issue exists only when "the evidence is such that a reasonable [trier of fact] could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); see also Celotex Corp. v. Catrett, 477 U.S. 317 (1986). The substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. See Anderson, 477 U.S. at 247. Factual disputes that are irrelevant or unnecessary are not material. See id. Furthermore, materiality is determined by assessing whether the fact in dispute, if proven, would satisfy a legal element under the theory alleged or otherwise affect the outcome of the case. See id. The court must view all the evidence in the light most favorable to the nonmoving party and draw all inferences in the nonmovant's favor. See Cruden v. Bank of New York, 957 F.2d 961, 975 (2d Cir. 1992). In making its determination, the court's sole function is to determine whether there is any material dispute of fact that requires a trial. See Anderson, 477 U.S. at 249; see also Delaware & Hudson Ry. Co. v. Conrail, 902 F.2d 174, 178 (2d Cir. 1990).

B. Summary Judgment and the Local Rules

Pursuant to the Local Rules of this Court, all material facts in a movant's statement of undisputed facts are "deemed to be admitted unless controverted by a statement of disputed material facts filed by the opposing party." Vt. LBR 7056-1(a)(3); cf., Vescio v. NCS 1, L.L.C. (In re Vescio), Adv. Pro. No. 02-1005, slip op. at 4 (Bankr. D. Vt. Apr. 22, 2003) (accepting the movant's statement of undisputed facts as true where the nonmovant failed to file a statement of disputed facts). Here, the Debtor filed a Statement of Uncontested Material Facts (doc. #23, Attach. #1). The Defendant filed a Statement of Undisputed Facts and Response to Debtor's Statement of Uncontested Facts (doc. #27).

The Defendant disputes the date of November 27, 2003, that is set forth in Paragraph 7 of the Debtor's Statement of Uncontested Material Facts, noting that it appears to be a typographical error. In reviewing the exhibits, it is clear that the date in Paragraph 7 was a typographical error; the date should reflect the date of the Warranty Deed, namely, November 27, 2002. In the absence of any opposition from the Debtor regarding the assertion of a typographical error, the Court will accept the "2002" date as the correct date, and therefore, view Paragraph 7 of the Debtor's Statement of Uncontested Material Facts as undisputed.

Further, while the Debtor alleges that the Defendant's Statement of Undisputed Facts are not material to this cause of action, the Defendant's statement is not disputed; thus, the Court deems them also to be admitted. See Vt. LBR 7056-1(a)(3).

III. UNDISPUTED FACTS

Based upon the Statements of Undisputed Facts, the Court finds the following facts to be material and undisputed. The Debtor was the wife of Defendant Pierce. At the time the parties were married, Defendant Pierce owned a homestead in Starksboro, Vermont (hereafter, "the Starksboro property"). After their marriage, the Debtor moved into the Starksboro property with Defendant Pierce. In December 1997, Defendant Pierce suffered a stroke. In early 1998, Defendant Pierce was moved to a rehabilitation facility in Burlington, Vermont. At the time Defendant Pierce was moved to the rehabilitation facility, the Debtor moved

out of the Starksboro property and in with her parents. In June 2001, approximately three and a half years after leaving the Starksboro property, the Debtor and her parents purchased residential real property in Middlebury, Vermont (hereafter, "the Middlebury property"). In September 2002, the Starksboro property was listed for sale with Green Mountain Realty. Defendant Pierce sold the Starksboro property in November 2002, almost five years after both the Debtor and Defendant Pierce had moved out of it. The Debtor did not participate in the sale of the Starksboro property, nor did she execute any documents to convey said property to Defendant Leggett. Also in November 2002, the Debtor filed a voluntary bankruptcy petition for relief under chapter 7 of the Bankruptcy Code. In her schedules, the Debtor chose federal exemptions, rather that state exemptions. See Schedule C. In her initial filing, the Debtor stated her marital status as "single" and made no mention of any interest in the Starksboro property. The Debtor claimed the Middlebury property exempt under 11 U.S.C. § 522(d)(1), the federal homestead exemption. In October 2003, the Debtor amended her schedules to reflect an interest in the Starksboro property. In mid-2003, Defendant Pierce died.

IV. LEGAL ANALYSIS

A. Federal or State Exemptions Generally

Bankruptcy Code § 522(b)(1) authorizes states to opt-out of federal bankruptcy exemptions and allow their residents to utilize state law exemptions. Vermont is an opt-out state; Vermont residents who seek bankruptcy relief may choose either federal or state exemptions. The Bankruptcy Code "gives [a] debtor the option to use his federal exemptions, 11 U.S.C. § 522(d), or his state exemptions, *but he may not mix them.*" John T. Mather Mem'l Hosp. of Port Jefferson, Inc. v. Pearl, 723 F.2d 193, 194 (2d Cir. 1983) (emphasis added).

B. A Homestead Interest

"A homestead is a property interest. Property interests are not created by the Constitution, but by existing rules or understandings that stem from an independent source such as State law." In re Brent, 68 B.R. 893, 895 (Bankr. D. Vt. 1987). While the Debtor is using federal bankruptcy exemptions in this case, her

interest in the Starksboro property is nonetheless defined by Vermont law. See Buther v. United States, 440 U.S. 48, 55-56 (1979) (instructing that state law determines the relative ownership interest of parties). The federal exemption is not very different from the Vermont homestead statute: "Both require occupancy, either actual or constructive. Under both, absence alone is not sufficient to constitute an abandonment unless an intent to abandon is shown." In re Brent, 68 B.R. at 895 (citing COLLIER ON BANKRUPTCY, 15th ed., 522-49; In re White, 18 B.R. 95, 97 (Bankr. D. Vt. 1982)).

The Debtor's Schedule C ("Exemptions"), as amended, lists two homestead interests. The first property, the Middlebury property, is property which the Debtor occupies and in which she holds an undivided one-third interest. The second property listed is the Starksboro property. However, the Debtor now alleges that she is not claiming the Starksboro property as her homestead, but rather, is asserting a marital homestead interest in the Starksboro property, so that she might void the conveyance to Defendant Leggett. See Pl.'s Opp'n at p.3 (doc. #32). "The traditional wisdom regarding exemptions is that a family can have but one homestead." In re Feiss, 15 B.R. 826, 827 (Bankr. E.D.N.Y. 1981) (citations omitted) (superseded on other grounds by statute/rule as stated in John T. Mather Mem'l Hosp. of Port Jefferson, Inc. v. Pearl, 723 F.2d 193 (2d Cir. 1983)). For the Debtor to assert a marital homestead interest in the Starksboro property, she first needs to meet the requirements of 27 V.S.A. § 101, which provides:

> The homestead of a natural person consisting of a dwelling house, outbuildings and the land used in connection therewith, not exceeding $75,000.00 in value, and owned and used or kept by such person *as a homestead* together with the rents, issues, profits and products thereof, shall be exempt from attachment and execution except as hereinafter provided.

Id. (emphasis added). The Debtor can assert a marital interest in the Starksboro property and void a conveyance in which she did not participate only if she demonstrates the statutory prerequisites for a homestead. See 27 V.S.A. § 141.[1]

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[1] Section 141 of Title 27 of the Vermont Statutes Annotated reads:

> **Execution and acknowledgment of conveyance.**
> (a) A homestead or an interest therein shall not be conveyed by the owner thereof, *if married*, except by way of mortgage for the purchase money thereof given at the time of such purchase, unless the wife or husband joins in the

Regardless whether the Debtor has a marital homestead interest in the Starksboro property, it is clear that she cannot exempt two homestead interests under § 522(d)(1). See In re Wolff, 108 Vt. 54, 56 (1936) ("A person can have but one homestead at a given time.") (citing Goodall v. Boardman, 53 Vt. 92, 101 (1880)). Thus, the Court will turn next to the question of whether the Debtor may assert a marital homestead interest as defined by Vermont state law, in order to realize more property for the bankruptcy estate.[2]

C. The Marital Property Interest and Abandonment

In order for the Debtor to void the conveyance of the Starksboro property under 27 V.S.A. § 141, she must first show that she retains an interest in the marital property. The original purpose of 27 V.S.A. § 141 was the "conservation of homes." Estate of Girard v. Laird, 159 Vt. 508, 515 (1993) (internal citations omitted). For a non-owner spouse to retain a marital property interest, the other spouse, as the owner and holder of legal title, must retain a property interest in that property. See In re Avery, 41 B.R. 224, 226 (Bankr. D. Vt. 1984). As the Vermont Supreme Court has instructed, for a homestead to arise, there must be both ownership and occupation of the premises. See id. Furthermore, "once a property has become a homestead, it can lose its character only through death, alienation, or abandonment. Typically, the homestead is abandoned when the debtor either sells the property or establishes a new homestead." In re Brent, 68 B.R. 893, 896 (Bankr. D. Vt. 1987) (internal citation omitted). It has further been held that "the homestead law does not vest any title to the homestead in the wife of the general and legal owner, during his lifetime, but only a contingent and inchoate right which, if not released or otherwise barred, may be enforced if the wife survives him." In re Avery, 41 B.R. at 226 (citing Cole v. Cole, 117 Vt. 354, 364 (1952); Proulx v. Parrow, 115 Vt. 232, 242

> execution and acknowledgment of such conveyance. A conveyance thereof, or of an interest therein, not so made and acknowledge d, shall be inoperative so far only as relates to the homestead provided for in this chapter.

Id. (emphasis added).

[2] Due to the confusing semantics of the dual use of the term "homestead," this Court will construe the Debtor's position that her attempt to exempt the Starksboro property is not an attempt to claim a second federal homestead exemption, but rather, an attempt to claim the additional homestead interest in order to assert a state property interest in that property that arose as a result of her marriage. For convenience, the Court shall refer to the Debtor's claimed interest in the Starksboro property as a "marital property interest."

(1948); Thorp v. Thorp, 70 Vt. 46, 50 (1897); Davis v. Andrews, 30 Vt. 678, 681 (1858)). In the Avery case, the debtor was residing with her husband in property owned solely by him, in which she held no ownership rights on the day she filed for bankruptcy relief. "As a result of her lack of interest in the property the Court held that she [did] not qualify for a homestead exemption. Her right [in the subject property] was merely an inchoate right which could ripen into a consummate homestead exemption upon the death of her husband." Id.; see also 27 V.S.A. § 105 (defining a surviving spouse's interest in a homestead).

D. The Instant Case

In early 1998, Defendant Pierce was moved from the Starksboro property to a rehabilitation facility in Burlington, Vermont, because he had suffered a stroke. Immediately thereafter, the Debtor moved in with her parents. Defendant Pierce remained in that rehabilitation facility until his recent death. The Starksboro property was sold approximately five years after both the Debtor and Defendant Pierce had relocated out of it. One and a half years prior to the sale of the Starksboro property, the Debtor had purchased an undivided one-third interest in a home in Middlebury, Vermont, with her parents, the so-called Middlebury property. Nothing in the record demonstrates that either the Debtor or Defendant Pierce intended to return to the Starksboro property.

When determining whether a party has abandoned his or her homestead, a court must examine "whether the debtor has an intention to return." Id. (citing In re White, 18 B.R. at 97; In re Wolff, 108 Vt. at 57; Thorp v. Wilbur, 71 Vt. 266, 270 (1899); Whiteman v. Field, 53 Vt. 554, 556 (1881)). "If a debtor intends to return to the homestead, then the homestead has not been abandoned and remains exempt during the intervening absence." In re Brent, 68 B.R. at 896 (citing West River v. Gale, 42 Vt. 27, 33-34 (1896)). In the Brent case, this Court observed that "a debtor's intent to maintain or abandon the homestead must be determined in relation to the surrounding exigencies." Id. (citing In re Neis, 723 F.2d 584, 590 (7th Cir. 1983)).

In her Motion for Summary Judgement, the Debtor alleges that she did indeed plan to return to the Starksboro property. She asserts that it was her intent that, once her husband, Defendant Pierce, was able to

leave the rehabilitation facility, they would both reside in the Starksboro property together. However, "the mere intention of future occupancy is not sufficient to constitute a homestead." In re Bernstein, 62 B.R. 545, 549 (Bankr. D. Vt. 1986) (citing True v. Estate of Morrill, 28 Vt. 672 (1856)). Moreover, the fact that the Debtor bought the Middlebury property and claimed it as her residence appears to indicate an intent to extinguish any marital property interest she arguably retained in the Starksboro property. See Jakab v. Cendant Mortgage Corp. (In re Jakab), 293 B.R. 621, 624 (Bankr. D. Vt. 2003) (citing Girard, 159 Vt. at 515-16).

Since "the law does not favor abandonment,"In re Brent, 68 B.R. at 893, it looks for a showing of exigencies preventing or intervening in an individual's ability to occupy the homestead. See In re Wolff, 108 Vt. at 54. The Court finds that the record before it, including evidence of the Debtor's actions, her bankruptcy petition, and the papers she filed in support of summary judgment, is insufficient to support a finding that the Debtor had a marital property interest in the Starksboro property at the time of her bankruptcy filing. In particular, the Court relies upon the following s factors in reaching its conclusion that the Debtor abandoned the Starksboro property: (1) the Debtor's failure to disclose any interest in the Starksboro property in her initial bankruptcy filings; (2) the Debtor's failure to disclose her marriage to Defendant Pierce, together with her statement *under penalty of perjury* that she was "single"; (3) the Debtor's purchase of the Middlebury property prior to her filing for bankruptcy relief and prior to Defendant Pierce's death; (4) the Debtor's identification of the Middlebury property as her residence to friends, family, and the Vermont Department of Motor Vehicles; and (5) the Debtor's listing of the Middlebury property as exempt under the federal homestead exemption on her bankruptcy schedules. Thus, the Court finds that the Debtor abandoned the Starksboro property prior to filing for bankruptcy relief. Retaining no property interest in the Starksboro property, the Court further finds the Debtor is precluded from attempting to assert any claim in this property on behalf of her bankruptcy estate.

Moreover, the Court finds Defendant Pierce had also abandoned the Starksboro property prior to the date the Debtor filed for bankruptcy relief. This is unequivocally illustrated by Defendant Pierce's sale of the property to Defendant Leggett. "The law of this state must be that the intent to sell the homestead is evidence

of an intent to abandon the homestead, but no more." In re Bernstein, 62 B.R. at 549. Defendant Pierce did not just have the intent to sell his homestead; he actually sold it. The Debtor's marital property interest in the Starksboro property was necessarily contingent upon both her marital relationship to Defendant Pierce *and* Defendant Pierce's homestead interest in the property. The Vermont Supreme Court has held that a conveyance of homestead property by only one spouse "is ineffective with respect to the spouse who did not join it and may be set aside by that spouse *unless the homestead interest is otherwise extinguished*." Girard, 159 Vt. at 517 (emphasis added). This Court has found that when the Debtor moved out of the Starksboro property and thereafter bought the Middlebury property, claiming the Middlebury property as her residence, she extinguished any marital property interest in the Starksboro property that she might have retained. Thus, as a matter of law, she cannot void the sale of the Starksboro property from Defendant Pierce to Defendant Leggett pursuant to 27 V.S.A. § 141.

V. CONCLUSION

Even if the Debtor did have an interest in the Starksboro property, she is precluded by law from simultaneously claiming two homestead interests. Moreover, having chosen to claim federal exemptions in her bankruptcy schedules, the Debtor is precluded from asserting any state law exemptions. The only way for the Debtor to claim an interest in the Starksboro property, on behalf of her bankruptcy estate, is through the State's homestead exemption law. Having found the Debtor extinguished any right she retained in the Starksboro property prior to her filing for bankruptcy relief, by abandoning the Starksboro property and claiming another property as her homestead, the Court finds the Debtor has no marital property interest in the Starksboro property which she might either claim as exempt or utilize to void the transfer to Defendant Leggett.

The Court finds, based upon all the papers filed in this adversary proceeding and case, there are no genuine issues as to any material facts. Thus, it is proper to grant summary judgment in this instance. Based

upon the relevant law, the Court awards summary judgment to Defendant Leggett and denies the Debtor's Motion for Summary Judgment.

This Memorandum of Decision constitutes the Court's findings of fact and conclusions of law.

December 1, 2003
Rutland, Vermont

Colleen A. Brown
United States Bankruptcy Judge