



Honorable Mike K. Nakagawa
United States Bankruptcy Judge



Entered on Docket
November 25, 2019

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

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In re:) Case No.: 19-14495-MKN
CHARLENE DEE ELLIS,) Chapter 13
Debtor.) Date: October 31, 2019
Time: 2:00 p.m.

**ORDER REGARDING TRUSTEE'S OBJECTION TO THE HOMESTEAD
EXEMPTIONS CLAIMED ON DEBTOR'S SCHEDULE C¹**

On October 31, 2019, the court heard the Trustee's Objection to the Homestead Exemptions Claimed on Debtor's Schedule C ("Objection") brought on behalf of Chapter 13 trustee, Rick A. Yarnall ("Trustee"). The appearances of counsel were noted on the record. After arguments were presented, the matter was taken under submission.

BACKGROUND

On July 15, 2019, a voluntary Chapter 13 petition ("Petition") was filed by Charlene Dee Ellis ("Debtor") along with her schedules of assets and liabilities ("Schedules"), her statement of financial affairs ("SOFA"), and other required information. (ECF No. 1). On the same date ("Petition Date"), Debtor filed a proposed Chapter 13 Plan #1 (Plan #1"), along with her Chapter 13 Statement of Current Monthly Income ("CMI Statement"). (ECF Nos. 2 and 5). A notice of

¹ In this Order, all references to "ECF No." are to the numbers assigned to the documents filed in the case as they appear on the docket maintained by the clerk of the court. All references to "Section" are to provisions of the Bankruptcy Code, 11 U.S.C. § 101, et seq. All references to "NRS" are to the Nevada Revised Statutes.

the Chapter 13 filing was issued scheduling a meeting of creditors for August 27, 2019 and notifying creditors of the Trustee's appointment. (ECF No. 7).

On her Petition, Debtor stated that she resides at 1084 King Richard Avenue, Las Vegas, Nevada 89119 ("Petition Address"). See Petition at ¶ 5. She states that she filed no other bankruptcy cases within the past eight years. Id. at ¶ 9. On her property Schedule A/B, Debtor attests that she owns property located at 4891 W. Dyer Road, Pahrump, Nevada 89048-0000 ("Residence"), having a value of \$158,785.00. On her Schedule C, Debtor claims the Residence as exempt ("Homestead Exemption") for its full value under NRS 21.090(1)(l) and NRS 115.050. On her Schedule D, Debtor lists no creditors having claims secured by the Residence.² On her unsecured Schedule E/F, Debtor lists Todd M. Leventhal ("Leventhal") as having a claim in the amount of \$45,024.90 based on a judgment in Case # CV 38222.³ On Item 2 of her SOFA, Debtor attests that she lived at the Residence from 2009 to 2014.⁴

On August 28, 2019, the meeting of creditors was concluded by the Trustee.

On September 25, 2019, the Trustee filed the instant Objection along with the Declaration of his counsel, Amanda Hunt ("Hunt Declaration"). (ECF Nos. 17 and 19). On the

² Effective May 15, 2019, Nevada increased the available homestead exemption from \$550,000 to \$605,000. Because the Residence apparently has a value of \$158,785 and is not subject to any mortgages or deed of trust, all of the equity in the Residence could be claimed under the prior and current homestead exemption.

³ On her property Schedule A/B, Debtor also listed a "Possible Legal Malpractice Suit against Civil Law Attorney (Matthew Callister)" ("Callister Law Firm") having an unknown value. On September 12, 2019, Leventhal filed a proof of claim in the amount of \$44,069.72, secured by a judgment that was recorded against the Residence on October 11, 2018. A copy of the judgment is attached to the proof of claim. It appears that the Callister Law Firm was the Debtor's counsel of record in connection with that judgment, which was obtained by default. Although Leventhal previously was the Debtor's attorney in connection with various criminal proceedings, Debtor has not scheduled any possible claims against Leventhal in connection with his prior representation of the Debtor.

⁴ According to her CMI Statement, Debtor is over the median income for a single resident in this jurisdiction. As an above median income debtor, Plan #1 proposes to pay \$1,362 for sixty months, totaling \$81,720, and to turnover to the Trustee any federal income tax refunds received for the 2019 through 2023 tax years. Plan #1 proposes to pay non-priority unsecured creditors 100 percent of their claims

1 same date, a joinder in the Objection was filed by Leventhal (“Leventhal Objection”). (ECF No.
2 21).⁵

3 On October 14, 2019, Debtor filed a reply (“Debtor Reply”).⁶ (ECF No. 24).

4 On October 31, 2019, a hearing was held on the Objection. The matter was taken under
5 submission subject to the Debtor filing proof that she recorded a Declaration of Homestead
6 (“Homestead Declaration”), and permission for Leventhal to supplement his joinder.

7 On November 4, 2019, the Debtor filed her supplement to which is attached a copy of a
8 Homestead Declaration. (ECF No. 26).

9 On November 21, 2019, Leventhal filed his supplement (“Leventhal Supplement”).
10 (ECF No. 30).

11 **DISCUSSION**

12 Because there is no dispute that the Debtor was living at the Petition Address rather than
13 at the Residence when she filed her Petition, the Trustee and Leventhal argue that she cannot
14 claim a homestead in the Residence under Nevada law. Moreover, Leventhal maintains that the
15 Homestead Declaration executed by the Debtor on October 13, 2017, and recorded on January
16 23, 2018, inaccurately represents that the Debtor was living at the Residence at that time.

17 Debtor maintains that she always intended the Residence to be her homestead and that
18 she lived there continuously after she purchased the Residence in March 2007. She represents
19 that her absence from the Residence from 2014 to the Petition Date was the result of the
20 prosecution, conviction, incarceration, and conditions of parole imposed upon her for a felony
21 that occurred in 2011. In essence, Debtor maintains that she was legally prohibited from living

22 ⁵ After the meeting of creditors was concluded, a 30-day deadline commenced for any
23 party in interest to object to the Debtor’s claimed exemption. See Fed.R.Bankr.P. 4003(b).
24 “Unless a party in interest objects, the property claimed as exempt [on the debtor’s list of
25 exemption] is exempt.” 11 U.S.C. § 522(l). The Trustee and Leventhal are the only parties in
interest to timely raise an objection to the Debtor’s homestead objection.

26 ⁶ Debtor suggests that she may have a claim for unjust enrichment against Leventhal, see
27 Debtor Reply at 3:4-6, but she does not list such a claim in her property Schedule A/B. It is not
28 known whether such a claim was asserted by the Debtor as a counterclaim in the previous
proceeding where Leventhal obtained his judgment against the Debtor.

1 at the Residence as of the Petition Date and should not be denied the benefit of the homestead
2 protection afforded under Nevada law.

3 There is no dispute that the Debtor currently lives in the Residence. There is no dispute
4 that the Debtor currently is on title to the Residence.⁷ There is no dispute that the Debtor can file
5 a homestead declaration at any time.⁸ There is no dispute that the Debtor can voluntarily dismiss
6 her Chapter 13 proceeding under Section 1307(b).⁹ There is no dispute that the Debtor can file
7 another Chapter 13 petition within one year, subject to the requirements of Section 362(c)(3), if
8 she wishes that the automatic stay arising from the filing of that petition be continued beyond
9 thirty days. There is no dispute that the automatic stay would prevent the enforcement of any
10 lien against the Residence, including any judgment lien in favor of Leventhal.

11 If the instant Objection is sustained, Debtor can dismiss her current Chapter 13
12 proceeding and file another bankruptcy petition.¹⁰ To overcome the inaccurate representation
13 that she was residing at the Residence when the Homestead Declaration was executed on
14 October 13, 2017, nothing prevents the Debtor from recording another homestead declaration
15 accurately representing that she currently resides at the Residence.¹¹ If she otherwise qualifies as

16 ⁷ Apparently, Leventhal at one point obtained from the Debtor a quitclaim deed to the
17 Residence as payment for his representation in a criminal proceeding. As a result of a
18 subsequent State Bar of Nevada disciplinary proceeding, however, Leventhal was ordered to
19 transfer full title to the Residence back to the Debtor. See Exhibit “2” to Debtor Reply.

20 ⁸ A homestead declaration under Nevada law is effective if it is filed any time before an
21 execution sale. See In re Stanton, 457 B.R. 80, 88 (Bankr. D. Nev. 2011). In Nevada, a debtor
22 can even file a homestead declaration after commencing bankruptcy that is effective against the
23 bankruptcy trustee. Id.

24 ⁹ Under Section 349(b)(3) dismissal of a case ordinarily reverts property of the estate in
25 the entity holding the interest prior to bankruptcy.

26 ¹⁰ A motion for relief from stay has not been filed, nor does it appear that the Debtor has
27 violated any order of the court or failed to prosecute the case. Thus, the 180-day bar to refiling
28 under Section 109(g) apparently would not apply.

¹¹ An abandonment of a declared homestead must be in writing, signed by the party
claiming the homestead, and recorded in the same office as the homestead declaration. NRS
115.040(2). Simply filing an amended homestead declaration may not be sufficient to constitute
the abandonment of a prior homestead declaration. Compare Towers v. Curry, 247 F.2d 738 (9th

a Chapter 13 debtor under Section 109(e) and can meet the requirements to confirm a Chapter 13 plan, nothing would prevent her from obtaining a discharge of her debts through completion of plan payments in accordance with Section 1328. Additionally, nothing would prevent the Debtor from treating Leventhal's allowed secured claim, if any, by completing plan payments in accordance with Section 1325(a)(5)(B).¹²

If the instant Objection is overruled, Debtor can seek to confirm her Plan #1, or an amended version. If she can confirm a Chapter 13 plan, she can obtain a discharge by completing plan payments in accordance with Section 1328, and treating Leventhal's allowed secured claim, if any, under Section 1325(a)(5)(B).¹³

Under these circumstances, the instant Objection may be "much ado about nothing." Moreover, because the exemption objection raised by the Trustee and Leventhal may have minimal impact on the relief the Debtor can achieve through Chapter 13, as well as the amounts received by Leventhal, it appears that the parties can easily resolve their differences without incurring significant additional legal expenses.

That being said, the Debtor has not cited controlling authority that permits her to claim a homestead of a residence in which she did not reside at the time she asserted the claim. Debtor cites two cases where physical occupancy of a residence was not required to assert the homestead claim by a person who intended to reside in the premises, but both of those decisions were based on California law. See Debtor Reply at 3:25 to 4:4, citing Michelman v. Frye, 238 Cal.App.2d 698 (2nd Dist. 1965) and Diaz v. Kosmala (In re Diaz), 547 B.R. 329 (B.A.P. 9th

Cir. 1957) (effect of filing second homestead under California law). This may be important because Nevada law refers to one homestead declaration being filed and recorded by the claimant. NRS 115.020(2). So, it appears that the Debtor might be required to file an abandonment of her existing Homestead Declaration and then to file another Declaration correctly stating that she currently lives in the Residence.

¹² Whether the Debtor can avoid Leventhal's judicial lien against the Residence under Section 522(f)(1)(A) is not before the court.

¹³ Debtor scheduled Leventhal as an unsecured creditor on her Schedule E/F, and Plan#1 does not treat Leventhal as a secured creditor. Plan #1 also proposes to pay all allowed general unsecured claims, presumably including Leventhal, the full amount of their claims.

1 Cir. 2016). The Trustee cites a decision of the Nevada Supreme Court, on a certified question
2 from this bankruptcy court, stating that the debtor must be in actual possession of the subject
3 residence to properly claim a Nevada homestead exemption. See Objection at 4:2-7, citing
4 Vanmeter v. Nilsson (In re Nilsson), 129 Nev. 946 (Nev. 2013). Leventhal cites to other, earlier
5 Nevada Supreme Court decisions that are consistent with the decision in Nilsson. See Leventhal
6 Supplement at 3:22 to 4:12, citing McGill v. Lewis, 61 Nev. 34, 116 P.2d 581 (Nev. 1941) and
7 Williams v. Clark County Dist. Attorney, 118 Nev. 473, 50 P.3d 536 (Nev. 2002).

8 Upon review of the authorities cited by the parties, the court concludes that the Objection
9 must be sustained. In Nilsson, the highest court of Nevada rejected a debtor's claim of
10 "constructive occupancy" to the former marital residence that was still occupied by the displaced
11 debtor's minor children. 315 P.3d at 970. The court also reiterated its requirement that the
12 property in question be the debtor's "bona fide residence" at the time a homestead declaration is
13 filed. Id., citing Jackman v. Nance, 109 Nev. 716, 721 (Nev. 1993) and McGill, 61 Nev. at 39-
14 40. Despite the Debtor's unfortunate recent circumstances in the instant case, the court
15 concludes that her argument is the legal equivalent of asserting constructive occupancy of the
16 Residence that simply does not constitute bona fide residency as of the Petition Date.

17 All is not lost for the Debtor, however, for the reasons previously mentioned. Because
18 she has paid her debt to society and apparently has regular income, nothing prevents her from
19 otherwise seeking a fresh start by completing payments under a confirmed Chapter 13 plan.

20 **IT IS THEREFORE ORDERED** that the Trustee's Objection to the Homestead
21 Exemptions Claimed on Debtor's Schedule C, Docket No. 17, be, and the same hereby is,
22 **SUSTAINED.**

23 Copies sent via CM/ECF ELECTRONIC FILING

24 Copies sent via BNC to:
25 CHARLENE D. ELLIS
26 1084 KING RICHARD AVENUE
27 LAS VEGAS, NV 89119
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