In the United States Bankruptcy Court

for the Northern District of Iowa

SHERMAN PAUL HOGREFE	Bankruptcy No. 92-41695XM
Debtor.	Chapter 7

ORDER RE: OBJECTION TO EXEMPTIONS

The matter before the court is the objection of North Iowa Cooperative Elevator (CO-OP) to Sherman Paul Hogrefe's (HOGREFE) claim of exemption in his homestead. Hearing was held March 30, 1993 in Fort Dodge, Iowa. The court now issues its findings of fact and conclusions of law as required by Fed.R.Bankr.P. 7052. This is a core proceeding under 28 U.S.C. 157(b)(2)(B).

Findings of Fact

Hogrefe filed a chapter 7 petition on September 14, 1992. He claimed as exempt property his homestead located at 22362 - 150th Street, Dougherty, Iowa (DOUGHERTY).

Hogrefe purchased Dougherty on October 23, 1991, for $56,000.00 with grain proceeds and cash on hand. At that time, Hogrefe, his wife, Chantelle Hogrefe, and their three children were living at 765 Briarstone (BRIARSTONE) in Mason City, Iowa.

Hogrefe hired Francis Hanig, a general contractor, to remodel the Dougherty property. The project included a complete renovation of the kitchen. Before beginning the project, Hanig estimated for Hogrefe that the job would cost approximately $80,000.00. Hogrefe borrowed the money for the renovation project. The Dougherty property is subject to a secured claim for $72,000.00. Exhibit 1, Schedules A, D.

Hanig and his crew began work on the project on or about November 15, 1991. Their last day on the job was July 22, 1992. Hanig's crew worked every day except holidays and weekends from November 15, 1991 through March 2, 1992 from 7:30 a.m. until 5:00 or 5:30 p.m. Hanig was personally on the job at least once every day during this period.

Hogrefe and his family were at the Dougherty house frequently during this period. There were times when members of the family were at the house for most of the day. At times, the family was there after the crew had left and at times, Hogrefe or his wife was there in the morning before the crew arrived. Sherman Hogrefe and Chantelle Hogrefe consulted with Hanig or his crew about the job and watched them work.

Sometimes the Hogrefes would bring food and eat lunch at Dougherty, but the family did not prepare meals there. There were kitchen facilities at Dougherty until February 17, 1992 when the entire kitchen was torn out. There was no food in the cupboards when they were removed.

Between November 15 and March 2, 1992, there was a television in the house and a playpen for the Hogrefes' youngest child. The construction crew brought in a table and chairs for their own meals. There were no beds or washer and dryer in the house. The week after the Hogrefes purchased Dougherty, Chantelle Hogrefe moved some items from storage at Sherman Hogrefe's place of business and stored them at Dougherty in the attic.

Hogrefe slept at Dougherty by himself on a mattress the nights of November 2, 3 and 4, 1991. He was in the area plowing fields during that time. Hogrefe often stayed at other locations, depending on the type of work he was doing. He spent time in western Iowa when helping his father. He stayed in a camper in Nora Springs between mid-September

and November 1, 1991 for corn drying season.

The family moved furniture into Dougherty in early July, 1992. They were completely moved into Dougherty and stopped staying at Briarstone on July 31, 1992.

Hogrefe listed Briarstone for sale December 2, 1991 with realtor Ron Knudtson. The original asking price was $297,500.00. Knudtson showed Briarstone in January, June and August, 1992. He observed that the Hogrefe family was still living at Briarstone in June, 1992. Subsequent to the bankruptcy petition, Sherman and Chantelle Hogrefe accepted an offer for the sale of Briarstone for $235,000.00. Briarstone was subject to secured claims totaling $255,000.00. Exhibit 1, Schedules A, D.

Knudtson also appraised Dougherty for the Hogrefes' use in obtaining bank financing for the remodeling project. The appraisal was done as if the renovations were completed, and the appraised value was $105,000.00. Knudtson appraised Dougherty in June, 1992 and observed that the Hogrefe family was not living there.

Between November, 1991 and January, 1992 the general manager at the Co-op was Richard Houge, and the agronomy manager was Jim Dunbar. During November and December, 1991, Hogrefe and Dunbar had made proposals to Houge regarding purchasing Pursuit brand herbicide from Hogrefe or selling Pursuit to Hogrefe. Hogrefe was a former chemical sales representative for American Cyanamid, the manufacturer of Pursuit. On or about December 22, 1991, Hogrefe gave Houge four checks dated December 22, 1991, made payable to the Co-op in the total amount of $262,220.00. Exhibits 11, 12, 13 and 14. Hogrefe and Houge had an understanding that Houge would hold the checks and Hogrefe would make them good at a later date. The purpose of the checks was to pay for 500 gallons of Pursuit herbicide.

On December 24, 1991, the Co-op gave Hogrefe a check for $230,000.00. Exhibit 7. Houge believed the check was a pre-payment for chemicals the Co-op was purchasing from Hogrefe in accordance with a proposal they had discussed previously. Houge told Hogrefe the Co-op could not purchase chemicals from Hogrefe and sell them to him at the same time. On December 26 or 27, 1991, Houge asked Hogrefe to return the $230,000.00. On December 28, Hogrefe gave Houge three checks made payable to the Co-op and "UAP" totaling $231,500.00. Exhibits 8, 9 and 10. The additional $1,500.00 was considered an interest payment. UAP referred to United Agri Products, a chemical warehouser. Houge then authorized Dunbar to order the 500 gallons of Pursuit. Hogrefe took possession of the Pursuit on January 2, 1992. The value of the herbicide was approximately $270,000.00.

On December 24, 1991, when Hogrefe received the Co-op check for $230,000.00, Hogrefe was indebted to Midwest Soya International, Inc. for $425,000.00. Exhibit 16. Hogrefe endorsed the Co-op check to Midwest Soya. Exhibit 7. Midwest Soya credited the $230,000.00 as a payment on the note. Exhibit 16. After Hogrefe took possession of the 500 gallons of Pursuit from the Co-op, he delivered it to Patterson Brothers Grain in Fayette. Midwest Soya then received a check from Patterson Brothers for $237,250.00. This amount also was applied as a payment on Hogrefe's note with Midwest Soya.

When the seven checks, Exhibits 8-14, were presented for payment at Hogrefe's bank, they were returned for insufficient funds. None of the checks have been paid, and Hogrefe scheduled his debt to the Co-op as $507,500.00. Exhibit 1, Schedule F.

Discussion

The Co-op argues that Hogrefe's homestead is not exempt pursuant to Iowa Code 561.21(1) because his debt to the Co-op was contracted prior to the acquisition of the homestead. Hogrefe disputes this, but also argues that even if the obligation to the Co-op is pre-acquisition debt, Iowa Code 561.20 permits an owner to exchange homestead rights from one residence to another without intervening debts attaching to the new homestead. The court concludes that although the debt was contracted prior to acquiring the Dougherty homestead, the homestead is exempt pursuant to 561.20.

Debt is "contracted" for purposes of 561.21(1) when debt is incurred. Pre-acquisition debt under the statute arises when the debtor has an obligation and the creditor holds a claim. See In re Marriage of McMorrow, 342 N.W.2d 73, 75-76

(Iowa 1983) (child support obligation under dissolution decree was pre-acquisition debt); Matter of Schuldt, 91 B.R. 501, 502 (Bankr. S.D. Iowa 1988). Hogrefe testified that he incurred debt with the Co-op by accepting the Co-op check for $230,000.00 on December 24, 1991, and by taking delivery of the 500 gallons of Pursuit on January 2, 1992.

Hogrefe's debt was contracted prior to his acquisition of the Dougherty homestead for purposes of 561.21. A homestead is "acquired" when the homestead right attaches by actual use and occupation of the property as a homestead, not when a person acquires title to the property. Hale v. Heaslip, 16 Iowa 451 (1864); Elston & Green v. Robinson, 23 Iowa 208 (1867). Therefore, it is not determinative that Hogrefe purchased Dougherty on October 23, 1991 with an intent to make it his homestead in the future.

The evidence indicates that Hogrefe and his family established their homestead at Dougherty sometime in July, 1992. Between November 15, 1991 and March 2, 1992, there were very few furniture items in the house, and most of those were brought in by the construction crew for their own use. Hogrefe moved the majority of the family's furniture into the home in July, 1992. The family sometimes brought food to the house, but did not prepare meals there. At one point in the construction, there were no kitchen facilities in the house. There is no evidence that Hogrefe's family stayed overnight at Dougherty until July, 1992. Hogrefe himself stayed there three nights in early November, 1991. However, his testimony indicates that he stayed there merely for his convenience while working. The visits by the family may well have been to make sure the work was progressing in a timely manner. Hogrefe testified he had hired Hanig for previous contracting work and was concerned that the job be completed promptly. The Hogrefe family did not abandon the home at Briarstone and establish their homestead at Dougherty until July, 1992.

"The general rule is that a homestead once acquired is presumed to continue. . . . In other words, intention to occupy in the future, while insufficient to establish a homestead originally, is sufficient to continue a homestead previously established." In re McClain's Estate, 220 Iowa 638, 262 N.W. 666, 669-70 (1935). Hogrefe had not yet established his homestead in Dougherty prior to the beginning of the renovation project in November, 1991. Therefore, he cannot claim the homestead continued through the construction project to July, 1992 when his family was actually able to move into the home. It cannot be said that the Hogrefes temporarily left their homestead because of the construction project. They did not acquire homestead rights at Dougherty until after the project was completed.

The case of Neal v. Coe, 35 Iowa 407 (1872), cited by Hogrefe, is distinguishable. In Neal v. Coe, the debtors had abandoned a previous homestead and shipped all their household goods to their new homestead. Upon arriving there, the family discovered that certain repairs were not completed, and they boarded at a hotel. However, they moved their goods into the new home as they arrived. In addition, they used the stable, made a garden and planted a grain crop on the premises. The court held that under these circumstances, the family had established the house as their homestead from the time they used and occupied the premises by placing their household goods there with an intention to occupy the premises as their homestead. In contrast, Hogrefe's family did not abandon their Briarstone homestead until July, 1992. Their limited activities at Dougherty were not sufficient to find they had established their homestead there even though they were not occupying the premises.

The final issue is whether the homestead is exempt despite the pre-acquisition debt because the Hogrefes transferred their homestead from Briarstone which was exempt as to the Co-op debt. Hogrefe was entitled to change his homestead. Iowa Code 561.7 provides:

> **561.7. Changes--nonconsenting spouse**
>
> The owner may, from time to time, change the limits of the homestead by changing the metes and bounds, as well as the record of the plat and description, or vacate it.
>
> Such changes shall not prejudice conveyances or liens made or created previously thereto.
>
> No such change of the entire homestead, made without the concurrence of the other spouse, shall affect that spouse's rights, or those of the children.

The terms of Iowa Code 561.20 determine the extent of the exemption in the new homestead. Iowa Code 561.20 provides:

561.20. New homestead exempt

> Where there has been a change in the limits of the homestead, or a new homestead has been acquired with the proceeds of the old, the new homestead, to the extent in value of the old, is exempt from execution in all cases where the old or former one would have been.

The homestead exemption statutes do not dictate when or how an owner may change homesteads. The owner may abandon an old homestead and change the entire homestead, subject to the rights of the owner's spouse and children and lienholders. Iowa Code 561.7. The owner could sell one house and use the proceeds to acquire a new home. The owner could also use property or money other than the proceeds of the old homestead to acquire the new. Harm v. Hale, 206 Iowa 920, 221 N.W. 582, 583-84 (1928); American Savings Bank v. Willenbrock, 209 Iowa 250, 228 N.W. 295, 298 (1929). The old homestead need not "enter into" the new. Shaffer Brothers v. Chernyk, 130 Iowa 686, 107 N.W. 801 (1906).

The Co-op argues that Hogrefe may not benefit from the rule of 561.20 because Dougherty was not acquired with the proceeds of Briarstone, and Briarstone had not been sold by the date of the bankruptcy petition or even by the date of hearing on this matter. Hogrefe purchased Dougherty with grain proceeds and cash on hand. Moreover, Briarstone was fully encumbered so that Hogrefe would not receive any proceeds from its sale. However, there is nothing in the homestead statutes or the case law to imply that the change in homesteads contemplated in 561.7 and 561.20 should be so narrowly construed. The language of those statutes is not so limited.

Iowa Code 561.1 contemplates that an owner may own two or more houses that could be used as a home. A person may have only one homestead, and the owner may choose which house the owner will retain as the homestead. An owner may change homesteads by moving from one home into another house he already owns. See Berner v. Dellinger, 206 Iowa 1382, 222 N.W. 370 (1928); In re Erickson, X87-02428S (Bankr. N.D. Iowa, June 10, 1988). An owner may change the homestead from one parcel to another the owner already owns if the change does not prejudice previously created liens. Chariton Feed & Grain, Inc. v. Kinser, 794 F.2d 1329 (8th Cir. 1986); Furman v. Dewell, 35 Iowa 170 (1872). There is no requirement that an owner sell the old homestead and use the proceeds to acquire the new in order to change homesteads. The cases cited in the Co-op's brief are not to the contrary.

In Blue v. Heilprin, 105 Iowa 608, 75 N.W. 642 (1898), the owner sold the old homestead and stayed in a rented home for approximately five months while the new home was being built. The homestead right usually attaches from the time of actual use and occupancy of the property as a home. The court in Blue v. Heilprin found that the owner did not sufficiently occupy the new homestead immediately after the sale of the old to establish the new homestead independently of the change from a previously established homestead. Id., 75 N.W. at 644. However, the court held that under these facts, the homestead right attached to the new homestead from the time the owner disposed of the old home. Cf. Neal v. Coe, 35 Iowa 407 (1872), discussed above. Hogrefe and his family, however, moved directly from Briarstone into the Dougherty home. There is no need in this case to refer to a sale date to determine when they changed the homestead.

In Lamb v. McConkey, 76 Iowa 47, 40 N.W. 77 (1888), the court concluded that the debt at issue was contracted prior to the acquisition of the homestead. The court stated that "for such indebtedness it could be sold, unless it was acquired with the proceeds of a prior homestead, and this is not claimed." Id., 40 N.W. at 79. The court was simply noting the possibility of an exception under what is now 561.20. As discussed above, the statute does not require an owner to purchase the new homestead with proceeds of the old before the owner may continue the exemption in the new.

The Iowa Supreme Court in American Savings Bank of Marengo v. Willenbrock, 209 Iowa 250, 228 N.W. 295 (1929), applied the homestead statutes now found at 561.7 and 561.20. The court expressly stated that the exemption does not apply only to a homestead acquired with the proceeds of the old.

> In the case before us, there was not merely a change of the limits of the homestead within the strict purview of these sections, nor is the case merely one of sale of a homestead and using the money derived from it in whole or in part in the purchase of another homestead. It is the case of one homestead being transmuted by exchange immediately into another. The theory is that the new homestead is a continuance of the old and

> the exemption dates from the acquisition and occupancy as a home of the old. (Citations omitted.) This is so though means of the debtor in addition to the old homestead are used in acquiring the new.

228 N.W. at 298. In Willenbrock, the court defined the "value" of the old homestead for purposes of the statute now at 561.20. The court said:

> The value of the homestead is . . . the value of the physical property, not the value of the owner's estate in it or the amount that the owner will enjoy from its sale. . . . the sale price would be the best evidence of value, for value is determined by what the property will bring. What it actually brings, undiminished by sums paid out of the proceeds, is the value, and the value or so much of the value as goes into the new homestead determines the amount of the exemption of the new.

228 N.W. at 300. Therefore, the court said the value of the old homestead is best determined by its sale price, but did not hold that sale proceeds must be applied to the new homestead to continue the homestead right. The court also concluded that value refers to fair market value rather than the owner's equity in the old homestead. There is no indication in the Willenbrock case or the homestead statutes that an owner with no equity could not change homesteads and obtain the benefit of the continuance of the homestead from the old into the new.

The change of homesteads from Briarstone to Dougherty did not prejudice the Co-op. Briarstone was exempt as to the Co-op debt. Dougherty was non-exempt property until July, 1992. Co-op did not obtain a lien against Dougherty. Section 561.20 permits Hogrefe to change his homestead to Dougherty without the Co-op debt attaching to the new homestead. Because the value of Dougherty is considerably less than the fair market value of Briarstone, the entire value of Dougherty is exempt as to the Co-op debt.

ORDER

IT IS ORDERED that North Iowa Cooperative Elevator's objection to Sherman Paul Hogrefe's claim of exemption in his homestead is overruled. Judgment shall enter accordingly.

SO ORDERED ON THIS 1st DAY OF SEPTEMBER, 1993.

William L. Edmonds
Chief Bankruptcy Judge

I certify that on _____ I mailed a copy of this order and judgment by U. S. mail to: