

In the United States Bankruptcy Court

for the Northern District of Iowa

JOHN E. WEBER and MARY LYNN WEBER
Debtors

Bankruptcy No. 93-11093KC
Chapter 7

ORDER

On September 8, 1993, the above-captioned matter came on for trial pursuant to assignment. The Creditors appeared in person with Attorney Mark McCool. Debtors appeared in person with Attorney Daniel DenBeste. Evidence was presented after which the Court took the matter under advisement. The parties were allowed until September 17, 1993 within which to file briefs. Those briefs have now been filed and this matter is ready for determination.

FINDINGS OF FACT

Creditors Barbara and Clarence Wright loaned John and Mary Weber the sum of \$3,000 in February of 1988. Mr. & Mrs. Weber purchased a home located at 2316 B. Avenue NE in Cedar Rapids, Iowa in October of 1988. This home became and remains the homestead of the Debtors. In March of 1991, Mr. & Mrs. Wright filed a Petition in the Iowa District Court against Mr. & Mrs. Weber. This Petition was in two counts. Count I sought judgment against Mr. & Mrs. Weber for the \$3,000 plus interest which they loaned to the Webers in 1988. Count II sought judgment against the Debtors for attorney's and accounting fees relating to the purchase of a separate piece of real estate. The debt associated with Count II was incurred after the purchase of the home and is, therefore, not a part of this exemption proceeding.

Trial was held on the State lawsuit in March of 1992. Judgment was entered in favor of Mr. & Mrs. Wright and against Mr. & Mrs. Weber on April 1, 1992. Judgment on Count I was entered in the amount of \$3,000. In addition, this judgment contained statutory interest as well as Court costs. Judgment was also entered on Count II, however, that Count is not involved in these proceedings.

After the entry of judgment, Creditors directed their attorney to commence collection procedures. The wages of Mrs. Weber were garnished on two separate occasions. The record reflects that a total of \$335.31 was collected through garnishment of Mrs. Weber's wages. Several attempts were made to garnish Mr. Weber's wages. He was employed at the University of Iowa into the early months of 1993. He then changed employment. While not clear from the record, it appears that a garnishment was attempted at the University of Iowa though not at his present employment.

In addition to garnishment proceedings, Creditors attempted to attach and execute on a 1984 Plymouth Van. However, Debtors claimed this automobile as exempt and the execution was subsequently lifted because of this claim.

No other attempts were made at collection. No judgment debtors' exam was held and no attempt was made to foreclose on the parties' homestead prior to the filing of the bankruptcy petition. Although the record is conflicting, it appears that the Debtors received a \$12,000 judgment in their favor at approximately the same time as the judgment was entered in these proceedings. No attempt was made to attach the proceeds of this judgment by the present Creditors. Reference is made to this other judgment by the Debtors in various pleadings. The evidentiary record made by Debtor Mary Weber appears to indicate that this judgment was paid before the present judgment was entered and no funds were left for execution by the time the present judgment was entered.

The bankruptcy petition was filed June 21, 1993. In the bankruptcy schedules, Debtors claimed as exempt their homestead, the 1984 Plymouth Van previously mentioned, as well as a 1983 Nissan Sentra. In other words, at the time of filing, there were no non-exempt assets available for execution. Subsequently, Creditors objected to the Nissan being

claimed as exempt. Debtors amended their schedules and on the date of this trial, the Nissan was sold for \$250.

In summary, a debt was incurred after which a homestead was established. Next, judgment was entered on the debt and execution took place on certain of the non-exempt assets prior to the filing of the bankruptcy petition. All property of the Debtors was claimed as exempt in the bankruptcy petition. A substantial part of the judgment remains unsatisfied. Based upon this set of facts, Creditors assert that the homestead exemption can be invaded to satisfy this judgment.

Iowa has opted out of the Federal exemption scheme pursuant to § 522 of the Bankruptcy Code. Chapter 561 of the Iowa Code defines the extent of a homestead exemption. Sec. 561.16 states that the homestead of every person is exempt from judicial sale where there is no special declaration of statute to the contrary. Sec. 561.21(1) states that the homestead may be sold to satisfy debts which are contracted prior to the acquisition of the homestead, but then only to satisfy a deficiency remaining after exhausting the other property of the debtor liable to execution.

Creditors assert that the indebtedness was incurred prior to the acquisition of the homestead. They allege that they are entitled to invade the homestead for the remaining amount of the unsatisfied judgment, interest, and costs as the bankruptcy petition states that there were no non-exempt assets claimed by Debtors.

Debtors assert that immediately prior to the filing of the bankruptcy petition, they had property which was subject to execution; namely the Nissan automobile with a value of \$400 and the wages of the Debtors. Because of the existence of non-exempt property available for execution before the filing of the bankruptcy petition, Debtors claim that the condition precedent to invasion of the homestead exemption (i.e., exhaustion of all non-exempt property) was not satisfied pre-petition. Debtors state that exemption rights are determined as of the date the bankruptcy petition is filed. Therefore, if execution had issued on the homestead on the date of the petition, Debtors would have been entitled to assert their homestead exemption because other non-exempt property (the Nissan motor vehicle and wages) was subject to execution. Debtors also assert that Creditors should not be allowed to invade the homestead exemption to the extent that Creditors' antecedent claim is unsatisfied post-petition. Debtors acknowledge that existing case law may suggest if not compel a contrary result. Debtors state that existing case law should not apply as the application of that reasoning alters the legislative intent and framework of sec. 561.21(1) of the Iowa Code. Based on the foregoing analysis, Debtors conclude that Chapter 561 mandates that exhaustion of non-exempt assets and invasion of the homestead must occur prior to the filing of the bankruptcy petition. They argue that if non-exempt assets exist and if the homestead has not been invaded as of the time of the filing of the petition, the homestead exemption remains intact and cannot be invaded post-petition.

As final arguments, Debtors assert the equitable doctrines of laches and estoppel by acquiescence. In so asserting, they state that Creditors had ample opportunity to attach non-exempt assets of the Debtors and chose not to do so. They assert that the doctrine of laches applies because of unreasonable delay in enforcement of Creditors' remedies. Debtors assert the doctrine of estoppel by acquiescence stating that Creditors should have more actively enforced their rights and, by their lack of action, waived their right to collect against non-exempt property.

The Court has examined these arguments and for reasons subsequently stated does not find these arguments compelling. The arguments posited are not supported either factually or legally. Factually, Debtors' argument is premised on the existence of non-exempt property available for execution immediately prior to the filing of the bankruptcy petition. The Debtors have asserted the existence of a Nissan automobile, non-exempt wages of both Debtors, and the existence of a judgment available for execution in the immediate past. The Court is not satisfied that the record has established the existence of these non-exempt assets as alleged by the Debtors. Mrs. Weber stated that the judgment discussed in these proceedings was paid before the Creditors obtained their judgment. She testified there were no funds left or available for execution by the time the Wrights obtained judgment against Debtors. Whether this is correct or not, the evidence is certainly in dispute as to whether this asset was available and if so, whether there was a sufficient amount left for the Creditors to attach. Secondly, the Nissan automobile was sold post-petition apparently as a non-exempt asset. However, Debtors listed this automobile as exempt in their schedules when the Petition was filed on June 21, 1993. Finally, Debtors assert that wages of the Debtors were non-exempt and, as a continually replenishing resource, wages would always constitute non-exempt property subject to execution by the Creditors. However, Federal Law places maximum limits on the amount of wages that can be garnished in any particular time period. Once a certain level of wages has been garnished, continued earnings would not create an unlimited resource for garnishment. The argument that wages

are always subject to execution and are always non-exempt property is not necessarily conclusive.

Debtors assert that the filing of the Petition is the critical date in the determination of the existence of non-exempt property. Assuming without deciding that this is correct, the record does not establish that non-exempt assets, as defined by the Debtors, existed at that time.

Even assuming the existence of non-exempt assets, the law does not support the arguments raised by the Debtors. The legal arguments made by Debtors seek a strained construction of existing law. Debtors assert that if exempt property exists on the date of filing of the petition, no post-petition invasion of the homestead can occur; even if it is subsequently determined that non-exempt assets exist in the bankruptcy estate. This is contrary to existing authority. See In re Ellingson, 82 B.R. 88 (Bankr. N.D. Iowa 1986); In re Nehring, 84 B.R. 571 (Bankr. S.D. Iowa 1988). These cases establish that exhaustion of all non-exempt assets prior to the filing of the bankruptcy petition is not a condition precedent to subsequent invasion of the homestead exemption.

To accept Debtors' logic in this case would place the onus on Creditors to seek out and exhaust every possible non-exempt asset of Debtors prior to the filing of the petition. This would encourage extremely aggressive collection efforts and raises the distinct possibility of significant abuse of the execution process in order to guarantee exhaustion of all non-exempt assets. Second, it creates an environment whereby the Debtors can improve their financial picture post-petition through the process of manipulation of assets pre-petition. Third, if the date of the filing of the petition is considered the critical date, Debtors can avoid the exhaustion of non-exempt assets by a race to the Courthouse. In other words, if it appears that the Creditors were being successful in gathering and disposing of non-exempt assets, the Debtors could expedite the filing of their petition so that some non-exempt assets would remain as of the time of filing of the petition. Finally, in almost all cases, Debtors could completely negate the effect of sec. 561.21(1) of the Code. This is contrary to, not only the spirit of the bankruptcy code, but also the letter of the code.

There are no requirements in Chapter 561 of the Iowa Code or § 522 of the Bankruptcy Code which mandate the conclusions sought by Debtors. The requirement that all non-exempt property be exhausted prior to invasion of the homestead is consistent with the philosophy of the homestead exemption. The homestead in Iowa is afforded extraordinary protection not afforded to other exemptions. As such, the statutory, as well as case law, has provided a judgment debtor every protection which can be provided under the law consistent with creditor's rights. The law requires that all non-exempt assets be exhausted so that the homestead can be salvaged, if at all possible. However, the law only requires that the steps be completed prior to the invasion of the homestead exemption. It does not mandate that these steps be completed at some alternative time, such as, prior to the filing of a bankruptcy petition. If this is what was intended by either State exemption law or under the Bankruptcy Code, both the State legislature and the United States Congress would have stated such an intended result. In this case, the homestead exemption has not been invaded as of this time, and will not be invaded until such time as a determination is made that all non-exempt assets are exhausted. It is consistent with the Bankruptcy Code, as well as Iowa exemption law, that this can be accomplished post-petition and during administration of a Chapter 7 proceeding.

Finally, the Court will address the equitable defenses of laches and estoppel by acquiescence. Debtors cite no authority in the bankruptcy context which would indicate that these two equitable doctrines apply in this context. As equitable principles, both doctrines can be invoked when there has been unwarranted delay which is prejudicial to the opposing party. As previously discussed, both legally and factually, it is the conclusion of this Court that there has not been any undue delay on the part of the Creditors which has prejudiced Debtors' rights. As previously noted, Creditors took reasonable steps to execute on this judgment. While the Creditors may or may not have exhausted all non-exempt assets, there is nothing in this record to indicate that Creditors were dilatory to the extent that they should be denied relief based on purely equitable principles. Also, this Court has concluded that, on the basis of legal principles, Creditors maintain their legal right to invade the Debtors' homestead exemption, post-petition, after the exhaustion of non-exempt assets. As Creditors maintain their legal right to proceed against assets of the Debtors, no compelling equitable reasons have been shown why the extraordinary equitable doctrines of laches and equitable estoppel should be enforced. In summary, it is the conclusion of this Court that these two doctrines have no applicability to the facts of this case.

WHEREFORE, for all of the reasons set forth herein, it is the conclusion of this Court that the Debtors' Resistance to the Objection to Exemptions is without merit.

FURTHER, it is the conclusion of this Court that the Creditors' Objection to Exemptions has been established, both factually and legally.

FURTHER, for all of the reasons set forth herein, Creditors' objection to the homestead exemption is SUSTAINED to the extent that the antecedent debt owed to Creditors Clarence and Barbara Wright is not satisfied after the other property of Debtors John E. and Mary Lynn Weber, subject to execution is exhausted.

FURTHER, for the purposes of this ruling, the antecedent debt shall consist of the judgment under Count I of the Linn County District Court case captioned Clarence C. Wright and Barbara M. Wright v. John E. Weber and M. Lynn Weber (LA 20148), as well as accumulated interest and court costs which are attributable to this Court.

SO ORDERED this 4th day of October, 1993.

Paul J. Kilburg, Judge
U.S. Bankruptcy Court