

JAN 25 1996

UNITED STATES BANKRUPTCY COURT  
FOR THE WESTERN DISTRICT OF NORTH CAROLINA  
CHARLOTTE DIVISION

J. BARON GROSHON  
BY: RSS  
Deputy Clerk

IN RE:	)	CASE NO. 95-31608
	)	
RICHARD C. COMBS	)	Chapter 7
SSN 241 90 3688	)	
	)	
Debtor(s).	)	
_____	)	

JUDGEMENT ENTERED ON JAN 25 1996

ORDER DENYING DEBTOR'S CLAIMED HOMESTEAD EXEMPTION  
AND DENYING MOTIONS TO AVOID JUDICIAL LIENS

This matter came on for hearing before the undersigned United States Bankruptcy Judge on January 11, 1996, upon the motions of Richard C. Combs ("Debtor") to avoid judicial liens on property pursuant to 11 U.S.C. § 522(f) and Bankruptcy Rule 4003 as impairing a claimed homestead exemption pursuant to N.C. Gen. Stat. § 1C-1601(a)(1) ("Statutory Homestead Exemption") in property located at 3440 Chelwood Drive, Concord, North Carolina ("Real Property"); upon the responses to the Debtor's motions filed by Wachovia Bank and Trust Company, N.A. ("Wachovia") and Cabarrus Bank of North Carolina ("Cabarrus Bank"); and upon Wachovia's objection to Debtor's claimed Statutory Homestead Exemption in the Real Property and the Debtor's reply to Wachovia's objection.

Debtor filed an emergency voluntary Chapter 7 petition on October 30, 1995 ("Petition Date"). This filing did not include any schedules, the statement of financial affairs, or the statement of intention required by 11 U.S.C § 521 and Bankruptcy Rule 1007(b). Debtor was given notice by this Court of the deficiencies of his filing on November 1, 1995.

On November 14, 1995, Debtor filed a second copy of his petition, along with the requisite schedules and statements. Schedule A listed Debtor's one-half undivided interest as tenant-in-common in the Real Property as an asset. Debtor's Schedule D of secured creditors includes the following creditors holding claims secured by the Real Property: a first mortgage to PNC Mortgage Corporation of America in the amount of approximately \$160,000.00, a second mortgage to Wachovia in the amount of approximately \$8,300.00, a senior judgment lien to Wachovia in the amount of approximately \$61,300.00, and a junior judgment lien to Cabarrus Bank in the amount of approximately \$137,800.00. On Schedule C, Debtor claimed his equity in the Real Property as exempt pursuant to N.C. Gen. Stat. 1C-1601(a)(1), but indicated that his equity had no value.

Debtor amended his claim of exemptions on December 5, 1995, claiming the full \$10,000 Statutory Homestead Exemption subject to a motion and order avoiding the judicial liens of Wachovia and Cabarrus Bank. Thereafter, Debtor filed his motions to avoid both judicial liens secured by the Real Property. Both Wachovia and Cabarrus Bank filed responses to the Debtor's respective motions, and Wachovia filed an objection to Debtor's Statutory Homestead Exemption, to which the Debtor replied.

Wachovia and Cabarrus Bank contend that the Debtor is not entitled to a Statutory Homestead Exemption in the Real Property because neither the Debtor nor a dependent of the Debtor resides there. Further, Wachovia and Cabarrus Bank contend that in the

absence of a valid exemption by the Debtor in the Real Property, their judgment liens against the Real Property may not be avoided under 11 U.S.C. § 522(f). The Debtor contends that since Article X, Section 2 of the North Carolina Constitution ("Constitutional Homestead Exemption") provides a homestead exemption not conditioned on use as a residence and in an amount to be set by the legislature but not less than \$1,000.00, the Statutory Homestead Exemption should be read in tandem with the Constitutional Homestead Exemption to make the constitutional exemption \$10,000.00. The Debtor further contends that even if residency is a requirement for his entitlement to the Statutory Homestead Exemption in the Real Property, the Debtor's two minor children, who are dependents of the Debtor, reside in the Real Property, satisfying the dependent residency requirement of the Statutory Homestead Exemption. In either case, Debtor contends that he is entitled to a \$10,000 exemption in the Real Property and is entitled to avoid the judgment liens of Wachovia and Cabarrus Bank which impair such exemption pursuant to 11 U.S.C. § 522(f).

The Court, having reviewed the pleadings filed herein, having heard the testimony of the Debtor, and having heard the argument of counsel for Wachovia, Cabarrus Bank, and the Debtor, determines that the Debtor has not claimed the Constitutional Homestead Exemption in the Real Property and is not entitled to the Statutory Homestead Exemption therein. Accordingly, Wachovia's objection to Debtor's Statutory Homestead Exemption in the Real Property is

sustained, and Debtor's motions to avoid the judicial liens of Wachovia and Cabarrus Bank are denied.

In support of its Order, the Court makes the following Findings of Fact:

1. While married, Debtor and Cathy H. Combs ("Former Spouse") owned the Real Property as tenants by the entirety and resided there until June 21, 1993. On that date, Debtor moved from the Real Property, Debtor and Former Spouse intending to live thereafter continuously separate and apart. Debtor testified that the Real Property was put on the market for sale in 1993, and was still for sale as of the date of the hearing.

2. Debtor and Former Spouse were divorced on August 8, 1994.

3. Debtor now lives in Mooresville, North Carolina. Debtor has not resided in the Real Property since June 21, 1993, was not using the Real Property as his residence on the Petition Date, and had no intention as of the Petition Date, and has no intention now, of returning to the Real Property and using it as a residence in the future.

4. The Former Spouse has physical custody of the two minor children born of the marriage. The Former Spouse and the two children continued to reside in the Real Property for some time after the Debtor moved out.

5. By Court Order dated March 8, 1994, Debtor was ordered to pay to his Former Spouse \$1,300.00 a month as child support beginning in February, 1994. Debtor testified that he had

made no child support payment to his Former Spouse from February, 1994 through September, 1995, but that in each of October, November, and December, 1995, he had sent his Former Spouse \$500.00 in partial payment of his child support obligation.

6. Debtor testified that his minor children spend approximately 45% of their time with him in his current home, during which time he provides their food, clothing, and shelter.

7. Debtor further testified that the Real Property is currently vacant, the Former Spouse having remarried and moved with the minor children to a new residence with her new husband. Debtor had no knowledge of whether his Former Spouse and his minor children moved out of the Real Property before or after the Petition Date.

8. Debtor claimed the Statutory Homestead Exemption on Schedule C. He has not claimed the Constitutional Homestead Exemption.

Based on the foregoing Findings of Fact, the Court makes the following Conclusions of Law:

1. Upon their divorce, the ownership interest of Debtor and Former Spouse in the Real Property converted from tenancy by the entirety to tenancy in common, each then owning a one-half undivided interest therein.

2. North Carolina has opted out of the federal exemption scheme provided in the Bankruptcy Code. See, 11 U.S.C. § 522(b)(2)(A); N.C. Gen. Stat. § 1C-1601(f)(1995). The Statutory

Homestead Exemption claimed by the Debtor provides in pertinent part:

(a) Exempt property. - Each individual, resident of this State, who is a debtor is entitled to retain free of the enforcement of the claims of his creditors:

(1) The debtor's aggregate interest, not to exceed ten thousand dollars (\$10,000) in value, in real property or personal property that the debtor or a dependent of the debtor uses as a residence. . . .

N.C. Gen. Stat. § 1C-1601(a) (1) (1995).

3. N.C.Gen.Stat. § 1C-1602 requires a debtor to elect either the Statutory Homestead Exemption or the Constitutional Homestead Exemption, making it clear that they are mutually exclusive.

4. The Statutory Homestead Exemption is clearly conditioned upon continued ownership of the property and continued occupancy as a residence by the debtor or a dependent of the debtor. In re Love, 42 B.R. 317, 318-319 (Bankr. E.D.N.C. 1984), aff'd, 54 B.R. 947 (D.C.N.C. 1985). Once the debtor and his dependents cease using the property as a residence, the right to the exemption ceases. Id.

5. The general rule is that a debtor's exemptions are determined as of the time of filing of the bankruptcy petition. 11 U.S.C. § 522(b) (2) (B). Therefore, to be entitled to the Statutory Homestead Exemption, Debtor must have an ownership interest in the Real Property and either he or a dependent must have been using the Real Property as a residence on the Petition Date.

6. Although argued by Wachovia, it is not necessary for the Court to determine whether minor children for whom a Debtor

fails to provide court ordered support can qualify as "dependents" as that term is used in the Statutory Homestead Exemption. Rather, the Court need only focus on whether the Debtor's minor children were residing in the Real Property on the Petition Date.

7. While the initial burden to establish a right to claim an exemption is on the party asserting it, once the claimant has made a prima facie case, the burden shifts, and the burden of persuasion is placed on the objector who must present convincing evidence that the claim cannot be sustained under the applicable law. Bankruptcy Rule 4003(c); In re: Russell, 60 B.R. 190, 193-194 (Bankr. M.D. Fla. 1986). Upon the introduction of sufficient evidence to rebut the prima facie validity of the exemption, the burden shifts back to the debtor to demonstrate entitlement to the exemption. In re: Rhinebolt, 131 B.R. 973, 975 (Bankr. S.D. Ohio 1991).

8. In this case, the objecting creditors, Wachovia and Cabarrus Bank, have introduced convincing evidence in the form of the Debtor's own testimony to rebut the prima facie validity of the Debtor's claimed Statutory Homestead Exemption in the Real Property and have shifted the burden of persuasion back to the Debtor. The Real Property is clearly not the Debtor's residence. The Debtor has ultimately failed to persuade the Court that his minor children resided at the Real Property on the Petition Date and that he is entitled to the Statutory Homestead Exemption in the Real Property.

Based on the foregoing Findings of Fact and Conclusions of Law, it is therefor ORDERED, ADJUDGED AND DECREED that:

1. Wachovia's objection to Debtor's claim of a \$10,000 Statutory Homestead Exemption in the Real Property is SUSTAINED and the Debtor's claimed Statutory Homestead Exemption therein is DENIED.

2. Accordingly, Debtor's motions to avoid the judicial liens of Wachovia and Cabarrus Bank in the Real Property pursuant to 11 U.S.C. §§ 522(f) and Bankruptcy Rule 4003 are DENIED.

This the 24<sup>th</sup> day of January 1996.

  
George R. Hodges  
U.S. Bankruptcy Judge

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