

AUG 03 2012

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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

5	In re:)	BAP No.	ID-11-1592-JuMkH
)		
6	DAVID B. RAMSEY and DONNA R. RAMSEY,)	Bk. No.	11-00977-TLM
)		
7)		
	Debtors.)		
8)		
	<hr/>)		
9	JEREMY J. GUGINO, Chapter 7 Trustee,)		
)		
10	Appellant,)		
)		
11	v.)	MEMORANDUM*	
)		
12	DAVID B. RAMSEY; DONNA R. RAMSEY,)		
)		
13)		
	Appellees.)		
14)		

Argued and Submitted on June 14, 2012
at Boise, Idaho

Filed - August 3, 2012

Appeal from the United States Bankruptcy Court
for the District of Idaho

Honorable Terry L. Myers, Bankruptcy Judge, Presiding

Appearances: Matthew Todd Christensen, Esq. of Angstman, Johnson & Associates, PLLC argued for appellant, Jeremy J. Gugino, Chapter & Trustee; Howard R. Foley, Esq. of Foley Freeman, PLLC argued for appellees, David and Donna Ramsey.

Before: JURY, MARKELL AND HOLLOWELL, Bankruptcy Judges.

* This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

1 Chapter 7¹ trustee, Jeremy J. Gugino, appeals the
2 bankruptcy court's order overruling his objection to the
3 homestead exemption claimed by debtors, David and Donna Ramsey,
4 in unimproved real property.

5 The trustee's objection raised the question whether debtors
6 had the "actual intent" to make the unimproved real property
7 their "homestead" within the meaning of Idaho Code § 55-1001(2).
8 After an evidentiary hearing, the bankruptcy court ruled in
9 favor of debtors and allowed their homestead. We AFFIRM.

10 I. FACTS

11 On April 7, 2011, debtors filed their chapter 7 petition.
12 Gugino was appointed the trustee.

13 In Schedule A, debtors listed real property located on
14 Palmetto Drive in Eagle, Idaho (the "Palmetto Property") with a
15 current value of \$250,000 and encumbered by secured claims in
16 the total amount of \$394,184.63. They also listed an unimproved
17 five acre lot located forty-five miles from Boise, Idaho (the
18 "Elk Meadows Property") with a value of \$37,000 and
19 unencumbered. In Schedule C, debtors claimed the Elk Meadows
20 Property exempt as their homestead under Idaho Code §§ 55-1001,
21 55-1102, and 55-1103.² Debtors' Statement of Intention showed
22

23
24 ¹ Unless otherwise indicated, all chapter and section
25 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532 and
26 "Rule" references are to the Federal Rules of Bankruptcy
27 Procedure.

28 ² These statutes authorize married debtors to claim a
\$100,000 homestead exemption in unimproved land as long as they
intend to place a house on the property and make it their
principal residence.

1 that they would surrender the Palmetto Property.

2 **The Trustee's Objection To Debtors' Homestead Exemption**

3 On May 7, 2011, the trustee objected to debtors' exemption
4 on the grounds that they could not meet the "actual intent"
5 requirement to make the Elk Meadows Property their "homestead"
6 under Idaho Code § 55-1001(2). The objection was based on
7 debtors' testimony at the § 341 meeting of creditors.³ Debtors
8 testified that they planned on residing in the Palmetto Property
9 until it went into foreclosure and then rent a residence in
10 Boise until they could start building a house on the Elk Meadows
11 Property. The trustee argued that debtors' ability to build the
12 house was predicated on them finding work and receiving
13 financing to actually build the house. These plans, the trustee
14 asserted, were "too speculative" to demonstrate "actual intent".
15 Finally, the trustee pointed out that debtors had been trying to
16 sell the Elk Meadows Property off and on since 2009, which was
17 inconsistent with their professed intent to build a house and
18 make it their principal residence.

19 **The Evidentiary Hearing**

20 After further briefing from the parties, the bankruptcy
21 court held an evidentiary hearing on September 26, 2011, at
22 which debtors and their real estate agent, Vern Mathie,
23 testified.

24 Debtors' testimony can be summarized as follows:

25 In 2002, debtors purchased the Palmetto Property and had
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27 ³ The transcript of the § 341 meeting is not part of the
28 record on appeal.

1 been living in the house continuously ever since. In December
2 2005, debtors purchased the Elk Meadows Property. At that time,
3 debtors were gainfully employed and their plan was to pay off
4 the mortgages on both properties and then build a vacation home
5 on the Elk Meadows Property.

6 The Elk Meadows Property had utilities (electric and
7 telephone), road access, and was subject to CC&R's. At some
8 point, debtors began the process of having a builder draw up
9 house plans. They also requested a variance from the Elk
10 Meadows CC&R's to set the house closer to the road, which was
11 granted in 2006.

12 In 2009, debtors' income became unstable and the Palmetto
13 Property required substantial repairs. As a result, debtors
14 listed the Elk Meadows Property for sale with two different real
15 estate agents in 2009 and 2010.

16 In 2010 debtors lost their jobs. Thereafter, they
17 collected unemployment and struggled to make the mortgage
18 payments on the Palmetto Property which totaled \$3100 per month.
19 They drew down on IRA and pension money to make their payments.

20 In January 2011, debtors obtained the house plans for the
21 Elk Meadows Property, which were admitted into evidence.
22 Debtors estimated that it would cost between \$165,000 and
23 \$175,000 to build the house.

24 On March 15, 2011, debtors requested their real estate
25 agent, Vern Mathis, to add to the MLS listing that debtors would
26 be willing to carry a note on the Elk Meadows Property.

27 In early to mid-March 2011, debtors decided to allow the
28 Palmetto Property to go into foreclosure. At that same time,

1 they also decided to declare the Elk Meadows Property as their
2 permanent residence. As a result, they recorded a declaration
3 abandoning their automatic homestead in the Palmetto Property on
4 March 21, 2011. On the same day, they recorded a declaration of
5 homestead and non-abandonment with respect to the Elk Meadows
6 Property. A few weeks later, debtors filed their chapter 7
7 petition. At the time of their filing, Debtors did not have
8 financing lined up to build the house on the Elk Meadows
9 Property nor did they have specific plans for when they would
10 start construction.

11 Debtors also testified that when the Palmetto Property was
12 foreclosed upon, they would live and work in Boise. Boise is
13 approximately forty-five miles from the Elk Meadows Property.

14 Mr. Mathis then testified. He stated that the Elk Meadows
15 Property had no improvements and that no construction of any
16 kind had taken place on the property. He further testified that
17 on March 15, 2011, debtors had asked him to make changes to the
18 MLS listing to carry back a note on the property to facilitate a
19 sale. According to Mr. Mathis, three days later, on March 18,
20 2011, debtors cancelled the listing. Finally, Mr. Mathis opined
21 that construction loans were very difficult to arrange.

22 At the end of the hearing, debtors' counsel stipulated with
23 the trustee that he met with debtors on March 17, 2011.

24 In closing argument, the trustee urged the bankruptcy court
25 to adopt objective factors for determining what constitutes
26 "actual intent" under Idaho exemption law with respect to
27 unimproved property. Those factors, the trustee argued, should
28 require a debtor to show that he or she has concrete plans to

1 construct and occupy a house on the unimproved property as well
2 as the financial means to do so. The bankruptcy court took the
3 matter under advisement.

4 **The Bankruptcy Court's Ruling**

5 On October 4, 2011, the court issued its findings of fact
6 and conclusions of law in an oral decision. In making its
7 decision, the bankruptcy court set forth the following general
8 standards applicable to deciding the issue of intent:

9 (1) Idaho's exemption laws are to be construed liberally in
10 favor of debtors; (2) the trustee, as the party objecting to
11 debtors' exemption, had the burden of proof and the ultimate
12 burden of persuasion; (3) exemptions are determined as of the
13 bankruptcy filing date; and (4) the question of debtors' intent
14 is a factual one that can be proven by direct or circumstantial
15 evidence. With respect to this later point, the bankruptcy
16 court recited the evidence it considered in making its decision.

17 For the trustee:

18 (1) debtors listed the Elk Meadows Property for sale
19 multiple times and even eventually as recently as
20 March 2011, one month before they filed their
petition;

21 (2) debtors continued to reside in the Palmetto
22 Property and expressed an intention to stay there
until foreclosure;

23 (3) debtors never commenced construction of a home on
24 the Elk Meadows Property despite the length of their
ownership;

25 (4) debtors did not have the financial ability to
build a home;

26 (5) assuming debtors would secure jobs in Boise,
27 debtors would double their commute time by living on
the Elk Meadows Property; and

28 (6) debtors cancelled the listing on the Elk Meadows

1 Property and filed their homestead declaration just
2 days after meeting with their bankruptcy attorney.

3 For the debtors:

4 (1) debtors professed their intent to reside on the
5 Elk Meadows Property in the future through the filing
6 of their declaration of homestead;

7 (2) debtors offered the January 2011 house plans into
8 evidence as well as the variance they secured for the
9 property;

10 (3) debtors' testimony indicated that at the time they
11 filed their petition, they knew they would not be able
12 to stay permanently in the Palmetto Property and that
13 they intended to eventually build a home on the Elk
14 Meadows Property.

15 The court gave weight to the fact that debtors' Statement
16 of Intention filed with their petition corroborated their
17 testimony to surrender the Palmetto Property. In addition, the
18 bankruptcy court found that debtors' decision to abandon the
19 Palmetto Property as their homestead and establish the Elk
20 Meadows Property as their homestead was due to their changing
21 circumstances, which culminated in discussions with their
22 bankruptcy attorney. The court decided that those discussions,
23 which occurred on the eve bankruptcy, were not sufficient
24 grounds to impeach debtors' testimony. In the end, the court
25 found debtors' testimony credible.

26 Having received and evaluated the weight and credibility of
27 all the evidence offered by the parties, the bankruptcy court
28 found that the trustee had not met his burden of proof of
showing, by a preponderance of the evidence, that debtors lacked
the intent to make the Elk Meadows Property their homestead as
required under Idaho exemption law.

On the same day it issued its oral ruling, the bankruptcy

1 court entered the order overruling the trustee's objection. The
2 trustee timely appealed.

3 II. JURISDICTION

4 The bankruptcy court had jurisdiction over this proceeding
5 under 28 U.S.C. §§ 1334 and 157(b)(2)(B). We have jurisdiction
6 under 28 U.S.C. § 158.

7 III. ISSUE

8 Whether the bankruptcy court erred in allowing debtors'
9 homestead exemption in the unimproved Elk Meadows Property.

10 IV. STANDARDS OF REVIEW

11 We review questions of fact, such as the bankruptcy court's
12 ultimate decision regarding debtors' intent to make the Elk
13 Meadows Property their homestead, under the clearly erroneous
14 standard. Kelley v. Locke (In re Kelley), 300 B.R. 11, 16 (9th
15 Cir. BAP 2003). "A [factual] finding is clearly erroneous when
16 there is no evidence in the record supportive of it and also,
17 when, even though there is some evidence to support the finding,
18 the reviewing court, on review of the record, is left with a
19 definite and firm conviction that a mistake has been made in the
20 finding." United States v. Gypsum Co., 333 U.S. 364, 395
21 (1948). We affirm the bankruptcy court's factual findings
22 unless its interpretation of the facts was "illogical,
23 implausible, or without support in inferences that may be drawn
24 from the facts in the record." United States v. Hinkson,
25 585 F.3d 1247, 1261-62 & n.21 (9th Cir. 2009) (en banc).

26 We review a bankruptcy court's conclusions of law,
27 including its interpretation of state law, de novo. Hopkins v.
28 Cerchione (In re Cerchione), 414 B.R. 540, 545 (9th Cir. BAP

1 2009).

2 V. DISCUSSION

3 When debtors filed their chapter 7 petition, all of their
4 assets became "property of their bankruptcy estate under § 541,
5 subject to their right to reclaim certain property as exempt."
6 Schwab v. Reilly, __ U.S. __, 130 S.Ct. 2652, 2656-58 (2010).
7 "Property a debtor claims as exempt will be excluded from the
8 bankruptcy estate '[u]nless a party in interest' objects." Id.
9 (citing § 522(l)). Whether property qualifies as exempt is to
10 be determined as of the date of the filing of debtors' chapter 7
11 petition. White v. Stump, 266 U.S. 310, 313 (1924); In re
12 Cerchione, 414 B.R. at 548.

13 Section 522(b) allows debtors to choose the exemptions
14 afforded by state law or the federal exemptions listed under
15 § 522(d). Idaho has elected to "opt out" of the federal
16 exemptions. Idaho Code § 11-609. Therefore, debtors were
17 limited to the exemptions allowed under Idaho state law. In re
18 Steinmetz, 261 B.R. 32, 33 (Bankr. D. Idaho 2001). Idaho
19 exemption statutes are to be liberally construed in favor of the
20 debtor. Id.

21 In Idaho, the homestead can be established automatically by
22 occupying a home as one's principal residence or by recording a
23 proper declaration of homestead. Idaho Code § 55-1004. To
24 claim a homestead exemption in bare land or improved property
25 which he or she does not yet occupy, the debtor must record a
26 proper declaration. Idaho Code § 55-1004(2). In the case of a
27 debtor who owns more than one parcel of property and who desires
28 to claim a homestead exemption in a parcel he or she does not

1 yet occupy, the debtor must execute and record two different
2 declarations: a declaration of homestead as to the unoccupied
3 property, and a declaration of abandonment as to the occupied
4 property.

5 The trustee does not dispute that debtors complied with the
6 technical requirements for declaring a homestead with respect to
7 the Elk Meadows Property and abandoning their automatic
8 homestead in the Palmetto Property. Rather, the trustee asserts
9 that to prove they "actually intended" to make the Elk Meadows
10 Property their homestead within the meaning of Idaho Code § 55-
11 1001(2), debtors need more than a mere declaration of homestead.

12 Idaho Code § 55-1001(2) states:

13 "Homestead" means and consists of the dwelling house
14 or the mobile home in which the owner resides or
15 intends to reside, with appurtenant buildings, and the
16 land on which the same are situated and by which the
17 same are surrounded, or improved; or unimproved land
owned with the intention of placing a house or mobile
home thereon and residing thereon Property
included in the homestead must be actually intended or
used as a principal home for the owner.

18 According to the trustee, proof of "actual intent" under the
19 statute should require evidence of objective criteria such as a
20 debtor's concrete plans to build a house on the bare land within
21 a reasonable amount of time and the financial ability to do so.
22 However, the plain language of the "homestead" definition does
23 not include conditions regarding timing, financial ability, or
24 otherwise. In re Conley, 1999 WL 33490228, at *12 (Bankr. D.
25 Idaho 2001) ("The statute requires only that, in addition to an
26 intent to reside, the debtor own or be purchasing the property
27 and, thus, have a present interest in such property.").

28 Although the Idaho Supreme Court has not provided guidance on

1 the intent requirement, numerous decisions by bankruptcy courts
2 and this Panel fill that gap.

3 Generally, determining a debtor's intent to establish a
4 homestead on property is a factually intensive endeavor. See
5 In re Kelley, 300 B.R. at 16; In re Moore, 269 B.R. 864, 868
6 (Bankr. D. Idaho 2001); In re Conley, 1999 WL 33490228, at *12
7 (Bankr. D. Idaho 2001) (finding that the debtor's decade long
8 litigation concerning the unimproved property was indicative of
9 his subjective intent to make the property his homestead). As
10 the trier of fact, the bankruptcy court had to determine which
11 witnesses it found credible, which of the permissible competing
12 inferences it would draw, and ultimately whether the party with
13 the burden of persuasion – here the trustee – had persuaded it
14 that the requisite facts showing intent or lack thereof were
15 proven.

16 We have no doubt that the bankruptcy court performed this
17 function properly. The bankruptcy court summarized the evidence
18 in support of the trustee's position and debtors' countervailing
19 evidence that it considered. The court explicitly credited
20 debtors' testimony and permissibly drew inferences from their
21 testimony and documentary evidence (house plans, the variance
22 from the CC&R's, and their Statement of Intention). "When
23 factual findings are based on determinations regarding the
24 credibility of witnesses, we give great deference to [those]
25 findings." Wolfe v. Jacobsen (In re Jacobsen), 676 F.3d 1193,
26 1201 (9th Cir. 2012).

27 Despite the factual questions raised by the trustee as to
28 whether debtors could reasonably expect to occupy the Elk

1 Meadows Property, we conclude that the bankruptcy court did not
2 clearly err in finding that debtors' had the actual intent to
3 make the Elk Meadows Property their homestead. The record as a
4 whole, particularly in light of the credibility finding,
5 supports the bankruptcy court's inferences and findings. "Where
6 there are two permissible views of the evidence, the
7 factfinder's choice between them cannot be clearly erroneous."
8 Anderson v. City of Bessemer City, N.A., 470 U.S. 564, 574-75
9 (1985).

10 In light of our conclusion, it is unnecessary for us to
11 conduct an exhaustive review of non-binding case law
12 interpreting other state's homestead exemption laws. Suffice it
13 to say that we are not persuaded by the bankruptcy court's
14 reasoning in In re Roberts, 280 B.R. 540 (Bankr. D. Mass. 2001).
15 Extrapolating from case law that recognizes the constructive
16 occupancy exception, the Roberts court held that "to establish
17 the requisite intent, a debtor must demonstrate that the future
18 occupancy is in the near future and is capable of measurement
19 given whatever steps a debtor must take to achieve occupancy. A
20 declaration of interest alone is insufficient." Id. at 546.

21 In those jurisdictions that recognize constructive
22 occupancy, the underlying homestead statute has been construed
23 to require actual occupancy. As a result, to avoid harsh
24 results, the courts have fashioned a narrow exception that
25 requires a manifestation of the intent to occupy the land as a
26 homestead, and actual occupation within a reasonable time
27 thereafter. In re Roberts, 280 B.R. at 545 (citing In re
28 Schissler, 250 B.R. 697, 700 (Bankr. W. D. Mo. 2000)); Sec.

1 State Bank of Scott City v. Coberly, 623 P.2d 544, 545 (Kan. Ct.
2 App. 1981); and Brodsky v. Maloney, 105 N.W.2d 911, 913 (S.D.
3 1960). The constructive occupancy exception and its requirement
4 of actual occupation within a reasonable time make sense in the
5 context of those cases. However, under Idaho law, physical
6 presence on undeveloped land is immaterial to a homestead by
7 declaration under Idaho Code § 55-1004(2). In re Conley, 1999
8 WL 33490228, at *11.

9 **VI. CONCLUSION**

10 Having found no error of fact or law, we AFFIRM.
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