

**AUG 09 2006**

**NOT FOR PUBLICATION**

**HAROLD S. MARENUS, CLERK  
U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT**

**UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT**

In re: ) BAP No. NC-05-1384-BPaA  
 )  
 GEORGE E. ANDERSON, ) Bk. No. 05-10433  
 )  
 Debtor. )  
 \_\_\_\_\_ )  
 )  
 STOHLMAN & ROGERS, INC., )  
 )  
 Appellant, )  
 )  
 v. ) **M E M O R A N D U M**<sup>1</sup>  
 )  
 GEORGE E. ANDERSON; )  
 LINDA S. SCHUETTE, Trustee, )  
 )  
 Appellees. )  
 \_\_\_\_\_ )  
 \_\_\_\_\_ )

Argued and Submitted on May 17, 2006  
at Sacramento, California

Filed - August 9, 2006

Appeal from the United States Bankruptcy Court  
for the Northern District of California

Honorable Alan Jaroslovsky, Bankruptcy Judge, Presiding

Before: BRANDT, PAPPAS and ALBERT,<sup>2</sup> Bankruptcy Judges.

<sup>1</sup> This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except when relevant under the doctrines of law of the case, res judicata or collateral estoppel. See 9th Cir. BAP Rule 8013-1.

<sup>2</sup> Hon. Theodor C. Albert, United States Bankruptcy Judge for the Central District of California, sitting by designation.

1 The bankruptcy court overruled Appellant's objection to debtor's  
2 claim of a declared California homestead exemption. In doing so, the  
3 bankruptcy judge declined to follow the arguably controlling authority,  
4 In re Anderson, 824 F.2d 754 (9th Cir. 1987), which he construed as  
5 holding that only the automatic homestead is available in the involuntary  
6 sale context. We need not decide that issue here, as we must remand for  
7 the requisite factual finding for a valid declared homestead exemption.  
8 We REVERSE and REMAND for further proceedings.

9  
10 **I. FACTS**

11 Appellant Stohlman & Rogers, Inc. obtained a judgment for \$18,044.69  
12 against debtor George Anderson in 1985. The judgment was recorded in  
13 Humboldt County, California, and has been renewed from time to time. At  
14 the time of recordation, debtor and his wife owned and resided in real  
15 property at 3539 Buttermilk Lane, Arcata, Humboldt County, California  
16 ("Property"). Debtor made no payments on the judgment, and with interest  
17 the balance owed grew to over \$70,000 by March 2004.

18 At the time of the bankruptcy court hearings in this matter, debtor  
19 was 79 years old. The Property had been his home for 35 years. He and  
20 his wife lived there continuously until approximately 2002, when Mrs.  
21 Anderson moved to Sacramento to take care of her aged mother. Shortly  
22 thereafter, debtor had open heart surgery. Then, after her mother's  
23 death, Mrs. Anderson suffered a stroke. The Andersons' healthcare needs  
24 require them to spend most of their time in Sacramento. It is undisputed  
25 that in the approximately two years prior to the bankruptcy court's  
26 ruling in this case, debtor had spent about 12 days a year at his  
27 Buttermilk Lane property and the rest of the time in Sacramento.

1 On 26 March 2004 Appellant obtained a writ of execution and sought  
2 to levy on the Property. Debtor asserted California's "automatic"  
3 homestead exemption. After trial, the state court ruled that debtor was  
4 not entitled to the automatic homestead exemption because he had not  
5 continuously resided at the Property, and he then resided in Sacramento.  
6 The court entered findings and conclusions to that effect on 16 October  
7 2004. Superior Court of California, County of Humboldt, No. CV040357;  
8 Ex. B to Decl. of Donna Peter, 10 August 2005. The court entered an  
9 order denying the exemption and ordering the sale of debtor's interest  
10 in the Property on 29 November 2004.

11 A sheriff's sale was scheduled for 9 March 2005. On 8 March 2005  
12 Debtor recorded a declaration of homestead with the Humboldt County  
13 Recorder. A few hours later he filed a chapter 7<sup>3</sup> petition, listing a  
14 \$25,000 exemption in the Property (which he subsequently amended to  
15 \$150,000), citing CCP § 704.920 and § 704.730(a)(3).

16 Appellant objected to the exemption, and the bankruptcy court held  
17 an evidentiary hearing. In its memorandum overruling the objection, the  
18 bankruptcy court interpreted Anderson as holding that only the automatic  
19 homestead applies in the involuntary sale context, and found:

20 that Anderson has not abandoned his homestead, and that  
21 continuing occupation is not required to maintain the  
22 exemption. Like many elderly people, health concerns and the  
23 needs of his wife have caused him to be absent from his home  
for a considerable length of time. These factors do not  
constitute abandonment of a homestead under California law.

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24 <sup>3</sup> Absent contrary indication, all "Code," chapter and section  
25 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 prior to  
26 its amendment by the Bankruptcy Abuse Prevention and Consumer  
27 Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23, as the case from  
28 which the adversary proceeding and these appeals arise was filed  
before its effective date (generally 17 October 2005).

All "Rule" references are to the Federal Rules of Bankruptcy  
Procedure.

All "CCP" references are to the California Civil Procedure Code.

1 Concluding that stare decisis did not require him to follow Anderson,  
2 because California courts have applied the declared homestead in the  
3 context of a forced sale, Webb v. Trippet, 235 Cal. App. 3d 647, 286 Cal.  
4 Rptr. 742 (1991), or addressed its availability indirectly, In re Morse,  
5 11 Cal. 4th 184, 204, 12 Cal. 4th 344A, 900 P.2d 1170, 44 Cal. Rptr. 2d  
6 620 (1995), the bankruptcy court declined to do so.

7 Appellant timely appealed.

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## II. JURISDICTION

10 The bankruptcy court had jurisdiction via 28 U.S.C. § 1334 and  
11 § 157(b) (1) and (b) (2) (B), and we do under 28 U.S.C. § 158(c).

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## III. ISSUE

14 Whether the bankruptcy court erred in overruling Appellant's  
15 objection to exemption.

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## IV. STANDARDS OF REVIEW

18 The right of a debtor to claim an exemption is a question of law  
19 that we review de novo. In re Kelley, 300 B.R. 11, 16 (9th Cir. BAP  
20 2003). The bankruptcy court's findings of fact are reviewed for clear  
21 error. Id. The validity of a claimed state exemption is controlled by  
22 applicable state law. In re LaFortune, 652 F.2d 842, 846 (9th Cir.  
23 1981).

24

## V. DISCUSSION

25 The nature and extent of a debtor's exemption rights are determined  
26 as of the petition date. In re Herman, 120 B.R. 127, 130 (9th Cir. BAP  
27 1990).

28

1 California has opted out of the federal exemption scheme. CCP  
2 § 703.130; In re Gose, 308 B.R. 41, 44 (9th Cir. BAP 2004). California  
3 law provides two types of homestead exemptions, set forth in Articles 4  
4 and 5 of Title 9 (Enforcement of Judgments), Division 2, Chapter 4 of the  
5 CCP. Article 4, §§ 704.710-704.850, provides for an automatic homestead  
6 exemption, while Article 5, §§ 704.910-704.995, provides for a declared  
7 homestead exemption.

8 An automatic residential exemption applies when a party has  
9 continuously resided in a dwelling from the time that a  
10 creditor's lien attaches until a court's determination that  
11 the exemption applies. (§ 704.710, subd. (c).) By contrast,  
12 the declared homestead exemption requires that a party record  
13 a declaration stating that the residence is the "principal  
14 dwelling" of the declarant or his or her spouse. (§§ 704.920,  
15 704.930, subd. (a)(3).)

16 Webb, 235 Cal. App. 3d at 651, 286 Cal. Rptr. at 744.

17 At issue in this appeal is the declared homestead:

18 A dwelling in which an owner or spouse of an owner resides may  
19 be selected as a declared homestead pursuant to this article  
20 by recording a homestead declaration in the office of the  
21 county recorder of the county where the dwelling is located.  
22 From and after the time of recording, the dwelling is a  
23 declared homestead for the purposes of this article.

24 CCP § 704.920. Unlike the automatic homestead, continuous residency is  
25 not required for a declared homestead exemption to be valid. Id.

26 "Homestead laws are designed to protect the sanctity of the family  
27 home against a loss caused by a forced sale by creditors[,] and are to  
28 be construed liberally in favor of the homeowner. Title Trust Deed Serv.  
29 Co. v. Pearson, 132 Cal. App. 4th 168, 174, 33 Cal. Rptr. 3d 311, 315  
30 (2005). See also Webb, 235 Cal. App. 3d at 650 (homestead exemptions  
31 protect insolvent debtors and their families from becoming homeless).

32 Neither type of homestead exemption wholly prevents a forced sale;  
33 rather, the exemption protects a portion of the proceeds:

1 Under the declared homestead exemption, once a declaration of  
2 homestead is properly recorded, a judicial lien may only  
3 attach to equity remaining in the property after subtracting  
4 all prior liens and the declared homestead exemptions. Under  
5 the non-declared or "automatic" homestead exemption, judgment  
6 liens may still attach, but in the event of a forced sale, the  
7 proceeds must be distributed to consensual lienholders and the  
8 judgment debtors in satisfaction of their homestead exemption  
9 before the judgment creditor receives anything.

6 In re Scovis, 231 B.R. 336, 340 (9th Cir. BAP 1999), rev'd on other  
7 grounds, 249 F.2d 975 (9th Cir. 2001) (citations omitted).

8 The parties have argued the question of whether the Article 5  
9 declared homestead exemption is available in bankruptcy. Anderson has  
10 been interpreted as holding that it is not, because bankruptcy is the  
11 equivalent of a forced sale, and the declared homestead is available only  
12 in the context of a voluntary sale. See Kelley, 300 B.R. at 19-21, and  
13 In re Pike, 243 B.R. 66, 70 (9th Cir. BAP 1999).

14 But to have a valid declared homestead, the declarant must have  
15 resided on the property on the date of the declaration. CCP § 704.920;  
16 Anderson, 824 F.2d at 757. Although the debtor so testified, transcript,  
17 7 September 2005, at 25, the bankruptcy court made no explicit finding  
18 to that effect. As noted, the bankruptcy court found that debtor had  
19 "not abandoned" his homestead. But it is not clear to what time period  
20 this finding refers. The time period after he recorded his homestead,  
21 which was also the petition date, is irrelevant. See Herman, 120 B.R.  
22 at 130.

23 And five months pre-petition, the state court found that Anderson  
24 had not continuously resided in the Property and was thus not entitled  
25 to the automatic homestead exemption. The bankruptcy court must give  
26 full faith and credit to that ruling, 28 U.S.C. § 1738; Far Out  
27 Productions, Inc. v. Oskar, 247 F.3d 986, 993 (9th Cir. 2001), and it has  
28 preclusive effect in bankruptcy. In re Bigelow, 271 B.R. 178, 183 (9th

1 Cir. BAP 2001); cf. In re George, 318 B.R. 729, 733 (9th Cir. BAP 2004),  
2 aff'd, 144 Fed. Appx. 636 (9th Cir. 2005), cert. denied, 126 S. Ct. 1068  
3 (2006); see also Christopher Klein, Lawrence Ponoroff & Sarah Borrey,  
4 Principles of Preclusion and Estoppel in Bankruptcy Cases, 79 Am. Bankr.  
5 L.J. 839, 878-79 (Fall 2005).

6 Taking the bankruptcy court's "not abandoned" language as referring  
7 to the time before debtor filed his homestead declaration, it does not  
8 address the implication of the state court's finding: if debtor had not  
9 continuously resided in the Property as of October 2004, and he then  
10 resided in Sacramento, what changed between then and March 2005? When  
11 did it again become his residence? To the extent the application of  
12 preclusion doctrines is discretionary, George, 318 B.R. at 733, it was  
13 an abuse of discretion not to address the state court's recent and  
14 contrary findings. We must therefore reverse.

15 So we need not resolve the applicability of the Article 5 declared  
16 homestead in bankruptcy, nor the propriety of any departure from stare  
17 decisis, see In re State Line Hotel, Inc., 323 B.R. 703, 712-13 (9th Cir.  
18 BAP 2005), because it will not be necessary if debtor did not reside in  
19 the Property on the date of his declaration of homestead.

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## VI. CONCLUSION

22 For these reasons we REVERSE and REMAND for further proceedings.

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25 PAPPAS, J., concurring in part and dissenting in part.

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I concur in the Panel's conclusion that the decision of the  
28 bankruptcy court allowing debtor's claim to a homestead exemption by

1 declaration must be reversed, albeit for a different reason. I dissent  
2 from the Panel's decision that a remand to the bankruptcy court for  
3 further findings of fact is required.

4 In my view, the bankruptcy court erred. As noted by the Panel, the  
5 bankruptcy judge declined to follow In re Anderson, 824 F.2d 754 (9th  
6 Cir. 1987), which held that only a so-called automatic homestead under  
7 California law, and not a declared homestead, is available to a debtor  
8 in a chapter 7 bankruptcy case because a bankruptcy case is tantamount  
9 to an involuntary sale of the debtor's property. I am not persuaded by  
10 the bankruptcy court's reasoning that it need not apply Anderson here  
11 based upon more recent rulings of the California courts, all of which  
12 seem equivocal, and none of which address the status of a declared  
13 homestead exemption claim in a federal bankruptcy case.

14 I also decline to follow the debtor's suggestion that we ignore the  
15 settled case law of this Panel holding, effectively, that a declared  
16 homestead is not available to chapter 7 debtors under these facts. See  
17 In re Kelly, 300 B.R. 11, 20-21 (9th Cir. BAP 2003) ("[W]e have  
18 determined that the filing of a bankruptcy petition constitutes . . . a  
19 forced sale in the bankruptcy context. . . . [As a result,] Debtor's  
20 declaration of homestead helps him not at all, as the additional benefits  
21 conferred by [a declared homestead] would benefit him only in the  
22 situation of a voluntary sale.") (citations omitted; emphasis in  
23 original); and In re Pike, 243 B.R. 66, 70 (9th Cir. BAP 1999)  
24 (describing a declared homestead in the context of a chapter 7 case as  
25 irrelevant because "the filing of a bankruptcy petition is the functional  
26 equivalent of a forced or involuntary sale under California law . . .  
27 ."). We are bound to follow our published decisions. Salomon N. Am.  
28 v. Knupfer (In re Wind N' Wave), 328 B.R. 176, 181 (9th Cir. BAP 2005).



1 Debtor claimed only a declared homestead in his bankruptcy  
2 schedules. As the Panel acknowledges, whether debtor is entitled to such  
3 an exemption is a question of law, not fact. In re Kelly, 300 B.R. at  
4 16. Even assuming upon remand the bankruptcy court finds that debtor  
5 resided at the subject property on the day he filed his homestead  
6 declaration (something, I suggest, it has already implicitly found, and  
7 will no doubt expressly do when it reconsiders its decision upon remand),  
8 debtor is not entitled to such exemption as a matter of law. Because of  
9 this, it is unfair to the parties and a needless expenditure of their  
10 resources, not to mention those of the courts, to remand for further  
11 fact-finding.

12 Finally, the Panel's suggestion that, upon remand, debtor may be  
13 entitled to an automatic homestead exemption on the date he filed his  
14 petition, and that the issue raised in this appeal may then be moot, is  
15 at best wishful thinking, and, at worst, gratuitous speculation. Again,  
16 debtor did not claim an automatic exemption. And we can not, and should  
17 not attempt to, make exemption claims for him. Until debtor properly  
18 claims an automatic homestead, and until the bankruptcy court disposes  
19 of that claim, we are not entitled to express an opinion about the  
20 validity of that claim.<sup>1</sup>

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23 <sup>1</sup> Of course, the state court specifically rejected debtor's  
24 automatic homestead exemption claim in October, 2004, finding that  
25 debtor had not continuously resided on the property as required by  
26 California law. But because debtor did not file his bankruptcy  
27 petition until March, 2005, the bankruptcy court in its decision, and  
28 the Panel in its remand, imply that debtor may have somehow  
reestablished an automatic homestead. It would be an odd result,  
indeed, if debtor can cure the defect in his homestead claim by simply  
reoccupying the property after the state court's adverse decision, but  
prior to any forced sale. This approach would seem to render the  
state law system for determining the existence of a homestead, not to  
mention the state court's judgment, irrelevant.

1 We must decide the appeal on the record presented, and under any set  
2 of facts, when the case law of this Circuit is applied, debtor is not  
3 entitled to the exemption he claimed. I would reverse the bankruptcy  
4 court's decision. Period.

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