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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NOT FOR PUBLICATION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**

6	In re:)	BAP No.	AZ-05-1077-MoSC
7	SERGIO RENTERIA and SANDRA)	Bk. No.	02-01943-EWH
8	RENTERIA,)		
9	Debtors.)		
10	_____)		
11	SERGIO RENTERIA and SANDRA)		
12	RENTERIA,)		
13	Appellants,)		
14	v.)	MEMORANDUM¹	
15	ROBERT P. ABELE, Chapter 7)		
16	Trustee,)		
17	Appellee.)		
18	_____)		

Argued and Submitted on
January 20, 2006 at Phoenix, Arizona

Filed - June 8, 2006

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

Honorable Eileen W. Hollowell, Bankruptcy Judge, Presiding

Before: MONTALI, SMITH and CARROLL,² Bankruptcy Judges.

¹ This disposition is not appropriate for publication and may not be cited except when relevant under the doctrines of law of the case, issue preclusion or claim preclusion. See 9th Cir. BAP Rule 8013-1.

² Hon. Peter H. Carroll, United States Bankruptcy Judge for the Central District of California, sitting by designation.

1 Sergio and Sandra Renteria ("Debtors") appeal a final order
2 of the bankruptcy court entered on February 9, 2005, which
3 effectively sustained the chapter 7 trustee's objection to
4 Debtors' homestead exemption. We REVERSE and REMAND.

5 **I. FACTS**

6 At the time they commenced their Chapter 12³ case on April
7 26, 2002, Debtors were family farmers operating a 320-acre farm
8 in Cochise County, Arizona (the "real property"). The real
9 property was encumbered by a lien in favor of the United States
10 Department of Agriculture, Farm Service Agency ("FSA") securing a
11 debt in excess of \$800,000. Located on the real property was a
12 mobile home (not owned by Debtors as of the petition date) as
13 well as a permanent dwelling structure (the "dwelling"), both of
14 which were in a state of disrepair. They claimed a homestead
15 exemption in the amount of \$100,000 under Arizona Revised Statute
16 ("A.R.S.") § 33-1101.⁴ The trustee did not object.

17 According to Debtors, the mobile home could be more easily
18 repaired than the dwelling, and as a result, Debtors undertook to
19 make the mobile home their primary residence. On September 19,
20 2003, Debtors filed a motion to use \$20,000 of estate funds and
21 \$18,000 in gift money from family members for the purchase of the
22 mobile home. According to Debtors, they had no other living
23

24 ³ Unless otherwise indicated, all chapter, section and rule
25 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and
26 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as
27 enacted and promulgated prior to the effective date (October 17,
2005) of The Bankruptcy Abuse Prevention and Consumer Protection
Act of 2005, Pub. L. 109-8, Apr. 20, 2005, 119 Stat. 23.

28 ⁴ Schedule C merely reflects "Homestead" in the "value
claimed amount" of \$100,000.

1 accommodations available to them.⁵ The court ultimately granted
2 the motion after Debtors expressly stipulated that the mobile
3 home would not be subject to any claim of exemption.⁶

4 On June 18, 2004, the case converted to a chapter 7.
5 Following the conversion, Debtors amended their schedules, but
6 made no changes to the homestead exemption. Cognizant of the
7 pre-conversion exemption waiver, the trustee requested, in the
8 form of an objection, that Debtors clarify the basis of the
9 claimed homestead exemption.

10 Debtors took the position that because the trustee did not
11 object to the homestead exemption at the outset of the chapter 12
12 filing, the exempt property was no longer property of the estate
13 at the time of conversion. Accordingly, the exempt property was
14 effectively removed from the reach of the trustee or creditors.

15 The trustee responded that Debtors had waived any right to a
16 homestead exemption as a condition of using estate funds for the
17 purchase of the mobile home.

18 A hearing was held on December 29, 2004. Debtors maintained
19 their arguments, and in addition, claimed that notwithstanding
20 the waiver of a homestead exemption in the mobile home, the
21 exemption attached to the real property and the dwelling. They
22 contended that any one of the categories of the applicable
23 Arizona homestead law, quoted *infra*, allowed them the claimed
24 exemption. Thus they argued that they could exempt the real
25

26 ⁵ At no time did Debtors reside, or intend to reside, in the
27 dwelling.

28 ⁶ Debtors admit to having executed a written abandonment or
waiver of the homestead as it pertained to the mobile home.

1 252 B.R. 778, 784 (9th Cir. BAP 2000); In re Goswami, 304 B.R.
2 386, 389 (9th Cir. BAP 2003); In re Kim, 257 B.R. 680, 684 (9th
3 Cir. BAP 2000). Whether property is included in a bankruptcy
4 estate is a question of law also subject to de novo review. In
5 re Kim, 257 B.R. at 684; In re Central Ark. Broad. Co., 68 F.3d
6 213, 214 (9th Cir. 1995).

7 V. DISCUSSION

8 A. Standing

9 Debtors contend that because FSA's lien against the real
10 property exceeded its value, the estate had no equity in the
11 property from which profits could be realized from its sale.⁷ In
12 the absence of such a pecuniary interest, Debtors assert that the
13 trustee did not have standing to object to the exemption.

14 The Ninth Circuit, in Matter of Fondiller, 707 F.2d 441, 442
15 (9th Cir. 1983), has held that "[o]nly those persons who are
16 directly and adversely affected pecuniarily by an order of the
17 bankruptcy court [have] standing to appeal that order." Direct
18 and adverse effect can include "diminution in property, increase
19 in burden, or detrimental affect of rights." Id.

20 Here, the argument that the estate has no pecuniary interest
21 in objecting to the homestead exemption is unsupported by the
22 record. Undoubtedly, the estate has a pecuniary interest in
23 objecting to the homestead exemption as a successful challenge
24 would increase the assets of the estate by \$100,000, the amount
25 of the claimed exemption. The fact that the real property has

26 ⁷ Issues pertaining to the sale of the real property are not
27 before us, and therefore, we decline comment. We do note,
28 however, that it has been sold, a fact that may render this
matter moot and compels us to remand.

1 since been sold does not negate the trustee's standing as of the
2 time of the objection.

3 Debtors argue that because the panel has consistently held
4 that a debtor does not have standing to contest actions affecting
5 the size of the estate, it should follow that trustees also lack
6 such standing. We reject this reasoning. As we noted in In re
7 Stoll, 252 B.R. 492 (9th Cir. BAP 2000), a case relied on by
8 Debtors, a chapter 7 debtor ordinarily does not have a pecuniary
9 interest in the property of the estate because the estate's legal
10 representative is the trustee - not the debtor.⁸ In re Stoll,
11 252 B.R. at 495 n.4.

12 We conclude that the trustee had standing to object to
13 Debtors' homestead exemption.

14 B. Debtors did not waive their right to a homestead exemption
15 in the real property.

16 Notwithstanding the waiver of exemption in the mobile home,
17 Debtors argue that they continued to hold a homestead exemption
18 on the real property and dwelling. According to Debtors, while
19 it is true that they executed a written abandonment or waiver of
20 the homestead as it pertained to the mobile home, they did not
21 abandon the homestead as to the real estate and the dwelling. As
22 a result, a homestead in these assets was permitted under A.R.S.
23 § 33-1104.

24 The homestead exemption under Arizona law is governed by
25 A.R.S. § 33-1101, which provides

26 _____
27 ⁸ An obvious exception would be where there is a surplus, or
28 at least a substantial possibility of a surplus, after all
creditors have been paid in full. In re Stoll, 252 B.R. at 495
n.4.

1 A. Any person the age of eighteen or over,
2 married or single, who resides within the
3 state may hold as a homestead exempt from
4 attachment, execution and forced sale, not
5 exceeding one hundred fifty thousand dollars⁹
6 in value, any one of the following:

7 1. The person's interest in real property in
8 one compact body upon which exists a dwelling
9 house in which the person resides.

10 2. The person's interest in one condominium
11 or cooperative in which the person resides.

12 3. A mobile home in which the person
13 resides.

14 4. A mobile home in which the person resides
15 plus the land upon which that mobile home is
16 located.

17 A.R.S. § 33-1101.

18 As there are no condominiums or cooperatives on the real
19 property, A.R.S. § 33-1101(A)(2) does not apply. Further,
20 Debtors concede that they executed a written abandonment or
21 waiver as to the mobile home, therefore, A.R.S. §§ 33-1101(A)(3)
22 is also inapplicable. Thus, Debtors' eligibility for a homestead
23 exemption can only fall within A.R.S. § 33-1101(A)(1) or (A)(4).

24 Under A.R.S. § 33-1101(A)(1), a person may claim a homestead
25 on a dwelling house in which the claimant resides. "Resides" is
26 defined as the "physical presence of the individual claiming a
27 homestead exemption." In re Elia, 198 B.R. 588, 597 (Bankr. D.
28 Ariz. 1996). A debtor, however, may be entitled to a homestead
exemption for his residence even though he was not physically
present at the time of the homestead claim if he intended the
premises to be his residence. In re Garcia, 168 B.R. 403, 408
(D. Ariz. 1994).

⁹ At the time the bankruptcy was filed, the maximum
exemption amount was \$100,000.

1 The record is clear that as of the date of the commencement
2 of the bankruptcy case, Debtors did not physically reside in the
3 dwelling. Moreover, as evidenced by the representations made
4 during the hearing to utilize estate funds, Debtors' clearly
5 intended to reside in the mobile home. Nothing in the record
6 suggests that Debtors ever intended to reside in the dwelling.
7 Therefore, Debtors could not claim a homestead exemption in the
8 dwelling and the real property as allowed under A.R.S. § 33-
9 1101(A) (1) .

10 As the bankruptcy court correctly noted, the only issue that
11 remains is whether Debtors were eligible for a homestead
12 exemption under A.R.S. § 33-1101(A) (4). While it is clear that
13 Debtors waived their right to a homestead as to the mobile home,
14 the law provides for a homestead in the mobile home "plus" the
15 land upon which the mobile home is located. We know of no reason
16 why Arizona law would preclude a debtor from waiving one portion
17 of a two-part exemption. Debtors claimed a homestead in the real
18 property and the mobile home, there was no timely objection to
19 that combined objection, then they waived a portion of it. We
20 believe the bankruptcy court incorrectly treated an unequivocal
21 waiver only of the mobile home to be a waiver of the properly
22 claimed exemption in the real property. However, because the
23 real property has been sold, the bankruptcy court needs to
24 determine whether it has any ongoing jurisdiction to resolve the
25 competing claims of Debtors and FSA in the real property (the
26 trustee having none), and if so, to determine the rights of the
27 parties.

28

1 **VI. CONCLUSION**

2 For the foregoing reasons, we REVERSE the bankruptcy court's
3 order that sustains the trustee's objection to the Debtors' claim
4 of exemption in the real property and REMAND to determine whether
5 it has jurisdiction to resolve, and if so, to resolve, whatever
6 issues remain from this dispute.

7
8
9 SMITH, Bankruptcy Judge, dissenting:

10
11 Debtors clearly waived their right to claim a homestead as
12 to the mobile home. The majority, however, pushes the ball a bit
13 further to conclude that the waiver of an exemption in the mobile
14 home does not constitute a waiver of an exemption on the land
15 upon which it is situated pursuant to A.R.S. § 33-1101(A)(4).¹⁰ I
16 disagree.

17 A.R.S. § 33-1101(A)(4) provides

18 A. Any person the age of eighteen over,
19 married or single, who resides within the
20 state may hold as a homestead exempt from
21 attachment, execution and forced sale, not
22 exceeding one hundred fifty thousand dollars¹¹
23 in value, any one of the following:

24 4. A mobile home in which the person resides
25 plus the land upon which that mobile home is
26 located.

27 A.R.S. § 33-1101(A)(4) (emphasis added).

28 ¹⁰ Notably, this issue was not raised by Debtors on appeal.

¹¹ At the time the bankruptcy was filed, the maximum
exemption amount was \$100,000.

1 This section authorizes a person to exempt the mobile home
2 in which he resides and the land on which it is located. It does
3 not, however, contemplate an exemption on the land alone. See
4 e.g., In re Unkefer, 44 B.R. 55, 58 (Bankr. D. Ariz. 1984) (noting
5 that prior to 1983, the Arizona legislature allowed an exemption
6 solely based on the land, but has since redesigned the law so
7 that a debtor must now reside on the homestead property claimed).

8 When Debtors stipulated to waive any right to a homestead
9 exemption in exchange for the use of estate funds, by operation
10 of law, they concurrently and necessarily waived the right to
11 assert a homestead exemption on the underlying land. Therefore,
12 the bankruptcy court properly held

13 [W]hen the Debtor sought to purchase the
14 mobile home from the mortgage company, and
15 use estate funds to do so, they waived their
16 homestead exemption rights [sic] Whatever
17 property may have been removed by the initial
18 exemption, was returned to the Bankruptcy
19 Estate in exchange for the use of Estate
20 funds to purchase the mobile home. The
21 Debtors are bound by their earlier waiver;
22 accordingly, the Trustee's objection to the
23 Debtors claim of a homestead exemption is
24 SUSTAINED.

25 Accordingly, the order should be affirmed.
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