

JUN 05 2013

NOT FOR PUBLICATION

SUSAN M SPRAUL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:) BAP No. CC-12-1559-C1DKi
)
 NAHED ABDELBASSIR ELEIWA,) Bk. No. 6:12-bk-22839 MJ
)
 Debtor.)
 _____)
)
 NAHED ABDELBASSIR ELEIWA,)
)
 Appellant,)
)
 v.) **M E M O R A N D U M**¹
)
 ROBERT S. WHITMORE, Chapter 7)
 Trustee,)
)
 Appellee.)
 _____)

Argued and Submitted on May 16, 2013
at Pasadena, California

Filed - June 5, 2013

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

Honorable Meredith A. Jury, Bankruptcy Judge, Presiding

Appearances: Zulu Ali of the Law Offices of Zulu Ali argued for
 Appellant Nahed AbdElbassir Eleiwa; Scott H.
 Talkov of Reid & Hellyer, APC argued for Appellee
 Robert S. Whitmore, Chapter 7 Trustee.

¹ 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 Before: CLEMENT,² DUNN, and KIRSCHER, Bankruptcy Judges.

2 **INTRODUCTION**

3 The debtor filed a chapter 7³ bankruptcy in which she
4 claimed homestead exemptions in two real properties that she
5 neither owned, nor lived in, on the date of the petition and
6 "tools of the trade" exemptions in two vehicles. The chapter 7
7 trustee objected to these exemptions, which the bankruptcy court
8 sustained. An appeal followed, and we now AFFIRM in part and
9 VACATE and REMAND in part.

10 **FACTS**

11 Nahed Eleiwa filed a chapter 7 petition, and Robert Whitmore
12 was appointed as the trustee over her estate. On the petition,
13 Eleiwa described her street address as 1040 South Mt. Vernon
14 Avenue, #G-105, Colton, California and her county of residence as
15 San Bernardino. Colton is a city in San Bernardino County. In the
16 Statement of Financial Affairs, she denied residing at any other
17 address within the past three years.

18 On Schedule A, Eleiwa listed two real properties: one
19 located in Mission Viejo, California and another in Irvine,
20 California. But she did not indicate the nature of her interest
21 in these properties (i.e., fee simple, community property, etc.).
22 Mission Viejo and Irvine are each located in Orange County. On

23 ² Hon. Fredrick E. Clement, United States Bankruptcy Judge
24 for the Eastern District of California, sitting by designation.

25 ³ Unless otherwise indicated, all chapter, section, and rule
26 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

1 Schedule B, Eleiwa listed two vehicles: a 2003 Toyota Camry and a
2 2011 Toyota Sienna.⁴ However, she indicated that they were the
3 property of her spouse Alaa Touni.

4 Although Eleiwa scheduled the Mission Viejo and Irvine
5 properties, grant deeds recorded in Orange County showed that
6 each property was transferred, without consideration,
7 approximately fourteen months prior to the petition date. The
8 transferor, as stated in the grant deeds, was the Keant Trust, of
9 which Eleiwa and her spouse are the co-trustees. The transferee
10 was Amro Elawa. The record is silent as to the identities of the
11 settlor and beneficiary and the terms of the Keant Trust,
12 including whether the trust is revocable.

13 Believing the grant deeds to be fraudulent transfers,
14 Whitmore commenced an adversary proceeding against Elawa to
15 recover the real properties. When Elawa failed to respond to the
16 complaint, Whitmore obtained a default judgment, which voided the
17 grant deeds and reverted title back to the Keant Trust.

18 Before the entry of the default judgment, Eleiwa amended
19 Schedule C to change how she exempted the two real properties and
20 two vehicles.⁵ She now claimed homestead exemptions in the

21 ⁴ We have taken judicial notice of the bankruptcy court
22 docket and various documents filed through the electronic
23 docketing system. See O'Rourke v. Seaboard Sur. Co. (In re E.R.
24 Fegert, Inc.), 887 F.2d 955, 957-58 (9th Cir. 1988); Atwood v.
Chase Manhattan Mortg. Co. (In re Atwood), 293 B.R. 227, 233 n.9
(9th Cir. BAP 2003).

25 ⁵ In the original Schedule C, Eleiwa utilized the exemption
26 scheme found at California Code of Civil Procedure § 703.140(b).

(continued...)

1 Mission Viejo and Irvine properties in the amounts of \$150,000
2 and \$25,000, respectively, pursuant to California Code of Civil
3 Procedure § 704.730(a)(3)(B). She also claimed a \$7,279 exemption
4 in the Camry and a \$2,000 exemption in the Sienna as "tools of
5 the trade" under California Code of Civil Procedure § 704.060.

6 Whitmore timely filed an objection to the amended
7 exemptions, and the bankruptcy court sustained the objection,
8 disallowing each of the four exemptions.

9 JURISDICTION

10 The bankruptcy court had jurisdiction under 28 U.S.C.
11 §§ 1334 and 157(b)(2)(B). An order disallowing a debtor's claim
12 of exemption constitutes a final, appealable order. See Preblich
13 v. Battley, 181 F.3d 1048, 1056 (9th Cir. 1999). We therefore
14 have jurisdiction pursuant to 28 U.S.C. § 158(a)(1) and (b).

15 ISSUES

16 This appeal presents but two issues: did the bankruptcy
17 court err in disallowing Eleiwa's (1) homestead exemptions in the
18 Mission Viejo property and the Irvine property, and (2) tools of
19 the trade exemptions in the Camry and the Sienna?

20 STANDARDS OF REVIEW

21 We review legal issues de novo and the bankruptcy court's
22

23

⁵ (...continued)

24 Specifically, she claimed a \$14,849 homestead exemption in the
25 Irvine property, a \$0 wildcard exemption in the Mission Viejo
26 property, and a \$2,011 wildcard exemption in the Sienna. For the
Camry, she combined a \$3,525 vehicle exemption and a \$3,754
wildcard exemption.

1 factual findings under a clearly erroneous standard. Kelley v.
2 Locke (In re Kelley), 300 B.R. 11, 16 (9th Cir. BAP 2003). A
3 factual finding is clearly erroneous if the record is devoid of
4 evidence to support it or if the reviewing court is "left with
5 the definite and firm conviction that a mistake" has been made in
6 the finding. Greene v. Savage (In re Greene), 583 F.3d 614, 618
7 (9th Cir. 2009). If the bankruptcy court's view of the evidence
8 is plausible, viewed from the prism of the entire record, the
9 court's factual findings cannot be clearly erroneous. See
10 Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 574
11 (1985).

12 DISCUSSION

13 I. The Law of Exemptions.

14 When a debtor files a chapter 7 petition, all of her assets
15 become property of the estate and may be used to pay creditors,
16 subject to the debtor's ability to reclaim specified property as
17 exempt. Schwab v. Reilly, 130 S. Ct. 2652, 2657 (2010).

18 A debtor may exempt property either as permitted by the
19 federal exemption scheme found at § 522(d) or, if the applicable
20 state has opted out of that scheme, as allowed under relevant
21 state law. See 11 U.S.C. § 522(b). California has elected not to
22 utilize the federal exemptions and, instead, offers a debtor the
23 choice between two different exemption schemes. See Cal. Civ.
24 Proc. Code §§ 703.130, 703.140(a). Here, Eleiwa has chosen the
25 set of exemptions provided in California Code of Civil Procedure
26 §§ 703.010-704.995 (except for those exemptions provided in

1 § 703.140(b)). See id. § 703.140(a).

2 Once a debtor claims an exemption, it is presumptively
3 valid, and the objecting party shoulders the burden of proving
4 that the exemption is not properly claimed. See Rule 4003(c);
5 Carter v. Anderson (In re Carter), 182 F.3d 1027, 1029 n.3 (9th
6 Cir. 1999).

7 **II. Homestead Exemptions.**

8 Eleiwa claimed homestead exemptions under California Code of
9 Civil Procedure § 704.730(a)(3)(B) based on her alleged status as
10 a disabled person⁶ and attempted to split the allowed \$175,000
11

12 ⁶ This exemption statute provides, in relevant part,

13 (a) The amount of the homestead exemption is one of the
14 following:

15 . . .

16 (3) One hundred seventy-five thousand dollars
17 (\$175,000) if the judgment debtor or spouse of the
18 judgment debtor who resides in the homestead is at
19 the time of the attempted sale of the homestead
20 any one of the following:

21 . . .

22 (B) A person physically or mentally disabled
23 who as a result of that disability is unable
24 to engage in substantial gainful employment.
25 There is a rebuttable presumption affecting
26 the burden of proof that a person receiving
disability insurance benefit payments under
Title II or supplemental security income
payments under Title XVI of the federal
Social Security Act satisfies the
requirements of this paragraph as to his or
her inability to engage in substantial
gainful employment.

(continued...)

1 exemption amount between the Mission Viejo and Irvine
2 properties.⁷ The bankruptcy court sustained Whitmore's objection
3 to the two homestead exemptions on multiple, alternative grounds:
4 (1) that the two real properties were not property of the estate;
5 and (2) that Eleiwa did not reside in either of the properties.⁸
6 On appeal, Eleiwa has challenged both of these grounds.

7 **A. Property of the Estate.**

8 First, we review the bankruptcy court's findings that the
9 Mission Viejo and Irvine properties were not property of the
10 estate both on the petition date and after Whitmore's avoidance
11 of the fraudulent transfers.

12 It is a "well settled rule that property cannot be exempted
13 unless it is first property of the estate." Heintz v. Carey
14 (In re Heintz), 198 B.R. 581, 586 (9th Cir. BAP 1996); accord
15 Owen v. Owen, 500 U.S. 305, 308 (1991). As the Ninth Circuit has
16 stated,

17 Whether [a] [d]ebtor's [property is] excluded from the

18 _____
19 ⁶ (...continued)
20 Cal. Civ. Proc. Code § 704.730(a)(3)(B).

21 ⁷ However, a debtor is entitled to only one such exemption.
22 See Cal. Civ. Proc. Code § 704.710(c) (defining "homestead" as
23 debtor's "principal dwelling"); see also id. § 704.720(c)
24 (permitting only one homestead exemption where debtor and spouse
25 each reside in separate homesteads); cf. Rowe v. Jackman
26 (In re Rowe), 236 B.R. 11, 14 (9th Cir. BAP 1999) (holding that
married couple was entitled to one homestead exemption under
Nevada law).

⁸ The bankruptcy court also sustained the objection on the
ground that § 522(g) precludes Eleiwa from claiming exemptions in
the two fraudulently transferred properties. However, since we
affirm on the other two grounds, we do not reach this issue.

1 estate is a question that should be addressed by the
2 bankruptcy court in the first instance. The exemption
3 question arises only if the [property is] first
4 determined to be property of the estate. In fact, if
5 the [property is] not property of the estate, the
6 bankruptcy court should not make a decision on the
7 exemption question.

8 Ehrenberg v. S. Cal. Permanente Med. Grp. (In re Moses), 167 F.3d
9 470, 474 (9th Cir. 1999) (quoting Spirtos v. Moreno
10 (In re Spirtos), 992 F.2d 1004, 1007 (9th Cir. 1993)).

11 Since property of the estate includes "all legal or
12 equitable interests of the debtor in property as of the
13 commencement of the case," 11 U.S.C. § 541(a)(1), a debtor can
14 exempt property that she owned as of the petition date. See
15 Robertson v. Alsberg (In re Alsberg), 161 B.R. 680, 683 (9th Cir.
16 BAP 1993), aff'd, 68 F.3d 312 (9th Cir. 1995). However, in this
17 instance, the bankruptcy court correctly found that Eleiwa did
18 not have an interest in the two real properties on the petition
19 date. The evidence shows, on that date, Amro Elawa, a third
20 party, held title to the Mission Viejo and Irvine properties.

21 Alternatively, "[a]ny interest in property that the trustee
22 recovers under [§ 550]" also becomes property of the estate.
23 11 U.S.C. § 541(a)(3). Yet, in this case, once the bankruptcy
24 court entered the default judgment in favor of Whitmore, voiding
25 the grant deeds, title reverted back to the Keant Trust, the
26 transferor, rather than to Eleiwa. The Keant Trust held title to
the two properties, and Eleiwa was only a co-trustee of that
trust. Under California law, the Keant Trust is presumed to be
the owner of that property. See Cal. Evid. Code § 662. And

1 without any evidence showing that Eleiwa was the trustor and that
2 the trust was revocable, the bankruptcy court appropriately found
3 that Eleiwa did not own the properties upon Whitmore's recovery.
4 The fact that Eleiwa was the co-trustee of the Keant Trust did
5 not mean that the trust's property became her bankruptcy estate's
6 property. See 11 U.S.C. § 541(b)(1), (d); Foothill Capital Corp.
7 v. Clare's Food Mkt., Inc. (In re Coupon Clearing Serv., Inc.),
8 113 F.3d 1091, 1099 (9th Cir. 1997).

9 **B. Residency.**

10 More problematic to Eleiwa's homestead exemption claims are
11 the bankruptcy court's findings that she did not reside in either
12 the Mission Viejo or Irvine property on the petition date. The
13 California homestead exemption "applies when a [debtor] has
14 continuously resided in a dwelling from the time that a
15 creditor's lien attaches until a court's determination that the
16 exemption applies." Kelley, 300 B.R. at 17 (citing Cal. Civ.
17 Proc. Code § 704.710(c)).

18 On appeal, Eleiwa argues that the evidence presented below
19 unequivocally established her residency in the two real
20 properties. However, we reject that argument and conclude that
21 the bankruptcy court's findings that Eleiwa did not reside at
22 either property were not clearly erroneous.

23 Eleiwa first takes issue with the bankruptcy court's
24 conclusion that she is "kind of stuck with what [she] told the
25 Court under penalty of perjury" in her petition. Hr'g Tr. 5:8-9,
26 Oct. 23, 2012. Specifically, the petition shows that Eleiwa

1 claimed the Colton address as her street address, rather than the
2 Mission Viejo or Irvine property. Further, on the petition, she
3 indicated her county of residence as being San Bernardino (where
4 Colton is located), rather than Orange (where the two real
5 properties are located).

6 Any representation made in a debtor's petition, signed under
7 penalty of perjury, is an admission that may be offered against
8 that debtor. See Am. Express Travel Related Servs. Co. v. Vee
9 Vinhnee (In re Vee Vinhnee), 336 B.R. 437, 449 (9th Cir. BAP
10 2005); Campbell v. Verizon Wireless S-CA (In re Campbell),
11 336 B.R. 430, 436 (9th Cir. BAP 2005). Thus, notwithstanding
12 Eleiwa's contention that she withdrew the admissions,⁹ it was
13 appropriate for the bankruptcy court to consider Eleiwa's
14 admissions made in the petition about her street address and her
15 county of residence as evidence in ruling on the homestead
16 exemptions.

17 Second, Eleiwa argues that the bankruptcy court erred by
18 looking only at the mailing address on the utility bills while
19 failing to give any weight to the service address listed on those
20 bills (which had the Mission Viejo property as the service
21 address).¹⁰ However, this argument also falls short because that

22 ⁹ Eleiwa argues that by amending the schedules, she withdrew
23 any admissions she may have made in the original schedules.
24 However, Eleiwa never amended the petition, which contained the
subject admissions considered by the bankruptcy court.

25 ¹⁰ In her opposition to Whitmore's objection to the
26 exemptions, Eleiwa attached several utility bills addressed to

(continued...)

1 portion of the bills is equivocal at best on the issue of where
2 Eleiwa resided on the petition date.

3 Evidence that a utility service is provided to a particular
4 address under a specific customer's name gives rise to two
5 possible inferences: one that the customer resided at that
6 address and another that the customer did not reside at that
7 address but was only paying for the service provided there. Here,
8 the bankruptcy court adopted the latter version of the facts,
9 possibly in light of the fact that the bills were mailed to
10 Eleiwa at an address different than the service address. Where
11 there are two plausible versions of the facts to be drawn from
12 the evidence, the court's findings cannot be clearly erroneous.
13 Vill. Nurseries v. Gould (In re Baldwin Builders), 232 B.R. 406,
14 410 (9th Cir. BAP 1999). Thus, the bankruptcy court did not err
15 in finding that the utility bills failed to establish that Eleiwa

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19 ¹⁰ (...continued)
20 either her or her spouse. Each bill listed a service address
21 (i.e., where the utility service was provided) and a mailing
22 address (i.e., where the bill was mailed to). All of the utility
23 bills showed the Mission Viejo property as the service address.
24 While the earlier bills listed that property also as the mailing
25 address, the more recent bills (i.e., for those months
26 immediately before and after the petition date) were mailed to a
post office box. When reviewing the bills, the bankruptcy court
noted that "if you look at where those bills were mailed, they
were mailed to a post office box of the husband." Hr'g Tr.
5:15-17, Oct. 23, 2012. The court then concluded, "If they did
live in the Mission Viejo address, they would get their mail
there, and they are not getting their mail there." Id. at
5:18-20.

1 resided at the Mission Viejo or Irvine property.¹¹

2 For these reasons, we affirm the bankruptcy court's
3 disallowance of the two homestead exemptions.

4 **III. Tools of the Trade Exemptions.**

5 Eleiwa also appeals the bankruptcy court's disallowance of
6 her claimed exemptions in the Camry and the Sienna as tools of
7 the trade of her spouse. The court's ruling was based on (1) the
8 lack of evidence showing that Eleiwa's spouse used the vehicles
9 in his business and (2) the aggregate exempted value of the
10 vehicles exceeding the statutory exemption amount.

11 California Code of Civil Procedure § 704.060 authorizes a
12 debtor to exempt tools of the trade up to an aggregate equity
13 value of \$6,075 if such tools are "reasonably necessary" to and
14 "actually used" by the debtor or the debtor's spouse in the
15 exercise of his or her trade, business, or profession.¹²

16 ¹¹ Eleiwa did not actually present any evidence to show that
17 she resided at the Irvine property. As previously noted, the
18 utility bills were only for the Mission Viejo property.

19 ¹² The relevant portions of this statute provide,

20 (a) Tools, implements, instruments, materials,
21 uniforms, furnishings, books, equipment, one commercial
22 motor vehicle, one vessel, and other personal property
23 are exempt to the extent that the aggregate equity
24 therein does not exceed:

25 (1) Six thousand seventy-five dollars (\$6,075), if
26 reasonably necessary to and actually used by the
27 judgment debtor in the exercise of the trade,
28 business, or profession by which the judgment
29 debtor earns a livelihood.

(2) Six thousand seventy-five dollars (\$6,075), if
(continued...)

1 Here, Eleiwa claimed a \$7,279 exemption in the Camry and a
2 \$2,000 exemption in the Sienna. On appeal, she appears to argue
3 that the bankruptcy court's factual findings were clearly
4 erroneous, but Eleiwa's argument is premised on new evidence not
5 presented below.

6 **A. Burden of Proof.**

7 Because the party objecting to an exemption has the burden
8 of proof, Rule 4003(c), that party has the initial burden of
9 producing evidence to rebut the presumptively valid exemption.
10 Carter, 182 F.3d at 1029 n.3. Here, Whitmore did produce some
11 evidence, in the form of Eleiwa's Schedule I and Statement of
12 Financial Affairs, showing that Eleiwa was currently unemployed

13 _____
14 ¹² (...continued)

15 reasonably necessary to and actually used by the
16 spouse of the judgment debtor in the exercise of
the trade, business, or profession by which the
spouse earns a livelihood.

17

18 (c) Notwithstanding subdivision (a), a motor vehicle is
19 not exempt under subdivision (a) if there is a motor
vehicle exempt under Section 704.010 which is
20 reasonably adequate for use in the trade, business, or
profession for which the exemption is claimed under
21 this section.

22 (d) Notwithstanding subdivisions (a) and (b):

23 (1) The amount of the exemption for a commercial
24 motor vehicle under paragraph (1) or (2) of
subdivision (a) is limited to four thousand eight
hundred fifty dollars (\$4,850).

25

26 Cal. Civ. Proc. Code § 704.060.

1 and had not operated a business in years. This evidence was
2 sufficient to meet Whitmore's initial burden to establish that
3 Eleiwa could not exempt the two vehicles as her own tools of the
4 trade under California Code of Civil Procedure § 704.060(a)(1).
5 However, Whitmore did not come forward with any evidence to rebut
6 Eleiwa's presumptively valid exemptions as her non-debtor
7 spouse's tools of the trade under § 704.060(a)(2).

8 Nevertheless, the bankruptcy court concluded that Eleiwa did
9 not meet her burden of producing evidence to demonstrate that the
10 vehicles qualified as her spouse's tools of the trade. Yet, the
11 burden of production does not shift to a debtor until the
12 objecting party has initially produced evidence to rebut the
13 exemption. See id. Because no evidence was presented by Whitmore
14 on this issue, the bankruptcy court erred in finding that Eleiwa
15 failed to produce any unequivocal evidence when that burden had
16 not yet shifted to her.

17 But even if the tools of the trade exemptions in the
18 vehicles are presumptively valid under California Code of Civil
19 Procedure § 704.060(a)(2), we must address other preliminary
20 issues affecting whether Eleiwa can claim these exemptions.

21 **B. Exemption Limit.**

22 First, a debtor cannot claim an exemption in an amount
23 greater than what the applicable statute will allow. For tools of
24 the trade, the statute provides that the aggregate equity of such
25 tools claimed exempt cannot exceed \$6,075. See Cal. Civ. Proc.
26 Code § 704.060(a)(1), (2). Here, Eleiwa claimed a \$7,279

1 exemption in the Camry and a \$2,000 exemption in the Sienna. She
2 valued the two vehicles at \$7,279 and \$19,017, respectively, on
3 Schedule B, and she did not include any debts securing them on
4 Schedule D. Thus, the aggregate equity of the vehicles claimed
5 exempt was \$9,279, clearly above the \$6,075 limit.

6 However, we need not choose which of the two exemptions in
7 the vehicles must be disallowed because the \$7,279 exemption in
8 the Camry, by itself, exceeds the statutory limit. Thus, the
9 bankruptcy court properly disallowed the exemption in that
10 vehicle as a tool of the trade.

11 **C. Property of the Estate.**

12 Second, as previously discussed, the bankruptcy court must
13 find that the property belongs to the estate before deciding
14 whether that property has been properly exempted. See Moses,
15 167 F.3d at 474. Here, the bankruptcy court did not make adequate
16 findings as to whether the vehicles were property of the estate.
17 The court noted, "The Debtor is now claiming the cars are owned
18 by the non-filing husband. I don't know whether the estate has a
19 community property interest in the cars. It may well have. I
20 don't know why it wouldn't." Hr'g Tr. 7:22-8:1, Oct. 23, 2012. As
21 a result, this matter must be remanded to the bankruptcy court on
22 the property of the estate issue. However, since the exemption in
23 the Camry must be disallowed for exceeding the statutory limit,
24 the proceeding on remand will only encompass determining whether
25 the Sienna is property of the estate.

1 in the Sienna that would constitute property of the estate.

2 On remand, if the bankruptcy court finds that the Sienna is
3 property of the estate, the court must then determine whether
4 Eleiwa can claim the Sienna as her spouse's tool of the trade,
5 applying the appropriate burden of proof. In contrast, if the
6 court finds that the estate has no interest in the Sienna, the
7 exemption will be disallowed.

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