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NOT FOR PUBLICATION

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

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UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP Nos.	CC-12-1664-KiTad
)		CC-13-1017-KiTad
RONALD A. NEFF,)		(cross appeals)
)		
Debtor.)	Bk. No.	11-22424-VK
_____)		
RONALD A. NEFF,)		
)		
Appellant/Cross-Appellee,)		
v.)		
)		
DOUGLAS J. DENOCE,)		
Appellee/Cross-Appellant,)		
)		
DAVID K. GOTTLIEB, Chapter 7)		
Trustee; WOODY FRANCIS;)		
MICHAEL D. KWASIGROCH; JAMES)		
JORDAN; KATHY JORDAN,)		
)		
Appellees.)		
_____)		

MEMORANDUM¹

Argued and Submitted on November 21, 2013
at Pasadena, California

Filed - February 4, 2014

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

Honorable Victoria S. Kaufman, Bankruptcy Judge, Presiding

Appearances: Appellant and Cross-Appellee, Ronald A. Neff, and
Appellee and Cross-Appellant, Douglas J. DeNoce,
did not appear at oral argument. Moriah Douglas
Flahaut, Esq. of Arent Fox LLP argued for Appellee,
David K. Gottlieb, 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: KIRSCHER, TAYLOR and DUNN, Bankruptcy Judges.

2 Chapter 7² debtor Ronald A. Neff ("Neff") appeals an order
3 sustaining the objection of creditor Douglas J. DeNoce ("DeNoce")
4 to Neff's claimed disability homestead exemption of \$175,000 under
5 CAL. CODE CIV. P. ("CCP") § 704.730(a)(3)(B). He further appeals
6 the bankruptcy court's denial of his request for an evidentiary
7 hearing. DeNoce cross-appeals the exemption order, which
8 overruled his objection under § 522(g)(1) to allow a standard
9 homestead exemption of \$75,000. We AFFIRM in part and VACATE and
10 REMAND in part.

11 **I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

12 **A. Events prior to Neff's first bankruptcy case**

13 In 2007, Neff, a former dentist, treated DeNoce³ with the
14 surgical placement of eight dental implants. It was a major full-
15 day surgery. Within a month or so, each tooth had either fallen
16 out or failed. Neff performed further surgery to correct the
17 eight implants, but, within a couple of months, each fell out or
18 failed again. DeNoce still apparently suffers from the improper
19 implant procedures. In October 2008, DeNoce filed suit against
20 Neff in state court for medical malpractice. Ultimately, DeNoce
21 was awarded a judgment of \$310,000.

22 In March 2008, a few months prior to DeNoce filing the
23

24
25 ² Unless specified otherwise, all chapter, code and rule
26 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
27 the Federal Rules of Bankruptcy Procedure, Rules 1001-9037. The
28 Federal Rules of Civil Procedure will be referred to as "Civil
Rules."

³ Mr. DeNoce, a former attorney, was disbarred by the
California State Bar in 1997.

1 medical malpractice action, Neff executed a revocable living trust
2 (the "Retirement Trust"). The trust res consisted solely of
3 certain real property (the "Lake Harbor Property"), which Neff had
4 owned since 1978 and which was free and clear of any liens.
5 According to Neff, after executing the Retirement Trust at his
6 attorney's office, he was sent home to prepare a quitclaim deed
7 transferring the Lake Harbor Property from himself to the
8 Retirement Trust. It is undisputed, however, that the quitclaim
9 deed was not recorded until two years later on April 7, 2010.

10 During this time, Neff lived in another home he owned (the
11 "Poinsettia Property"), which was subject to a mortgage lien.

12 Before and during his treatment of DeNoce, Neff was under
13 investigation by the dental board for allegedly diverting and/or
14 using controlled substances or prescribed drugs, particularly,
15 Vicodin. In December 2008, Neff closed his long-time dental
16 practice. In February 2009, he began renting dental office space
17 with another dentist, working just one day per week.

18 Neff's dental license was eventually revoked by the
19 California dental board in January 2010 due to his substance abuse
20 and other issues. At the license revocation hearing in October
21 2009, Neff testified that he wanted to continue practicing
22 dentistry, even under a probationary license if necessary, and
23 that he was hoping to see patients one additional day each week.

24 **B. Neff's first bankruptcy case**

25 Neff filed his first chapter 13 bankruptcy case on March 4,
26 2010 (the "First Bankruptcy Case"). It was dismissed on April 9,
27 2010, for Neff's failure to appear at the § 341(a) meeting of
28 creditors.

1 **C. Neff's second bankruptcy case**

2 Neff filed his second chapter 13 bankruptcy case two months
3 later on June 18, 2010 (the "Second Bankruptcy Case"). Neff
4 reported the Poinsettia Property in his Schedule A with a value of
5 \$350,000 and a secured claim of \$403,000. In his Schedule B, Neff
6 reported that the Retirement Trust owned the Lake Harbor Property
7 valued at \$350,000. In his Schedule C, Neff claimed a standard
8 homestead exemption of \$75,000 on the Poinsettia Property, and he
9 further claimed that the Retirement Trust and Lake Harbor Property
10 were fully exempt as retirement assets. In his Schedule I, Neff
11 reported that his monthly income consisted of private disability
12 payments and trust income derived from renting the Lake Harbor
13 Property. Neff did not disclose the recent transfer of the Lake
14 Harbor Property in Question 10 of his Statement of Financial
15 Affairs ("SOFA").

16 On the same day the Second Bankruptcy Case was filed, DeNoce
17 filed suit against Neff in state court to set aside what he
18 contended was a fraudulent transfer of the Lake Harbor Property.
19 That matter was stayed due to the Second Bankruptcy Case.

20 During a hearing on Neff's motion to continue the automatic
21 stay, the bankruptcy court (Judge Thompson) became aware of Neff's
22 transfer of the Lake Harbor Property to the Retirement Trust on
23 April 7, 2010, while his First Bankruptcy Case was pending.
24 Facing resultant dismissal, Neff agreed to record a quitclaim deed
25 transferring the Lake Harbor Property back to himself. On July
26 30, 2010, Judge Thompson entered an order (the "Judge Thompson
27 Order") granting Neff's motion to continue the stay, which also
28 expressly provided:

1 Debtor Ronald Neff shall record a deed to the Lake Harbor
2 Lane property back into his own name as an individual,
3 and this recording shall take place no later than the
4 close of business Tuesday August 3, 2010. If not done by
5 the said date, this case shall be dismissed.

6 Neff recorded a quitclaim deed transferring the Lake Harbor
7 Property back into his name on August 4, 2010.

8 On August 10, 2010, Neff filed his first set of amended
9 Schedules A, B, C, F, I and J, and a first amended SOFA. Notably,
10 Schedule A reported that Neff owned both the Lake Harbor Property
11 and the Poinsettia Property, each valued at \$350,000, with a
12 secured claim against the Poinsettia Property for \$403,000. In
13 his Schedule C, Neff still claimed a standard homestead exemption
14 of \$75,000 for the Poinsettia Property and further claimed that
15 the Lake Harbor Property was fully exempt as a retirement asset
16 under CCP § 704.115(b). In his first amended SOFA, Neff reported
17 both the initial and subsequent transfers of the Lake Harbor
18 Property. Neff later testified that on the day he filed his first
19 amended schedules and SOFA, he decided to move out of the
20 Poinsettia Property and move into the Lake Harbor Property, which
21 was now his primary residence.⁴ He had made this decision around
22 1:00p.m., after he filed the amended documents.

23 **The Rule 2004 motions and the motion to dismiss the Second**
24 **Bankruptcy Case**

25 In September 2010, DeNoce moved to dismiss the Second
26 Bankruptcy Case for bad faith, contending that it should be
27 dismissed for, among other things, the alleged fraudulent transfer

28 ⁴ Neff stated in a declaration that he decided to move to the
Lake Harbor Property because he had lost his license to practice
and that property had no mortgage, it was smaller and easier to
maintain, and had lower monthly servicing fees.

1 of the Lake Harbor Property that occurred during his First
2 Bankruptcy Case and Neff's valuing the Poinsettia Property at only
3 \$350,000 when Zillow.com estimated the home's value at \$719,000.

4 On September 16, 2010, Neff filed a second set of amended
5 Schedules B and C. His Schedule B disclosed a recently-filed suit
6 against his homeowners association ("HOA") for a claim regarding
7 mold infestation of the Poinsettia Property, which he valued at
8 \$1.2 million ("Mold Litigation").⁵ In his Schedule C, Neff now
9 claimed a homestead exemption for the Lake Harbor Property, as
10 opposed to the Poinsettia Property, and for the enhanced amount of
11 \$175,000 due to disability under CCP § 704.730(a)(3)(B).

12 On November 30, 2010, DeNoce moved to further amend prior
13 Rule 2004 orders so he could examine Neff about his alleged
14 disability and his claimed enhanced homestead exemption. Although
15 the bankruptcy court had previously denied DeNoce access to Neff's
16 medical and/or disability records, DeNoce contended that such
17 information was necessary to determine the legitimacy of Neff's
18 claimed disability. Judge Kaufman, who was later assigned the
19 Second Bankruptcy Case, granted DeNoce's motion on May 31, 2011.

20
21 ⁵ DeNoce had contended that the basis for the Mold Litigation
22 was completely fabricated so Neff could claim the Poinsettia
23 Property was worth only \$350,000 when it, according to DeNoce
24 (using Zillow.com), was worth \$719,000. The chapter 7 trustee
25 ultimately sold the Poinsettia Property for \$550,000.

26 As for the Mold Litigation, a case filed by Neff's neighbor,
27 who had lodged a similar complaint against the HOA, was dismissed
28 for non-suit. Neff's mold case was dismissed twice for procedural
reasons. When the case was reinstated for a third time, Neff
failed to submit any discovery to the HOA, despite numerous
extensions given, and he failed to comply with a subsequent
discovery order. After languishing for over a year with no
discovery ever being produced by Neff, the HOA moved for
terminating sanctions, which the state court granted on January 4,
2012. A judgment striking Neff's complaint and awarding the HOA
sanctions of \$930.00 was entered on March 23, 2012.

1 The bankruptcy court held four evidentiary hearings on the
2 motion to dismiss the Second Bankruptcy Case on May 31, June 17,
3 September 26,⁶ and October 19, 2011. At the May 31 hearing, Neff
4 conceded that he had not listed the April 7, 2010 transfer of the
5 Lake Harbor Property in his amended SOFA filed on July 19, 2010.
6 When DeNoce characterized the Judge Thompson Order as an "order"
7 to transfer the Lake Harbor Property back into Neff's name, Neff
8 disagreed, contending that he "voluntarily offered" to transfer it
9 back, and that he was not under a court order to do so. Upon
10 further pressing by DeNoce that Neff was in fact "ordered" to
11 transfer the property back, the court interjected and the
12 following colloquy ensued:

13 THE COURT: She didn't make an order. The Court read the
14 ruling. It wasn't an order. It was an indication of the
consequence of refusing to transfer it back.

15 . . .

16 THE COURT: So, it's there, but it wasn't an order that
17 was made during that hearing. But she definitely did
18 talk about it as something that would have been, you
19 know, in her sense inappropriate during the pendency of
his bankruptcy, his prior one. So - but I just don't
think you should refer to it as an order because it
wasn't an order.

20 MR. DENOCE: There was an order.

21 THE COURT: Well, it wasn't an order at the time.

22 MR. DENOCE: There was an order after the hearing.

23 THE COURT: Because I think that was put into the order.

24 Hr'g Tr. (May 31, 2011) 132:10-12; 132:24-133:9.

25
26 ⁶ We do not have a transcript from the September 26, 2011
27 hearing in the record. However, on September 27, 2011, the
28 chapter 13 trustee also moved to dismiss Neff's Second Bankruptcy
Case for a variety of reasons, including an objection to Neff's
use of the Lake Harbor Property as a retirement vehicle, and
because Neff had insufficient income to fund a plan.

1 At the June 17, 2011 evidentiary hearing, DeNoce asked Neff
2 why he had not claimed the disability homestead exemption in his
3 initial Schedule C filed on July 19, 2010. Neff testified that he
4 had subsequently seen a psychiatrist with the Social Security
5 Administration (the "SSA"), and the psychiatrist had indicated
6 that he was approving Neff's disability for mental health reasons.
7 When asked why he had not claimed the disability homestead
8 exemption in his first amended Schedule C filed on August 10,
9 2010, Neff testified that although he was disabled at that time
10 and had been receiving benefits from a private disability insurer
11 for the past two years, he did not receive a disability benefit
12 determination from the SSA until September 2010, after the first
13 amended Schedule C had been filed in August 2010. So, in his
14 mind, his disability had now been approved by the SSA, which
15 prompted filing the second amended Schedule C in September 2010.

16 When asked further about his mental condition, Neff testified
17 that he suffered from Attention Deficit Hyperactivity Disorder
18 ("ADHD") and Post-Traumatic Stress Disorder ("PTSD"). The PTSD
19 was a result from being repeatedly raped as a child. Neff
20 admitted that he had not dealt with this issue until he sought
21 treatment for his alcoholism. Neff also testified about his
22 physical disabilities, stating that on August 10, 2010, and
23 currently, he suffered from degenerative disc disease,
24 osteoarthritis, spondylosis, stenosis in his vertebral column,
25 bulging discs, herniated discs, sciatica and shooting pains. In
26 summary, Neff testified that his claimed disability homestead
27 exemption was based both on his physical and mental disabilities.

28 The bankruptcy court held a final evidentiary hearing on the

1 motion to dismiss on October 19, 2011. When questioned further
2 about the SSA's disability benefit determination, Neff testified
3 that he was required to see an SSA doctor, and that his benefit
4 determination was based on this doctor's report. Neff testified
5 that he knew of no other doctor who had issued an opinion that he
6 was not fully disabled.

7 After a brief recess, Neff's counsel informed the bankruptcy
8 court that Neff was not physically or mentally up for any further
9 questioning, and that he agreed to withdraw his opposition to the
10 motion to dismiss as long as he was not barred from filing a
11 chapter 7 case. The bankruptcy court accepted his withdrawal and
12 orally granted the motion dismissing the Second Bankruptcy Case.
13 It entered the related order on November 14, 2011.

14 While the motion to dismiss the Second Bankruptcy Case was
15 pending, DeNoce had filed a first amended nondischargeability
16 complaint against Neff on July 22, 2011, seeking to except his
17 debt from discharge under § 523(a)(6). Once Neff's Second
18 Bankruptcy Case was dismissed, however, DeNoce's § 523 action also
19 was dismissed.

20 **D. Neff's third bankruptcy case and DeNoce's objection to the**
21 **disability homestead exemption**

22 Neff filed a chapter 7 bankruptcy case on October 24, 2011,
23 (the "Third Bankruptcy Case"), before the order dismissing the
24 Second Bankruptcy Case was entered on November 14. David K.
25 Gottlieb was appointed trustee. In his Schedule C, Neff claimed a
26 disability homestead exemption of \$175,000 against the Lake Harbor
27 Property.

28 On August 24, 2012, DeNoce filed an objection to Neff's

1 claimed homestead exemption ("Exemption Objection"). In short,
2 DeNoce contended that Neff was able to work and was not disabled.
3 DeNoce conceded that Neff was receiving disability benefits from
4 two sources – the SSA and Northwestern Mutual ("Northwestern"),
5 his private insurer, which raised the presumption. However,
6 DeNoce argued that the Northwestern benefits did not create any
7 presumption, because Neff had admitted these payments were based
8 on losing his dental license, not because of any physical
9 disability. In addition, argued DeNoce, the two doctors who Neff
10 had said found him "totally disabled" – Dr. Goldsmith, the SSA
11 psychiatrist, and Dr. Hersel, his pain management doctor of many
12 years – had opined that Neff could work 16-20 hours per week.
13 Neff's primary doctor, Dr. Chatoff, also had opined that he could
14 work 20 hours per week. Finally, argued DeNoce, Neff had
15 testified at his Rule 2004 examination on August 8, 2011, that
16 although his dental license had been revoked, he was capable of
17 working other jobs in the dental field not requiring a license,
18 but that he was unable to look for work due to his pending legal
19 matters.

20 DeNoce disputed Neff's claim of a mental disability, which
21 was the sole basis for his SSA disability benefits, arguing that
22 such claim was suspect. First, argued DeNoce, Neff had not sought
23 SSA benefits until March 2010 when he filed his First Bankruptcy
24 Case. Second, the report from the SSA doctor, dated July 2010,
25 was the only documentation of Neff's PTSD/childhood rape claim.

26 Notably, despite DeNoce's many references to the transcripts
27 from Neff's Rule 2004 examinations conducted during the Second
28 Bankruptcy Case and the various alleged medical reports and

1 letters, he failed to submit any of them with the Exemption
2 Objection.⁷

3 Alternatively, DeNoce argued that Neff was not entitled to
4 even a standard homestead exemption of \$75,000, because he had
5 fraudulently and voluntarily transferred the Lake Harbor Property
6 to the Retirement Trust, concealed the transfer, and the transfer
7 was avoided when Judge Thompson ordered him to transfer it back.⁸

8 Neff opposed the Exemption Objection and requested an
9 evidentiary hearing. In short, he contended that his disability
10 payments from the SSA and Northwestern created the presumption
11 that he was fully disabled and thus he was entitled to the
12 disability homestead exemption under CCP § 704.730(a)(3).

13 In his declaration in support, Neff stated that the SSA
14 doctor had deemed him fully disabled, and that he was receiving
15 monthly SSA disability benefits as a result. Like DeNoce, he too
16 did not include a copy of this report with his brief. But, he did
17 include the first page of his benefit determination letter from
18 the SSA, dated August 30, 2010. The SSA letter stated that Neff's
19 records indicated he became disabled on January 30, 2007, which
20 was just days after dental board investigators came to his office
21 to confront him with the substance abuse allegations. The SSA
22

23
24 ⁷ Volume III of the Rule 2004 transcripts, which contains
25 Neff's August 8, 2011 testimony about his disability, was filed
26 under seal, and we have no copy of it in the record. In reviewing
the bankruptcy court's ruling, it apparently did not review it
either, accepting what DeNoce had said about them as true.

27 ⁸ Notably, the chapter 7 trustee, who filed an appeal brief
28 in support of the bankruptcy court's decision to deny the enhanced
homestead exemption, did not object to Neff's claimed exemption or
join in DeNoce's objection.

1 letter further stated that Neff was entitled to monthly SSA
2 benefits as of March 2009, based on his filing date for benefits
3 of March 2, 2010. Also attached to his opposition was a copy of a
4 recent report from a Dr. Okhovat, an associate of Dr. Hersel's,
5 dated August 28, 2012. This report was the result of a July 31,
6 2012 examination required by Northwestern for continued disability
7 benefits payments. Dr. Okhovat's report stated that Neff was
8 "unable to work" in either his normal occupation or in any other,
9 and that his prognosis for Neff's inability to work was
10 "indefinite."

11 As for DeNoce's objection under § 522(g)(1) to even a
12 standard \$75,000 homestead exemption, Neff countered that he had
13 not engaged in a fraudulent conveyance, but that issue was moot in
14 any event because he voluntarily returned the Lake Harbor Property
15 to the estate.

16 In his reply to the Exemption Objection, DeNoce noted that
17 Neff had failed to respond to his own Rule 2004 testimony, where
18 he stated that he could work in other jobs in the dental field, or
19 attempt to rebut the doctor reports stating that he could work at
20 least part time. On that issue, DeNoce (now) attached a variety
21 of documents from Northwestern and what appears to be the earlier-
22 referenced report from Dr. Hersel, dated March 28, 2008, which
23 stated that Neff's physical ailments prevented him from performing
24 dentistry for more than 16-20 hours per week. In a partial letter
25 to Neff from a Northwestern representative dated January 5, 2010,
26 the representative stated that Neff's report of working 24 hours
27 per week in his request for benefits did not match what he had
28 told a claims investigator on January 31, 2007, which was that he

1 was working 32 hours per week. In another letter from this same
2 representative dated May 19, 2010, the representative stated that
3 to be considered totally disabled and receive lifetime benefits,
4 Neff had to prove his disability was due to a "medical" condition
5 (as opposed to losing one's license to practice), and that he had
6 not yet shown a medical disability based on the records submitted.

7 Also included in DeNoce's reply were copies of disability
8 payment statements Neff had received from Northwestern between
9 October 30, 2010 and May 30, 2011, showing his disability status
10 as "partial." DeNoce also again referenced the report from the
11 SSA doctor dated July 2010, but did not include it with his reply.
12 This report allegedly showed that Neff's PTSD was only "mild," and
13 that he was "slightly to moderately" impaired.

14 To refute the recent report from Dr. Okhovat, DeNoce claimed
15 that Neff had been a patient of Dr. Hersel's (who is in the same
16 office as Dr. Okhovat) for twenty years and could get these
17 doctors to write up pretty much whatever he wanted. To support
18 his contention, DeNoce included a copy of a handwritten note from
19 Neff to Dr. Hersel dated March 11, 2007, asking Dr. Hersel to sign
20 off on an enclosed typewritten letter drafted by Neff, which was
21 to be inserted on Dr. Hersel's letterhead and presented to the
22 state court judge presiding over Neff's 2006 DUI case.

23 The bankruptcy court held a hearing on the Exemption
24 Objection on October 23, 2012. After noting that DeNoce had
25 failed to include any copies of the Rule 2004 examination
26 transcripts referenced in his moving papers, the bankruptcy court
27 announced its findings:

28 It seems to me that . . . in looking at the case law on

1 what's required for an enhanced disability exemption, it
2 seems to me that Doctor Neff doesn't meet that standard,
3 that he admitted in his 2004 exam that he could work. He
4 just can't be a dentist right now because his license has
5 been revoked.

6 And his insurance through Northwestern is based primarily
7 - well, solely on the fact that he lost his license to be
8 a dentist. And he filed two cases where he didn't claim
9 any enhanced disability

10 And that when I look at at least what's been excerpted
11 and the objection and the reply, it references the fact
12 that he can work. So he isn't entitled - and the fact
13 that he gets Social Security benefits may create a
14 presumption, but it doesn't mean it can't be refuted.
15 And when I look at the total record or at least what's
16 been excerpted, it looks like he can work. He doesn't
17 meet the standard to be precluded from substantial
18 gainful employment, which is required for him to have an
19 enhanced disability . . . exemption.

20 . . .

21 And never was it really made clear what kind of
22 disability he's claiming. I mean, it's - all we have is
23 a letter from the [SSA]. And also, it just seems bizarre
24 to me that we know he's been working since that time.

25 I mean, the letter was like, well, you're going to be
26 disabled from 2009, but he works after that. So I don't
27 find that letter to be meaningful at all. And I don't
28 find the fact that . . . Northwestern is providing him
insurance based on losing his license is any evidence of
disability.

19 Hr'g Tr. (Oct. 23, 2012) 3:24-4:23; 5:11-21. In response, counsel
20 for Neff again requested an evidentiary hearing, stating that he
21 would have a doctor come in and testify as to Neff's ailments.
22 The court asked why the doctor's declaration was not submitted
23 with his opposition. Counsel said that Dr. Okhovat's report was
24 submitted. The court agreed, but noted that his report was not a
25 declaration, and that Neff appeared able to get these particular
26 doctors to sign whatever he gave them. The court further noted
27 that the only party to submit a declaration was Neff, and it "[did
28 not] find him to be very convincing." Id. at 8:2-3.

1 In denying Neff's request for an evidentiary hearing, the
2 court further stated:

3 I mean, I don't think an evidentiary hearing is a chance
4 to redo stuff you should have done - an evidentiary
5 hearing is a chance to have the witnesses, based on the
6 declarations that were presented, come into court. I
7 don't need . . . Doctor Neff for that. I already saw
8 Doctor Neff for days on the motion to dismiss his prior
9 Chapter 13 case that he consented to.

10 . . .

11 I don't understand the point of an evidentiary hearing if
12 all we have is Doctor Neff, who attaches a letter from
13 the [SSA], which I don't find too particularly
14 convincing, knowing that he didn't claim the disability
15 exemptions in the last two cases for the homestead he was
16 claiming at the time, and that the information from
17 Northwestern indicates that just because he lost his
18 license - and he admitted in his 2004 exam that he could
19 work.

20 Id. at 8:9-15; 10:1-9.

21 Upon that ruling, the bankruptcy court sustained DeNoce's
22 objection to the claimed disability homestead exemption. It
23 summarily overruled his objection under § 522(g)(1), making no
24 findings on the matter. An order consistent with the court's
25 ruling was entered on December 17, 2012 (the "Exemption Order").
26 The Exemption Order stated that the court had determined Neff was
27 able to engage in "substantial gainful employment" under
28 CCP § 704.730(a)(3)(B), and that the evidence presented overcame
the presumption of disability notwithstanding Neff's award of SSA
disability benefits. Neff was allowed the standard homestead
exemption of \$75,000. Cross-appeals of the Exemption Order
followed.

29 II. JURISDICTION

30 The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334
31 and 157(b)(2)(B). We have jurisdiction under 28 U.S.C. § 158.

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V. DISCUSSION

A. The bankruptcy court erred when it sustained DeNoce's objection to Neff's claimed disability homestead exemption.

"Exemptions serve to protect and foster a debtor's fresh start from bankruptcy." In re Rolland, 317 B.R. 402, 412-13 (Bankr. C.D. Cal. 2004). A claimed exemption is "'presumptively valid.'" Carter v. Anderson (In re Carter), 182 F.3d 1027, 1029 n.3 (9th Cir. 1999)(citation omitted). Once an exemption has been claimed, "the objecting party has the burden of proving that the exemptions are not properly claimed." Rule 4003(c); Gonzalez v. Davis (In re Davis), 323 B.R. 732, 736 (9th Cir. BAP 2005)(Klein, J., concurring). Initially, this means the objecting party has the burden of production and the burden of persuasion. Carter, 182 F.3d at 1029 n.3. If the objecting party produces evidence to rebut the presumptively valid exemption, the burden of production then shifts to the debtor to go forward with unequivocal evidence to demonstrate the exemption is proper. Id. (citation omitted). The burden of persuasion, however, always remains with the objecting party. Id.

California has opted out of the federal exemption scheme and permits its debtors only the exemptions allowable under state law. § 522(b)(2), (3); CCP §§ 703.010(a), 703.130. Therefore, while "the federal courts decide the merits of state exemptions, . . . the validity of the claimed state exemption is controlled by the applicable state law." In re Kelley, 300 B.R. at 16. California exemptions are to be broadly and liberally construed in favor of the debtor. In re Gardiner, 332 B.R. 891, 894 (Bankr. S.D. Cal. 2005).

1 The issue here is whether Neff was entitled to claim an
2 enhanced homestead exemption under CCP § 704.730(a)(3)(B). That
3 statute allows a homestead exemption of \$175,000 if,

4 the judgment debtor . . . who resides in the homestead is
5 at the time of the attempted sale of the homestead any
one of the following:

6 A person physically or mentally disabled who as a result
7 of that disability is unable to engage in substantial
8 gainful employment. There is a rebuttable presumption
9 affecting the burden of proof that a person receiving
10 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.

11 CCP § 704.730(a)(3)(B) sets forth a two-part test to
12 determine if a debtor is eligible for the disability exemption:
13 the debtor must (1) have a physical or mental disability; and
14 (2) as a result of that disability, be unable to engage in
15 substantial gainful employment. Cases interpreting the statute
16 are clear: the homestead exemptions set forth in CCP § 704.730(a)
17 are dependent upon whether "the debtor is eligible for an
18 exemption as of the date of the petition." In re Rostler,
19 169 B.R. 408, 411 (Bankr. C.D. Cal. 1994)(citing In re Dore,
20 124 B.R. 94, 98 (Bankr. S.D. Cal. 1991)(holding that exemption
21 rights are fixed as of the petition date); In re Rolland, 317 B.R.
22 at 420. See also Hopkins v. Cerchione (In re Cerchione), 414 B.R.
23 540, 548 (9th Cir. BAP 2009)(a debtor's entitlement to an
24 exemption is determined based upon facts as they existed at the
25 time of the bankruptcy filing).

26 Because Neff was receiving SSA disability benefits at the
27 time he filed his Third Bankruptcy Case, he was entitled to a
28 presumption that he was disabled and unable to engage in

1 substantial gainful employment within the meaning of the statute.

2 As for the first element of CCP § 704.730(a)(3)(B), the
3 bankruptcy court did not expressly find that Neff was not
4 suffering from a disability at the time, whether it be mental or
5 physical, although it certainly hinted. However, if its decision
6 could be construed as such, this was erroneous, because DeNoce
7 failed to sufficiently rebut Neff's evidence supporting his
8 disability status – the SSA benefits he was receiving based on his
9 mental disability, and his unrefuted testimony about both his
10 physical and mental disabilities. Pure speculation about whether
11 Neff's mental disability claim is "bogus" is not evidence, and
12 certainly not enough to sufficiently rebut the presumption or even
13 shift the burden to Neff.

14 The bankruptcy court did, however, expressly find against
15 Neff on the second element of CCP § 704.730(a)(3)(B), concluding
16 that DeNoce had overcome the presumption and that Neff's
17 disability did not render him unable to engage in "substantial
18 gainful employment." Neff contends on appeal that the bankruptcy
19 court erred in sustaining DeNoce's objection by (1) considering
20 evidence not relevant to the date the Third Bankruptcy Case was
21 filed, (2) disregarding his SSA disability benefits and failing to
22 apply the presumption that he was unable to engage in substantial
23 gainful employment, and (3) disregarding Dr. Okhovat's August 28,
24 2012 report stating that Neff was unable to work. As for his last
25 argument, the bankruptcy court was not required to consider the
26 August 28, 2012 Dr. Okhovat report, because Neff's entitlement to
27 the disability homestead exemption is determined based upon facts
28 as they existed at the time he filed his Third Bankruptcy Case,

1 not nearly one year afterward. However, we agree with his other
2 two arguments.

3 CCP § 704.730(a)(3)(B), enacted in 1991, does not define the
4 term "substantial gainful employment," and California decisions
5 have provided little guidance for interpreting it. In re Rostler
6 was the first court to define the term. The court began by
7 reviewing the rebuttable presumption found in the statute.
8 169 B.R. at 412. To qualify for benefits under the SSA, one must
9 be unable to engage in "substantial gainful activity." Because
10 the statutory presumption refers to the Social Security Act, and
11 the operative language there and the California statute are
12 virtually identical, the court looked to cases interpreting the
13 Act to define the term "substantial gainful employment." Id.
14 Looking to Corrao v. Shalala, 20 F.3d 943 (9th Cir. 1994), for
15 guidance, the court determined that to satisfy the second element
16 of CCP § 704.730(a)(3)(B), the debtor must have been, at the time
17 of petition, unable to "(1) perform meaningful mental or physical
18 work-related activity; (2) in a competitive or self-employed
19 position; (3) that normally results in pay or profit."
20 In re Rostler, 169 B.R. at 413; In re Rolland, 317 B.R. at 420.

21 In reviewing the language of § 704.730(a)(3)(B), we observe
22 that the term "gainful employment" is qualified by the adjective
23 "substantial." Work activity is "substantial" if it involves
24 significant physical or mental activities. In re Rostler,
25 169 B.R. at 412 (citing Corrao, 20 F.3d at 946)). Thus, it would
26 appear that from the statute and test set forth in In re Rostler
27 that "any work" or "part-time work" may not necessarily rise to
28 the level of "substantial" or "gainful" employment. See

1 In re Morris, 2010 WL 9485973, at *4 (Bankr. E.D. Cal. Oct. 7,
2 2010). The term "substantial" also modifies the term "gainful,"
3 which suggests that the debtor must be physically, mentally and
4 emotionally able to work enough hours, at a high enough net wage,
5 to contribute materially to his or her support. See id.

6 As the objecting party, DeNoce was required to rebut the
7 presumption that, as of the petition date, Neff was unable to
8 engage in "substantial gainful employment" - i.e., that he had the
9 ability to perform meaningful mental or physical work-related
10 activity, in a competitive or self-employed position, which
11 normally results in pay or profit, and that Neff was physically,
12 mentally and emotionally able to work enough hours, at a high
13 enough net wage, to contribute materially to his support. Neff's
14 level of disability, whether only "partial" or "full," does not
15 control the outcome of whether he is eligible for a disability
16 homestead exemption. The pertinent question is whether his
17 disability rendered him unable to engage in substantial gainful
18 employment at the time he filed the Third Bankruptcy Case.

19 The bankruptcy court determined that the evidence presented
20 sufficiently rebutted the presumption that Neff was unable to
21 engage in substantial gainful employment: "And that when I look
22 at at least what's been excerpted and the objection and the reply,
23 it references the fact that he can work. . . . And when I look at
24 the total record or at least what's been excerpted, it looks like
25 he can work. . . . And also, it just seems bizarre to me that we
26 know he's been working since that time. I mean, the letter was
27 like, well, you're going to be disabled from 2009, but he works
28 after that. So I don't find that letter to be meaningful at

1 all. . . . He doesn't meet the standard to be precluded from
2 substantial gainful employment" Hr'g Tr. (Oct. 23, 2012)
3 4:10-12; 4:14-16; 4:14-18; 4:16-17.

4 We disagree that DeNoce met his initial burden here, much
5 less rebutted the presumption. DeNoce had both the burden of
6 persuasion and production to prove that Neff was able to engage in
7 "substantial gainful employment" at the time he filed his Third
8 Bankruptcy Case. The fact that Neff was receiving SSA disability
9 benefits only added to DeNoce's burden. In his Exemption
10 Objection, DeNoce referenced three doctors' reports, all of which
11 he claimed opined that Neff could work a range of 16-20 hours per
12 week. However, DeNoce failed to submit any of these reports with
13 his Exemption Objection. In his reply, he submitted what appears
14 to be Dr. Hersel's report dated March 28, 2008, which states that
15 Neff would be "unable to practice dentistry beyond sixteen or
16 twenty hours per week." This report offers virtually no support,
17 because it precedes the Third Bankruptcy Case by over three years,
18 and because it states only that Neff was unable to practice
19 "dentistry" for more than 16-20 hours per week. As of January
20 2010, Neff was unable to practice dentistry for any number of
21 hours because his license to practice dentistry had been revoked.
22 The Hersel report also precedes the SSA benefit determination
23 letter. Neff's 2009 statement to the dental board that he would
24 like to work one additional day per week (besides the one day per
25 week he was working at the time, which may or may not be
26 "substantial"), and the statements he made to a Northwestern
27 claims investigator about how many hours he worked in 2007 are
28 likewise "stale."

1 The only probative "evidence" supporting DeNoce's Exemption
2 Objection was Neff's Rule 2004 testimony from August 8, 2011,
3 where he stated that he could work in other careers in the dental
4 field that did not require a license (such as a dental assistant
5 or reviewing dental claims for an insurance company), but that his
6 legal troubles were precluding him from committing to a job. This
7 testimony was given just two months before he filed his Third
8 Bankruptcy Case. Notably, however, Neff never testified as to how
9 many hours he could work at these alternative jobs. Thus, whether
10 these jobs could provide "substantial gainful employment" is
11 unknown. In any event, DeNoce failed to submit this (or any
12 other) portion of the referenced Rule 2004 transcript to the
13 bankruptcy court.

14 The bankruptcy court found great significance in the fact
15 that Neff continued to work after the SSA's retroactive disability
16 date of March 2009. However, the only evidence before the court
17 on that issue was Neff's unrefuted testimony that in 2009, the
18 year prior to losing his license, he had already cut his practice
19 down to one day per week due to his disability. The court did not
20 explain how this minimal "work," or the fact that Neff admitted he
21 "could work," rose to the level of "substantial gainful
22 employment" within the meaning of the statute.

23 Accordingly, because the bankruptcy court's decision to
24 sustain DeNoce's objection to Neff's claimed disability homestead
25 exemption under CCP § 704.730(a)(3)(B) is not supported by
26 adequate findings, we VACATE and REMAND the Exemption Order in
27 part. As a result, we need not address Neff's argument that the
28 bankruptcy court abused its discretion in denying his request for

1 an evidentiary hearing.

2 **B. The bankruptcy court did not err when it overruled DeNoce's**
3 **objection under § 522(g)(1).**

4 Section 522(g) limits the ability of a debtor to claim an
5 exemption where the trustee has recovered property for the benefit
6 of the estate. Under § 522(g)(1), a debtor may claim an exemption
7 where the trustee has recovered property under §§ 510(c)(2), 542,
8 543, 550, 551 or 553 only if (1) the property was involuntarily
9 transferred, and (2) the debtor did not conceal the transfer or an
10 interest in the property. See Hitt v. Glass (In re Glass),
11 164 B.R. 759, 761 (9th Cir. BAP 1994), aff'd, 60 F.3d 565 (9th
12 Cir. 1995).

13 Although DeNoce has cross-appealed the Exemption Order, he
14 does not articulate any specific argument as to how the bankruptcy
15 court erred in overruling his objection under § 522(g)(1), and he
16 does not complain about the lack of any findings on the matter.

17 The Exemption Objection was a "contested matter" subject to
18 Rule 9014. 9 COLLIER ON BANKRUPTCY ¶ 4003.03[2] (Alan N. Resnick &
19 Henry J. Sommer, eds., 16th ed., 2013). As a contested matter,
20 the bankruptcy court was required to make findings of fact, either
21 orally on the record or in a written decision. See Rule 9014(c)
22 (incorporating Rule 7052, which in turn incorporates Civil
23 Rule 52). These findings must be sufficient to indicate the
24 factual basis for the court's ultimate conclusion. Unt v.
25 Aerospace Corp., 765 F.2d 1440, 1444 (9th Cir. 1985).

26 In the absence of complete findings, we may vacate a judgment
27 and remand to the bankruptcy court to make the required findings.
28 See United States v. Ameline, 409 F.3d 1073 (9th Cir. 2005).

1 However, even when a bankruptcy court does not make formal
2 findings, we may conduct appellate review "if a complete
3 understanding of the issues may be obtained from the record as a
4 whole or if there can be no genuine dispute about omitted
5 findings." Veal v. Am. Home Mortg. Servicing, Inc. (In re Veal),
6 450 B.R. 897, 919-20 (9th Cir. BAP 2011)(citations omitted).
7 While an absence of findings is regrettable, it does not preclude
8 us from reviewing this matter. The factual record is undisputed
9 and sufficiently established.

10 As much as DeNoce wishes to argue the importance of the
11 events that occurred during Neff's Second Bankruptcy Case, the
12 case relevant to this issue is his Third Bankruptcy Case. The
13 transfer of the Lake Harbor Property from Neff to the Retirement
14 Trust occurred on April 7, 2010. It is undisputed that this
15 transfer was voluntary. We further conclude that the Judge
16 Thompson Order was not an "order" that directed Neff to transfer
17 the Lake Harbor Property back into his name, but rather he
18 "voluntarily" undertook the task of transferring it back into his
19 name during his Second Bankruptcy Case. On the day Neff filed his
20 Third Bankruptcy Case, the Lake Harbor Property was in his name
21 and was, therefore, property of the estate. He even reported it
22 in his Schedule A. Section 522(g) applies only to property
23 restored to the estate, not property already in the estate on the
24 date of filing. In re Osborn, 346 B.R. 204, 206 (Bankr. N.D. Cal.
25 2006)(citing In re Glass, 60 F.3d at 568). Thus, the statute does
26 not apply.

27 Further, if one takes DeNoce's contention that the Retirement
28 Trust was an invalid self-settled trust to its logical conclusion,

1 then Neff's interest in the Lake Harbor Property was never
2 "effectively" transferred and was always property of the estate,
3 even in his Second Bankruptcy Case. Accordingly, the trustee had
4 nothing to recover.

5 Alternatively, even if the transfer of the Lake Harbor
6 Property was a recoverable transfer within the meaning of
7 § 522(g), and even if the Judge Thompson Order was interpreted as
8 an "order" to recover it, DeNoce has failed to cite any authority
9 that a recovery by anyone other than the trustee satisfies the
10 statute. The First Circuit BAP has held otherwise, concluding
11 that applying § 522(g) to a creditor's prepetition recovery of
12 transferred property is inconsistent with the statute's plain
13 meaning:

14 The statute specifically provides who must recover the
15 property, how the property is to be recovered, and the
16 debtor's limitations, in order for a debtor to claim
17 exemption rights in property recovered by the trustee.
18 The language of § 522(g), in this regard, is plain and
19 unambiguous, and thus, our function is to "enforce it
20 according to its terms." United States v. Ron Pair
21 Enters., Inc., 489 U.S. 235, 241 (1989). The term
22 "creditor" is not used interchangeably with the term
23 "trustee" in the Bankruptcy Code.

24 . . .

25 In view of the above, the Panel finds that the bankruptcy
26 court erred in sustaining the objection to the claimed
27 exemption pursuant to § 522(g) in favor of Stornawaye
28 because the transfer was caused pre-petition by a
creditor acting for its own benefit, and not by the
trustee's action under §§ 510(c)(2), 542, 543, 550, 551,
or 553 of the Bankruptcy Code.

29 Stornawaye Fin. Corp. v. Hill (In re Hill), 387 B.R. 339, 348 (1st
30 Cir. BAP 2008). Further, although we did not expressly hold in In
31 re Glass that § 522(g) is not applicable when someone other than
32 the trustee recovers transferred property to the estate, we did

