

DEC 10 2014

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

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ORDERED PUBLISHED

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP Nos.	CC-14-1050-KiTad
)		CC-14-1059-KiTad
EDWARD E. ELLIOTT,)		(Consolidated)
)		
Debtor.)	Bk. No.	SV 11-23855-VK
)		
_____)		
)		
EDWARD E. ELLIOTT,)		
)		
Appellant,)		
)		
v.)		
)		
DIANE C. WEIL, Chapter 7)		
Trustee,)		
)		
Appellee.)		
_____)		

O P I N I O N

Argued and Submitted on October 23, 2014,
at Malibu, California

Filed - December 10, 2014

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

Honorable Victoria S. Kaufman, Bankruptcy Judge, Presiding

Appearances: Andrew E. Smyth, Esq. of Smyth Law Office argued
for appellant, Edward E. Elliott; Alla Tenina, Esq.
of Tenina Law, Inc. argued for appellee, Diane C.
Weil, Chapter 7 Trustee.

Before: KIRSCHER, TAYLOR and DUNN, Bankruptcy Judges.

1 KIRSCHER, Bankruptcy Judge:

2
3 Debtor Edward E. Elliott ("Elliott") appeals an order
4 sustaining the objection of appellee, chapter 7¹ trustee Diane C.
5 Weil ("Trustee"), to his claimed homestead exemption under CAL.
6 CIV. PROC. CODE § 704.730(a)(3). The bankruptcy court sustained
7 Trustee's objection on the basis that Elliott had claimed the
8 exemption in bad faith. Elliott contends that despite his
9 misconduct, he is nevertheless entitled to the exemption due to an
10 intervening change in the controlling law while this appeal was
11 pending.

12 We conclude that Law v. Siegel, 134 S.Ct. 1188 (2014), has
13 abrogated Ninth Circuit law such that unless statutory power
14 exists to do so, a bankruptcy court may not deny a debtor's
15 exemption claim or bar a debtor's exemption claim amendment on the
16 basis of bad faith or of prejudice to creditors. Martinson v.
17 Michael (In re Michael), 163 F.3d 526, 529 (9th Cir. 1998)
18 (adopting test set forth in Doan v. Hudgins (In re Doan), 672 F.2d
19 831, 833 (11th Cir. 1982)). However, a statutory basis may exist
20 to deny Elliott's claimed homestead exemption. We VACATE and
21 REMAND for further proceedings by the bankruptcy court.²

22
23
24 ¹ Unless specified otherwise, all chapter, code and rule
25 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

26 ² We exercised our discretion to review documents that were
27 electronically filed in the bankruptcy court but were not included
28 in Elliott's excerpts of the record. See O'Rourke v. Seaboard
Sur. Co. (In re E.R. Fegert, Inc.), 887 F.2d 955, 957-58 (9th Cir.
1989); Atwood v. Chase Manhattan Mortg. Co. (In re Atwood), 293
B.R. 227, 233 n.9 (9th Cir. BAP 2003).

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

2 Elliott filed a chapter 7 bankruptcy case on December 1,
3 2011. On his bankruptcy petition, Elliott listed his address as
4 Hiawatha Street. On Schedules A and D, Elliott did not list any
5 real property in which he had an interest or list any real
6 property in which creditors held secured claims. Elliott did not
7 claim entitlement to a homestead exemption in his Schedule C and
8 he did not list any ownership interest in an incorporated business
9 on Schedule B. Additionally, Elliott omitted certain judgment
10 lien creditors (the "Judgment Creditors") who obtained a judgment
11 against him in 2006 for fraud and negligent misrepresentation.

12 At the § 341(a) meeting of creditors, Elliott confirmed his
13 address as Hiawatha Street and claimed that his bankruptcy
14 petition, schedules and statement of financial affairs were true
15 and complete. Furthermore, Elliott asserted that he did not own
16 any real property and had not transferred or given away anything
17 of value in the last four years.

18 Based on the information disclosed in Elliott's bankruptcy
19 schedules and corresponding testimony, Trustee issued a "No
20 Distribution" report. Elliott was granted a discharge on March 8,
21 2012, and the bankruptcy case was closed on March 13, 2012.

22 On March 26, 2012, Lee Wong Investments, Inc. ("LWI")
23 transferred by quitclaim deed real property located in Los Angeles
24 (the "Buckingham Property") to Elliott as a gift. Elliott does
25 not dispute that LWI is a Nevada corporation which he organized
26 and controls.

27 Following this transaction, Elliott sent a letter to counsel
28 for the Judgment Creditors, who were never informed of the

1 bankruptcy, stating that he acquired the Buckingham Property after
2 the bankruptcy and demanding that their judicial liens be removed.
3 This demand triggered an investigation by the Judgment Creditors,
4 which revealed the history of Elliott's continuous interest in the
5 Buckingham Property through numerous sophisticated transfers of
6 title. The Buckingham Property was first transferred from Elliott
7 to 1019 South Central Associates Ltd. ("S. Central"), a business
8 that, according to information Trustee received from the
9 California Secretary of State, was organized by the son of
10 Elliott's deceased partner. This initial transfer occurred on
11 August 14, 2006, just a few months after the judgment was entered
12 against Elliott in the state court fraud case. Then, on February
13 13, 2007, S. Central transferred the Buckingham Property to LWI,
14 the corporation organized and controlled by Elliott.³ Finally, on
15 March 26, 2012, the Buckingham Property was transferred back to
16 Elliott in his individual capacity, following his discharge.

17 When the Judgment Creditors discovered Elliott's continuous
18 interest in the Buckingham Property, they moved to reopen the
19 bankruptcy case. The bankruptcy court granted their motion and
20 ordered that the case be reopened.

21 Nearly one year after the bankruptcy case was reopened,
22 Elliott amended his schedules to disclose his interest in the
23 Buckingham Property. He valued the property at \$360,000 and

24
25 ³ In her objection to Elliott's homestead exemption, Trustee
26 provided records from the Nevada Secretary of State as evidence of
27 Elliott's ownership interest in LWI, the company which held title
28 to the Buckingham Property on the petition date. These records
showed that when the Buckingham Property was transferred from S.
Central to LWI, Elliott was LWI's president, treasurer and
director.

1 indicated that Bank of America held a \$120,826 secured claim
2 against it. He also claimed a homestead exemption for the
3 Buckingham Property under CAL. CIV. PROC. CODE § 704.730(a)(3).

4 Trustee objected to Elliott's claimed homestead exemption on
5 the basis of bad faith. She outlined the pattern of affiliate
6 transfers of the Buckingham Property to advance the proposition
7 that Elliott never really relinquished control of it, but instead
8 utilized these transfers to shield it from creditors, Trustee and
9 the bankruptcy court.

10 In response, Elliott filed declarations from his friend
11 Juanita A. Jehdian ("Jehdian") and his attorney Andrew E. Smyth
12 ("Smyth"). Jehdian asserted that she currently lived at the
13 Buckingham Property with Elliott. Although she admitted not
14 living there on the petition date, Jehdian claimed that she had
15 frequently visited the Buckingham Property during the month of
16 December 2011, and in doing so, knew that Elliott had "resided at
17 the [Buckingham Property] in December 2011." Smyth declared that
18 Elliott "has a homestead exemption on file." In support, Smyth
19 attached a copy of a homestead declaration filed by Elliott with
20 the state of California on October 18, 2005, where he claimed as a
21 declared homestead the Buckingham Property.

22 In reply, Trustee refuted Elliott's suggestion that the 2005
23 homestead declaration protected his entitlement to a homestead
24 exemption. Specifically, Trustee argued that because Elliott did
25 not hold title to the Buckingham Property on the petition date, he
26 could not claim the homestead exemption. Thus, Trustee maintained
27 that notwithstanding Elliott's bad faith, the bankruptcy court
28 could nevertheless sustain her objection on the basis that Elliott

1 was never entitled to a homestead exemption in the first place.

2 At the exemption hearing, the bankruptcy court sustained
3 Trustee's objection to Elliott's claimed homestead exemption on
4 the basis of bad faith. The court focused on: Elliott's failure
5 to disclose his correct address as the Buckingham Property; his
6 misleading testimony at the § 341(a) meeting; the suspicious
7 timing of the property transfer following discharge; and Elliott's
8 subsequent amendments claiming a right to exempt a property he had
9 initially concealed. The court ultimately concluded that "this is
10 not just about delay. This is about bad faith of a Debtor who
11 misrepresented where he lives, who waited until after he got
12 discharged to disclose his residency in the property, and this is
13 not an appropriate use of the bankruptcy code." Hr'g Tr. (Jan. 9,
14 2014) 3:4-8.

15 The order denying Elliott's claimed homestead exemption was
16 entered "on the basis that the debtor belatedly claimed the
17 exemption in bad faith." Elliott timely appealed.

18 II. JURISDICTION

19 The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334
20 and 157(b)(2)(B). An order denying a debtor's claim of exemption
21 constitutes a final order. Preblich v. Battley, 181 F.3d 1048,
22 1056 (9th Cir. 1999). Therefore, we have jurisdiction under 28
23 U.S.C. § 158.

24 III. ISSUES

25 1. Did the United States Supreme Court's decision in Law v.
26 Siegel, entered while this appeal was pending, abrogate the
27 bankruptcy court's "bad faith" basis for denying Elliott's claimed
28 homestead exemption under CAL. CIV. PROC. CODE § 704.730(a)(3)?

1 2. Bad faith notwithstanding, is there a statutory basis to deny
2 Elliott's claimed homestead exemption?

3 IV. STANDARDS OF REVIEW

4 The right of a debtor to claim an exemption is a question of
5 law we review de novo. Kelley v. Locke (In re Kelley), 300 B.R.
6 11, 16 (9th Cir. BAP 2003). The bankruptcy court's findings of
7 fact with respect to a claimed exemption, including a debtor's
8 intent, are reviewed for clear error. Id. Factual findings are
9 clearly erroneous if illogical, implausible or without support in
10 the record. Retz v. Samson (In re Retz), 606 F.3d 1189, 1196 (9th
11 Cir. 2010).

12 V. DISCUSSION

13 A. Exemptions generally

14 When a debtor files a bankruptcy petition, all of his 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, 560 U.S. 770, 774 (2010). "Exemptions
18 serve to protect and foster a debtor's fresh start from
19 bankruptcy." In re Rolland, 317 B.R. 402, 412-13 (Bankr. C.D.
20 Cal. 2004).

21 A claimed exemption is "presumptively valid." Carter v.
22 Anderson (In re Carter), 182 F.3d 1027, 1029 n.3 (9th Cir. 1999).
23 Once an exemption has been claimed, "the objecting party has the
24 burden of proving that the exemptions are not properly claimed."
25 Rule 4003(c); Gonzalez v. Davis (In re Davis), 323 B.R. 732, 736
26 (9th Cir. BAP 2005). Initially, this means the objecting party
27 has the burden of production and the burden of persuasion. In re
28 Carter, 182 F.3d at 1029 n.3. If the objecting party produces

1 evidence to rebut the presumptively valid exemption, the burden of
2 production then shifts to the debtor to produce unequivocal
3 evidence to demonstrate the exemption is proper. Id. The burden
4 of persuasion, however, always remains with the objecting party.
5 Id.

6 California has opted out of the federal exemption scheme and
7 permits its debtors only the exemptions allowable under state law.
8 CAL. CIV. PROC. CODE § 703.130. Therefore, while "the federal
9 courts decide the merits of state exemptions, . . . the validity
10 of the claimed state exemption is controlled by the applicable
11 state law." In re Kelley, 300 B.R. at 16. California exemptions
12 are to be broadly and liberally construed in favor of the debtor.
13 In re Gardiner, 332 B.R. 891, 894 (Bankr. S.D. Cal. 2005); In re
14 Rolland, 317 B.R. at 413.

15 Elliott contends he is entitled to apply the homestead
16 exemption provided by CAL. CIV. PROC. CODE § 704.730(a)(3) to the
17 Buckingham Property. That statute provides in pertinent part that
18 a homestead exemption of \$175,000 is allowed if:

19 (3) [T]he judgment debtor . . . who resides in the
20 homestead is at the time of the attempted sale of the
homestead any one of the following:

21 (A) A person 65 years of age or older.

22 (B) A person physically or mentally disabled who as
23 a result of that disability is unable to engage in
24 substantial gainful employment. There is a rebuttable
25 presumption affecting the burden of proof that a
26 person receiving disability insurance benefit
27 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.

28 (C) A person 55 years of age or older with a gross
annual income of not more than twenty-five thousand
dollars (\$25,000) or, if the judgment debtor is

1 married, a gross annual income, including the gross
2 annual income of the judgment debtor's spouse, of not
3 more than thirty-five thousand dollars (\$35,000) and
the sale is an involuntary sale.

4 CAL. CIV. PROC. CODE § 704.730(a)(3). Trustee objected to Elliott's
5 claimed exemption both on the grounds that it was made in bad
6 faith and that his statutory right to the exemption was destroyed
7 prepetition due to his frequent title transfers with respect to
8 the Buckingham Property. The bankruptcy court sustained Trustee's
9 objection on the basis of bad faith, but did not address the
10 alternative basis for denying the exemption on statutory grounds.

11 **B. The effect of Law v. Siegel on the bankruptcy court's denial
12 of Elliott's claimed homestead exemption based on his bad
faith misconduct**

13 Elliott contends that Law v. Siegel, 134 S.Ct. 1188 (2014),
14 has overruled the bankruptcy court's authority to deny his
15 homestead exemption on the basis of bad faith. We agree.

16 Prior to being abrogated by Law v. Siegel, law within the
17 Ninth Circuit gave a bankruptcy court the authority to deny an
18 amended exemption claim if the trustee or another party in
19 interest timely objected and showed, by a preponderance of the
20 evidence, that the debtor had acted in bad faith or that the
21 creditors had been prejudiced. In re Michael, 163 F.3d at 529
22 (adopting test set forth in In re Doan, 672 F.2d at 833; Tyner v.
23 Nicholson (In re Nicholson), 435 B.R. 622, 630 (9th Cir. BAP
24 2010); Arnold v. Gill (In re Arnold), 252 B.R. 778, 784 (9th Cir.
25 BAP 2000). Under this line of authority, a debtor's intentional
26 attempt to conceal estate assets was a recognized basis to support
27 a court's finding of bad faith and, thus, sufficient grounds to
28 deny a debtor's claimed exemption.

1 When considering whether to deny Elliott's claimed homestead
2 exemption, the bankruptcy court properly applied the equitable
3 principles of the law available at the time to the facts it
4 believed demonstrated Elliott's misconduct. At the exemption
5 hearing, the court explained that Elliott's misconduct,
6 established by his concealment of the Buckingham Property through
7 omissions in his initial schedules, his misrepresentations at the
8 § 341(a) meeting and his calculated title transfers, was
9 sufficient to establish Elliott's bad faith. Therefore, the order
10 denying Elliott's claimed homestead exemption in its entirety was
11 well supported by valid Ninth Circuit precedents.

12 However, Law v. Siegel, entered on March 4, 2014, while this
13 appeal was pending, abrogated our authority to deny exemptions or
14 amendments to exemptions based on a debtor's bad faith. There,
15 the Supreme Court considered whether the bankruptcy court could
16 rely on § 105(a) to confer a general equitable power to surcharge
17 the debtor's \$75,000 homestead exemption to partially compensate
18 the estate for over \$500,000 in administrative expenses resulting
19 from the debtor's bad faith conduct, which, in effect, amounted to
20 a denial of his homestead exemption. 134 S.Ct. at 1194-95. The
21 Supreme Court rejected such a remedy, finding that surcharging an
22 exemption contravened specific provisions in the Bankruptcy Code,
23 and no statutory basis in the Bankruptcy Code allowed for the
24 surcharge on equitable grounds. Id. at 1195-96.

25 Specifically, the Court noted that the surcharge conflicted
26 with two subsections of § 522: § 522(b), which allows a debtor to
27 exempt estate property; and § 522(k), which expressly limits the
28 use of exempt property to pay for administrative expenses. Id. at

1 1195. The Court reasoned that § 522, with its "carefully
2 calibrated exceptions and limitations," did "not give courts
3 discretion to grant or withhold exemptions based on whatever
4 considerations they deem appropriate," such as the debtor's bad
5 faith conduct. Id. at 1196. Furthermore, outside of § 522, the
6 Code did not confer "a general, equitable power in bankruptcy
7 courts to deny exemptions based on a debtor's bad-faith conduct."
8 Id.

9 Although the bankruptcy court's denial of Elliott's claimed
10 homestead exemption did not involve precisely the same context of
11 surcharging an exemption to pay administrative expenses as in Law
12 v. Siegel, the same rationale that prohibited the equitable
13 surcharge of exemptions in that case must also apply to the denial
14 of amended exemptions based on Elliott's misconduct here. The
15 Code specifically provides that exempt property "is not liable"
16 for the payment of "any [prepetition] debt." Id. at 1192 (citing
17 § 522(c)). The bankruptcy court's denial of Elliott's homestead
18 exemption allows the sale proceeds from the claimed homestead to
19 pay prepetition debts. However, under Law v. Siegel, the court
20 cannot contravene the § 522(c) mandate in this way "absent a valid
21 statutory basis for doing so." Id. at 1196.

22 A debtor's bad faith is not a statutorily created exception
23 to the exemption but rather is a judge-made exception under Ninth
24 Circuit authority. The Supreme Court has now mandated in Law v.
25 Siegel that "[t]he Code's meticulous . . . enumeration of
26 exemptions and exceptions to those exemptions confirms that courts
27 are not authorized to create additional exceptions." Id.
28 Accordingly, courts can no longer deny claimed exemptions or bar

1 amendments to exemptions on the ground that the debtor acted in
2 bad faith, when no statutory basis exists for doing so. As such,
3 despite Elliott's apparent bad faith, his claimed homestead
4 exemption must stand absent some statutory basis for its denial.
5 See also In re Arellano, 517 B.R. 228, 229-32 (Bankr. S.D. Cal.
6 2014)(containing comprehensive discussion of the impact of Law v.
7 Siegel).

8 **C. A statutory basis to deny Elliott's claimed homestead**
9 **exemption may exist.**

10 Although Law v. Siegel no longer allows the bankruptcy court
11 to deny a debtor's claimed exemption based on bad faith conduct or
12 prejudice to creditors, the Supreme Court has affirmed the
13 principle that a "valid statutory basis" is sufficient grounds to
14 deny a debtor's homestead exemption. 134 S.Ct. at 1196. Thus, in
15 the case at bar, state law governing California's homestead
16 exemption criteria and the Code's limitations on exemptions may
17 provide another basis to deny Elliott's claimed homestead
18 exemption in the Buckingham Property.

19 **1. California's criteria for homestead exemptions**

20 Trustee argues that even if the bankruptcy court's authority
21 to deny Elliott's homestead exemption based on bad faith has been
22 abrogated, Elliott is still not entitled to the claimed exemption
23 because he did not have legal or equitable title to the Buckingham
24 Property on the petition date. Specifically, Trustee asserts that
25 Elliott's declared homestead exemption was destroyed by his
26 conveyance of the Buckingham Property's title to a third party
27 prepetition. While we agree with Trustee, Elliott's loss of the
28 declared homestead is not dispositive of his right to a homestead

1 exemption under California law.

2 Two types of homestead exemptions exist in California: the
3 declared homestead exemption governed by Article 5; and the
4 automatic homestead exemption governed by Article 4. In re
5 Cumberbatch, 302 B.R. 675, 678 (Bankr. C.D. Cal. 2003). The
6 declared and automatic homestead exemptions are separate and
7 distinct. Katz v. Pike (In re Pike), 243 B.R. 66, 69 (9th Cir.
8 BAP 1999). While the amount of both homestead exemptions is the
9 same, the appropriate context for applying each differs. Id.

10 **a. Declared homestead exemption**

11 The protections of an Article 5 declared homestead exemption
12 apply only in the context of voluntary sales. In re Kelley, 300
13 B.R. at 19. For a debtor to invoke the declared homestead
14 exemption he must record a declaration stating that the residence
15 is his principal dwelling. See CAL. CIV. PROC. CODE §§ 704.920,
16 704.930(a)(3). Once the declaration is duly recorded, the
17 declared homestead exemption continues thereafter even if the
18 debtor does not reside in the premises, unless the debtor has
19 abandoned the declared homestead. See In re Kelley, 300 B.R. at
20 18 (emphasis added).

21 A declared homestead can be effectively abandoned or
22 destroyed where title to all or a portion of the homestead
23 property is transferred to a third party. Knudsen v. Brock (In re
24 Knudsen), 80 B.R. 193, 195 (Bankr. C.D. Cal. 1987)(debtor ceases
25 to hold interest in declared homestead property for purposes of an
26 Article 5 exemption when debtor conveys title of subject property
27 to third party, and reconveying property from third party to
28 debtor does not "automatically resurrect" homestead declaration).

1 First Trust & Sav. Bank of Pasadena v. Warden, 18 Cal.App.2d. 131,
2 134 (1936). Elliott's declared homestead for purposes of Article
3 5 was effectively abandoned or destroyed when he conveyed title to
4 the Buckingham Property to S. Central in 2006; it was not
5 resurrected by his reacquisition of title from LWI in 2012. Id.

6 Nevertheless, the California declared homestead exemption is
7 inapplicable here. Elliott sought to exempt the Buckingham
8 Property in the forced sale context of his bankruptcy case under
9 CAL. CIV. PROC. CODE § 704.730(a)(3), not in the context of a
10 voluntary sale, where the Article 5 declared exemption would
11 apply. This contextual distinction is critical because even if
12 Elliott's declared homestead exemption was not abandoned, an
13 effective Article 5 exemption does not protect his interest in the
14 Buckingham Property in the forced sale context of his chapter 7
15 bankruptcy. See In re Kelley, 300 B.R. at 20; In re Knudsen, 80
16 B.R. at 196-97.

17 Accordingly, the issue of whether Elliott's homestead
18 declaration was abandoned or destroyed through prepetition title
19 transfers is irrelevant because "[i]n the context of bankruptcy
20 . . . [d]ebtor's declaration of homestead helps him not at all, as
21 the additional benefits conferred in Article 5 would benefit him
22 only in the situation of a voluntary sale." In re Kelley, 300
23 B.R. at 21 (emphasis in original).

24 Therefore, despite Trustee's correct assertion that Elliott's
25 declared homestead exemption was destroyed prepetition, the issue
26 of whether he is entitled to a homestead exemption must be
27 assessed within the scope of the Article 4 automatic exemption.

28

1 **b. Automatic homestead exemption**

2 The Article 4 protections for automatic homestead exemptions
3 are applicable in a forced sale context. In re Kelley, 300 B.R.
4 at 19. The filing of a bankruptcy petition constitutes such a
5 "forced sale" to trigger the application of the automatic
6 homestead exemption. Id. at 17. Distinct from the Article 5
7 exemption, once triggered, the automatic homestead exemption need
8 not be memorialized or recorded in a homestead declaration. Wells
9 Fargo Fin. Leasing, Inc. v. D & M Cabinets, 177 Cal.App.4th 59, 68
10 (2009).

11 Elliott has claimed entitlement to the Article 4 automatic
12 homestead exemption by referencing CAL. CIV. PROC. CODE
13 § 704.730(a)(3) in his amended Schedule C. Because Elliott's
14 claim of exemption is presumed valid, Trustee had the burden to
15 prove it was not properly claimed. See Rule 4003(c). Trustee
16 argued that Elliott was not entitled to the homestead exemption
17 because he could not claim an exemption in property he did not own
18 on the petition date. However, for purposes of CAL. CIV. PROC. CODE
19 § 704.730, Elliott's conveyance of the Buckingham Property's title
20 to a third party does not defeat his right to an automatic
21 exemption, because continuous residency, rather than continuous
22 ownership, controls the Article 4 analysis.

23 The statutory definition of "homestead" for purposes of the
24 Article 4 automatic exemption is set forth in CAL. CIV. PROC. CODE
25 § 704.710(c) and "requires only that the judgment debtor reside in
26 the property as his or her principal dwelling at the time the
27 judgment creditor's lien attaches and continuously thereafter
28 until the court determines the dwelling is a homestead."

1 Tarlesson v. Broadway Foreclosure Invs., LLC, 184 Cal.App.4th 931,
2 937 (2010)(citing CAL. CIV. PROC. CODE § 704.710(c))(emphasis added).
3 Thus, based on the plain language of the statute, the automatic
4 homestead exemption does not require that the judgment debtor
5 continuously own the property. See In re Donaldson, 156 B.R. 51,
6 52 (Bankr. N.D. Cal. 1993)(by continuously residing in their home
7 throughout the bankruptcy proceeding, debtors retained a
8 possessory interest sufficient to establish their right to an
9 automatic exemption despite their loss of title in a prepetition
10 foreclosure); Tarlesson, 184 Cal.App.4th at 937-38 (where judgment
11 debtor conveyed her home's title to a related party, debtor's
12 continuous occupancy of the property was enough to retain a
13 sufficient equitable or beneficial interest in it to qualify as a
14 homestead under § 704.710(c) and thus claim an automatic homestead
15 exemption).

16 Accordingly, the automatic homestead exemption applies to any
17 interest in the property if the debtor satisfies the continuous
18 residency requirement set forth in CAL. CIV. PROC. CODE
19 § 704.710(c).⁴ The factors a court should consider in determining
20 whether the debtor has sufficient residency to establish an
21 exemptible interest in the property and, thus, to qualify for the
22 automatic homestead, are physical occupancy of the property and
23

24 ⁴ This principle is consistent with and explicitly echoed in
25 sections of Article 4 other than CAL. CIV. PROC. CODE § 704.730(c).
26 For instance, CAL. CIV. PROC. CODE § 704.820 recognizes that debtors
27 with less than a fee interest are still entitled to a homestead
28 exemption under Article 4, stating in the Commission Comments it
"implements the intent of [Article 4] not to restrict the interest
of the judgment debtor for which a homestead exemption is
available. A homestead exemption is available to a judgment
debtor regardless of whether the judgment debtor's interest is a
fee, leasehold, or lesser interest."

1 the intention with which the property is occupied. In re Kelley,
2 300 B.R. at 21 (citing Ellsworth v. Marshall, 196 Cal.App.2d 471,
3 474 (1961)).

4 Neither Elliott nor Trustee directly addressed before the
5 bankruptcy court, or address on appeal, whether Elliott's alleged
6 residency at the Buckingham Property is sufficient to satisfy the
7 continuous residency requirement to qualify for the automatic
8 homestead exemption. Trustee's objection focused on Elliott's bad
9 faith in concealing the Buckingham Property and his destroyed
10 declaration of homestead. Neither party provided any relevant
11 evidence to support a finding whether or not Elliott had satisfied
12 the continuous residency requirement. Thus, as it stands, nothing
13 in the record confirms whether (1) Elliott resided at the
14 Buckingham Property at the time the Judgment Creditors' lien(s)
15 attached and continued to reside there with the intent of
16 retaining it as his principal dwelling, and (2) whether he resided
17 there on the petition date. In fact, Elliott confirmed in his
18 § 341(a) meeting testimony that he resided on Hiawatha Street on
19 the petition date.

20 Because the bankruptcy court confined its inquiry to
21 Elliott's bad faith in concealing the Buckingham Property, it did
22 not make any factual findings relevant to whether Elliott
23 satisfied the continuous residency requirement set forth in CAL.
24 CIV. PROC. CODE § 704.730(a)(3). Thus, material factual issues
25 exist that the court must consider in making this determination,
26 including the threshold determination that the Buckingham Property

27
28

1 is property of the estate.⁵ Accordingly, we must VACATE the order
2 on appeal and REMAND to the bankruptcy court to resolve these
3 factual issues and determine whether Elliott is entitled to an
4 automatic homestead exemption under CAL. CIV. PROC. CODE
5 § 704.730(a)(3).

6 **2. The Bankruptcy Code's statutory limitations of**
7 **exemptions**

8 Even if on remand the bankruptcy court finds that Elliott
9 retained, through continuous residency, a sufficient property
10 interest in the Buckingham Property to qualify for the automatic
11 homestead exemption under CAL. CIV. PROC. CODE § 704.730(a)(3), the
12 Code provides additional limitations which may function as a basis
13 to deny Elliott's exemption given his misconduct.

14 As the Supreme Court acknowledged in Law v. Siegel, "§ 522
15 sets forth a number of carefully calibrated exceptions and
16 limitations, some of which relate to the debtor's misconduct."
17 134 S.Ct. at 1196. Most relevant among them for our purposes is
18 § 522(g).

19 Section 522(g) limits the ability of a debtor to claim an
20 exemption where the trustee has recovered property for the benefit
21 of the estate. Under § 522(g)(1), a debtor may claim an exemption
22 where the trustee has recovered property under §§ 510(c)(2), 542,
23 543, 550, 551 or 553 only if (1) the property was involuntarily
24 transferred, and (2) the debtor did not conceal the transfer or an

25
26 ⁵ It is a "well settled rule that property cannot be
27 exempted unless it is first property of the estate." Heintz v.
28 Carey (In re Heintz), 198 B.R. 581, 586 (9th Cir. BAP 1996). As
discussed more thoroughly below, the bankruptcy court has since
determined that the Buckingham Property is property of the estate.

1 interest in the property. Hitt v. Glass (In re Glass), 164 B.R.
2 759, 761 (9th Cir. BAP 1994), aff'd, 60 F.3d 565 (9th Cir. 1995).
3 Thus, the debtor is not entitled to claim an exemption “[w]here a
4 debtor voluntarily transfers property in a manner that triggers
5 the trustee’s avoidance powers or the debtor knowingly conceals a
6 prepetition transfer or an interest in property, and such property
7 is returned to the estate as a result of the trustee’s actions
8 directed toward either the debtor or the transferee[.]” Id. at
9 764-65.

10 In his opening appellant’s brief, Elliott identified § 522(g)
11 as a basis for denying a homestead exemption for the type of
12 misconduct involved here. However, he contends that “while it can
13 be argued in this case that [he] did conceal the [Buckingham
14 Property], this is not a case where the Trustee ‘recovered’ the
15 property[.]” and therefore, § 522(g) is inapplicable. We
16 disagree.

17 On June 4, 2013, Trustee filed a turnover action against
18 Elliott for the Buckingham Property under § 542. See Adv. No.
19 SV 13-01118-VK. Trustee has succeeded in that action.⁶ Hence,
20 this constitutes a “recovery” as contemplated by § 522(g), which
21 then brings the Buckingham Property within the scope of the
22 § 522(g)(1) limitation on Elliott’s right to claim an exemption in
23

24 ⁶ While this appeal was pending, on April 7, 2014, the
25 bankruptcy court entered a judgment revoking Elliott’s discharge
26 and vesting title of the Buckingham Property in Trustee after
27 finding “the debtor knowingly and fraudulently failed to disclose
28 a significant asset in his schedules, i.e., the debtor’s interest
in a corporation that held title to his residence. For no
consideration, less than three weeks after the debtor obtained his
discharge, the debtor obtained title to his residence from that
corporation.” Adv. No. SV 13-01118-VK, dkt. no. 63 at 2, ¶ 1. No
appeal has been filed.

