

IN THE SUPREME COURT OF FLORIDA

Case No.: SC09-751

LESLIE S. OSBORNE,

Petitioner,

v.

DENISE J. DUMOULIN,

Respondent.

ON DISCRETIONARY REVIEW OF CERTIFIED QUESTION
FROM THE CIRCUIT COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT,
Lower Tribunal Case No.: 08-15355-A

PETITIONER'S REPLY BRIEF

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ARGUMENT

A DEBTOR WHO OWNS, RESIDES IN, AND INITIALLY CLAIMS A RESIDENCE EXEMPT AS HOMESTEAD, HAS RECEIVED THE BENEFIT OF A HOMESTEAD.

The Brief of the Appellee in this case simply ignores the facts. The Debtor states on Page 4 of her brief “there is no indication that Ms. Dumoulin has presented any obstacle to the Trustee taking possession of her home...” At the beginning of Page 15 of her brief the Debtor further states “a Debtor who merely continues to live in her home is not receiving the benefits of the homestead exemptions, because she is not impeding... creditors or her trustee”.

What the Debtor fails to acknowledge is that she did impede the Trustee when she claimed the property exempt. It is an undisputed fact that the Debtor filed her bankruptcy petition on September 19, 2007. On September 19, 2007, the Debtor claimed her home exempt as homestead, pursuant to Article X Section 4 of the Florida Constitution. A meeting of creditors was held on October 26, 2007. Pursuant to F.R.B.P. 4003, any objections to exemptions must have been filed within 30 days or by November 25, 2007. Further, 11 U.S.C. § 522(l) states that “unless a party in interest objects, the property claimed as exempt on such list is

exempt”. Therefore, the exemption was deemed allowed by law as of November 25, 2007.

In addition to the above, the U.S. Supreme Court in Taylor v Freeland and Kronz, 112 S.Ct. 1644 (1992), reiterated that a Chapter 7 Trustee could not contest the validity of a claimed exemption after the 30-day period for objecting had expired, even if the Debtor had no legal basis to claim the exemption.

The law is thus clear that as of November 25, 2007, the Debtor, who had claimed this property as exempt, was entitled to the homestead exemption and that no one could challenge such exemption. It is hard by any stretch of the imagination, to understand how the Debtor claims she did not receive the benefit of the homestead.

At page 9 of her Brief, the Debtor argues that the phrase “receives the benefits” comports with the present tense of the word “receives”. In essence, that the owning, residing in and asserting to the public that such property is your home is not enough to actually receive a benefit. You must actually, specifically, keep a creditor from executing on your property.

This argument was responded to, in depth, in the Petitioner’s/Trustee’s Initial Brief, subsection A. As such, it will not be repeated here. One point that will be raised, however, is the argument as to present tense.

When a bankruptcy is filed, the Debtor is required to list all of her assets and all of her debts. All of the assets are placed into what is called the bankruptcy estate, at which point the Debtor is then entitled to exempt out various assets. When looking at the Debtor's financial picture, the bankruptcy courts have often said this is deemed a "snapshot" of the Debtor's financial picture as of the date of filing, and that is what the schedules are intended to do. In re Arcella-Coffman 318 BR 463 (Bkcty. Ind. 2004).

Thus, any receipt of benefits would be in the present tense, i.e. the "snapshot". In the instant case, not only was the Debtor living in the home, present tense, but the Debtor actually claimed the homestead exempt. The fact that she subsequently changed her mind should be deemed irrelevant. F.S. 222.25(4) specifically uses the word "claims" the homestead. As the Debtor has claimed the homestead, as well as living on the property and receiving the benefits, the Debtor's position is clearly without merit.

The Debtor argues on page 19 of her Brief,

"§ 222.25(4) disqualifies only those who *claim* homestead exemption and those who are receiving the benefits of such exemption".

In the instant case, the Debtor both claimed the homestead exemption and received the benefit of the exemption. The Debtor intended to keep residing on the property, intended to sell the property to a friendly buyer and then continue to

reside on the property. It was only after the 30-day window provided by the U.S. Supreme Court and the Bankruptcy Code had expired, and after the property had been allowed as exempt, that the sale fell through. Had the sale proceeded, the Trustee would not have been able to object or even ask for the turnover of the property. This is so because the Debtor had already been allowed the exemption by law. The benefit had already been received.

Were this court to allow the Debtor's position, creditors could never get paid. A debtor could freely switch her mind back and forth between whether she's claiming a homestead property exempt or claiming personal property exempt. There would be no finality.

In the past, if a creditor attempted to argue that the Debtor's property was not homestead, the case law was that the Debtor had to make a clear and unequivocal abandonment, In re Herr 197 BR 939 (Bky S.D. Fla 1996), or the homestead status would be maintained. The Herr case is particularly instructive. In Herr, the bankruptcy court, citing to Florida law, stated that under Florida law abandonment of a homestead may only be proved by a strong showing of a Debtor's intent not to return to his residence. Mere absence due to health, financial or family reasons, generally does not constitute abandonment (Id. at 941). In Herr, the Debtor had moved out of his home; however, stated that he intended to retain the property, sell it and then buy another homestead. The court held no

abandonment can be shown. In the instant case, the Debtor didn't move out but stayed on the property. The Debtor's intent was to take the home, sell it, and then rent it back from the buyer so that she could retain possession.

Now, according to the Debtor, abandonment is simply saying "I don't want it exempt". This is contrary to all reported decisions. The Debtor's position is that she can continue to live in the property, continue to receive the benefits of living in the property, creditors would not have attempted to execute judgments against said property due to this court's long-standing case law on abandonment, and the Debtor could additionally claim all of the exemptions allowed under Florida law, including F.S. 222.25(4). This is an abuse.

Florida has long been known as a Debtor's haven. In 2005, the bankruptcy code was changed dramatically due to abuses in the system. The state most often referred to as leading those abuses is Florida. In Havoco v. Hill, 790 So. 2d 1018 (Fla 2001), this court recognized the abuses, particularly surrounding the homestead, that have gone on in the state of Florida. This court noted that due to the homestead protections being constitutional, as opposed to statutory, this court did not believe it had the authority to correct these abuses.

F.S. 222.25(4) is not a constitutional provision. This court has the full power and authority to correct the abuses.

The Petitioner/Trustee would hereby request this court render its determination that ownership and residence in a home is all that is required for one to be determined to be “receiving the benefits” of a homestead so as to disqualify a Debtor from claiming the additional exemption of F.S. 222.25(4).

CONCLUSION

For the reasons set forth above, the decision of the District Court must be rejected.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. and/or electronic mail to: DENISE J. DUMOULIN, c/o Donna A. Bumgardner, donnabkclaw@aol.com, MOREQUITY, INC., c/o Peter E. Lanning, Esq, bkfiling@consuegralaw.com, Alan Parrish, 9204 King Palm Drive, Tampa, FL 33619-1328 (alan.parrish@consuegralaw.com) and OFFICE OF THE US TRUSTEE, USTPRegion21.MM.ECF@usdoj.gov this 27th day of August, 2009.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Brief complies with the font requirements of
Rule 9.210.

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