UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

Bankruptcy Case No. 02-12000

IN RE: Thomas M. ST. JEAN, Sr.,
Debtor

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U.S. BANKRUPTCY COURT
BANGOR, MAINE

Thomas M. ST. JEAN, Sr.,
Movant

v.

The Cadle Company,
Respondent.

MEMORANDUM OF DECISION

INTRODUCTION

The Debtor, Thomas M. St. Jean, Sr., seeks avoidance of a judicial lien against his claimed residence in Greenville, Maine (the "Property") pursuant to § 522(f)(1)(A).[1] The lien creditor, The Cadle Company ("Cadle") objects to avoidance, alleging that the Debtor is not entitled to his claimed residence exemption. The facts are stipulated, and the only issue is whether a debtor, who has never actually resided on a property may nevertheless claim a residence exemption on that property. I conclude that neither actual occupancy on the date of bankruptcy nor prior occupancy is necessary to qualify for the exemption in a bankruptcy case; constructive occupancy is sufficient. Based on the Debtor's showing of constructive occupancy on the date of bankruptcy, he is entitled to the residence exemption, and the judicial lien shall be avoided.

FACTS

The following statement of facts is set forth verbatim from the stipulation of the parties:[2]

1. Debtor filed his Chapter 7 petition on November 8, 2002.

2. Respondent, The Cadle Company ("creditor"), as Assignee of the Federal Deposit Insurance Corporation obtained a Writ of Execution from the United States District Court of Maine dated June 7, 2002 against Debtor and Terry St. Jean, who were by then divorced, arising out of a judgment entered on January 8, 1993.

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[1] Unless otherwise indicated, all citations to statutory sections are to the Bankruptcy Code, 11 U.S.C. § 101 *et seq.* Section 522(f) provides, as it relates to this case: "the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is . . . a judicial lien . . ."

[2] Stipulation of Counsel Pursuant to Pretrial Scheduling Order dated December 30, 2002. The exhibits attached to the stipulation are not included here. They are part of the record.

3. On August 18, 2000, Debtor and Heidi Martin purchased an unimproved house lot on Scammon Road in Greenville, Maine, which property is more fully described in a Warranty Deed dated August 18, 2000 from Michael C. Jacques and Sandra K. Jacques to Thomas M. St. Jean and Heidi Martin recorded in the Penobscot [sic][3] Registry of Deeds in Book 1271, Page 296 (hereinafter "lot 20"). Debtor holds a one-half interest as a joint tenant in lot 20.

4. Debtor and Heidi Martin were subsequently married and decided to purchase the house lot adjacent to lot 19 [sic].

5. By purchasing adjacent lots, the St. Jeans intended to take advantage of the covenant set forth in paragraph 7 of their deeds which provides that when two adjacent lots are purchased by the same Grantee, the lots become one indivisible unit, with relaxed set back restrictions.

6. On February 11, 2002, the couple purchased the adjacent lot which is more fully described in a warranty deed dated February 11, 2002 from Roger A. Shepheard and Vickie to Thomas St. Jean and Heidi St. Jean recorded in the Penobscot [sic] County Registry of Deeds in Book 1370, Page 260 (hereinafter "lot 19"). Debtor holds a one-half interest as a joint tenant in lot 20 [sic].

7. The St. Jeans obtained a building permit from the Town of Greenville on June 6, 2002.

8. Debtor entered into a contract dated July 17, 2002 with Les Habitations Techniques and Moosehead Building, Inc. for the purchase and installation of a modular home for the sum of $81,823.00.

9. Debtor paid a $6,000.00 non-refundable deposit at the signing of the Modular Home Contract.

10. Debtor sought and on August 5, 2002 obtained and accepted a residential mortgage loan commitment from United Kingfield Bank.

11. The loan was approved for $97,000.00, which was sufficient to fund the balance due on the Modular Home Contract and to complete all other necessary improvements to the land.

12. On July 28, 2002, Debtor hired Mike Theriault, an excavation contractor.

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[3] The deed was actually (and properly) recorded in the Piscataquis County Registry of Deeds.

13. Between July 28, 2002 and August 10, 2002, Mr. Theriault excavated the foundation hole, installed the foundation footings and poured the cement slab for the foundation.

14. During this period, Mr. Theriault excavated and installed a septic system, built an approximately 350' driveway and dug the trench for electrical service to the property.

15. Debtor hired East Road Electric, Inc. to install electric service to the property and on August 17, 2002 electric power was brought to the property.

16. Since installation, Debtor has received monthly electricity bills from Central Maine Power Company.

17. Debtor has planted decorative trees and perennial gardens, and has landscaped the property.

18. On Augusta 13, 2002, creditor filed an Execution Lien pursuant to 14 § MRSA 4651-A against Debtor's real estate (the "lien") in the Piscataquis County Registry of Deeds in Book 1405, Page 291.

19. Creditor claims the amount due it, including interest, as of the petition date, is $156,865.00.

20. As a result of the filing of the lien, United Kingfield Bank has refused the Debtor's loan until the encumbrance is removed.

21. Prior to the filing of the lien, Debtor hired Bill Haskell & Son to dig a well, but as a result of the lien, has not moved forward to install the well.

22. United Kingfield Bank, through its loan officer, Diane Sherman, has agreed to close the loan if Debtor can remove the lien.

23. Les Habitations Techniques and Moosehead Building, Inc. are both ready, willing and able to complete the modular home contract if Debtor is able to pay the balance of the contract price now due.

24. Bill Haskell & Sons, Inc. is ready, willing and able to drill the well upon payment by the Debtor.

25. The proceeds of the United Kingfield Bank loan will be sufficient to pay the balance due on the modular home contract and the contract with Bill Haskell & Sons, Inc.

26. The Debtor ceased construction efforts only after United Kingfield Bank discovered the creditor's lien and refused to proceed with the closing.

27. The driveway is located on both lots 19 and 20.

28. The septic system is located partly on both lot 19 and 20.

29. The installation of landscaping, the driveway, the septic system, and the placement of the foundation were all intended to take advantage of the lot merger covenant and the resulting indivisible parcel.

30. The aggregate value of Debtor's interest in lots 19 and 20 is less than $25,000.00.

31. Though he did not reside there, the Debtor intended to construct a residence for he [sic] and his wife on the property as of the petition filing date.

32. Creditor's judgment lien is a judicial lien within the meaning of 11 U.S.C. § 101(36) and § 522(f)(1)(A).

33. The Creditor's lien for $156,865.00, plus the amount of the exemption the Debtor could claim ($25,000.00), if applicable, if there were no liens on the property exceeds the value that the Debtor's interest in the property would have in the absence of any liens. There are no other liens on the property.

34. Debtor and Heidi St. Jean currently reside in a home owned by Heidi and located on North Wiggin Street in Greenville.

35. As part of their plan to build a new home, Heidi listed the North Wiggin Street property for sale in the summer of 2002.

36. Debtor has at no time occupied lots 19 and 20.

37. If the creditor had not filed the lien, the St. Jeans likely would have closed on their loan with United Kingfield Bank, paid the balance due Les Habitations Techniques and accepted delivery and installation of the modular home on the property.

38. If the creditor's lien is removed, the St. Jeans have the financial ability to complete the purchase and installation of their modular home.

39. Absent the creditor's lien, the Debtor has the ability to complete construction and occupy the property imminently.

DISCUSSION

To avoid a lien for impairment of an exemption under § 522(f), a debtor must first

demonstrate an entitlement to the exemption. Often the objection to avoidance is actually an objection to the exemption, it being understood, as in this instance, that absent an objection to the exemption, avoidance would result from the application of the arithmatic formula in the statute. Here, on the stipulated facts, the Debtor has met his burden of proof under § 522(f)(1)(A) and (2)(A). The Cadle lien is a judicial lien, and the amount of it ($156,865), plus all other liens on the Property ($0) and the amount of the residence exemption ($25,000) exceeds the value the Debtor's interest in the Property would have in the absence of any liens (less than $25,000).[4]

The only point of contention is the Debtor's entitlement to the residence exemption. Objection to exemptions must be made, pursuant to Fed. R. Bankr. P. 4003(b), within 30 days after the meeting of creditors, and the burden of proof is on the objecting party. Fed. R. Bankr. P. 4003(c). Cadle's objection to the Debtor's claim of exemption, made in the context of its objection to the Debtor's motion to avoid judicial lien, was timely.

Maine, which has opted out of the federal exemptions,[5] provides a residence exemption

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[4] Section 522(f)(2)(A) provides:

> For the purposes of this subsection, a lien shall be considered to impair an exemption to the extent that the sum of -
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> (i) the lien;
> (ii) all other liens on the property; and
> (iii) the amount of the exemption that the debtor could claim if there were no liens on the property;
>
> exceeds the value that the debtor's interest in the property would have in the absence of any liens.

[5] *See* 11 U.S.C. § 522(b); 14 M.R.S.A. § 4426.

for "real or personal property that the debtor . . . uses as a residence . . . ." 14 M.R.S.A. § 4422(1)(A).[6] The exemption statute is to be "construed and applied liberally, in favor of the fresh start policy." *In re Bennett*, 192 B.R. 584 (Bankr. D. Me. 1996).[7]

Interpretation of Maine's residence exemption has been the subject of substantial judicial analysis in the bankruptcy court of this District. In *In re Grindal*, 30 B.R. 651 (Bankr. D. Me. 1983), the court noted that:

> [t]he concept of "residence" is a flexible one, and must be construed in light of the policies underlying the exemption statute. . . In general, the purpose of the exemption statutes is to secure for the debtor the means to support himself and his family . . . In particular, homestead statutes promote the stability and welfare of the state by encouraging property ownership, and they secure to the householder a home for himself and his family . . . Given the purposes of the homestead exemption, a finding that the debtors *actually* occupied the homestead on the filing date is neither necessary nor sufficient to qualify for the exemption. Occupancy may be constructive as well as actual.

Id. at 652-3.[8] The court further stated that the primary factor is the debtor's intention on the filing date. *Id.* at 653. Intention, however, is not the only factor. In *Bennett*, the court observed:

> When evaluating a constructive occupancy based residence exemption claim, assaying a debtor's intention to occupy is an essential inquiry . . . But examining

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[6] The statute permits a debtor to exempt: " . . . the debtor's aggregate interest, not to exceed $25,000 in value, in real or personal property that the debtor or a dependent of the debtor uses as a residence, . . . , provided that if minor dependents of the debtor have their principal place of residence with the debtor, the debtor's aggregate interest may not exceed $50,000 and provided further that if the debtor's interest is held jointly with any other person or persons, the exemption may not exceed in value the lesser of $25,000 or the product of the debtor's fractional share times $50,000.

[7] At the time of the *Bennett* decision, the exemption was the same as now, except that the amount of the exemption was $12,500.

[8] When *Grindal* was decided, the state residence exemption was not materially different than the current exemption, except that the amount of the exemption was $7500.

> intent is not the exclusive inquiry. A debtor must also demonstrate a meaningful ability to occupy the property imminently or within a reasonable time.

192 B.R. at 587-8. Thus, in order to establish constructive occupancy, a debtor must show both an intent to occupy the property as a residence, and an ability to occupy it without unreasonable delay.

Prior occupancy has been considered as an element of constructive occupancy. *See Grindal*, 30 B.R. at 653 ("A debtor who does not actually occupy the homestead on the filing date, but who intends to return when circumstances permit, may qualify for the exemption."); *In re Cole*, 185 B.R. 95, 98 (Bankr. D. Me. 1995)("Even if I were to accept (for the moment) the proposition that a residence exemption can be established without prior occupancy, Cole has demonstrated nothing more than a vague intention to live on the Hartland property and has shown no present plans or tangible, contemporary preparations to move there."). Prior occupancy has never expressly been a condition of constructive occupancy in this District. Rather, it has been viewed as one factor indicative of the debtor's intent. Other factors have also been considered. For example, in the *Bennett* case, the court had no difficulty finding an intent to make a property a residence when, over a period of ten years, the debtors had cleared title to the property, used it to cut and split wood and conduct yard sales, brought fill onto the property, and lived there in a camper one summer. 192 B.R. at 585-6.

In this case, the parties have stipulated that the Debtor and his wife obtained a building permit, entered into a contract for the installation of a home, paid a deposit, obtained approval for

financing the construction, had a foundation poured, a septic system installed, a driveway built, and they landscaped the Property. Both the bank and construction company are willing to proceed with the financing of and building the home if the creditor's lien can be avoided.

I find that the Debtor has made the requisite showing of constructive occupancy. He has demonstrated by his actions both his intent to occupy the Property as his residence, and his ability to occupy it without unreasonable delay. Cadle has failed to meet its burden under Fed. R. Bankr. P. 4003(c). The residence exemption applies to the Property in Greenville, and the Debtor is entitled to avoid the judgment lien of The Cadle Company pursuant to § 522(f)(1)(A).

An appropriate order will issue.

DATED: March 7, 2003

Louis H. Kornreich
United States Bankruptcy Judge