

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION**

In re:

Case No. 05-14608
Chapter 7

LEE EDWARD GAINES,

Debtor.

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

This case is before the Court upon the Debtor's Motion for Reconsideration of Order dated January 12, 2007, overruling his Objection to Trustee's Notice of Public Auction, regarding a parcel of real property. After an evidentiary hearing held on March 14, 2007, the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. On October 13, 2005, Lee Edward Gaines ("Debtor") filed a *pro se* petition for relief under Chapter 7 of the Bankruptcy Code (the "Code"). (Tr. Ex. 1). Aaron R. Cohen is the Chapter 7 Trustee (the "Trustee") assigned to Debtor's case.
2. On Schedule C of his petition, Debtor claimed a vacant lot located at 8942 Dandy Avenue, Jacksonville, Florida (the "Property"), as exempt pursuant to 11 U.S.C. § 522(d). Debtor listed the value of the Property as \$9,000. (Tr. Ex. 2).
3. On Schedule D of his petition, Debtor indicated that the city of Jacksonville held secured municipal liens on the Property totaling \$6,159.38. Debtor indicated that the liens accrued from August 1999 through October 2005. (D. Ex. 5).
4. From 1983 through 2001, Debtor resided on the Property in a mobile home. Debtor admittedly has not resided on the Property since 2002, and his mobile home was removed from the Property shortly thereafter. (Tr. Ex. 6).
5. On April 21, 2006, the Trustee objected to Debtor's claim of homestead exemption in the Property. The basis for Trustee's objection was that Debtor did not reside on the property. (Tr. Ex. 3).

6. On June 7, 2006, this Court granted Debtor a discharge of his debts, pursuant to 11 U.S.C. § 727. (D. Ex. 1).

7. After a hearing held on July 12, 2006, the Court issued an order dated October 4, 2006, sustaining Trustee's objection to Debtor's claim of exemption in the Property. (Tr. Ex. 4).

8. On November 3, 2006, Trustee filed a Notice of Public Auction regarding the Property. The notice indicated that the Property was a "residential vacant lot," and that the auction would be conducted on November 25, 2006. (D. Ex. 2).

9. On November 21, 2006, Debtor filed an Objection to Trustee's Notice of Public Auction, upon the basis that the Property was exempt as his homestead. (D. Ex. 3).

10. On January 5, 2007, Debtor filed amended Schedule C, which listed the Property as exempt "homestead land." Debtor listed the value of the Property as \$13,650.00. (Tr. Ex. 5).

11. On January 10, 2007, the Court held a hearing on Debtor's Objection to Trustee's Notice of Public Auction and overruled the objection in an order dated January 12, 2007.

12. On January 26, 2007, Debtor filed a Motion for Reconsideration of the Order dated January 12, 2007, overruling his Objection to Trustee's Notice of Public Auction.

CONCLUSIONS OF LAW

The issue before the Court for its determination is whether the Debtor is entitled to claim the Property as exempt, pursuant to the Florida homestead exemption.

Florida's homestead exemption is located in Article X, § 4, of the Florida Constitution, and it provides:

- (a) There shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, except for the payment of taxes and assessments thereon, obligations contracted for the purchase, improvement or repair thereof, or obligations contracted for house, field or other labor performed on the realty, the following property owned by a natural

person:

(1) a homestead,if located within a municipality, to the extent of one-half acre of contiguous land, upon which the exemption shall be limited to the residence of the owner or the owner's family;

Fla. Const. art. X, § 4.

The Florida Supreme Court has held that intent to create a homestead is shown “by a debtor’s specific acts” toward establishing a permanent residence, “which are not contradicted” by the debtor’s subsequent conduct. In re Frederick, 183 B.R. 968, 971 (Bankr. M.D. Fla. 1995) (citing Semple v. Semple, 89 So. 638, 639 (Fla. 1921)). Although Florida’s homestead exemption should be “liberally construed,” courts must be cognizant in preventing its fraudulent use. In re Brown, 165 B.R. 512, 514 (Bankr. M.D. Fla. 1994) (citing Hillsborough Inv. Co. v. Wilcox, 13 So. 2d 448, 450 (Fla. 1943)).

This Court has previously made clear that “[o]nce property is imbued with homestead status, it remains homestead until it is abandoned.” In re Frederick, 183 B.R. at 971 (quoting In re Mackey, 158 B.R. 509, 513 (Bankr. M.D. Fla. 1993)). A homestead is abandoned when it no longer serves as the owner’s “bona fide home and place of permanent [residence].”¹ In re Frederick, 183 B.R. at 971 (quoting In re McCarthy, 13 B.R. 389, 390 (Bankr. M.D. Fla. 1981)). Thus, a debtor’s homestead exemption survives *temporary* absences due to financial or health reasons. In re Klaiiber, 265 B.R. 290, 293 (Bankr. M.D. Fla. 2001).

In determining whether a homestead has been abandoned, the owner’s intent is the principal factor, and physical absence from the property “is not determinative.” In re Mackey, 158 B.R. 509, 513 (Bankr. M.D. Fla. 1993). This Court has previously recognized that whether a homestead has been abandoned is a factual question, which requires a court to “consider the facts and circumstances of each individual case.” Id. (citing In re McCarthy, 13 B.R. at 389). Finally, the objecting party has the burden of demonstrating that the party seeking the homestead exemption is not so entitled. In re Brown, 165 B.R. at 514 (citing In re Sanders, 72 B.R. 124, 125 (Bankr. M.D. Fla. 1987)).

¹ As the court noted in Klaiiber, “[d]ebtors seldom admit to abandonment.” In re Klaiiber, 265 B.R. 290, 293 (Bankr. M.D. Fla. 2001).

Debtor argues that the Property qualifies as his homestead, and therefore, is exempt from sale pursuant to Florida’s homestead exemption. In support of his position, Debtor asserts that although he has not resided on the now vacant Property since 2002, it retains homestead status because (i) his extended absence was due to a prolonged illness, (ii) he never intended to abandon the Property, and (iii) he intends to re-occupy the Property as his homestead.

Conversely, Trustee asserts that Debtor is not entitled to claim the Property as exempt, as it is merely a vacant lot that Debtor has not resided on or maintained since 2002. Thus, Trustee argues that Debtor abandoned the Property as his homestead and has failed to re-establish it as such.

In support of his position, Debtor cites to non-binding case law from the Southern District of Florida.² In re Laing, 242 B.R. 538, 540-541 (Bankr. S.D. Fla. 1999); In re Herr, 197 B.R. 939, 940 (Bankr. S.D. Fla. 1996). In Herr, the debtor resided on his homestead property for thirty-five (35) years prior to it being damaged by Hurricane Andrew. In re Herr, 197 B.R. at 940. Following the hurricane, the debtor’s homestead was rendered uninhabitable, and the City of Miami subsequently demolished it. Id. In reaching its holding, the court reasoned that the debtor had been forced out of his home by Hurricane Andrew and that his testimony established that, although he was not financially able to make the house habitable again, he was planning on selling it and using the proceeds to purchase another home. Id. at 941. Accordingly, the court overruled the creditor’s objection to debtor’s claim of homestead exemption. Id. at 942.

In addition to being non-binding precedent upon this Court, the case law relied on by Debtor is clearly distinguishable from the facts and circumstances in the instant case. In addition to the fact that the debtor in Herr unquestionably had his home of thirty-five (35) years destroyed by a hurricane, he also testified that he planned on selling the property and using the proceeds to buy another home. Conversely, the Debtor in the instant case was only able to offer his own self-serving testimony as to an illness that allegedly kept him away from the Property since 2002. Further, Debtor testified that he lacks sufficient funds to rebuild, and the record is devoid of any evidence indicating that he intends to

² In reaching its holding, the court in Laing primarily relied on one of its previous cases, In re Herr, 197 B.R. 939 (Bankr. S.D. Fla. 1996).

sell the Property and subsequently purchase a new homestead with the proceeds.

This Court has previously held that “[h]omestead status is established by the actual intention to live permanently in a place coupled with actual use and occupancy.” In re Frederick, 183 B.R. at 970-971 (quoting In re Brown, 165 B.R. at 514). Since 2002, Debtor has not occupied or used the Property as his “bona fide home and place of permanent [residence].” Although Debtor testified that his absence was due to illness, he failed to proffer any additional evidence, such as medical records, notes from healthcare providers or any other proof, in regards to his lengthy illness. Further, although Debtor claims that he intends to re-occupy the Property as his homestead, there is no evidence indicating that he is preparing the vacant lot for immediate use. Instead, what the evidence does show is that over the years, in addition to being absent from the Property, Debtor has also failed to maintain it, which ultimately resulted in the City of Jacksonville removing his mobile home. Further, as indicated in Debtor’s bankruptcy schedules, the City of Jacksonville holds over \$6,000.00 in secured liens on the Property. Thus, none of Debtors actions since 2002 indicate an intent to maintain the vacant Property as his homestead.³

Based upon the facts and circumstances of the instant case, the Court finds that the Trustee has carried the burden of establishing that Debtor is not entitled to claim the homestead exemption for the Property.

CONCLUSION

As the evidence before the Court illustrates Debtor’s intent to abandon the Property, Debtor’s Motion for Reconsideration of Order dated January 12, 2007, overruling his Objection to Trustee’s Notice of Public Auction, is denied. The Court will enter a separate order consistent with these Findings of Fact and Conclusions of Law.

ORDERED on April 18, 2007, in Jacksonville, Florida.

/s/ George L Proctor
George L. Proctor
United States Bankruptcy Judge

Copies to:

Debtor
Chapter 7 Trustee
United States Trustee
All Interested Parties

³ “The mere intention, at some future day, to repair and occupy [property claimed as homestead], where such intention is not manifested by acts as well as words, is not sufficient.” Semple v. Semple, 89 So. 638, 639 (Fla. 1921).