

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

In re:

Case No. 3:13-bk-4067-PMG

Stephanie Ann Schrawder,
f/k/a Stephanie Ann Heiney,

Debtor.

Chapter 13

**ORDER ON TRUSTEE'S OBJECTION TO PROPERTY
CLAIMED AS EXEMPT BY DEBTOR**

THIS CASE came before the Court for hearing to consider the Objection of Douglas W. Neway, as Chapter 13 Trustee, to Property Claimed as Exempt by Debtor. (Doc. 74).

Section 222.25(4) of the Florida Statutes provides that a debtor may claim a "wildcard" personal property exemption if he does not "claim or receive the benefits of" a homestead exemption under the Florida constitution. Following the Florida Supreme Court's decision in Dumoulin, bankruptcy courts have generally found that a Chapter 7 debtor who does not claim a homestead exemption on his bankruptcy schedules may claim the wildcard exemption under §222.25(4), even if the debtor intends to retain his residence.

In Chapter 13 cases, however, a debtor/homeowner who does not claim a homestead exemption in his bankruptcy case is not "effectively surrendering his home to the trustee for administration." Consequently, a Chapter 13 debtor who intends to retain his residential property receives the benefits

of the homestead exemption, even though the exemption is not claimed on his bankruptcy schedules, and the debtor is not entitled to claim the wildcard personal property exemption under §222.25(4) of the Florida Statutes.

Background

The Debtor, Stephanie Ann Schrawder, filed a petition under Chapter 13 of the Bankruptcy Code on June 30, 2013. On her schedule of assets filed with the petition, the Debtor listed certain real property located at 2736 E. Fennel Court, Middleburg, Florida (the Property). The Property was listed with a scheduled value of \$90,172.00, and a scheduled mortgage in the amount of \$119,406.00. According to the schedules, the Property was the Debtor's "residence to be retained: single family home." (Doc. 1).

The Debtor did not claim the Property as exempt on her bankruptcy schedules.

During her Chapter 13 case, the Debtor sought and obtained approval of a permanent mortgage modification through the Home Affordable Modification Program. (Docs. 6, 43, 50, 62, 66).

On July 11, 2014, the Debtor filed a Fourth Amended Chapter 13 Plan, which provided for the Debtor to make monthly payments to the Chapter 13 Trustee from her future earnings, and for the Chapter 13 Trustee to disburse a portion of the Debtor's payments to the holder of the home mortgage in the amount approved by the modification. The Plan also provided for the re-vesting of title to estate property in the Debtor upon confirmation. (Doc. 65).

On September 23, 2014, the Debtor filed an Amended Schedule of Personal Property, and an Amended Schedule of Property Claimed as Exempt. (Doc. 72). On the Amended Schedules, the Debtor listed an interest in a 2013 income tax refund in the amount of \$4,749.00, and claimed \$4,000.00 of the refund as exempt under §222.25(4) of the Florida Statutes.

The Chapter 13 Trustee asserts that the Debtor is not entitled to the claimed personal property exemption, because she “does have and receive the benefit of a homestead whether [s]he claims it exempt or not.” (Doc. 74).

Discussion

Article X, section 4(a)(1) of the Florida Constitution provides that a person’s homestead is exempt from forced sale under process of any court. Fla. Const. art. X, §4(a)(1). To qualify for the constitutional protection, the homestead “must meet constitutionally defined size limitations and must be owned by a natural person who is a Florida resident who either makes or intends to make the property that person’s residence.” Cutler v. Cutler, 994 So.2d 341, 343 (Fla. 3d DCA 2008).

In addition to the constitutional homestead protection, the Florida Constitution and Florida Statutes also provide Florida residents with certain exemptions for personal property. Section 222.25(4) of the Florida Statutes, for example, provides:

222.25. Other individual property of natural persons exempt from legal process

The following property is exempt from attachment, garnishment, or other legal process:

...

(4) A debtor’s interest in personal property, not to exceed \$4,000.00, if the debtor does not claim or receive the benefits of a homestead exemption under s. 4, Art. X of the State Constitution.

Fla. Stat. §222.25(4)(Emphasis supplied). “Section 222.25(4) exempts personal property other than a homestead, but allows for an expanded personal property exemption to qualified debtors, i.e., those who did not claim any homestead exemption. Fla. Stat. §222.25(4). ‘The intent of the statute appears to be to give a debtor who lacks homestead protections some extra personal exemptions.’” In re

Dumoulin, 2011 WL 1772160, at 2 (11th Cir.)(quoting In re Rogers, 396 B.R. 100, 102 (M.D. Fla. 2008)).

A. Dumoulin

In Osborne v. Dumoulin, 55 So.3d 577, 580 (Fla. 2011), the Supreme Court of Florida addressed the question of whether a debtor “receives the benefits of” Florida’s constitutional homestead exemption for purposes of §222.25(4), if the debtor owns homestead property but does not claim the exemption in his bankruptcy case.

The Florida Supreme Court answered the question by holding that a debtor does not receive the benefits of the constitutional homestead exemption, and may claim the personal property exemption under §222.25(4), if he does not claim the homestead exemption in his bankruptcy case, and the trustee’s administration of the bankruptcy estate is not otherwise impeded by the homestead exemption. Dumoulin, 55 So.3d at 590.

The Florida Supreme Court’s decision is based on two primary points. First, the Court determined that the term “benefits” in §222.25(4) refers “only to the protection of the homestead from the reach of creditors,” as that protection is provided by the constitutional exemption. “[T]he protection of the homestead from creditors constitutes the only ‘benefits’ of the article X homestead exemption.” Id. at 587.

Second, the Court determined that a debtor in bankruptcy “effectively surrenders” his homestead to the bankruptcy trustee for administration if he does not claim the homestead exemption in his case. Consequently, “when the real property which has been occupied by a debtor as his homestead becomes subject to administration by the bankruptcy trustee, the debtor has lost the benefits of the homestead exemption.” Id. at 588.

The Eleventh Circuit Court of Appeals subsequently conformed the answer of the Supreme Court of Florida:

Benefits, according to the state supreme court, are the protection of the homestead from creditors. *Id.* at 586-87. To “claim or receive” the benefits within the meaning of §222.25(4) gives the debtor the option to claim the homestead exemption. When the debtor elects not to do so, thus surrendering the home to the bankruptcy trustee, the debtor has lost the benefits of the homestead exemption. *Id.* at 587-88.

In re Dumoulin, 2011 WL 1772160, at 2. In other words, the Florida Supreme Court held that a debtor who does not claim a homestead exemption in his bankruptcy case thereby subjects the homestead to administration by a bankruptcy trustee. The trustee serves as representative of the debtor’s creditors. Consequently, the debtor does not “receive the benefits of” the homestead exemption for purposes of §222.25(4), because he has lost the only benefit provided by the homestead exemption, which is protection of the homestead from his creditors.

B. Chapter 7

The decision in Dumoulin involved a debtor in a Chapter 7 bankruptcy case. In re Dumoulin, 2011 WL 1772160, at 1; 55 So.3d at 580.

“Subsequent to *Dumoulin*, courts have uniformly ruled that a Chapter 7 debtor who intends to retain his residence does not receive the benefit of homestead exemption if he has not claimed the residence as exempt and there is no other impediment to the Chapter 7 trustee’s administration of the residence as an asset of the estate.” In re Valone, 500 B.R. 645, 649 (Bankr. M.D. Fla. 2013), *aff’d*, 2014 WL 970024 (M.D. Fla.) (Emphasis supplied).

In Rodale, for example, a Chapter 7 debtor owned a home but did not claim a homestead exemption on his bankruptcy schedules. Based on the decision in Dumoulin, this Court found that the debtor did not “receive the benefits of” the constitutional homestead exemption for purposes of

§222.25(4), even though the trustee was unlikely to administer the property because it lacked value for the estate, and even though the debtor intended to retain the property as his residence. In re Rodale, 452 B.R. 290 (Bankr. M.D. Fla. 2011). Similarly, in Iuliano, the Court found that a Chapter 7 debtor did not receive the benefits of the homestead exemption within the meaning of §222.25(4), because he did not claim his residence as exempt in the Chapter 7 case, even though the debtor intended to retain the property as his home. In re Iuliano, 2011 WL 1627172 (M.D. Fla.).

The critical factor in both Rodale and Iuliano, in accordance with the decision in Dumoulin, is that the debtor's residential property was subject to administration by the Chapter 7 trustee because the debtor had not claimed a homestead exemption on his bankruptcy schedules. In re Rodale, 452 B.R. at 297(The operative conduct was the debtor's decision to not claim the homestead exemption in the bankruptcy case, with the result that the debtor "effectively surrendered" the homestead to the trustee for administration.); In re Iuliano, 2011 WL 1627172(The debtor did not receive the benefits of the homestead exemption, because the residence was made available for administration by the Chapter 7 trustee when it was not claimed as exempt.).

C. Chapter 13

In the matter under consideration, the Debtor filed a petition under Chapter 13 of the Bankruptcy Code, not a petition under Chapter 7. She did not claim her residential Property as exempt on her bankruptcy schedules, and proposed a Chapter 13 Plan that provides for retention of the Property and payment of the mortgage on the home.

The effect of a debtor not claiming an exemption in a Chapter 13 case is fundamentally different from a debtor not claiming the exemption in a Chapter 7 case.

It is axiomatic that Chapter 7 and Chapter 13 serve different purposes. Chapter 7 entails a review of the debtor's assets, and the liquidation of any non-exempt equity in those assets for the benefit of the debtor's pre-petition creditors. Chapter 13 allows a debtor to keep his or her assets, by making payments to the debtor's creditors over a period of three to five years.

In re Quigley, 391 B.R. 294, 312 (Bankr. N.D. W.Va. 2008). The duties of a Chapter 7 trustee, therefore, include liquidating the estate's property, whereas the duties of a Chapter 13 trustee include ensuring the debtor's performance under his plan. See 11 U.S.C. §§704, 1302.

Because of these differences between the operating chapters of the Bankruptcy Code, property that is not claimed as exempt in a Chapter 7 case is property of the bankruptcy estate that may be liquidated by the trustee.

In a Chapter 13 case, however, non-exempt property is not liquidated or administered by a trustee, but instead remains in the possession of the debtor. 11 U.S.C. §1306(b) ("Except as provided in a confirmed plan or order confirming a plan, the debtor shall remain in possession of all property of the estate.").

The primary effect of the property's non-exempt status relates to the amount that the debtor must pay under his Chapter 13 plan to satisfy the confirmation requirements of §1325 of the Bankruptcy Code. See In re Jozil, 2010 WL 5559697, at 2 (Bankr. M.D. Fla.). In other words, if the home is not exempt, a debtor may be required to pay the amount of any equity in the home to the Chapter 13 Trustee for distribution to creditors. The payment of a debtor's accumulated equity in the home, however, is not equivalent to the loss of his benefits under the homestead exemption. See Dumoulin, 55 So.3d at 587 (quoting In re Gatto, 380 B.R. 88, 93 (Bankr. M.D. Fla. 2007)) ("[The Trustees] point to benefits that are incidental to the ownership of a home such as the acquisition of owner's equity None of these benefits derive from the exemption for a homestead from the reach of creditors under

section 4, article X of the Florida Constitution.”). The home remains protected from forced sale by creditors, even if the debtor must contribute the amount of any equity to the Plan.

A Chapter 13 debtor who does not claim a homestead exemption in his bankruptcy case, therefore, is not “effectively surrendering” his home to the trustee for administration within the meaning of the Florida Supreme Court’s decision in Dumoulin. Consequently, a Chapter 13 debtor who intends to retain his residential property does not lose the benefits of the homestead exemption by failing to claim the exemption on his bankruptcy schedules.

Dumoulin requires a debtor who wishes to retain his residence and to claim the wild card exemption to “effectively surrender” the residence to the trustee for administration. But, unlike in a Chapter 7 case, a Chapter 13 trustee is not charged with the duty to administer property of the estate, and the debtor’s residence never becomes subject to administration by the Chapter 13 trustee. Therefore, a Chapter 13 debtor who proposes to retain his residence during the term of his plan but who does not claim the residence as exempt still receives the homestead exemption’s protections despite failing to assert the homestead exemption.

In re Valone, 500 B.R. at 651. In affirming the Bankruptcy Court’s decision in Valone, the District Court found that the Chapter 13 debtors in that case received the benefit of the homestead exemption, as those benefits were defined by the Florida Supreme Court in Dumoulin, because their residence was not subject to liquidation by the Chapter 13 trustee or any of their creditors during the term of their Chapter 13 plan. In re Valone, 2014 WL 970024, at 5. See also In re Azar, Case No. 8:11-bk-6973-KRM(The Chapter 13 debtors received the benefits of the homestead exemption during the life of the case, even though they had not claimed the exemption on their bankruptcy schedules, because the home was not subject to liquidation by a bankruptcy trustee.)(Doc. 38, pp. 17-18).

In this case, the Debtor owns a home, but did not claim it as exempt in her Chapter 13 case. She obtained a permanent modification of the home mortgage during her bankruptcy case, and filed a

Chapter 13 plan reflecting her intent to retain the home as her residence. She has not “effectively surrendered” the home for administration by a trustee in bankruptcy, and is therefore receiving the benefits of the homestead exemption for purposes of §222.25(4) of the Florida Statutes. Accordingly, the Debtor may not claim the personal property exemption provided by the statute, and the Chapter 13 Trustee’s objection to the personal property exemption should be sustained.

Conclusion

Section 222.25(4) of the Florida Statutes provides that a debtor may claim a “wildcard” personal property exemption if he does not “claim or receive the benefits of” a homestead exemption under the Florida constitution. Following the Florida Supreme Court’s decision in Dumoulin, bankruptcy courts have generally found that a Chapter 7 debtor who does not claim a homestead exemption on his bankruptcy schedules may claim the wildcard exemption under §222.25(4), even if the debtor intends to retain his residence.

In Chapter 13 cases, however, a debtor/homeowner who does not claim a homestead exemption in his bankruptcy case is not “effectively surrendering his home to the trustee for administration.” Consequently, a Chapter 13 debtor who intends to retain his residential property receives the benefits of the homestead exemption, even though the exemption is not claimed on his bankruptcy schedules, and the debtor is not entitled to claim the wildcard personal property exemption under §222.25(4) of the Florida Statutes.

Accordingly:

IT IS ORDERED that the Objection of Douglas Neway, as Chapter 13 Trustee, to Property Claimed as Exempt by Debtor, is sustained, and the Debtor's claim of the personal property exemption pursuant to §222.25(4) of the Florida Statutes is disallowed.

DATED this 20th day of NOVEMBER, 2014.

BY THE COURT

P. Glenn

PAUL M. GLENN
United States Bankruptcy Judge