

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

In re:

Case No. 9:05-bk-15856-ALP
Chapter 7 Case

A. STEVEN BUONOPANE,

Debtor

**ORDER ON MOTION FOR PARTIAL
SUMMARY JUDGMENT**
(Doc. No. 52)

THE MATTER under consideration before this Court is a Motion for Partial Summary Judgment, filed by Diane L. Jensen, Trustee (Trustee). The Motion is filed in a contested matter which involves a challenge by the Trustee of the Debtor's right to claim the benefits of the Florida homestead exemption. The property in question was, according to the Trustee, acquired by the Debtor within 1,215 days prior to the commencement of the Chapter 7 case, thus the homestead right is governed by 11 U.S.C. §522(p). At the hearing on the Trustee's Motion, the Trustee established the following facts, which are without dispute and, according to the Trustee, would justify the award of a Partial Summary Judgment and the determination that the Debtor's right to enjoy the homestead exemption under the State of Florida is governed by Section 522(p).

On October 23, 2000, Stephen Lee Johnson conveyed by Warranty Deed real property, Parcel Identification No. 67390860061 (the Real Property) to Kathleen F. Buonopane, as Trustee to the Todd-Rae Realty Trust. On December 28, 2004, Kathleen F. Buonopane, individually and as Trustee of the Todd-Rae Realty Trust dated July 17, 2000, and A. Steven Buonopane (the Debtor), who resides at 879 Meadowland Drive, Naples, Florida 34108, as grantors executed a Warranty Deed conveying the interest in the Real Property described above to the Debtor and his wife, Kathleen Buonopane. (Trustee's Exhibit A). It appears from the record that on July 17, 2000, the Todd-Rae Realty Trust was established indicating that the beneficiaries of the Trust were the Debtor and his wife, who are not involved in this Chapter 7 case. (Trustee's Exhibit C). On the same date, the Debtor and his wife filed a Declaration of Domicile located at the above-stated Naples residence declaring that the property is their permanent home

and predominate residence and they intend to use the same regularly. Id.

The Debtor filed his voluntary Petition for Relief on August 10, 2005. Based on these undisputed facts, the Trustee contends that, although it is not raised in the pleading, the Debtor does not have a cognizable interest in the Real Property, thus, he is not entitled to the constitutional protection granted to individuals in Florida by Article X, Section 4 of the Florida Constitution. In opposition to the Trustee's Motion, counsel for the Debtor contends first that Section 522(p) is not applicable in the State of Florida citing In re McNabb, 326 B.R. 785 (Bankr. D. Ariz. 2005) and, in any event, the Debtor has sufficient equitable ownership interest in the subject property which would support his homestead exemption claim.

Considering first the applicability of Section 522(p) of the Code as it applies to the issue which is currently before this Court, it is without dispute that the bankruptcy court in Arizona held in McNabb, that Section 522(p) does not apply in states which have opted-out of the federal exemptions. Section 522(p) provides in part: "as a result of electing under subsection (b)(3)(A) to exempt property under State and local law, a debtor may not exempt any amount of interest that was acquired by the debtor during 1215-day period preceding the day of the filing of the petition that exceeds in the aggregate \$125,000 in value...." The decision of McNabb has been rejected by a line of bankruptcy cases which considered the identical issue, such as, In re Kaplan, 331 B.R. 483(Bankr. S.D. Fla. 2005); In re Virissimo, 332 B.R. 201(Bankr. D. Nev. 2005); and In re Landahl, 2006 WL 506034 (Bankr. M.D. Fla.). Although the courts rejecting McNabb used somewhat different interpretation of the term "as of a result of electing," all rejected McNabb and concluded that McNabb's interpretation of the term "as a result of electing" was inconsistent with the undisputable intent of Congress in enacting subsection (p) of Section 522 of the Code. As Judge Makell of the Bankruptcy Court of Nevada noted in the case of In re Kane, 336 B.R. 477, (Bankr. D. Nev. Jan. 2006), the statement by the Representative, James Sensenbrenner of Wisconsin, fully supports the proposition that the provision of the Code was designed to close "the 'millionaire's mansion' loophole in the current bankruptcy code that permits corporate criminals to shield their multi-million dollar homesteads." 151 CONG. REC. H2048 (DAILY ED. Aril 14, 2005). A literal adoption of the McNabb principle would produce the bizarre result that Section 522(p) would not cover Florida, since Florida is where several mansion loophole abuses are

alleged to have occurred, but Section 522(p) would cover Massachusetts, Minnesota and Rhode Island, none of which have unlimited exemptions. There is no known history of any widespread mansion abuses in these jurisdictions. This Court is in full agreement with the reasoning and the holding of Kane and is satisfied that subsection (p) of Section 522 of the Code applies in Florida, notwithstanding the fact that, in Florida, an individual has no right to elect between a federal and state election by virtue of Fla. Stat. 222.20.

This record leaves no doubt that the Debtor acquired his interest, if he has any, in the Real Property within the 1,215 days of his Petition date. Thus, the limitation on the right of exemption would apply assuming that under applicable local law the Debtor does have an interest cognizable in law which would support a claim of exemption based on the homestead exemption as granted by Article X, Section 4 of the Florida Constitution.

Accordingly, it is

ORDERED, ADJUDGED AND DECREED that the Trustee's Motion for Partial Summary Judgment be, and the same is hereby granted, and it is determined that Section 522(p) of the Bankruptcy Code is applicable in the State of Florida and, thus, controls the Debtor's right of exemption. It is further

ORDERED, ADJUDGED AND DECREED that the remaining issue, that is, the Debtor's right to claim the benefit of the Florida Homestead under Article X, Section IV of the Florida Constitution shall be forthwith scheduled for pretrial conference on May 10, 2006, beginning at 2:00 p.m. at the United States Bankruptcy Courthouse, Fort Myers, Federal Building and Federal Courthouse, Room 4-117, Courtroom D, 2110 First Street, Fort Myers, Florida, in order to prepare the issue for trial.

DONE at Tampa, Florida, on 4/6/06

/s/ Alexander L. Paskay
ALEXANDER L. PASKAY
United States Bankruptcy Judge