UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

IN RE

VALERIE HOLLAND FUREY — Case No. 13-bk-4538-JAF

Debtor. — Chapter 13

_____/

ORDER OVERRULING THE OBJECTIONS TO EXEMPTION FILED BY LIBERTY NATURAL PRODUCTS INC. AND THE CHAPTER 13 TRUSTEE

This case is before the Court upon the Chapter 13 Trustee's (the "Trustee") Objection to Property Claimed as Exempt by Debtor, Valerie Holland Furey, and Notice of Preliminary Hearing (the "Trustee's Objection") and Liberty Natural Products, Inc.'s, ("Liberty"), Objection to Claim of Exemption ("Liberty's Objection"). (Docs. 40, 44). Debtor filed a Brief in Opposition to Objections filed by Liberty and the Trustee. (Doc. 107). The Court held a hearing on the Objections on January 15, 2014, and took the matter under advisement. Thereafter, Liberty filed a Motion for Limited Reopening of the Record of the Evidentiary Hearing on Objection to Claim of Exemption (the "Motion"), to which Debtor objected. (Docs. 118, 120). The Court held a hearing on the Motion and granted Liberty's requested relief *i.e.*, admitted the composite exhibit A attached to the Motion into evidence; the composite exhibits A consists of Debtor's fee agreements with Bunnell & Woulfe, P.A. (the "Bunnell Law Firm") (Doc. 118-1, 134). Debtor further filed an affidavit and a Supplemental Memorandum of Law in Opposition to the Objections. (Doc. 137, 138). Upon careful consideration of the evidence and the parties'

arguments, the Court concludes that the Objections to Debtor's claim of exemption should be overruled.

Background

On April 13, 2009, Liberty obtained a money judgment in the amount of $136,665.10 from the Circuit Court of Clackamas County, Oregon (the "Oregon State Court") in a breach of contract action against Debtor (then known as Valerie Hawk-Hoffman). (Debtor's Ex. 1). On August 11, 2009, Liberty obtained a supplemental money judgment from the Oregon State Court against Debtor in the amount of $14,531.75 for its attorney's fees and costs for defending a counterclaim filed by Debtor (collectively, the "Oregon Judgments") (Debtor's Ex. 1). On May 20, 2009, Liberty domesticated the Oregon Judgments and recorded them in the Official Records for Palm Beach County, Florida, thereby creating a lien on all real property owned by Debtor in Palm Beach County. (Debtor's Ex. 1). On October 30, 2009, Liberty filed an action in Palm Beach County seeking a determination that Debtor was not entitled to claim that condominium property located at 2180 Ibis Isle Road, Unit 15, Palm Beach, Florida (the "Palm Beach Condo") was homestead property exempt from execution by Liberty (the "Homestead Action"). (Debtor's Ex. 1).

During the pendency of the Homestead Action, Debtor and her former husband, David Hoffman, decided to sell the Palm Beach Condo[1] because Debtor wished to purchase another property in a better school zone. To that end, on February 23, 2010, the Fifteenth Judicial Circuit Court for Palm Beach County (the "Fifteenth Judicial Circuit Court") entered an order releasing the Palm Beach Condo from the operation and effect of Liberty's lien and discharged the lis pendens. (Debtor's Ex. 4). The release of the judgment lien and discharge of the lis pendens was

[1] Pursuant to the Fifteenth Judicial Circuit Court's declaratory judgment (Debtor's Ex. 6), Debtor's former husband executed a quit claim deed to convey his interest in the Palm Beach Condo and it was signed and recorded in December of 2007. (Debtor's Ex. 6 at 1-2)

conditioned upon Debtor placing the net sales proceeds of the Palm Beach Condo in an escrow account pending the determination of whether the Palm Beach Condo was exempt from Liberty's judgment (the "Escrow Order"). (Debtor's Ex. 4). Furthermore, the Fifteenth Judicial Circuit Court ordered as follows:

> If this court determines that the [Palm Beach Condo] is exempt from the judgment lien as homestead property, then the cash proceeds shall be released to [Debtor] and/or Defendants, [Debtor] and David Hoffman. If this Court determines that the [Palm Beach Condo] is not exempt as homestead real property, then the proceeds shall be subject to the judgment lien of [Liberty].

(Debtor's Ex. 4). Thereafter, the Palm Beach Condo was sold and the sum of $471,437.85 was deposited into the escrow account of the Debtor's attorney. (Debtor's Ex. 1). During the pendency of the Homestead Action, the Fifteenth Judicial Circuit Court entered an Order on Motion to Release Funds from Escrow. (Debtor's Ex. 5). In this order, the Fifteenth Judicial Circuit Court determined that the amount necessary to cover the Oregon Judgments including interest until the end of 2010 was $169,590.05. (Debtor's Ex. 5). For this reason, the Fifteenth Judicial Circuit Court determined that Debtor and her former Husband were entitled to the release of $301,847.80 leaving the balance, $169,590.05, in the escrow account pending the final outcome of the Homestead Action. (Debtor's Ex. 5). On March 30, 2011, Debtor and her former husband purchased real property located at 3909 South Trapani Drive, St. Augustine, Florida ("St. Augustine Property"), and thereafter they filed an affidavit declaring the St. Augustine Property as their homestead. (Debtor's Ex. 1). On February 6, 2012, the Fifteenth Judicial Circuit Court entered a declaratory judgment concluding that Debtor was entitled to homestead protection under Article X, Section 4 of the Florida Constitution with respect to the Palm Beach Condo. (Debtor's Ex. 6). Liberty appealed the declaratory judgment to the Fourth District Court of Appeal. (Debtor's Ex. 1). The Fifteenth Judicial Circuit Court granted the Liberty's motion for

stay of disbursement of escrow funds and ordered the stay to remain effective until the conclusion of the appeal if Liberty posted a bond in the amount of $39,478.19. (Debtor's Ex. 7). On June 27, 2013, the Fourth District Court of Appeal *per curiam* affirmed the declaratory judgment and thereafter denied rehearing. (Debtor's Exs. 8; 9).

On July 25, 2013, Debtor filed a petition for relief under Chapter 13 of the Bankruptcy Code. (Doc. 1). In her schedules, Debtor claims that her St. Augustine Property and funds held in the escrow account are exempt under Florida homestead exemption protection. (Doc. 1 at 19). The Trustee filed his Objection and Liberty filed its Objection. (Doc. 40, 44). Both the Trustee and Liberty objected to Debtor's claim of exemption in the sale proceeds held in the escrow account.[2] (Doc. 40 at 1-2, Doc. 44 at 1-5).

The Court held a hearing on the objections, and Debtor testified she intended to use the entire amount of sale proceeds of the Palm Beach Condo to purchase another property in a better school zone. Unfortunately, Liberty prevented her from doing so because it obtained the Escrow Order, forcing her to transfer the sale proceeds to the escrow account. After Debtor was allowed to withdraw $301,847.80, she purchased the St. Augustine Property for $205,000.00 or $225,000.00. She used the balance of that amount to pay for fees and costs associated with purchasing the real property; she also constructed a pool, patio and "various other things." However, the St. Augustine Property does not suit her needs or the needs of her family, and apparently it desperately needs renovations. For this reason, Debtor plans to spend the balance remaining in the escrow account to improve the St. Augustine Property or to acquire a new homestead property.

[2] In addition, the Trustee objected to Debtor's claimed exemption in $372.53 held in a checking account; however, at the evidentiary hearing, the parties announced that this issue had been resolved. For this reason, the Court will not address it.

On February 4, 2014, Liberty filed a Motion for Limited Reopening of the Record of the Evidentiary Hearing on Objection to Claim of Exemption (the "Motion for Limited Reopening of the Record"). (Doc. 118). In the Motion for Limited Reopening of the Record, Liberty requested that the Court admit into evidence Debtor's fee agreements with the Bunnell Law Firm. (Doc. 118 at 1-2). Liberty claims that Debtor's fee agreement to pay the Bunell Law Firm's contingency fee and costs out of escrow funds establishes that Debtor does not intend to use the escrow funds to refurbish her homestead or to acquire a new homestead. (Doc. 118 at 2). Liberty claims that the fee agreements did not constitute a waiver of the homestead exemption protection. (Doc. 118 at 2). Rather, Liberty argues that the homestead protection did not apply to the balance remaining in the escrow account in the first instance, in part, because the fee agreements show that Debtor lacks intent to use the funds solely to improve her homestead or acquire a new homestead. (Doc. 118 at 2 n.1). The Court entered an Order Granting the Motion for Limited Reopening of the Record. (Doc. 134). The Court admitted Debtor's fee agreements with the Bunnell Law Firm into evidence as part of the record of the hearing held on January 15, 2014. (Doc. 134 at 1). The Court allowed Debtor to file an affidavit and a supplemental brief within thirty days from the date of the entry of the order and gave Liberty seven days to respond to Debtor's papers. (Doc. 134 at 1-2).

On March 17, 2014, Debtor filed her affidavit and Supplemental Memorandum of Law in Opposition to Objections to Exemptions filed by Liberty and the Trustee. (Docs. 137, 138). Liberty did not file a response. In the affidavit, Debtor provided the following testimony. Liberty initiated the Homestead Action; on February 23, 2010, Debtor and her former husband retained the services of Don Fradley and Fradley Law Firm, P.A. (the "Fradley Law Firm") to represent them in the Homestead Action and they used their own financial resources to pay for legal

services. (Doc. 137 at 1-2). During the pendency of the Homestead Action, Debtor and her former husband ran out of money to keep the Fradley Law Firm retained and could not hire any other counsel. (Doc. 137 at 2). The Bunnell Law Firm agreed to take over representation of the Homestead Action on a contingency fee basis. (Doc. 137 at 2). At the time Debtor and her former husband retained the Bunnell Law Firm, there was approximately $169,000.00 in the escrow account, which was their only substantial asset. (Doc. 137 at 2). On February 11, 2011, Debtor and her former husband signed a retainer agreement providing a contingency fee to the Bunnell Law Firm payable from the escrow account upon a successful defense of the Homestead Action (the "First Retainer Agreement"). (Doc. 137 at 2). Subsequent to filing the initial complaint in the Homestead Action, Liberty made several amendments to the complaint adding, among other things, counts against Debtor and her former husband for defamation. (Doc. 137 at 2). On March 17, 2012, Debtor and her former husband signed another retainer agreement to cover representation of the defamation counts (the "Second Retainer Agreement"). (Doc. 137 at 2). The Second Retainer Agreement does not provide for any contingency fee to the Bunnell Law Firm. Instead, it provides that the Bunnell Law Firm will be paid a flat fee per day for trial preparation and trial and on an hourly basis for discovery.[3] (Doc. 137 at 3). Thereafter, Debtor testified that she intended to reinvest the entire amount of the proceeds from the sale of the Palm Beach Condo into another homestead in Florida and the only reason she was not able to reinvest the entire amount of proceeds into another homestead in Florida was because of the litigation initiated by Liberty.

Analysis

[3] The Bunnell Law Firm filed a claim in Debtor's case for $124,558.56 for "[a]ttorney [f]ees and costs for services performed." (Claim No. 5).

When dealing with a Debtor's exemptions, Federal Rule of Bankruptcy Procedure 4003(c) places the burden of proof on the objecting party who must prove "that the exemptions are not properly claimed." Fed. R. Bankr. P. 4003(c). The objecting party must prove that the exemption is not proper by a preponderance of the evidence. In re Hill, 163 B.R. 598, 603 (Bankr. N.D. Fla. 1994).

The exemption of a debtor's homestead from process in Florida is constitutionally protected. See Fla. Const. Art. X, § 4.[4] In order to establish a homestead, a Florida resident must acquire title to the "land in question and with his family [make] his home thereon . . . and no action of the Legislature or declaration or other act on his part [is] required to make it his homestead. . . ." Hutchinson Shoe Co. v. Turner, 130 So. 623, 624 (Fla. 1930). "[T]he homestead exemption is to be liberally construed in the interest of protecting the family home." [5] Havoco of Am., Ltd. v. Hill, 790 So. 2d 1018, 1020 (Fla. 2001).

Furthermore, it is well established law in Florida, that the proceeds of the sale of a homestead are exempt from the claims of creditors only if a debtor has "an abiding good faith intention prior to and at the time of the sale of the homestead to reinvest the proceeds thereof in another homestead within a reasonable time." Orange Brevard Plumbing & Heating Co. v. La Croix, 137 So. 2d 201, 206 (Fla. 1962). ("[O]nly so much of the proceeds of the sale as are intended to be reinvested in another homestead may be exempt under this holding. Any surplus

[4] Article X, § 4(a) of the Florida Constitution provides for an unlimited exemption as follows:

> (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. . . .

[5] "The general purpose of the homestead provision in the Florida Constitution, at least historically, has been to protect the family and the family home." In re Estate of Morrow, 611 So. 2d 80, 81 (Fla. 2d DCA 1992) (citing City Nat'l Bank of Fla. v. Tescher, 578 So. 2d 701 (Fla. 1991)).

over and above that amount should be treated as general assets of the debtor."). This is possible due to the applicability of the doctrine of equitable conversion. Id. at 207. In other words "[t]he funds resulting from the voluntary sale of the homestead are 'converted', and while 'in transit' assume the character of the exempt real property, dependent, however, upon a bona fide intent of the seller to reinvest such funds in another homestead within a reasonable time." Id. "The requirement as to the intention of the seller to reinvest is necessary in order to carry into effect the real, underlying purpose of the homestead exemption . . . ." Id. Moreover, Florida courts refuse to "fix . . . an iron clad inflexible period of time and thereby define reasonable period of time." Id.; see also In re Binko, 258 B.R. 515, 517 (Bankr. S.D. Fla. 2001). "The question whether funds received from the sale of a homestead are invested in another homestead within a *reasonable time* must be determined from the facts and circumstances of each case." Orange Brevard, 137 So. 2d at 207 (emphasis in original).

The parties do not dispute that the sale proceeds of the Palm Beach Condo, $471,437.85, that were transferred to the escrow account were protected by the homestead exemption. The parties also do not dispute that $301,847.80, the amount Debtor was allowed to use to acquire a new homestead during the pendency of the Homestead Action, is protected by the homestead exemption. The parties dispute whether the homestead protection applies to the balance of the sale proceeds, the $169,590.05 that still remains in the escrow account. Liberty claims that Debtor may not claim two separate homestead exemptions in both the St. Augustine Property and the escrow funds. Liberty does not elaborate on this issue or provide a theory supporting its argument. However, it appears that Liberty is arguing that Debtor waived her homestead exemption protection in the $169,590.05 when Debtor purchased the St. Augustine Property after

the Fifteenth Judicial Circuit Court ordered a release of $301,847.80 during the pendency of the Homestead Action. The Court respectfully disagrees.

The eligibility of a debtor to exempt property is fixed at the time the bankruptcy petition is filed. In re Franzese, 383 B.R. 197, 203 (Bankr. M.D. Fla. 2008). A "bankruptcy court must interpret and apply the Florida exemption law in the same manner as a Florida State Court." Colwell v. Royal Int'l Trading Corp. (In re Colwell), 196 F.3d 1225, 1226 (11th Cir. 1999). Florida Case law specifically establishes the rule that provides "'once a homestead always a homestead . . . .'" Reed v. Fain, 145 So. 2d 858, 867 (Fla. 1962). Homestead status continues until the homestead is abandoned or alienated in the manner provided by law. Coy v. Mango Bay Prop. & Invs., Inc., 963 So. 2d 873, 878 (Fla. 4th DCA 2007); In re Franzese, 383 B.R. 197, 203 (Bankr. M.D. Fla. 2008) ("[A] homeowner can waive the right to claim homestead protection by abandonment or alienation in any manner provided by law."). "[T]here is little that a homeowner can do under Florida law to lose the protection of homestead." [6] In re Bennett, 395 B.R. 781, 789 (Bankr. M.D. Fla. 2008). To show abandonment, both the owner and his family must have abandoned the property. Cain v. Cain, 549 So. 2d 1161, 1163 (Fla. 4th DCA 1989). In re Minton, 402 B.R. 380, 383 (Bankr. M.D. Fla. 2008) ("The claimant's stated intention regarding the property is a principal factor in determining whether abandonment has occurred."). However, "[s]uch exceptions to the exemption 'should be strictly construed.'" In re Minton, 402 B.R. 380, 383 (Bankr. M.D. Fla. 2008). "Florida State Courts exhibit 'extreme reluctance' to find abandonment of the homestead exemption." In re Minton, 402 B.R. 380, 383 (Bankr. M.D. Fla. 2008).

[6] For instance, a homeowner may waive the homestead protection and such waiver may "be accomplished as the Florida Constitution prescribes: by 'mortgage, sale, or gift . . . .'" Chames v. DeMayo, 972 So. 2d 850, 861 (Fla. 2007). "Requiring that a waiver of the homestead exemption be made in the context of a mortgage assures that the waiver is made knowingly, intelligently, and voluntarily." Id. Thus, a general waiver in an otherwise unsecured instrument such as a retainer agreement is not valid. Id. at 861-62.

Here, Debtor's testimony established that she sold the Palm Beach Condo, where she established and maintained a homestead, with the intent to reinvest the sale proceeds, $471,437.85, in another homestead. Debtor was prevented from doing so by an order of the Fifteenth Judicial Circuit Court issued in the Homestead Action, which required her to put the sale proceeds into the escrow account. Thereafter, the Fifteenth Judicial Circuit Court ordered that only $169,590.05 must remain in the escrow account. At that time, Debtor purchased the St. Augustine Property and established a new homestead therein during the pendency of the Homestead Action. These circumstances do not establish an abandonment of the homestead protection applicable to the $169,590.05 remaining in the escrow account. Furthermore, the Court is unaware of any case law mandating that a person spend the entire amount of sale proceeds protected by homestead exemption at the time of purchasing the new homestead. Adoption of such an arbitrary rule would be completely impractical because it would deprive homeowners of the opportunity to make necessary improvements after the purchase. In other words, if a person purchased a new homestead for less than the homestead sale proceeds, he or she could no longer enjoy Florida constitutional protection in the reminder of the homestead sale proceeds regardless of whether he or she had intended to invest the remainder of the homestead sale proceeds in necessary improvements.[7] The Court declines to adopt such a rule and concludes Debtor did not abandon her homestead exemption right to the balance remaining in the escrow account when she was forced to purchase another homestead for a lesser amount. Debtor is still entitled to reinvest $169,590.05 in her new homestead.

[7] Chames v. DeMayo, 972 So. 2d 850, 860 (Fla. 2007) ("An individual cannot waive a right designed to protect both the individual and the public . . . . We have repeatedly recognized that the homestead exemption protects not only the debtor, but also the debtor's family and the State.").

In the alternative, Liberty claims that Debtor's testimony that she intended and still intends to invest the escrow funds, $169,590.05, in the new homestead is not credible. Liberty points to the First Retainer Agreement, which provides Debtor agreed to pay a contingency fee to the Bunnell Law Firm payable out of escrow funds upon the successful outcome of the Homestead Action. The fee due to the Bunnell Law Firm remains unpaid and it appears Debtor attempted to waive her right to homestead exemption in a portion of the escrow funds to defend her right to these funds against Liberty. However, "a waiver of the homestead exemption in an unsecured agreement [such as retainer agreement] is unenforceable." Chames v. DeMayo, 972 So. 2d 850, 853 (Fla. 2007) (stating that the homestead protection may only be waived as prescribed by art. X, § 4(c) of the Florida Constitution—by "mortgage, sale, or gift"—and not via a retainer agreement). Debtor's testimony established that at the time she sold the Palm Beach Condo she intended to reinvest the homestead proceeds. Debtor specifically testified that she still intends to invest the entire amount of the escrow funds into the new homestead and it appears she does not intend to pay that fee. Such behavior may be morally questionable, but it isn't sufficient to remove the escrow proceeds from the protection of homestead exemption. Accordingly it is,

ORDERED:

1. Liberty and the Trustee's Objections (Doc. 40, 44) are overruled.

2. Debtor's claim of exemption in the escrow funds is allowed.

DATED this 22 day of May, 2014 in Jacksonville, Florida.

/s/_____
JERRY A. FUNK
United States Bankruptcy Judge