

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE**

In re:

Bk. No. 01-12120-JMD
Chapter 13Walter M. Marsico, Sr.,
Debtor

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MEMORANDUM OPINION

I. INTRODUCTION

On November 1, 2001, the Court held a hearing on the objections to the New Hampshire homestead exemption claimed by the Debtor and his non-debtor spouse in property located at 95 Canopache Road in Wolfeboro, New Hampshire (the "Property"). The Debtor had previously asked for and received Court authorization to sell the Property. All liens not paid at the closing and the homestead exemption claimed by the Debtor and his non-debtor spouse attached to the proceeds from the sale of the Property that are being held in escrow by the Chapter 13 Trustee. Two creditors, Canopache Cottages Association (the "Association") and Walter A. Morgner, Jr. ("Morgner"), filed objections to the homestead exemption claimed by the Debtor and his non-debtor spouse. After hearing from all parties on November 1, 2001, the Court established a schedule for submitting post-hearing briefs and took the matter under submission.

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the “Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire,” dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

II. FACTS

Prior to July of 1998, the Debtor and his non-debtor spouse (collectively the “Marsicos”) resided in New Jersey in a home previously owned by the Debtor’s parents. In April of 1998 the Debtor’s wife purchased the New Jersey home. The Marsicos had lived in New Jersey all of their lives and have extended family that live in the area. In 1978 the Debtor had started a business in New Jersey. The business is no longer active. The Debtor’s wife had also run a business in New Jersey that remained active until approximately two years ago. On July 31, 1998, the Marsicos purchased and moved into the Property. During 1998 the Marsicos used the Property as a vacation home and returned to New Jersey in September of 1998. The Debtor testified that although they used the Property as a vacation home in 1998, they had always talked about moving to New Hampshire.

The Marsicos made some brief visits to the Property during the winter of 1998/1999 and then returned to the Property in August of 1999. The Marsicos remained at the property until mid-December of 1999, when they returned to New Jersey. On January 20, 2000, the Debtor filed a Chapter 13 bankruptcy petition with this Court. See BK. No. 00-10112-JMD. In March of 2000 the Marsicos once again returned to the Property. The Marsicos had made arrangements to operate a gas station/convenience store business under a six month trial lease during 2000. The gas station/convenience store business closed Columbus Day weekend and the Marsicos returned to New Jersey at that time, having decided not to purchase the gas station/convenience store business.¹

¹ The Court notes that the Debtor also testified that the Marsicos left the Property and returned to New Jersey in December of 2000. However, in other testimony the Debtor stated that the Marsicos had

Since purchasing the Property the Marsicos had had disagreements with the Association and in 2000 the Marsicos made attempts to sell the Property with the intent of purchasing another property in New Hampshire. During the winter of 2000 the Marsicos returned to the Property once in order to conduct business related to a potential sale of the property.

The sale of the Property did not occur over the winter and the Marsicos returned to the property in March of 2001. The Debtor testified that during March and April of 2001 he and his wife were making preparations to operate a marina grocery store under a one a one year lease agreement that had an option for future years. The Marsicos remained at the Property on a continuous basis until July of 2001 when the Property was sold.

On March 23, 2001 the Debtor's first Chapter 13 bankruptcy petition was dismissed by the Court. See Bk. No. 00-10112-JMD, Doc. No. 86. On June 22, 2001 the Debtor had filed a second Chapter 13 bankruptcy petition with the Court. After filing his second petition the Debtor asked for and received Court approval to sell the Property. Upon sale of the Property in July the Marsicos returned to their New Jersey home. The Debtor testified that both he and his wife continue to search for a new home in New Hampshire.

In support of their claim that they are domiciled in New Hampshire the Marsicos presented several documents wherein they listed the Property as their address. Entered into evidence were: a January 20, 2000, application to have their 1995 Jeep Cherokee titled in New Hampshire; a January 19, 2000, letter from an their attorney in the prior bankruptcy proceeding; a January 24, 2000, notice of Chapter 13 filing from the Court in the Debtor's first bankruptcy case; a copy of a December 1, 2000, contract for the sale of the Property that was never executed; a May 25, 2001, electric bill relating to the property; an August 28, 2000, insurance policy endorsement on their motor vehicles for the period of May 31, 2000 to July 31,

returned once around the end of November in 2000 to conduct some business with relation to a potential sale of the Property. Accordingly, the Court finds that the Marsicos could not have "returned" to the Property in November if they had not already left for New Jersey prior to November of 2000.

2000, which reduced the automobile premium; a 2000-2001 homeowners insurance policy; an August 14, 2000 letter from their real estate brokerage company, Century 21; a March 2, 2001, certificate of service for a pleading sent by Attorney Charles Gallagher to the Debtor; a personal guarantee note signed by the Debtor's spouse on June 6, 2001; and an affidavit to the New Hampshire Liquor Commission dated June 11, 2001. All of the aforementioned documents listed the Debtor's and/or his wife's address as 95 Canopache Road, Wolfeboro, New Hampshire. See Exhibits 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, and 113.

In support of their position, the Association and Morgner presented a copy of a July 2001 purchase and sale agreement that the Debtor had signed wherein the Debtor's address was listed as New Jersey. See Exhibit 201. With regards to the signing of documents such as Exhibit 201, the Debtor testified that since he is legally blind his wife reads the document to him and then positions the document so that he can sign it. The Debtor testified that he had signed several purchase and sale agreements that had been prepared by several different real estate agents. The Debtor further testified that he did not pay attention to the address listed for him on the purchase and sale agreement.

Finally, the Debtor testified at trial that although his long time accountant is in New Jersey, he did employ a bookkeeper in New Hampshire. Further, the Debtor's attorney for all matters other than bankruptcy is a long standing friend located in New Jersey.

III. DISCUSSION

Under 11 U.S.C. § 522(b), unless a state has opted out of the federal scheme, a debtor is permitted to exempt certain property from the bankruptcy estate based either upon state or federal exemption laws. If a debtor chooses to use state law exemptions the debtor may exempt property that is exempt under "State or local law that is applicable on the date of the filing of the petition at the place in which the debtor's domicile has been located for the 180 days immediately preceding the date of the filing or the petition, or for a longer portion of such 180-day period than in any other place." 11 U.S.C. § 522(b)(2)(A). Under Federal Rule of

Bankruptcy Procedure (“Rule”) 4003(c) the party objecting to an exemption claimed by the debtor bears the burden of establishing that the debtor is not entitled to the claimed exemption.

Upon examination of the bankruptcy venue statute, 28 U.S.C. § 1408, it becomes clear that domicile and residence do not have the same meaning under the bankruptcy code. The venue statute allows a debtor to file a bankruptcy petition in one of several different locations. The options available to the debtor include both his place of residence and his place of domicile. See 28 U.S.C. § 1408(c). Domicile has been defined as a place where a person has a permanent home and an intention of returning. See Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 48 (1989). In order to change domicile a person must have a physical presence in a new location and an intent to remain there for an indefinite period of time. See Id.; In re Sparfven, 265 B.R. 506, 518 (Bankr. D. Mass. 2001) (citations omitted). Where a person has more than one residence the intent of the person is particularly important. Sparfven, 265 B.R. at 518.

With regards to domicile, a person’s intent is determined by looking at his or her actions and statements. Id. There are many factors that courts may consider when determining domicile. These factors include: (1) where the person’s residence is located; (2) where a person votes; (3) where a person’s personal and real property is located; (4) where the person’s family is located; (5) the memberships the person holds in community churches, clubs, lodges, and other groups; (6) the location of the person’s stockbroker, lawyer, accountant, and other professionals; (7) payment of taxes; (8) place of employment and location of business; (9) insurance; (10) place of vehicle registration; (11) driver’s license; and (12) location of primary bank account. See District of Columbia v. Murphy, 314 U.S. 441, 455-58 (1941); Sparfven, 265 B.R. at 518-21. Courts also consider testimony of the person regarding his or her domicile, but such self serving statements are not controlling. Murphy, 314 U.S. at 456; Sparfven, 265 B.R. at 518.

In this particular case the Marsicos have two separate homes in two different states. Accordingly, the Court must determine the Marsicos’ domicile by looking at the intent of the Marsicos. While courts have delineated many different factors to examine when determining a person’s intent with regards to his or

her domicile, the testimony in this trial focused on only a few of the delineated factors. As such, the Court will examine only those factors upon which evidence was presented at trial.

The Debtor testified that he considered New Hampshire to be his domicile. As noted above, however, such a self serving statement by the Debtor is not controlling. With regards to the Marsicos place of residence, the testimony showed that the Marsicos maintained a home in both New Jersey and New Hampshire. The Debtor owned the Property from July 31, 1998, through July, 2001, a period of 36 months. During the time he owned the Property, the Marsicos resided in the Property, exclusive of short visits, during August and September 1998 (2 months), August through mid-December 1999 (4.5 months), March through mid-October 2000 (7.5 months) and March through July 2001 (5 months), for a total of 19 of the 36 months that the Debtor owned the Property. The testimony at trial revealed that the longest period of continuous residence at the Property was during 2000 when the Marsicos operated a gas station/convenience store business under a six month trial lease which the Debtors did not extend or renew.

The testimony also revealed that both of the Marsicos have family living in New Jersey. The Marsicos do not have any family members living in New Hampshire. The Court notes that at times the Marsicos two college aged children did live with them at the Property. Further, the testimony and exhibits did show that the Marsicos had at least attempted to have one vehicle registered in New Hampshire and placed home owners insurance coverage on the Property for the period covering July 31, 2000 to July 31, 2001.

Next the Court will turn to the Marsicos business and professional ties. The testimony at trial showed that the Debtor had started a business in 1978 in New Jersey, but that the business was not currently active. The Debtor's wife had also operated a store in New Jersey that she closed approximately two years ago. The testimony of the Debtor revealed that the Marsicos have operated two different businesses in New Hampshire. In the summer of 2000 the Marsicos operated a gas station/convenience store in New Hampshire under a sixth month trial lease arrangement which was not extended or renewed. In May of 2001 the Marsicos opened a marina grocery store under a one year lease that included options for

future years. In connection with the marina grocery store business the Debtor's wife obtain a liquor license from the State of New Hampshire, wherein her address is listed as the Property. See Exhibit 113. No testimony was provided regarding the current status of this business. The Debtor testified that he has a bookkeeper in New Hampshire, but that his accountant is from New Jersey. The Debtor's attorney, other than for matters relating to bankruptcy, is a long time friend in New Jersey. No testimony was presented regarding any of the other factors generally looked at by courts in determining a persons intent with regards to domicile.

Based upon the testimony and exhibits presented at trial, the Court finds that the Association and Morgner have meet their burden with regards to their objection to the homestead exemption claimed by the Debtor. While the Debtor testified that he believed New Hampshire to be his place of domicile, the evidence presented at trial does not support the Debtor's claim. The Debtor testified that when he purchased the Property in 1998 the home was used as a vacation property, and thus the Court must look to the years of 1999 through 2001 to determine if the Marsicos changed their domicile to New Hampshire. During 1999 the Marsicos resided at the property from August through mid-December, a period of 4.5 months. No evidence was presented that the Marsicos engaged in any business activity during 1999. However, the Court notes that testimony was presented which indicated that the Debtor's wife sold her New Jersey business during 1999. The evidence presented at trial suggests that while the Marsicos may have been attempting to change their domicile during 1999, they returned to New Jersey for the winter after only 4.5 months of residence in New Hampshire. The Court finds that the Marsicos activities during 1999 do not indicate a change in domicile to New Hampshire.

During 2000 the Marsicos resided in New Hampshire for more than half of the year (March through mid-October) while they operated a retail business under a six month trial lease. The testimony at trial was that they decided not to extend or renew that lease. After they ceased their trial operation of the retail business, they returned to their New Jersey residence. The Court finds that they Marsicos activities during 2000 do not indicate a change in domicile to New Hampshire because those activities were of a temporary,

short term nature and do not reflect an intent to remain in New Hampshire for an indefinite period. Even if the operation of the retail business in New Hampshire during 2000 did effectuate a change in domicile, the Court would find that the Marsicos cessation of that business and return to their New Jersey home would evidence a change in domicile back to New Jersey.

The Court does not find the other evidence presented at trial in support of the Marsicos intent to change their domicile to New Hampshire to be persuasive. The Marsicos argue that the address on an affidavit of the Debtor's wife, Beverly, filed with the New Hampshire Liquor Commission in June 2001 in connection with obtaining a liquor license for the marina grocery store is evidence of their intent to remain in New Hampshire. The Court is not persuaded. In the affidavit Beverly was required to state where she "lives at" in question 2. As noted earlier in this opinion where one resides and where one is domiciled are two separate and distinct concepts. Where one currently lives is not where one is domiciled unless there is an intent to remain for an indefinite period of time. In addition, the Debtor had executed an agreement on May 5, 2001, to sell the Property and never secured another long term New Hampshire residence by lease or purchase. The Court can hardly conclude that the Marsicos intended to remain in New Hampshire for an indefinite period of time when they only signed a one year lease in connection with the marina grocery store, agreed to sell the Property at the beginning of that lease term, sold the Property in July 2001, and as of the petition date and the time of trial had not secured another New Hampshire residence by lease or purchase.

Next, there is the Marsicos application to register a vehicle in New Hampshire. The Court examined the application and notes that it is dated the day after the Debtor filed his first bankruptcy petition with this Court. See Exhibit 103. While it may just be a coincidence, the Court finds it troubling that the Debtor did not file an application to register his vehicle in New Hampshire until the day after he filed his first petition with this Court. In addition, the automobile insurance endorsement admitted as Exhibit 108 reflects two automobiles in addition to the one allegedly registered in New Hampshire. Although the evidence suggests that one of these two automobiles may be partially owned by and in possession of their daughter, no other evidence was offered to explain where these other two automobiles are registered or garaged.

The Court has also considered the location of professionals used by the Marsicos and finds such an examination inconclusive. The Marsicos attorney and accountant are located in New Jersey, but the Marsicos also have a bookkeeper in New Hampshire. Based upon these facts the Court finds that the location of the professionals used by the Marsicos does not support either the Debtor's claim nor the claim of the objecting parties.

Lastly, the Court has examined the insurance policies that were admitted as exhibits at the hearing. The Court finds the automobile insurance endorsement troubling. The endorsement only covers the two month period from May 31, 2000, to July 31, 2000. If the Marsicos had intended on remaining in New Hampshire for an indefinite period of time, why was this endorsement to the insurance policy only for a two month period? The underlying insurance policy which might reflect the use of the insured vehicles (i.e. business, pleasure, commuting) and where they were garaged was not offered. As for the homeowners insurance policy, the Court agrees that it tends to support the Debtor's contention that he is domiciled in New Hampshire. However, one insurance policy is not enough by itself to convince the Court that the Marsicos intended to remain in New Hampshire for an indefinite period of time.

IV. CONCLUSION

For the reasons set forth in this opinion, the Court shall enter a separate order sustaining the Association's and Morgner's objections to the New Hampshire homestead objection claimed by the Debtor and his non-debtor spouse. This opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052.

DATED this 10th day of December, 2001, at Manchester, New Hampshire.

J. Michael Deasy
Bankruptcy Judge