

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

In re:

Bk. No. 01-12120-JMD  
Chapter 7

Walter M. Marsico, Sr.,  
Debtor

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**MEMORANDUM OPINION**

**I. INTRODUCTION**

On August 23, 2002, the Court held a hearing on an Objection to Claim of Exemption (the “Objection”) filed by Canopache Cottages Association and Walter Morgner, Jr. (the “Creditors”). The Creditors objected to a federal exemption the Debtor claimed pursuant to 11 U.S.C. § 522(d)(1) (hereinafter the “Federal Exemption”). The Debtor had claimed the exemption by filing

Debtor's Notice of Amendment to Schedule C (the "Notice of Amendment") on December 21, 2001. See Doc. No. 62. The Creditors timely filed their Objection on January 10, 2002.

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**

### **A. History**

On June 22, 2001, the Debtor filed a Chapter 13 bankruptcy petition with this Court. In his petition the Debtor claimed a homestead exemption in a home he owned in Wolfeboro, New Hampshire (the "Property") pursuant to 11 U.S.C. § 522(b)(2) and the New Hampshire Revised Statutes Annotated, Chapter 480 (hereinafter the "State Exemption"). The Creditors objected to the State Exemption on the ground that the Debtor was not domiciled in New Hampshire. After an evidentiary hearing the Court issued a memorandum opinion dated December 10, 2001 sustaining the objection to the State Exemption on the ground that the Debtor was not a domiciliary of New Hampshire. See In re Marsico, 2001 BNH 047 ("Marsico I").

On December 21, 2001, the Debtor filed an amendment to his schedules and claimed the Federal Exemption. In the Objection, the Creditors contended that although section 522(d)(1) refers to an exemption in a debtor's residence as opposed to referring to domicile, the term residence should be equated with domicile. Accordingly, the Creditors claimed that the Debtor may not claim an exemption in the Property because this Court has previously ruled that the Debtor was not domiciled in New Hampshire. The Debtor contended that the terms "residence" and

“domicile” have two separate meanings under the Bankruptcy Code and that this Court’s ruling in Marsico I did not preclude the Debtor from claiming the Federal Exemption. On April 26, 2002, this Court issued a memorandum opinion wherein it determined that the meaning of the word “residence” for purposes of the Federal Exemption was not identical to the meaning of the word “domicile” for purposes of the State Exemption. Based upon the factual record in Marsico I, this Court held that as of the end of 2000 the Debtor either had not established the Property as his residence or had abandoned the Property as his residence. See In re Marsico, 2002 BNH 015 (“Marsico II”). This Court left for further evidentiary hearing the question of whether the Debtor had established or abandoned the Property as his residence after 2000 and before the commencement of this case. Specifically the Court stated:

The Court wishes to make it clear that if Canopache and/or Morgner wish to pursue an objection based upon the ground that the Debtor cannot *properly claim* the Federal Exemption any such objection must be limited to: (i) whether the Debtor established a “residence” in the Property within the standard set forth above between March 2001 and the filing of the petition in this proceeding on June 22, 2001 and (ii) if residency was so established, whether it was abandoned prior to June 22, 2001.

Id at 11 n 2. On August 23, 2002 this Court held a further evidentiary hearing on the issue of whether the Debtor had established a residency for purposes of the Federal Exemption during 2001.

### **III. DISCUSSION**

#### **A. “Residence” for Purposes of Section 522**

In Marsico II this Court found that the terms residence and domicile, as used in the Bankruptcy Code, have different meanings. Based upon the legislative history of section 522(d) this Court held that “the creation of the interest subject to a claim of exemption as a ‘residence’

[shall be determined] under state law, but [the Court] shall apply the exemption under the provisions of federal law.” Marsico II at 7. Accordingly, this Court concluded that the Debtor could establish the Property as his “residence” and “homestead” for purposes of the Federal Exemption if he physically occupied the Property for a significant period of time as his principal home. Id at 7-8. The determination of what constitutes “significant” was left to be determined on the facts of the case, in light of the purpose for determining the meaning of the word residence. However, this Court indicated that “actual physical occupancy” of the Property would not include occupancy as a vacation home or an investment property for a brief period of time and that the Debtor could not have more than one principal residence at a time. Id at 8.

#### **B. The Debtor’s Claim of Residence**

The Debtor did not offer any new documentary evidence at the August 23, 2002 hearing; however he did offer, without objection, Debtor’s Exhibits 102-113, which had been previously admitted into evidence at the November 1, 2001 hearing on the objections to the Debtor’s State Exemption. See Marsico I. Debtor’s Exhibits 102-113 were offered in support of the Debtor’s claim that he occupied the Property as a residence in New Hampshire in 2001. Debtor’s Exhibits 101, 102, 103, 104, 105, 106, 108, and 110 are dated either 1999 or 2000 and are thus irrelevant to the issue at hand. See Marsico II at 9-10 (holding that Debtor did not establish a residence in New Hampshire during the years of 1999 and 2000 or that any such residence had been abandoned). The Court considered the Debtor’s remaining exhibits: a May 25, 2001 electric bill (Debtor’s Ex. 107); a coverage summary page from a July 31, 2000 through July 31, 2001 homeowners policy (Debtor’s Ex. 109); a March 3, 2001 certificate of service for a pleading sent by Attorney Charles Gallagher to the Debtor (Debtor’s Ex. 111); and a June 6, 2001 document titled “Terms Agreement” (Debtor’s Ex. 112); a June 11, 2001 Liquor Commission Affidavit

(Debtor's Ex. 113). All of these documents listed the Debtor's address as 95 Canopache Road, Wolfboro, New Hampshire. See Debtor's Exhibits 107, 109, 111, 112, and 113. The Debtor did not testify at the hearing.

In support of the Objection to the Federal Exemption, the Creditors and the Chapter 7 Trustee offered into evidence a copy of the Debtor's spouse's current New Jersey drivers license (the Debtor is legally blind and relies on his spouse for transportation) (Trustee's Ex. 1); a May 5, 2001 purchase and sales agreement that the Debtor had signed wherein the Debtor's address was listed as New Jersey (Trustee's Ex. 2); a February 20, 2001 letter from the law firm of Shapiro & Kreisman addressed to the Debtor's spouse at their New Jersey property (Morgner's Ex. 105); a December 13, 2001 Chapter 13 bankruptcy petition filed by the Debtor's spouse in New Jersey, listing her residence as the New Jersey property and claiming a homestead exemption in the New Jersey property (Morgner's Ex. 106); an April 10, 2001, New Jersey bankruptcy pleading wherein the Debtor's spouse states, "the subject [New Jersey] property is our family homestead . . ." (Morgner's Ex. 107); an April 3, 2002 letter from Beverly Marsico to Homeside Lending containing the letterhead "Walter M. & Beverly J. Marsico, 20 Drew Road, Sussex, NJ 07641" (Morgner's Ex. 107); an April 11, 2001 court pleading from Superior Court of New Jersey wherein the Debtor and his spouse certify that they own a home out of state with equity in it and are willing to use that equity to save their New Jersey home, that "for more than 20 years I have lived within a half mile of the house [in New Jersey]," "my husband, our children and I have resided in the house [in New Jersey] and have a longstanding history with it," and finally they state that they were only in New England for medical treatment for the Debtor's degenerative eye condition (Morgner's Exhibit 107).

The only live testimony came from Ken Brown, Treasurer of the Canopache Association and neighbor to the Debtor. Brown took copious notes of all activity involving the Property including the coming and going of the Debtor and his family members from December 2000 to June 2001. Using Brown's testimony in conjunction with his notes, the Court calculates that the Debtor spent a total of 53 days at the Property out of 173 possible days, between January of 2001 and the petition date of June 22, 2001. See Canopache's Exhibit 201. Thus, the Debtor spent approximately one-third of that time at the Property and two-thirds of that time period somewhere else, possibly in New Jersey.

The issues before the Court are whether this time period spent at the Property (1) was "significant" enough in terms of time and (2) was of a nature that it constituted actual physical occupancy as the Debtor's principal residence, bearing in mind that the Debtor cannot have more than one principal residence. See Marsico II at 8. The Court need not decide whether the period of the Debtor's residency at the Property was "significant" because the Creditors and the Chapter 7 Trustee have presented overwhelming evidence showing that the Debtor did not treat the Property as his principal residence but rather treated his New Jersey property as his principal residence from the beginning of 2001 through the petition date. So while 53 days might be enough to qualify as significant period of time, the evidence in this case compels a finding that the Debtor's principal residence during 2001 was in New Jersey, not New Hampshire.

It is clear to the Court that the Debtor and his spouse have been playing a shell game in different venues. The Debtor has repeatedly represented to this Court that he was using the Property as a principal residence. However, the Debtor's evidence is sparse, a few local utility or service bills and the insurance policy for the Property. All of the Debtor's evidence is self serving and reflects information which the Debtor, or his spouse, provided to third parties, not any

determination by those third parties that the Debtor used the Property as his principal residence. In addition, the Court notes that the Debtor's mail from New Jersey was never forwarded to his New Hampshire property and all tax returns reflect his New Jersey address.

While the Debtor was attempting his sleight of hand in New Hampshire, the Debtor's spouse was deftly placing the homestead prize under a New Jersey shell. During 2001, the Debtor's spouse was before a bankruptcy court in New Jersey trying to save their New Jersey home. In that proceeding she was claiming that the New Jersey home was the "family homestead" and that "my husband, our children and I have resided in the house and have a longstanding history with it." Morgner's Exhibit 107. Further, the Debtor's spouse certified to a New Jersey Superior Court that she has "another home in New Hampshire" with equity which she can use to save her New Jersey home. Id. It is evident to this Court that the Debtor is attempting to claim a homestead exemption in New Hampshire while his spouse is simultaneously claiming a homestead exemption in New Jersey. No evidence was presented by the Debtor that he and his spouse are living apart. In fact, the Debtor's eyesight is insufficient for him to hold a driver's license and he depends on his spouse for his transportation needs. The evidence supports a conclusion that the Debtor and his spouse maintain their principal residence together in the same location. The evidence further supports a finding that the location is New Jersey. The Court believes that both the Debtor and his wife are coordinating their efforts in an attempt to retain the equity in the New Hampshire property, through the Federal Exemption, in order to use it to save their principal residence in New Jersey to the detriment of the Debtor's creditors.

Accordingly, the Court finds that the Debtor did not physically occupy the Property as his principal residence between January 1, 2001 and the petition date. Therefore, the Debtor is not entitled to claim the Federal Exemption.

#### **IV. CONCLUSION**

For the reasons set forth above, the Objection is sustained. This opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. The Court will issue a separate order consistent with this opinion.

DATED this 6<sup>th</sup> day of November, 2002, at Manchester, New Hampshire.

/s/ J. Michael Deasy  
J. Michael Deasy  
Bankruptcy Judge