

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

In re:

Bk. No. 03-11851-JMD
Chapter 7

Charlene M. Chase,
Debtor

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Attorney for Debtor*

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Pro Se Creditor*

MEMORANDUM OPINION

I. INTRODUCTION

On October 1, 2003, the Court held a hearing on the objections to the Debtor's claim of a homestead exemption under NH RSA 480:1 for property located at 125 School Street, Lisbon, New Hampshire (the "Property") filed by Cara Heathe and Christine Sabens (Doc. No. 9) (the "Heathe Objection") and William Beard (Doc. No. 7) (the "First Beard Objection") and (Doc. No. 12) (the "Second Beard Objection"). Heathe and Sabens also filed an objection to the First Beard Objection on the grounds that it was filed more than thirty days after the conclusion of the first meeting of creditors (Doc. No. 15).¹ The parties stipulated to certain facts and made offers of

¹ The first meeting of creditors was held on July 24, 2003. *See* Doc. No. 5. Pursuant to Fed. R. Bankr. P. 4003(b), an objection to a claim of exemption must be filed within thirty days after that meeting.

proof on other factual matters. After consideration of the stipulations, offers and arguments of the parties at the hearing, the Court finds that there is no dispute regarding any material facts.

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

On August 3, 2001, the Debtor entered the home of a neighbor at night and assaulted an eleven year old female occupant of that home in her bedroom. The Debtor was arrested and as a condition of bail was ordered not to come within one hundred yards of the victim. Since the Property was within one hundred yards of the victim’s home, the Debtor moved in with her mother on Pine Knoll Terrace in Lisbon. On September 21, 2001, the Debtor was indicted for second degree assault, a class B felony under New Hampshire law. On July 1, 2002, the victim and her family moved out of their home near the Property and out of the Town of Lisbon. The Debtor continued to reside with her mother and left the Property vacant. On January 21, 2003, the Debtor pled guilty to the charges and was sentenced. On January 29, 2003, the Debtor was incarcerated in the New Hampshire State Prison for Women where she currently resides. The Debtor commenced this bankruptcy proceeding on May 27, 2003 (the “Petition Date”).

See Taylor v. Freeland & Kronz, 503 U.S. 638, 643 (1992). In this case that deadline was August 25, 2003. The Heathe Objection was timely filed on August 25, 2003, as was the First Beard Objection (Doc. No. 7). Accordingly, Sabens’ and Heathe’s objection to the First Beard Objection shall be denied. However, the Second Beard Objection (Doc. No. 12), which was substantively the same as the First Beard Objection, was not filed until September 3, 2003. Accordingly, the Second Beard Objection was filed late and shall be denied.

III. DISCUSSION

The objecting creditors contend that the Debtor voluntarily chose not to live in the Property in August 2001 and has not actually resided there for more than two years. They argue that the bail conditions imposed on the Debtor do not make her absence from the property involuntary because the criminal act which resulted in her arrest and the imposition of bail conditions was an intentional act. The objecting creditors also contend that even if the termination of the Debtor's residency in August 2001 is considered involuntary, she was under no compulsion to continue to reside away from the Property after July 1, 2002, when the victim moved away from Lisbon.

The Debtor contends that her conditional bail in August 2001 and her current incarceration constitute involuntary absences from the property and do not cause a loss of her homestead rights. The Debtor argues that she intends to return to the Property and reside there with her daughter. She contends that she has not attempted to sell or rent the Property in order to preserve it as a home to which she may return after her incarceration. She also contends that the reason that she did not reside in the Property after July 1, 2002, is because she could not afford the expense of maintaining a residence in the Property.

The parties agree that on August 8, 2001, the Debtor was residing at the Property and had a homestead right in the Property under New Hampshire. A homestead right must be established by actual physical possession of a property with the intent to occupy it as a home. Currier v. Woodward, 62 N.H. 63, 64 (1882). The homestead right does apply to investment property, property occupied by tenants or other property where the owner, or his family, does not dwell. Id. Once a homestead right is established, temporary absence from the property, with the intent to retain a home there and an intent to return to it does not constitute an abandonment of the homestead

right. Wood v. Lord, 51 N.H. 448, 455 (1871); Austin v. Stanley, 46 N.H. 51, 52 (1865).

However, the establishment of a home at another location does constitute abandonment of the prior homestead. Wood, 51 N.H. at 454-55.

This Court has held that absence from a property incident to a divorce proceeding may constitute a temporary absence which does not result in a loss of a homestead exemption. In re Deickler, 1999 BNH 026, at 9 (citing In re Eckols, 63 B.R. 523 (Bankr. D.N.H. 1986)). The Debtor argues that the rationale of the Eckols decision applies in this case. The Court disagrees. In Eckols, Judge Yacos held that absence from a marital home incident to a divorce would not constitute an abandonment of a homestead right. Eckols, 63 B.R. at 527. The decision in Eckols was based upon long standing New Hampshire law expressed in the Currier, Austin and Wood decisions cited above and the public policy consideration that the law should not require “the often hostile parties to a matrimonial dispute to continue to share the marital abode on penalty of loss of property rights” due to the “potential for harm to a spouse or to children.” Id. at 526-27 (citing In re Smith, 57 B.R. 81 (Bankr. W.D.N.Y. 1985)). Such public policy considerations are not present in this case. Even in cases where such public policy considerations are present, the period of such absence from the residence is not unlimited. See In re Weza, 248 B.R. 470, 473 (Bankr. D.N.H. 2000) (holding that an absence of six years incident to a legal separation resulted in a loss of homestead rights).

Construing the stipulated facts and the offers of proof in the light most favorable to the Debtor, the Court finds that from July 1, 2002, through January 28, 2003, a period of almost seven months, the Debtor chose to reside with her mother because she could not afford to live in the Property. While residing with her mother she paid a significant portion of her monthly income as rent. During this period and as of the Petition Date the Debtor intended to return to the Property

and occupy it as her home at some point in the future. However, the Court finds that the Debtor's admitted financial inability to occupy the Property as her home after July 1, 2002, coupled with the pending criminal charges, and her payment of a significant portion of her income to her mother as rent compel a finding that she had established her "home" with her mother. While a temporary absence from a "home" with an intent to return does not result in the abandonment of the homestead, in this case the Debtor did not have the financial ability to live in the Property as her home and has presented no evidence or made any offer of proof that she had any prospect of a change in her financial condition.

Under New Hampshire law the failure to occupy the Property while residing somewhere else as a home results in a loss of the homestead right, unless the absence is "temporary." The word "temporary" is an adjective describing something that continues for a limited time, usually short and transitory in nature. Blacks Law Dictionary (7th ed. 1999). The combination of the Debtor's admitted financial plight and the pending criminal charges against her resulted in the Debtor's absence from the Property being indefinite rather than temporary. Accordingly, the Debtor's homestead right in the Property was lost by her voluntary absence from the Property between July 2002 and January 2003. The Court does not need to consider the arguments by the objecting creditors that the Debtor's absence from the Property from August 2001 through June 2002 was voluntary.

IV. CONCLUSION

For the reasons set forth above, the Heathe Objection and the First Beard Objection shall be sustained and the Debtor shall have no homestead exemption in the Property.² 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.

ENTERED at Manchester, New Hampshire.

Date: October 14, 2003

/s/ J. Michael Deasy
J. Michael Deasy

² The Debtor also claimed a wildcard exemption in the Property pursuant to NH RSA 511:2(XVIII). The validity of that exemption has not been challenged and therefore that claim of exemption will stand.