

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

U. S. BANKRUPTCY COURT SOUTHERN DISTRICT OF MISSISSIPPI FILED DEC 01 1994 CHARLENE J. PENNINGTON, CLERK BY _____ DEPUTY
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IN RE: BENJAMIN J. ANDERSON, JR.

CASE NO. 93-02786EEW

MOTION NO. 93-1900

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Edward Ellington, Bankruptcy Judge

MEMORANDUM OPINION

The Court has before it a *Motion for Summary Judgment* filed by the Debtor, Benjamin J. Anderson, Jr. on his *Motion to Avoid Judicial Lien* and also a *Cross-Motion for Summary Judgment* filed by Charlie Moseley and Rosie Moseley. The Debtor's motion for summary judgment seeks a finding by this Court that a certain 100 acre parcel of real property constitutes the Debtor's homestead under Mississippi law, thereby enabling the judgment lien held by Charlie and Rosie Moseley to be avoided pursuant to 11 U.S.C. § 522(f)(1).¹ The Moseley's cross-motion for summary judgment

¹ Hereinafter, all code sections refer to the Bankruptcy Code found at Title 11 of the United States Code unless specifically noted otherwise.

seeks a finding that the property in question is not homestead property and, therefore, their judgment lien may not be avoided. Alternatively, the Moseleys argue that even if the property fits within the definition of homestead property, the Debtor is barred from asserting his claim under the doctrines of *res judicata* and collateral estoppel and the principles of laches, waiver and estoppel. After considering the arguments of counsel and being otherwise advised in the premises, the Court finds that the Debtor's motion is well taken and should be granted. The Court further finds that the Moseleys' motion is not well taken and should be denied. In so holding, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

The material facts are not in dispute. The Debtor owns a 100 acre parcel of real property located in Sharkey County, Mississippi. On December 28, 1992, the Chancery Court of Sharkey County, Mississippi entered a default judgment against the Debtor in favor of Charlie and Rosie Moseley in the amount of \$33,100.

Attempting to collect the judgment, the Moseleys caused a writ of execution to be issued against the Debtor's 100 acre parcel. Before the date noticed for sale of the property, the Debtor filed a motion for a temporary restraining order and a motion to set aside the default judgment with the Chancery Court of Sharkey County, Mississippi. The court granted a temporary restraining order, effective until the motion to set aside the

default judgment could be heard. After a hearing on the motion to set aside the default judgment, the court denied the Debtor's motion and dissolved the temporary restraining order.

Subsequently, a second writ of execution was issued against the property. Prior to the date noticed for sale of the property, the Debtor filed another motion with the Chancery Court of Sharkey County, Mississippi, seeking a temporary restraining order and also filed a Petition for Writ of Mandamus, Prohibition and Other Extraordinary Relief with the Supreme Court of Mississippi. Both the motion for a temporary restraining order and the petition filed with the supreme court were denied.

On August 27, 1993, the Debtor filed his petition for relief under Chapter 7 of the Bankruptcy Code. In his schedules, he claimed the 100 acre parcel as exempt. The Moseleys objected to his claim of exemption. The Debtor then filed a Motion to Avoid Judicial Lien, seeking to avoid, pursuant to § 522(f)(1) of the Bankruptcy Code, the judgment lien held by the Moseleys on the 100 acre parcel. The Moseleys responded to the Debtor's motion to avoid their lien, denying that the property constitutes the Debtor's homestead. The Moseley's further assert that the Debtor is barred from raising a claim of homestead exemption under the doctrine of *res judicata* since he did not raise a claim of homestead exemption in the hearings on the motions for temporary restraining orders, the motion to set aside the default judgment, and the petition before the Mississippi Supreme Court.

The Debtor then filed the *Motion for Summary Judgment* on his *Motion to Avoid Judicial Lien*. In his motion, the Debtor states that he is the record owner of the property in question and that he resides on the property and also leases part of the property to a third party for agricultural purposes. The Debtor further states that the property consists of approximately 100 acres and has a value of less than \$75,000. The Debtor requests that based on the foregoing, the Court find that he may claim a homestead exemption in the property as defined by Mississippi Homestead Exemption Law.

In support of his motion, the Debtor attached as exhibits to his motion a copy of the deed to his property, an affidavit signed by the Debtor stating that he resides on the property, the lease agreement for the portion which the Debtor leases to a third party, and a copy of the tax collector's assessed value of the property.

In his affidavit the Debtor states that he has physically resided on the property since July of 1991 and that he has a dwelling on the property which contains a bed, gas stove and space to store his personal property. The Debtor also states that since July 1991, he has not spent more than 10 nights away from this dwelling.

The Moseleys filed a response to the Debtor's motion for summary judgment and also filed a *Cross-Motion for Summary Judgment*. In their response to the Debtor's motion for summary judgment, the Moseley's admit that the Debtor owns the land, that

it consists of approximately 100 acres and has a value of less than \$75,000. The Moseley's deny that the Debtor uses the property as homestead property or that his claim of homestead was timely in order to enable him to claim the property as exempt. The Moseleys did not attach any exhibits in support of their response to the Debtor's motion for summary judgment.

In the Moseleys' cross-motion for summary judgment, the Moseleys contend that because the Debtor did not assert a claim of homestead exemption during any of the state court proceedings, he is now barred by the doctrines of collateral estoppel and *res judicata*, and the principles of laches, waiver and estoppel. In support of their cross-motion for summary judgment, the Moseley's attached as exhibits various documents from the state court proceedings.

CONCLUSIONS OF LAW

Rule 18 of the Uniform Local Rules for the United States Bankruptcy Courts in the Northern and Southern Districts of Mississippi, pertaining to motions for summary judgment, requires that the movant:

1. List and separately number each material fact in the *prima facie* case or affirmative defense upon which summary judgment is sought.
2. For each material fact listed, cite the factual authority.
3. Attach as exhibits to the motion the factual authorities relied upon for establishment of the material facts.

"The substantive law will identify which facts are material." Abbott v. Equity Group, Inc. (In re Ellington), 2 F.3d 613, 618 (5th Cir. 1994) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986)).

In the present case, the question before the Court is whether the Debtor is entitled to claim the 100 acre parcel as exempt from execution under Mississippi law, and, therefore, is entitled to claim it as exempt from his bankruptcy estate and, further, to avoid the judgment lien held by the Moseleys under § 522(f)(1)² of the Bankruptcy Code.

The Mississippi homestead exemption statute is found at Miss. Code Ann. § 85-3-21(Supp. 1994). It provides in pertinent part as follows:

§ 85-3-21. Homestead exemption; land and buildings.

Every citizen of this state, male or female, being a householder shall be entitled to hold exempt from seizure or sale, under execution or attachment, the land and buildings owned and occupied as a residence by him, or her, but the quantity of land shall not exceed one hundred sixty (160) acres, nor the value thereof, inclusive of improvements, save as hereinafter provided, the sum of Seventy-five Thousand Dollars (\$75,000.00); provided, however, that in determining this value, existing encumbrances on such land and buildings, including taxes and all other liens, shall first be deducted from the actual value of such land and buildings.

² § 522(f)(1) provides in pertinent part:

(f) Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is -

(1) a judicial lien

In Stinson v. Williamson (Matter of Williamson), 844 F.2d 1166 (5th Cir. 1988), the Fifth Circuit Court of Appeals stated that "[i]n construing the homestead statute, the Mississippi Supreme Court has established a rule of construction that requires resolution of doubt or ambiguity in the exemptionist's favor." Id. at 1169 (footnote omitted). In Matter of Williamson the Fifth Circuit went on to say that the "controlling factor" in determining whether a parcel constitutes homestead property is whether the property is "devoted to homestead purposes" and that it is not necessary for a permanent structure to be located on the property in order for the parcel to be homestead property. Id. at 1170, 1170 n.12.

In support of his motion for summary judgment, the Debtor attached a copy of the deed showing his ownership of the property, an affidavit stating that he has resided on the property since July of 1991 and has spent no more than ten nights away from the property since that time, and a copy of the tax collector's assessed value of the property.

The Moseleys do not contest the Debtor's ownership of the property in question or that it consists of less than 160 acres and has a value less than \$75,000. The Moseleys do contest the Debtor's assertion that he uses the property for his homestead. However, the Moseleys have not produced anything to support their position that the Debtor does not use the property as his homestead.

Rule 56 of the Federal Rules of Civil Procedure as made applicable by Rule 7056(e) of the Federal Rules of Bankruptcy Procedure provides in relevant part as follows:

Rule 56. Summary Judgment.

.....
(e) Form of Affidavits; Further Testimony; Defense Required. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

The Debtor has attached to his motion for summary judgment an affidavit stating that he resides on the property in question. The Moseleys have offered nothing to raise a genuine issue of material fact regarding the Debtor's use of the property.

In their cross-motion for summary judgment, the Moseley's set out the sequence of events regarding the state court default judgment and the post-trial motions filed by the Debtor seeking to have the default judgment set aside. These events do not appear to be in dispute. The Moseleys argue that because the Debtor never raised a claim of homestead exemption in the state court proceedings the doctrines of collateral estoppel and *res judicata* and the principles of laches, waiver and estoppel should apply to bar the Debtor from asserting his claim of homestead exemption.

The Court finds no merit in the Moseleys' argument. The Fifth Circuit Court of Appeals has recently stated:

Collateral estoppel applies in bankruptcy courts only if, inter alia, the first court has made specific, subordinate, factual findings on the identical ... issue in question -- that is, an issue which encompasses the same prima facie elements as the bankruptcy issue -- and the facts supporting the court's findings are discernible from that court's record.

Dennis v. Dennis (Matter of Dennis), 25 F.3d 274, 278 (5th Cir. 1994). In the state court proceeding a default judgment was entered against the Debtor. He sought to have the default judgment set aside after a writ of execution was issued against the subject property. Whether or not the property in question is the Debtor's homestead has no bearing on whether grounds existed for setting aside the default judgment, and no findings were made by the state court regarding the homestead character of the property.

In support of their argument that the principles of laches, waiver and estoppel should apply to bar the Debtor's claim of homestead, the Moseleys state that Mississippi law requires that a homestead exemption be timely asserted. Again in Matter of Williamson, 844 F.2d at 1172, the Fifth Circuit found that where the Debtor did not assert a homestead exemption until after a post-petition sale of the property, and then he asserted the exemption in the proceeds of the sale, the Debtor did not waive his right to claim a homestead exemption in the sale proceeds. In so holding, the Fifth Circuit recognized the line of Mississippi cases holding that an exemptionist must qualify for the exemption before a judgment lien is foreclosed. Id. at 1172. The Debtor's property in the present case was not foreclosed at a judicial sale. Upon

filing his bankruptcy schedules, the Debtor claimed a homestead exemption in his property. This Court finds that the Debtor's assertion of homestead exemption in the property was timely.

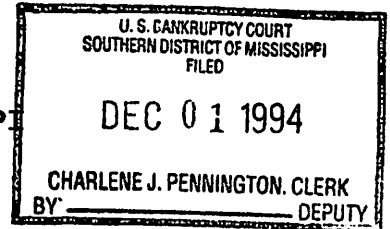
Based on the foregoing, the Court finds that there exists no genuine issue of material fact that the Debtor owns and occupies the 100 acre parcel of property as his residence, and that the value of the parcel is less than \$ 75,000. Therefore, the Court finds that the Debtor is entitled as a matter of law to judgment in his favor on his Motion to Avoid Judicial Lien. The Court further finds that while there exists no genuine issue of material fact regarding the Moseleys' cross-motion for summary judgment, the Moseleys are not entitled a judgment in their favor as a matter of law.

A separate judgment consistent with this opinion will be entered in accordance with Rules 7054 and 9021 of the Federal Rules of Bankruptcy Procedure.

This the 13th day of December, 1994.


UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION



IN RE: BENJAMIN J. ANDERSON, JR.

CASE NO. 93-02786EEW

MOTION NO. 93-1900

ORDER PARTIALLY AVOIDING JUDICIAL LIEN

In accordance with the Court's opinion entered contemporaneously herewith on the Debtor's *Motion for Summary Judgment* on his motion to avoid the fixing of the judicial lien (judgment) of Charlie Moseley and Rosie Moseley on exempt property of the Debtor, the Court finds that the motion is well taken and should be granted. The Court further finds that the *Cross-Motion for Summary Judgment* filed by Charlie Moseley and Rosie Moseley is not well taken and should be denied.

IT IS, THEREFORE, ORDERED AND ADJUDGED as follows:

1. Pursuant to 11 U.S.C. § 522(f)(1), the judicial lien (judgment) of Charlie Moseley and Rosie Moseley obtained against the Debtor, Benjamin J. Anderson, Jr., in the Chancery Court of Sharkey County, Mississippi, Charlie Moseley and Rosie Moseley vs. B.J. Anderson, Jr., Court Cause No. 8903, is hereby avoided and held for naught to the extent it impairs the Debtor's homestead exemption provided by Miss. Code Ann. § 85-3-21 (1972) and 11 U.S.C. § 522(b), said homestead being located in Sharkey County, Mississippi, and being more fully described as follows, to-wit:

The North Half of the Northwest Quarter of the Northeast Quarter (N 1/2 NW 1/4 NE 1/4) and the East Half of Northeast Quarter (E 1/2 NE 1/4) all in Section 9, Township 13 North, Range 5 West, containing 100 acres, more or less, in Sharkey County, Mississippi.


2. A certified copy of this Order is to be filed in the land records of Sharkey County, Mississippi, and the Chancery Clerk is requested to index this Order in the direct and sectional index under the name of Benjamin J. Anderson, Jr. (Debtor) as grantor. The Debtor's attorney will ensure compliance with this provision.

3. The Circuit Clerk of Sharkey County, Mississippi, is to enter on the judgment roll that the judicial lien (judgment) of Charlie Moseley and Rosie Moseley in Charlie Moseley and Rosie Moseley vs. B.J. Anderson, Jr., Court Cause No. 8903 has been PARTIALLY CANCELLED by this Order and a certified copy of the Order is to be placed in the suit file. The Debtor's attorney will ensure compliance with this provision.

4. The aforesaid clerks are authorized to charge fees for their services as otherwise authorized by state law.

5. The *Cross-Motion for Summary Judgment* filed by Charlie and Rosie Moseley is hereby denied with prejudice.

SO ORDERED this the 1st day of December, 1994.


UNITED STATES BANKRUPTCY JUDGE