No. 3:23-cv-05288-WHO

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN RE: EVANDER FRANK KANE,

Debtor.

EVANDER FRANK KANE,

Appellant,

v.

FRED HJELMESET, CHAPTER 7 TRUSTEE,

Appellee.

On Appeal from the United States Bankruptcy Court
for the Northern District of California
Bankr. No. 21-50028-SLJ
Hon. Bankruptcy Judge Stephen L. Johnson

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

This appeal arises from the Bankruptcy Court's Homestead Order,[1] which required Kane to turn over the exempt Homestead Proceeds he received after the Trustee's sale of his San Jose Residence.

As set forth below and in Kane's Opening Brief, this Court should find that the Bankruptcy Court erred when (1) it enforced the six-month reinvestment requirement of California homestead law, even though Kane's homestead exemption was preempted by § 522(p)[2] of the Bankruptcy Code, which does not include any reinvestment requirement; (2) it failed to recognize Kane's expenditure of the exempt funds for housing and related expenses within six months as a qualifying reinvestment under California law; and (3) it refused to toll the six-month reinvestment period while the appeal of the Homestead Order was pending.

Finding error under any one of these three independent theories is sufficient to overturn the Turnover Order. Kane respectfully requests that this Court reverse the Bankruptcy Court's Turnover Order or, in the alternative, vacate and remand this matter to the Bankruptcy Court for further findings and conclusions consistent with this Court's decision.

II. ARGUMENT

A. Bankruptcy Code § 522(p) Preempts C.C.P. § 704.720(b)'s Six-Month Reinvestment Requirement

The Bankruptcy Code allows states to opt out of the federal exemption scheme. § 522(b)(2). California has affirmatively done so. C.C.P. § 703.130. Both the Bankruptcy Code and the California Code of Civil Procedure have seen

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[1] Capitalized terms are used as defined in Kane's Opening Brief. ECF 7.

[2] Unless specified otherwise, all chapter and code references are to the Bankruptcy Code, 11 U.S.C. §§ 101–1532.

amendments regarding the treatment of homestead exemptions. In 2005, the Bankruptcy Code was amended to add § 522(p), which caps the amount of homestead exemption in any state to $170,350 if the home was purchased within 3½ years before the petition date. The California Code of Civil procedure was amended in 2021 to raise the homestead exemption available under California law to the countywide median home price, with a floor of $300,000 and a ceiling of $600,000.[3] C.C.P. § 704.730. The tension between these two laws, created by the 2021 amendment to California state law, is central to this appeal.

California law provides that homestead exempt funds, in the amount set by C.C.P. § 704.730 ($600,000 in this case) are exempt for a period of six months following receipt:

> If a homestead is sold under this division . . . the proceeds of sale . . . of the homestead . . . are exempt in the amount of the homestead exemption provided in [C.C.P. §] 704.730. The proceeds are exempt for a period of six months after the time the proceeds are actually received by the judgment debtor, except that, if a homestead exemption is applied to other property of the judgment debtor . . . during that period, the proceeds thereafter are not exempt.

C.C.P. § 704.720(b). The exempt amounts must be reinvested in a new homestead within six months to retain their exempt status. *In re Jacobson*, 676 F.3d 1193, 1198 (9th Cir. 2012).

Herein lies the problem: Kane never received the "amount of the homestead exemption provided in [C.C.P. §] 704.730." The Bankruptcy Court capped the amount at $170,350 pursuant to § 522(p) after finding Kane acquired the San Jose

[3] Prior to the 2021, the state exemption was $75,000 for a single homeowner, with a maximum of $175,000 for homeowners who met certain requirements.

Residence less than 3½ years prior to the bankruptcy petition date. ER-227. Section 522(p) does not merely cause a slight modification to California's homestead law—it drastically alters and undercuts the rights that are afforded by California's homestead exemption scheme. Thus, the amount of Kane's homestead exemption was not determined in accordance with "the entire state law applicable on the filing date" pursuant to the "snapshot" rule. *See In re Jacobson*, 676 F.3d at 1193. Instead, it was determined by § 522(p), which circumvents state law and does not contain any reinvestment requirement.

The Bankruptcy Court found that there was no implied preemption because "states can opt out" of the federal exemption scheme, as California has. ER-227. But states *cannot* opt out of the § 522(p) cap, which is applied despite a state's decision to opt out of the federal exemption scheme. *See* § 522(b)(2). This constitutes implied conflict preemption because "compliance with both federal and state regulations is a physical impossibility." *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992). Simply put, it is not possible for an exemption to be paid in the amount of $600,000, but also limited to $170,350. Furthermore, the conflict between federal and state law stands as an obstacle to the "liberal construction of the law and facts to promote the beneficial purposes of the homestead legislation to benefit the debtor" required under California law. *Broadway Foreclosure Invs., LLC v. Tarlesson*, 184 Cal. App. 4th 931, 936 (2010). The solution is to follow federal law, which does not contain any requirement for reinvestment.

The Bankruptcy Court justified its application of the six-month reinvestment requirement by referencing the nonbinding case *In re Konnoff*, 356 B.R. 201 (B.A.P. 9th Cir. 2006). *In re Konnoff* states:

> [T]he Supreme Court is clear that states have the authority to provide limited exemptions or not to provide

> exemptions at all. States have the authority to create whatever exemptions they elect, even if they are less inclusive (or more restrictive) than the exemptions afforded debtors by the federal exemption scheme.
>
> Of course, states do not have a carte blanche to place unlimited restrictions on exemptions; if the exemptions directly conflict with the Code, then the Code prevails. But there is nothing in the Code that prohibits a state from imposing a time limitation as a condition to maintaining the exempt status of certain property.

Id. at 206–07 (internal citations and quotations removed). The court in *Konnoff* found that Arizona's eighteen-month reinvestment requirement "does not conflict with a specific provision of the [Bankruptcy] Code nor does it abridge or abrogate the right of the debtors to claim an exemption." *Id.* at 207. However, *Konnoff* is distinguishable because it did not involve the federal cap of § 522(p), but merely upheld the application of a reinvestment requirement when exempt funds were paid in the full amount allowed by state law. Here, on the other hand, the § 522(p) cap has directly abridged and abrogated Kane's right to claim the full $600,000 of his exemption under C.C.P. § 704.730.

Due to this unavoidable and direct conflict between state law and the cap provided by § 522(p), "the [Bankruptcy] Code prevails." *In re Konnoff*, 356 B.R. at 206. The federally capped $170,350 exemption should control, *without* application of C.C.P. § 704.720(b)'s preempted time limitation.

B. Kane's Expenditure of the Homestead Proceeds for Housing and Related Expenses Within Six Months Qualifies as a Reinvestment Under California Law

Assuming for sake of argument that the six-month reinvestment requirement of C.C.P. § 704.720(b) applies, the Bankruptcy Court erred in holding that "Kane's rental payments and attorney's fees to defend the homestead obligation do not

qualify as reinvestment in a new homestead." ER-229. Under California law, Kane's payments for housing and related expenses satisfy the reinvestment requirement.

The Bankruptcy Court incorrectly interpreted California's homestead law to require that "the purchased property, whatever it might be, [must be] subject to execution by the creditor if it's going to qualify as a homestead." ER-231. The Bankruptcy Court supported this interpretation with the nonbinding case *In re Nolan*, 618 B.R. 860, 869 (Bankr. C.D. Cal. 2020), which stated that an interest in property must be "reachable by judgment creditors" to satisfy the reinvestment requirement. The Bankruptcy Court then held that even though Kane paid rent, there was no evidence that Kane's interest could have been reached by creditors, so it did not qualify as a reinvestment. ER-233–34.

The Bankruptcy Court's interpretation does not comport with California law, which is much broader than described in *Nolan*. C.C.P. § 704.710(c) defines a homestead as:

> the principal dwelling (1) in which the judgment debtor or the judgment debtor's spouse resided on the date the judgment creditor's lien attached to the dwelling, and (2) in which the judgment debtor or the judgment debtor's spouse resided continuously thereafter until the date of the court determination that the dwelling is a homestead.

The plain language of the statute does not require a debtor to have an ownership interest in the property for it to be considered a homestead; the law only requires continuous residency. *Elliott v. Weil (In re Elliott)*, 523 B.R. 188, 196 (B.A.P. 9th Cir. 2014); *Phillips v. Gilman (In re Gilman)*, 887 F.3d 956, 965 (9th Cir. 2018); *Tarlesson*, 184 Cal. App. 4th at 937. This is supported by the legislative comment to C.C.P. § 704.720, which states that, "[u]nlike the former provisions, [C.C.P. §] 704.720 does not specify the interest that is protected and does not limit the

homestead in a leasehold to a long–term lease; *any interest sought to be reached by the judgment creditor in the homestead is subject to the exemption*." (emphasis added).

Any interest—even a short-term leasehold interest—qualifies for the homestead exemption under California law. Thus, Kane's possessory leasehold interest in the rental properties, in which he and his family intended to (and did) continuously reside, qualifies as a homestead for the reinvestment requirement of C.C.P. § 704.720(b). Kane provided undisputed evidence that he paid a total of $174,500 for a security deposit and monthly rent for the properties he leased.[4] ER-202–03. *See* Kane's Opening Brief at 24 (listing payments). A creditor could seek to reach the short-term leasehold interests by seeking turnover from either the landlord[5] or from Kane himself (as the Trustee is attempting here). Because Kane's payments of rent and deposit were a condition precedent to his possession of the leased properties, those payments were inextricably tied to his interest and are protected by California's broad homestead exemption. To hold otherwise would force Kane and other debtors who choose to rent (or may be unable to purchase property) to pay their homestead exemption twice: first to their landlord, and then again to the bankruptcy trustee.

The Trustee argues on appeal that Kane "failed to provide any evidence to the Bankruptcy Court to demonstrate that he did anything other than merely

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[4] He also paid no less than $30,000 in attorneys' fees to preserve his homestead exemption after a creditor sought to deny it in its entirety. ER-203. The legal fees incurred in the defense of homestead rights are also exempt. *In re Sain*, 584 B.R. 325, 332–33 (Bankr. S.D. Cal. 2018).

[5] This is precisely what a trustee sought in *Sticka v. Casserino (In re Casserino)*, 379 F.3d 1069 (9th Cir. 2004), where the Ninth Circuit held that an Oregonian debtor's security deposit and prepaid rent were exemptible under Oregon's similar homestead exemption law.

occupy" the properties. Trustee's Responsive Brief at 12. Not so. Given the uncertain status of Kane's 2021–22 NHL season, the small amount of Homestead Proceeds he actually received (which made purchasing a new home in an expensive market impossible), and the immediate need to provide shelter for his family, Kane entered into short-term leases in Menlo Park, Edmonton, and Los Angeles. ER-202–03; ER-195–201; Kane's Opening Brief at 24–30. He paid monthly rent and security deposits, he held a possessory short-term leasehold interest, and he satisfied the residency conditions of California homestead law. *Id.* He provided ample evidence that his actions satisfied the reinvestment requirement of C.C.P. § 704.720(b).

This is not a case where Kane "squander[ed]" the Homestead Proceeds for nonexempt purposes. *In re Golden*, 789 F.2d 698, 700 (9th Cir. 1986). Rather, he used the funds to ensure shelter for himself and his family. This is precisely the goal sought to be furthered by homestead exemption laws. *Sticka v. Casserino (In re Casserino)*, 290 B.R. 735, 740 (B.A.P. 9th Cir. 2003). Accordingly, this Court should apply a "liberal construction" of California's law "to promote the beneficial purposes of the homestead legislation to benefit the debtor and his family," and find that Kane's payment of rent and related expenses fulfills the reinvestment requirement of California homestead law. *Tarlesson*, 184 Cal. App. 4th at 938.

C. The Appeal of the Homestead Order Should Equitably Toll the Six-Month Reinvestment Period

Even if this Court determines that the reinvestment requirement of C.C.P. 704.720(b) applies and the requirement is not satisfied by Kane's payments for rent and related expenses, it should find that the Bankruptcy Court abused its discretion by failing to equitably toll the six-month reinvestment period during Kane's appeal of the Homestead Order. If equitable tolling is applied, then Kane's purchase of his current home in Edmonton fits comfortably within the tolled period. Rejecting the

equitable tolling argument would force Kane, and similarly situated parties who have a dispute as to the amount of the homestead, to invest homestead proceeds twice: once within six months of receipt of the undisputed portion, and then again if and when they receive any additional proceeds.

The cases discussed in the parties' appeal briefs stand for the general proposition that, if a debtor is prevented from having full control over his exempt proceeds, the reinvestment period should be equitably tolled. *In re Dudley*, 617 B.R. 149 (Bankr. E.D. Cal. 2020); *In re Marriott*, 427 B.R. 887 (Bankr. D. Idaho 2010); *In re Bading*, 376 B.R. 143 (Bankr. W.D. Tex. 2007). Because Kane did not have full control over the exempt Homestead Proceeds during the appeal of the Homestead Order (and did not even know what their full amount would be), equitable tolling is necessary and appropriate.

Kane claimed a homestead exemption of $600,000. ER-017. There is no dispute that Kane received a $170,350 portion of his claimed homestead exemption on October 6, 2021. ER-165; ER-215 (Homestead Order). There is also no dispute that Kane appealed the Bankruptcy Court's Homestead Order which had limited his claimed exemption to $170,350 pursuant to § 522(p). ER-155. *See* D.C. No. 3:21-cv-08209-WHO (appeal of Homestead Order). The appeal was not resolved until February 28, 2023, when it was voluntarily dismissed as part of a multifaceted settlement. ER-179; ER-166.

While the appeal was pending, neither Kane nor any other party knew whether the District Court would (1) affirm the Bankruptcy Court's limitation of his homestead exemption to $170,350; (2) reverse the limitation and grant Kane the full amount of his claimed $600,000 exemption; or (3) award some other amount to account for appreciation between the purchase of the property and the date Kane filed his bankruptcy petition. Kane did not have "possession of or control over" over the full Homestead Proceeds during this time, because their

amount was entirely uncertain. *In re Dudley*, 617 B.R. at 154. This uncertainty was no fault of Kane's and was beyond his control. Rather, it was a natural function of the time required for the appeal process to play out.

These circumstances provide ample grounds for equitable tolling under California law as set forth in *Dudley*:

> California's six-month reinvestment period has been equitably tolled when, through no fault of their own, exemption *claimants lacked possession of or control over* homestead proceeds following an involuntary or voluntary sale of the homestead and, as a result, were unable to timely reinvest the proceeds.
>
> * * *
>
> The reinvestment period has also been equitably tolled when the debtor receives homestead proceeds following a voluntary sale of the homestead but, again, *circumstances beyond the debtor's control prevent the timely reinvestment of the proceeds*.

Id. (emphasis added). If equitable tolling is applied during the appeal of the Homestead Order, then Kane's purchase of his current home in Edmonton falls comfortably within the tolled period.

Practically speaking, the Bankruptcy Court's view that Kane received and had unfettered control over the Homestead Proceeds during the pendency of his appeal leads to an unfair result. Kane would ostensibly be required to purchase a home with the $170,350 portion of his exempt funds within six months of October 6, 2022. He would then await the appeal court's decision regarding the remaining $429,650. If he prevailed on appeal, he would then be required to purchase a second home to protect the additional funds. The far more reasonable result is to

equitably toll the reinvestment requirement until the amount of the Homestead Proceeds is conclusively determined.[6]

Finally, the Trustee speculates that Kane was not prevented from purchasing a residence because he "had a four-year contract with the Edmonton Oilers which paid him $5.125 million a year." Trustee's Responsive Brief at 14. However, this speculation does not establish that Kane actually received anything close to that amount after escrow, taxes, and withholdings, which have been discussed at length in related appeals. *See* D.C. No. 3:23-cv-02944-WHO, ECF 15 at 2 (estimating that such charges consumed 45% of Kane's paychecks). The speculation does not counter Kane's argument before the Bankruptcy Court that "great uncertainty regarding the status of the Debtor's 2021–22 NHL season, together with the relatively small sum of homestead proceeds that he actually received while he appealed the Homestead Order for the balance of his claimed exemption, made purchasing a new home in an expensive housing market impossible." ER-200. Finally, the speculation regarding Kane's income is ultimately irrelevant to the grounds for equitable tolling set forth in *Dudley*, which Kane fulfills for the reasons set forth above. 617 B.R. at 154.

III. CONCLUSION

For the reasons set forth above and in his Opening Brief, Evander Kane respectfully requests that this Court reverse the Bankruptcy Court's Turnover Order or, in the alternative, vacate and remand this matter to the Bankruptcy Court for further findings and conclusions consistent with this Court's decision.

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[6] That fact that Kane ultimately did not prevail on the appeal is immaterial. As he did not know the full amount of his Homestead Proceeds until the appeal was resolved, equitable tolling should apply.

Dated April 17, 2024

FINESTONE HAYES LLP

/s/ Stephen D. Finestone
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Evander Frank Kane

CERTIFICATION OF COMPLIANCE FOR BRIEFS

No.: 3:23-cv-05288-WHO

Debtor: Evander Frank Kane

The undersigned certifies that this brief contains 2,984 words, excluding the items exempted by Federal Rule of Bankruptcy Procedure 8015(g). This brief complies with the 6,500-word limit of Federal Rule of Bankruptcy Procedure 8015(a)(7)(B)(ii). The type size and typeface comply with Federal Rule of Bankruptcy Procedure 8015(a)(5)(A).

Dated April 17, 2024

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