

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK**

In Re:

JAMES T. WIGGINS, JR.,

Debtor.

BK. NO. 89-21053

DECISION AND ORDER

BACKGROUND

On June 9, 1989 the debtor, James T. Wiggins, Jr. (the "Debtor"), filed a voluntary petition initiating a Chapter 7 case. The petition listed his mailing address at c/o Wiggins, 128 Emerson Street, Rochester, New York 14613 ("Emerson Street"), the same address listed in response to question 1.C. of the Statement of Financial Affairs which asks: "where do you now reside." On Schedules A-2 and B-1 the Debtor listed as an asset real property jointly owned by him and located at 41 Timberline Drive, Webster, New York ("Timberline Drive") with a market value of \$129,000 and liens of \$63,130.16. On Schedule B-4 the Debtor claimed an exemption for Timberline Drive. On the Statement of Intention Regarding Consumer Debts the Debtor checked the homestead at Timberline Drive and the related mortgages to be retained indicating that the property had been claimed exempt.

A §341 meeting was scheduled for July 11, 1989 and was adjourned to August 2, 1989. At the adjourned §341 meeting the Debtor was examined by the Trustee. The Trustee's minute report indicates that the §341 meeting was closed on August 2, 1989. The report further indicates that there were possible assets in the case in the nature of equity in the Debtor's house, which the State Court had ordered sold as part of a pending matrimonial proceeding, and possible equity in an automobile.

The Court's June 20, 1989 Notice of the §341 meeting states that: "if the debtor is an individual any objection to debtor's claim of exempt property must be filed within 30 days following the conclusion of the Section 341(a) meeting or within 10 days of any objectionable amended claim of exemptions unless time to object is extended by the Court."

On October 27, 1990 an order was entered authorizing the Trustee to sell the interest of the

Debtor in Timberline Drive to Peter Zarcone (the Debtor's former father-in-law) for \$12,000, and the Trustee completed the sale.

By motion dated January 2, 1992 the Debtor moved to amend his statement of financial affairs to show that his residence at the time of the petition was Timberline Drive rather than Emerson Street. On March 4, 1992 an order was entered allowing the amendment without prejudice to the Trustee's rights to object to any claim of a homestead exemption. At the time the order was entered the Court was not aware that the Trustee had not previously filed objections to the claimed homestead exemption in accordance with Rule 4003. Thereafter, by motion returnable March 16, 1992 the Debtor moved for an order allowing him a \$10,000 homestead exemption to be paid from the proceeds of the Trustee's sale of Timberline Drive. The motion was opposed by the Trustee and a hearing was set for April 9, 1992 on the Trustee's objection to the allowance of the homestead exemption. The basis for the objection was that the Debtor did not reside at Timberline Drive at the time of the filing of his petition.¹

At the hearing on April 9, 1992 the principal testimony was by the Debtor and his former wife, Carolyn Wiggins.

DISCUSSION

From the pleadings in support of the motion to allow a homestead exemption and from the testimony before the Court on April 9, 1992, it is clear that the marital relationship between the Debtor and Carolyn Wiggins was extremely strained even prior to May, 1987 when the Debtor began

¹ Section 5206(a) of the New York Civil Practice Law and Rules provides that:

"Property of one of the following types, not exceeding ten thousand dollars in value above liens and encumbrances, owned and occupied as a principal residence, is exempt from application to the satisfaction of a money judgment, unless the judgment was recovered wholly for the purchase price thereof:

1. a lot of land with a dwelling thereon,"

to stay at Emerson Street, which is his mother's house, or at friends' houses.

Shortly after May, 1987 Carolyn Wiggins commenced an action for divorce against the Debtor in New York State Supreme Court ("Supreme Court") based on grounds of cruel and inhuman treatment and adultery. In May, 1989 after a trial which lasted several weeks and upon the stipulation of the parties, the Supreme Court ordered the Timberline Drive property sold and the proceeds held in escrow. An order to this effect was entered on July 5, 1989. In the fall of 1989 a Decree of Divorce was entered.

From the testimony and pleadings in this case it is clear that the Debtor did not technically reside on a permanent basis at Timberline Drive at the time of the filing of his petition. What is not clear is that he intended to permanently reside elsewhere. Certainly residing with his mother at Emerson Street was not intended as a permanent residence. The Debtor testified that he never intended to abandon Timberline Drive as his permanent residence, and in May, 1988 he brought a motion in the matrimonial action to have the Supreme Court permanently remove Carolyn Wiggins from the property so that he and his children could live there together. In his moving papers he stated that he had not abandoned the marital residence and did not intend to. This motion was denied as was a similar application by Carolyn Wiggins to have the Debtor permanently removed from the residence. It appears that it was not until after the Supreme Court ordered the property sold and the proceeds held in escrow that the Debtor rented an apartment of his own in September, 1989.

The Debtor's failure to reside at Timberline Drive was clearly in large part the result of the ongoing and heated matrimonial difficulties between he and Carolyn Wiggins which ultimately resulted in the Decree of Divorce being entered in the fall of 1989. There was a great deal of testimony concerning numerous incidents of violence between the parties. The police were called to Timberline Drive on a number of occasions and there were allegations that Carolyn Wiggins threw knives at the Debtor. Police reports were filed on at least two occasions after May, 1987, and in December, 1988 Carolyn Wiggins was arrested as result of an altercation with the Debtor at

Timberline Drive.

From the testimony and the pleadings on behalf of the Debtor it appears that although the Debtor did not reside at Timberline Drive on a permanent basis from May, 1987 to the date of the filing of his petition, he did have substantial contact with the property. The Debtor returned to the house often to spend time with his children, make repairs, pick up his mail and occasionally, he claims, sleep over on the couch. It also appears that the Debtor paid or at least contributed to the payment of the mortgages on Timberline Drive for periods through the beginning of 1989. It is undisputed that at the time of filing of his petition in June, 1989 the Debtor's then spouse and children were residing at Timberline Drive.

Since (1) at the time of the filing of his petition the Debtor's wife and children resided at Timberline Drive; (2) the State Court in the pending divorce action had not terminated the Debtor's rights of ownership or possession in the property; (3) the Debtor's failure to permanently occupy and reside at the property was primarily the result of matrimonial difficulties where there was evidence of violence between the spouses; (4) the Debtor had continual and substantial contacts with the property and had not established another permanent residence; and (5) the Debtor clearly claimed the property as exempt, this Court holds that the Debtor is entitled to a homestead exemption in accordance with the provisions of Section 5206 of the New York Civil Practice Law and Rules. In re Pearlman, 54 B.R. 455 (Bankr. S.D.N.Y. 1985); In re Smith, 57 B.R. 81 (Bankr. W.D.N.Y. 1985); In re Warren, 38 B.R. 290 (Bankr. N.D.N.Y. 1984); and In re Thomas, 27 B.R. 367 (Bankr. S.D.N.Y. 1983).

To disallow an exemption under such circumstances would be contrary to the policy underlying the exemption and would encourage hostile and sometimes violent parties in heated matrimonial actions to stay at the marital residence at all costs and engage in their own "War of the Roses." See In re Smith, 57 B.R. 81, 82 (Bankr. W.D.N.Y. 1985.)

A further reason to allow the Debtor the homestead exemption, which was clearly claimed

in his schedules, is that a review of the Court's files indicates that the Trustee did not file an objection to the claim of a homestead exemption, either in accordance with the provisions of Rule 4003 of the Rules of Bankruptcy Procedure or as required by the Court's Notice of the §341 meeting. In either case, an objection should have been filed and served by September 1, 1989 which was 30 days after the close of the first meeting of creditors. Although the Trustee may have orally advised the Debtor and his attorney of his objection at the §341 meeting, no objection was in fact filed with the Court as required by the Rules or the Court's Notice. Therefore, the Court concludes that the Trustee's objection was not timely made. Taylor v. Freeland, 1992 U.S. Lexis 2549 (April 21, 1992).

CONCLUSION

Since the Debtor's family resided at Timberline Drive at the time of the filing of his petition, the State Court had not determined that the Debtor had no rights of ownership or possession in the property, the Debtor maintained significant and continuous contacts with the property and had not established another permanent residence, the Debtor's failure to permanently reside at the property at the time of the filing of his petition was directly or indirectly the result of marital difficulties where there was a pending action for divorce and history of violence between the spouses and the Trustee failed to timely file objections to the claim of homestead exemption, this Court holds that the Debtor is allowed a \$10,000 homestead exemption from the proceeds of the sale of the Timberline Drive property.

IT IS SO ORDERED.

/s/
HON. JOHN C. NINFO, II
U.S. BANKRUPTCY COURT JUDGE

Dated: May 6, 1992