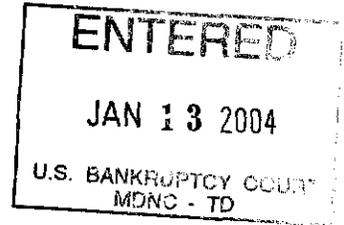


UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION



IN RE:

RANDALL C. MIKLES

DEBTOR

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CASE NO. 03-52865

**ORDER DENYING MOTION BY TRUSTEE TO COMPEL DEBTOR TO TURNOVER
EXCESS VALUE IN PROPERTY EXEMPTIONS**

This matter came on for hearing before the undersigned Bankruptcy Judge on December 3, 2003 upon the Motion by the Trustee to Compel Debtor to Turnover excess value in property exemptions and the Objection to the Motion as filed by the Debtor. Appearing before the Court was W. Joseph Burns, Trustee, and A. Carl Penney, counsel for the Debtor. After consideration of the matters of record in this case, the Court makes the following findings of fact and conclusions of law.

FACTS

The facts are not in dispute. The Debtor filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code on September 22, 2003 and W. Joseph Burns was duly appointed as the Trustee. The Debtor exempted his residence, which he owns as a tenant by the entirety, pursuant to 11 U.S.C. § 522(b)(2)(B) and the laws of the State of North Carolina pertaining to property held as tenants by the entirety. The Debtor listed the value of the homeplace at \$120,000.00 and listed two liens against the property totaling \$90,618.00. The Debtor did not exempt this property under the residential exemption of N.C.Gen.Stat. 1C-

1601(a)(1). In as much as the Debtor did not exempt his home under the residential exemption, the Debtor elected to exempt personal property under the “wild card” exemption consisting of monies in the amount of \$1,013.00 and equity in a 1997 Kenworth Tractor in the amount of \$1,000.00.

In a typical bankruptcy case, this fact scenario would not result in an objection to exemptions by the Trustee. However, it is undisputed that the Debtor’s spouse filed a Chapter 13 bankruptcy petition on September 4, 2003, known as Case No. 03-52646 (hereinafter referred to as the “Debra Mikles” case). Debra Mikles took the same exemption in the homeplace and proposed a Chapter 13 plan under which all secured and priority debts will be paid in full and unsecured creditors will be paid in full. The plan has not yet been confirmed by the court. The Trustee contends that since both the Debtor and Debra Mikles are in a bankruptcy proceeding, the Debtor owes the bankruptcy estate his excess equity in the real property of \$4,691.00¹. In addition, the Trustee contends that since both the Debtor and his wife are in a bankruptcy proceeding, the Debtor does not have a wildcard exemption and therefore the Debtor should also remit the sum of \$2,013.00.

DISCUSSION

Joint cases between a husband and wife are permitted by § 302(a) of the Bankruptcy Code. If there is a joint filing, there is simply joint administration of the cases. Only if the husband and wife file a joint case can the court determine to what extent, if any, the debtors’ cases should be consolidated for substantive purposes pursuant to §302(b). Absent the filing of a joint petition, there is no authority for substantive consolidation. Creditors may not file a joint

¹This figure is obtained by taking the value of the property (\$120,000) and deducting the mortgage balance of \$90,618.00 and then deducting the \$20,000 residential exemption leaving a balance of \$9,382.00 which is then divided by two, \$4,691.00.

involuntary petition against two spouses. In re Benny, 842 F.2d 1147 (9th Cir. 1988).

In this instance, one spouse has filed a Chapter 7 and the other, a Chapter 13. Each Debtor has a separate estate, separate §541 property, and separate exemptions. Each Debtor is entitled to exempt property held as tenants by the entirety and take advantage of a wild card. See In re Banks, 22 B.R. 891, 893 (Bankr. W.D.N.C. 1982). If a debtor elects the North Carolina statutory residence exemption, he or she may only exempt up to \$10,000 per person in equity. If a debtor exempts more than \$3,500 in equity, then he or she is not entitled to a wild card. In this case, neither Debtor elected the North Carolina statutory residence exemption and, thus, the full wild card exemption is available.

A separate analysis must be made for the entirety property exemption. This exemption is allowed under section 522(b)(2)(B) the Bankruptcy Code and applicable North Carolina law. The exemption is unlimited as to amount or value. The § 541 property that each debtor has includes an interest in property that is owned as a tenant by the entirety. See In re Cordova, 73 F.3d 38, 40 (4th Cir. 1996) and In re Ballard, 65 F.3d 367, 371 (4th Cir. 1996). In the Fourth Circuit, a debtor's right to exempt entireties property pursuant to § 522(b)(2)(B) is subject to the right of the bankruptcy trustee to liquidate entireties property for the benefit of joint creditors. See Sumy v. Schlossberg, 777 F.2d 921 (4th Cir. 1995). In this case, there are two mortgages that constitute joint debt and a limited number of joint unsecured debts (three creditors who are owed approximately \$10,000.00).² In order for a trustee to sell entireties property, he must comply with the provisions of 11 U.S.C. §363(h). That provision states:

Notwithstanding subsection (f) of this section, the trustee may sell both the

² The court notes that one of the Debts listed as joint is the debt of NC Two, L.P. This creditor filed a proof of claim with a judgment attached to the claim and only listed Randall Mikles as a Debtor. If this is correct, the non-mortgage joint debt is only \$7,000.00.

estate's interest, under subsection (b) or (c) of this section, and the interest of any co-owner in property in which the debtor had, at the time of the commencement of the case, an undivided interest as a tenant in common, joint tenant, or tenant by the entirety, only if--

(1) partition in kind of such property among the estate and such co-owners is impracticable;

(2) sale of the estate's undivided interest in such property would realize significantly less for the estate than sale of such property free of the interests of such co-owners;

(3) the benefit to the estate of a sale of such property free of the interests of co-owners outweighs the detriment, if any, to such co-owners; and

(4) such property is not used in the production, transmission, or distribution, for sale, of electric energy or of natural or synthetic gas for heat, light, or power.

In this instance, the Trustee has not initiated an adversary proceeding to sell the property. If one were filed, it could be argued that the co-owner's proposal to pay the joint debts in full in the Chapter 13 would prevent the Trustee from prevailing.

In this instance, the Trustee is asking the court to substantively consolidate a Chapter 7 with a Chapter 13 case and find that the Debtors are over the statutory North Carolina exemption of \$20,000 for real property. The Court does not find that any cause exists to substantively consolidate the cases. Additionally, there is no authority to change the § 522 exemptions to North Carolina statutory exemptions.

These are separate cases and must be treated as such. Each party elected legal exemptions and, therefore, the Trustee's objection to the wildcard exemption is overruled and the Trustee's Motion to require turnover of excess exemptions is DENIED.

This the 13 day of January 2004.

CATHARINE R. CARRUTHERS

Catharine R. Carruthers
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

IN RE:

Randall C. Mikles

Debtor

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Case Number: 03-52865 C-7W

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on the below date, the undersigned Deputy Clerk served a copy of the Order Denying Motion by Trustee to Compel Turnover by depositing the same, enclosed in a postpaid wrapper, properly addressed to the following parties in interest, at their last known addresses as shown below, in a post office or official depository under the exclusive care and custody of the United States Postal Service:

A. Carl Penney
P. O. Box 21103
Winston-Salem, NC 27120-1103

W. Joseph Burns
Suite 102
3600 Country Club Road-Park West
Winston-Salem, NC 27284

Kathryn L. Bringle
Chapter 13 Trustee
Box 2115
Winston-Salem, NC 27102-2115

Michael D. West (via BA's Box)
P. O. Box 1828
Greensboro, NC 27402

THIS the 13 day of January, 2004.

OFFICE OF THE CLERK

BY:



Tonya Doucette

Case Administrator