


SO ORDERED.

SIGNED this 9th day of February, 2022.



  
LENA MANSORI JAMES  
UNITED STATES BANKRUPTCY JUDGE

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

IN RE:	)	
	)	
Donald Calvin McLain,	)	Case No. 19-51262
	)	
Debtor.	)	Chapter 7
_____	)	

**ORDER**  
**OVERRULING TRUSTEE’S OBJECTION TO EXEMPTION**

THIS CASE comes before the Court on the Objection to Debtor’s Claim for Property Exemption in 390 Concord Parkway N., Concord, North Carolina (Docket No. 120, the “Objection”), filed by the chapter 7 trustee (the “Trustee”). For the reasons stated below, the Court finds the Trustee did not meet the heightened burden set by Rule 4003(b)(2) of proving the Debtor fraudulently claimed his homestead exemption and will thus overrule the Objection.

**BACKGROUND**

The Debtor initiated this case on December 2, 2019, by filing a voluntary petition under chapter 13 of the Bankruptcy Code. In the Debtor’s bankruptcy

schedules (Docket No. 15), prepared with the help of bankruptcy counsel,<sup>1</sup> the Debtor listed interests in several real properties, including fee simple ownership interests in 390 Concord Parkway N., Concord, North Carolina (the “Concord Parkway Property”) and 30 Sumner Avenue NW, Concord, North Carolina (the “Sumner Property”). The Debtor valued the Concord Parkway Property at \$490,590.00, which was encumbered by a mortgage held by Uwharrie Bank in the amount of \$209,763.70 (Claim # 12-1) and a secured tax lien of the Cabarrus County Tax Collector in the amount of \$12,688.36 (Claim # 2-1).

In his petition, and in response to the prompt “where you live,” the Debtor entered the address for the Concord Parkway Property. Several weeks after the petition date and in conjunction with the filing of his schedules and statements, the Debtor filed a Notice of Change of Address, changing his mailing address to a post office box number in Concord, North Carolina (Docket No. 12).

In Section 1 of Local Form 91C, the Debtor claimed a \$35,000.00 exemption on the Concord Parkway Property under N.C. Gen. Stat. § 1C-1601(a), which provides that a resident of North Carolina who is a debtor is entitled to exempt his or her “aggregate interest, not to exceed thirty-five thousand dollars (\$35,000) in value, in real property or personal property that the debtor or a dependent of the debtor *uses as a residence*.” N.C. Gen. Stat. § 1C-1601(a)(1) (emphasis added). To date, the Debtor has not amended any of his claims for exemption.

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<sup>1</sup> Just prior to the conversion of the Debtor’s case to chapter 7 of the Bankruptcy Code, the Debtor’s bankruptcy counsel requested and received Court approval to withdraw from further representation of the Debtor (Docket No. 59). To date, the Debtor has not retained new counsel and has proceeded pro se.

On January 10, 2020, the chapter 13 trustee conducted the meeting of creditors required under 11 U.S.C. § 341, and the Debtor's proposed chapter 13 plan was confirmed on April 30 of that year (Docket No. 30, the "Plan"). At no time during the chapter 13 phase of this bankruptcy case did any party object to the Debtor's claimed exemption in the Concord Parkway Property.

The Plan required the Debtor to market and sell the Concord Parkway Property by a date certain. When it remained unsold by that date, the Plan required the Concord Parkway Property to be sold through auction, but the Debtor refused to sign the documents required to consummate the sale. On the motion of Uwharrie Bank and based on the material violation of the Plan's terms, the Court converted the Debtor's chapter 13 case to a case under chapter 7 of the Bankruptcy Code on August 11, 2021 (Docket No. 61). After his appointment, the Trustee successfully moved for Court approval to sell the Concord Parkway Property for \$380,000.00, eventually completing the sale process in early 2022 (Docket Nos. 92, 124).

On October 29, 2021, the Trustee filed an initial objection under Rule 4003(b)(1) to the Debtor's claimed homestead exemption in the Concord Parkway Property (Docket No. 99), but later withdrew it upon finding the objection was untimely by operation of Federal Rule of Bankruptcy Procedure 1019(2)(B).<sup>2</sup>

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<sup>2</sup> The Trustee filed the initial objection under Rule 4003(b)(1), which permits a party in interest to file an objection "within 30 days after the meeting of creditors held under § 341(a) is concluded or within 30 days after any amendment to the list or supplemental schedules is filed, whichever is later." Federal Rule of Bankruptcy Procedure 1019, however, provides in relevant part:

(B) A new time period for filing an objection to a claim of exemptions shall commence under Rule 4003(b) after conversion of a case to a chapter 7 case unless:

- (i) the case was converted to chapter 7 more than one year after the entry of the first order confirming a plan under chapter 11, 12, or 13; or

Approximately one month later, the Trustee filed the instant Objection under Rule 4003(b)(2), which provides an exception for the trustee — and only the trustee — to the limited timeframe in which an objection may be filed. Under subparagraph (b)(2), the trustee may file an objection “at any time prior to one year after the closing of the case” but only if the debtor “*fraudulently* asserted the claim of exemption.” Fed. R. Bankr. P. 4003(b)(2) (emphasis added). The Trustee alleged that the Debtor’s true residence at the time of the petition was the Sumner Property and that the Debtor “fraudulently stated in his bankruptcy schedules that he resided at the [Concord Parkway Property] in order to obtain the benefit of a (wrongful) claim for exemption in the same.” (Docket No. 120, ¶¶ 13–14). Based on this allegedly fraudulent claim, the Trustee asserted his objection to the Debtor’s homestead exemption was timely under Rule 4003(b)(2).

The Court held a hearing on the Objection on February 1, 2022, at which Daniel Bruton appeared in his capacity as Trustee. The pro se Debtor did not appear at the hearing and did not file a response to the Objection.

#### DISCUSSION

While the Trustee filed the Objection nearly two years past the general deadline, he may nevertheless move to deny the Debtor his homestead exemption

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(ii) the case was previously pending in chapter 7 and the time to object to a claimed exemption had expired in the original chapter 7 case.

Fed. R. Bankr. P. 1019(2)(B). As the case was converted to chapter 7 in August 2021, which was more than one year after the Debtor’s chapter 13 plan was confirmed in April 2020, there was no new time period afforded the Trustee and his objection under Rule 4003(b)(1) was thus time-barred.

under Rule 4003(b)(2) if he can show the Debtor fraudulently asserted the exemption claim in the Concord Parkway Property. The rule provides that

The trustee may file an objection to a claim of exemption at any time prior to one year after the closing of the case if the debtor fraudulently asserted the claim of exemption. The trustee shall deliver or mail the objection to the debtor and the debtor's attorney, and to any person filing the list of exempt property and that person's attorney.

Fed. R. Bankr. P. 4003(b)(2).

For the Court to sustain his Objection, the Trustee must satisfy both the general burden set by Rule 4003(c) in proving that the exemption is not properly claimed,<sup>3</sup> as well as the heightened burden set by Rule 4003(b)(2) of proving the Debtor fraudulently asserted the exemption claim. As in the case of any objection under Rule 4003, the Trustee, as the objecting party, bears the burden of proving the exemption is wrongfully claimed by a preponderance of the evidence. *In re Jolly*, 567 B.R. 480, 482 (Bankr. M.D.N.C. 2017). A claimed exemption is presumptively valid, *In re Man*, 428 B.R. 644, 653 (Bankr. M.D.N.C. 2010), and North Carolina “exemption laws are to be liberally construed in favor of the debtor and allowance of the exemption.” *In re Wright*, 618 B.R. 743, 746 (Bankr. M.D.N.C. 2020) (quoting *In re Parker*, 610 B.R. 535, 537 (Bankr. E.D.N.C. 2019)). If the objecting party produces evidence to rebut the presumptive validity of the claimed exemption, the burden of production shifts to the debtor “to come forward with evidence to demonstrate that the exemption is proper.” *In re Man*, 428 B.R. at 653 n.3 (quoting

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<sup>3</sup> “Burden of Proof. In any hearing under this rule, the objecting party has the burden of proving that the exemptions are not properly claimed. After hearing on notice, the court shall determine the issues presented by the objections.” Fed. R. Bankr. P. 4003(c).

*In re Carter*, 182 F.3d 1027, 1029 n.3 (9th Cir. 1999)). Even in this burden-shifting approach, however, the objecting party retains the burden of persuasion. *Id.*; see also *In re Nicholson*, 435 B.R. 622, 630 (B.A.P. 9th Cir. 2010).

In addition to showing the Debtor's homestead exemption was not properly claimed, the Trustee must also prove, for purposes of Rule 4003(b)(2), that the Debtor fraudulently<sup>4</sup> asserted the exemption. The Ninth Circuit Bankruptcy Appellate Panel explained the interplay between the two burdens the trustee must satisfy:

In order to establish that the debtor fraudulently asserted the exemption, the objector must do more than show that the facts do not support the claim of exemption. The objector must also show that the debtor knew, at the time she claimed the exemption, that the facts did not support that claim, and that she intended to deceive the trustee and creditors who read the schedules.

*Whatley v. Stijakovich-Santilli (In re Stijakovich-Santilli)*, 542 B.R. 245, 256 (B.A.P. 9th Cir. 2015). As one court noted, demonstrating an exemption was fraudulently claimed “is not an easy standard to meet.” *In re Koki*, No. 17-01055, 2018 WL 816812, at \*3 (Bankr. D. Haw. Feb. 9, 2018).

To support the Objection, the Trustee points to two pieces of evidence that he argues show the Debtor fraudulently claimed his homestead exemption. First, he points to the Notice of Change of Address that the Debtor filed weeks after the petition date, which the Trustee posits was done because the Debtor “did not reside at the [Concord Parkway Property] and did not want his bankruptcy mailings to be

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<sup>4</sup> As it is undefined in Rule 4003, the Court applies the common law definition of fraud, except the damages requirement. *Whatley v. Stijakovich-Santilli (In re Stijakovich-Santilli)*, 542 B.R. 245, 256 (B.A.P. 9th Cir. 2015).

sent to an address where he did not reside.” (Docket No. 120, ¶ 11). Second, the Trustee filed the transcript from the § 341 meeting he conducted with the Debtor on October 29, 2021 (Docket No. 125). The relevant portion of the transcript includes the following exchanges between the Trustee and the Debtor:

MR. BRUTON: When's the last time you lived in that house [at 390 Concord Parkway].

MR. McLAIN: Define lived. What's

MR. BRUTON: --- Well, I'm not talking spending a night. That house was your home where you woke up in the morning and went home at night and continued to do so on a regular basis.

MR. McLAIN: I have not been in the house to sleep other than what I've done since this bankruptcy has started this to try to move the stuff out ---

MR. BRUTON: --- Okay, so back in 2

MR. McLAIN: --- According to what Ms. -- what [my former bankruptcy attorney] has told me that I had to do.

MR. BRUTON: Right. Okay. So back when you filed in 2019, you were quote, unquote, living at the 30 Summer Avenue address. Is that correct?

MR. McLAIN: That was where I was staying for my business, yes.

MR. BRUTON: What do you mean staying for your business?

MR. McLAIN: Well, I have the two properties. My home has always been 390 and my wife and I bought 30 Sumner about 20 years ago.

...

MR. BRUTON: So you and your ex-wife moved into the 30 Sumner Avenue property and lived there? That's where you spent the night?

MR. McLAIN: At that time, yes, sir.

MR. BRUTON: All right. But what was the status when you filed bankruptcy with [your former attorney] back in 2019? Where did you spend the night then?

MR. McLAIN: I was at 30 Sumner Avenue.

MR. BRUTON: Okay. That's what I need to know in that regard.

Docket No. 125, pp. 5–8. The Trustee argues that this purported admission demonstrates the Debtor did not use the Concord Parkway Property as his residence at the time of the bankruptcy filing and that he “lied about the location of his residence in his bankruptcy petition” (Docket No. 120, ¶¶ 13–14).

Based on evidence presented, the Court finds the Trustee falls short of meeting the required burden under Rule 4003(b)(2). First, the Court finds the Debtor's decision to change his mailing address to a post office box is not, on its own, sufficient to prove the Debtor did not use the Concord Parkway Property as his residence for purposes of the North Carolina homestead exemption. *See, e.g., In re Edwards*, No. 13-36126, 2015 WL 179073, at \*4 (Bankr. N.D. Tex. Jan. 13, 2015). Additionally, the Trustee's definition of "lived" that he provided to the Debtor at the § 341 meeting does not directly align with the meaning of residence for purposes of the North Carolina homestead exemption under N.C. Gen. Stat. § 1C-1601(a)(1). Courts have found valid homestead exemptions under North Carolina law where debtors did not spend every night in the property at issue. *See, e.g., In re Davila*, No. 13-03246, 2014 WL 335393 (Bankr. E.D.N.C. Jan. 30, 2014) (finding property in Mexico, on which debtor paid taxes and kept personalty, including her dining room table and bed, to be debtor's residence although her brother had lived at the property for a period of time and protected and maintained the home); *In re Whitney*, No. 13-05671, 2014 WL 183821 (Bankr. E.D.N.C. Jan. 15, 2014) (finding inherited property where debtor maintained utilities, paid the property taxes, and kept much of her personalty to be her residence although she only resided at property approximately 10 days a month).

Second, even if the Court found the Debtor's homestead exemption in the Concord Parkway Property to be improperly claimed, the evidence provided by the Trustee does not satisfy his burden to prove the Debtor fraudulently claimed that



exemption. The only contemporaneous or subsequent statements made by the Debtor that are before the Court, and which could shed any light on the Debtor's state of mind at the time he made the exemption claim, come from the October 2021 transcript of the § 341 meeting.<sup>5</sup> Rather than proving the Debtor knew, at the time he claimed the exemption in the Concord Parkway Property, that the facts did not support the claim, the transcript instead reveals the Debtor to be unsure of the legal meaning of "lived" for purposes of his exemption and that he likely relied on the advice of his former counsel when claiming his exemptions. There is nothing in the transcript evidencing an attempt by the Debtor to deceive the Trustee; it appears to the Court that the Debtor answered the Trustee's questions to the best of his understanding and forthrightly admitted where he "spent the night" according to the Trustee's explanation of the term "lived." In sum, the Court finds the Objection to be lacking the quantity and type of evidence courts have relied upon to find fraudulent exemptions under Rule 4003(b)(2). *See generally Kolb v. Bentley (In re Bentley)*, 599 B.R. 369 (Bankr. M.D. Fla. 2019); *In re Stijakovich-Santilli*, 542 B.R. 245; *In re Petrosine*, No. A11-00424, 2012 WL 4070038 (Bankr. D. Alaska Sep. 13, 2012).

The Court recognizes that, in bringing this Objection, the Trustee is indirectly attempting to *preserve* the Sumner Property for the Debtor. The Trustee has significant funds on hand from the sale of the Concord Parkway Property, but

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<sup>5</sup> There was no transcript provided of the initial § 341 meeting of creditors held by the chapter 13 trustee on January 10, 2020. The Court is, therefore, unable to ascertain what topics may have been covered or how the Debtor characterized his residence at that time.

given the Debtor's \$35,000.00 homestead exemption, it does not appear that those funds will be sufficient to pay all creditors in full. As a result, the Trustee will be required to move forward with a sale of the Sumner Property, which appears to have significant equity. The Court urges the Debtor to consider the practical implications of his claim for exemption and notes that Rule 1009(a) provides in relevant part, "[a] voluntary petition, list, schedule, or statement may be amended by the debtor as a matter of course at any time before the case is closed." Fed. R. Bankr. P. 1009(a).

#### CONCLUSION

Accordingly, IT IS HEREBY ORDERED that the Trustee's Objection is OVERRULED and the Debtor's proposed residential exemption of the Concord Parkway Property under N.C. Gen. Stat. § 1C-1601(a)(1) is allowed as filed.

**END OF DOCUMENT**

PARTIES TO BE SERVED

Donald McLain (Ch.7)

19-51262

Daniel C. Bruton, Trustee  
*via cm/ecf*

William P. Miller, BA  
*via cm/ecf*

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