

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION**

In re:)	
)	
Bruce Gill,)	Case No. 11-80976
)	
Debtor.)	

**ORDER OVERRULING TRUSTEE'S OBJECTION TO
DEBTOR'S CLAIM FOR PROPERTY EXEMPTIONS**

THIS MATTER came on for hearing before the undersigned bankruptcy judge on the Trustee's Objection to the Debtor's Claim for Property Exemptions. Appearing at the hearing was Stephanie Osborne-Rodgers, counsel for the Chapter 7 Trustee, and Joe Weinberger, Jr., counsel for the Debtor. Having considered the Objection, evidence, and other matters of record, the court makes the following findings of fact and conclusions of law:

The Debtor filed a petition for relief under Chapter 13 of the Bankruptcy Code on June 17, 2011 (the "Petition Date"). On his schedules, the Debtor listed himself as a co-owner of real property located at 205 Marvin Gill Road in Roxboro, North Carolina (the "Property") with a total value of \$76,900.00 and indicated that the Property was encumbered by a mortgage held by Chase with a balance of \$15,716.39. The Debtor's ex-wife is the co-owner of the Property but has not lived in the Property since 2008. On Local Form 91C, the Debtor claimed the net value of his half interest in the Property in the amount of \$30,591.81 as exempt pursuant to N.C. Gen. Stat. § 1C-1601(a)(1). The Trustee has filed an objection and contends that the Property does not qualify as the Debtor's residence.

Pursuant to North Carolina law, a resident of North Carolina who is a debtor is entitled to exempt his or her aggregate interest, not to exceed \$35,000.00 in value, in real or personal

property that the debtor or a dependent of the debtor uses as a residence. N.C. Gen. Stat. § 1C-1601(a)(1). Exemption laws should be liberally construed in favor of the exemption. *Elmwood v. Elmwood*, 295 N.C. 168, 185 (1978).

The Trustee asserts that the Debtor did not actually reside in the Property on the Petition Date; therefore, the Property cannot be exempted as his residence. The court agrees with the Trustee that, generally, a debtor must occupy property in order to claim it as his or her residence. Nevertheless, “absence from the home that is involuntary and temporary does not constitute relinquishment or abandonment of the homestead.” *In re McClamrock*, 2004 WL 229521, at *1-2 (Bankr. M.D.N.C. 2004) (citing *In re Buick*, 237 B.R. 607, 610 (Bankr. W.D.Pa. 1999)). Accordingly, the mere fact that a debtor does not occupy property does not necessarily preclude it from qualifying as a residence under N.C. Gen.Stat. § 1C-1601(a)(1). *Id.*

In this case, the record reflects that the Debtor lived in the Property for approximately 28 years, but then moved into his girlfriend's home sometime last year due to the presence of mold in the house. Debtor continued to make the mortgage payment of \$266.92 per month during his absence, and he included the mortgage payment on Schedule J as part of his budget. The Debtor has not changed his address on any documentation, such as his driver's license. The court finds that the Debtor's absence from the Property on the Petition Date was involuntary. It is not disputed that the Property is contaminated with mold, and the evidence reflects that, but for the mold, the Debtor would not have moved out. The Debtor has not had and still does not have the funds to pay for the removal of the mold.

The Trustee also argues that the Property does not qualify as the Debtor's residence because the Debtor intends to sell the Property, and therefore has no intent to return to the

Property.¹ The Debtor and his ex-wife entered into a contract for the sale of the Property on July 15, 2011, approximately one month post-petition, with the closing scheduled for September 30, 2011. It is a basic principal of bankruptcy law that exemptions are determined as of the date that a bankruptcy petition is filed. *See e.g., In re Orso*, 283 F.3d 686, 691-92 (5th Cir. 2002) (“We cannot emphasize too strongly that the day on which the bankruptcy petition is filed is the ‘as of’ date for determining the applicability of exemption provisions.”). The Debtor had not entered into a contract to sell the Property on the Petition Date. Moreover, even if the Debtor had been party to such a contract, a pending contract to sell is merely that, and certainly not a guarantee that the Property would actually sell. *See In re Cunningham*, 513 F.3d 318, 324 (1st Cir. 2008) (holding that proceeds from postpetition sale of home retained exempt status and stating “[t]o interpret § 522(c) as conferring merely an ephemeral exemption, subject to post-termination events, would undermine that basic principle and its relationship to the fresh start policy of the Bankruptcy Code”); *In re Wengerd*, __ B.R. __, 2011 WL 2328863, at *5 (6th Cir. BAP 2011) (holding the debtor’s intent to sell residence post-petition was irrelevant and did not defeat the establishment of an allowable homestead exemption). Given that the Property qualified as the Debtor’s residence on the Petition Date because his absence from the Property was involuntary,

¹The Trustee does not dispute that if the Debtor intended to move back into the Property rather than sell it, it would qualify as the Debtor’s residence for purposes of his exemptions. Unfortunately, the Debtor cannot currently occupy the Property as is, and the Debtor cannot afford the cost of removing the mold from the Property. The court notes that the Trustee’s reasoning effectually puts the Debtor into a box: the Property qualifying as the Debtor’s residence even though he cannot occupy it so long as he does not intend to sell it, but not qualifying if he does intend to sell it so that he can use the proceeds to obtain a residence that is habitable.

the Debtor's intent to attempt to sell the Property postpetition does not disqualify him from the residential exemption.

Based on the forgoing, after consideration of the facts and circumstances of this case, the Court finds that the Debtor is entitled claim the net value of his half interest in the Property in the amount of \$30,591.81 as exempt pursuant to N.C. Gen. Stat. § 1C-1601(a)(1). The Trustee's Objection is overruled.

SO ORDERED.

SERVICE LIST

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Debtor

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Stephanie Osborne-Rodgers
Attorney for Trustee

John A. Northen
Trustee

Michael D. West
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