

**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF FLORIDA  
PENSACOLA DIVISION**

In re:

CAROL A. KAIN,  
  
Debtor.

CASE NO.: 12-31492-KKS  
CHAPTER: 7

---

**ORDER DETERMINING PORTION OF PROPERTY EXEMPT,  
AS TO ORDER SUSTAINING IN PART AND OVERRULING IN  
PART (DOC. 102) CREDITOR VIRGINIA PEARCE'S OBJECTION  
TO DEBTOR'S CLAIM OF HOMESTEAD EXEMPTION (DOC. 11)**

THIS MATTER came before the Court for a further evidentiary hearing on October 16, 2013, for a determination of what amount of the Debtor's property, measured either in percentage or in square feet ("ft<sup>2</sup>"), qualifies for homestead exemption pursuant to this Court's Order Sustaining in Part and Overruling in Part Creditor Virginia Pearce's Objection to Debtor's Claim of Homestead Exemption (Doc. 102). Present at the hearing were the Debtor and her counsel, Creditor, Virginia Pearce and her counsel, and the Chapter 7 Trustee.

The Debtor filed her voluntary Petition for relief under Chapter 7 on November 5, 2012. She listed one parcel of real property on her Schedule A and listed that property as exempt on her Schedule C. Creditor, Virginia Pearce, filed her Objection to Debtor's Claim of Homestead Exemption (the "Objection," Doc.11) on November 21, 2012; the Debtor filed a Response on December 5, 2012. (Doc. 14). Following a preliminary hearing on the Objection on December 19, 2012, and an evidentiary hearing on March 27, 2013, the Court requested the parties to file supplemental memoranda of law, which they did on April 15 and 16, respectively. At the March 27, 2013 evidentiary hearing the Court heard testimony of the Debtor and several other witnesses for the Debtor and for Virginia Pearce, received documentary evidence, and heard argument of counsel. At a telephonic hearing on July 9, 2013, the Court announced its findings of fact and

conclusions of law on the legal issue of whether any of the Debtor's property, which is zoned commercial and historically housed the Debtor's medical practice, could be exempt homestead. The Order Sustaining in Part and Overruling in Part Creditor Virginia Pearce's Objection to Debtor's Claim of Homestead Exemption ("Exemption Order," Doc. 102), entered on July 15, 2013, was based on and incorporated by reference the findings and conclusions announced on July 9.

The Exemption Order sustained the Objection as to the portion of the Debtor's real property and improvements used for business purposes and overruled the Objection as to the portion of the property that "functions solely as the Debtor's residence." Virginia Pearce filed a Motion to Reconsider the Exemption Order (Doc. 104), which the Debtor opposed (Doc. 108). After hearing argument of the parties on Virginia Pearce's Motion for Reconsideration, the Court denied that Motion by order dated August 26, 2013.<sup>1</sup> The October 16, 2013 final evidentiary hearing was for the purpose of determining what amount of the Debtor's property, measured either in percentage or in square feet, qualifies as exempt homestead as the portion of the property that functioned solely as the Debtor's residence. Under the applicable case law the Court must look to the Petition date, November 5, 2012, to determine what, if any, portions of the property owned by the Debtor qualifies as exempt homestead because it functioned solely as the Debtor's residence. The following facts are undisputed:

As of the Petition date the Debtor, an Osteopathic physician who had been in practice for many years, was continuing to use her property as a clinic for treating patients. The Debtor saw one patient at the clinic on the petition date and three patients the week prior.<sup>2</sup> As of the Petition date the Debtor was residing on the property, having lost her prior marital home at foreclosure

---

<sup>1</sup> Creditor Virginia Pearce has appealed the Order Denying her Motion for Reconsideration. (Doc. 120). Virginia Pearce also filed a motion for the Court to file a written opinion, which was denied by order dated July 15, 2013 (Doc. 103).

<sup>2</sup> Creditor's Ex. 5 at 4.

one year before. When the Debtor filed her Petition, she was liable to Virginia Pearce on a final deficiency judgment in the amount of \$258,414.20 resulting from the foreclosure on her prior marital home.<sup>3</sup> Virginia Pearce is the Debtor's largest creditor.

Pre-petition the Debtor had requested a zoning variance from the Town of Shalimar, in order to live on the property as her residence.<sup>4</sup> That request was denied, and as of the Petition date the Debtor's property was subject to fines being assessed for zoning violations (residing on commercially zoned property) at the rate of \$10.00 per day.<sup>5</sup> In spite of having been denied a zoning variance, and in spite of the zoning violation fines accruing, the Debtor continued to reside on the property because, as she testified, she had nowhere else to go.

In a case involving somewhat similar facts, *In re Wilson*,<sup>6</sup> the Bankruptcy Court for the Southern District of Florida was faced with a debtor who claimed homestead exemption as to a commercially zoned nightclub that contained an upstairs apartment where the debtor was residing. The *Wilson* court overruled the creditor and trustee's objections to the debtor's claim of homestead exemption on the portion of the property that functioned solely as the debtor's residence.<sup>7</sup> Bankruptcy courts in other states faced with similar facts and the same issue have ruled similarly to the court in *Wilson*.<sup>8</sup>

Based on the applicable case law and the evidence presented at the hearings on March 27 and October 16, 2013, the Court finds that the bathroom and a portion of the "kitchen" on the Debtor's property are exempt homestead. Those are the only portions of the property that the Debtor used exclusively for her residence as of the date of the Petition. Virginia Pearce's Objection to

---

<sup>3</sup> Doc. 69.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *In re Wilson*, 393 B.R. 778 (Bankr. S.D. Fla 2008).

<sup>7</sup> *Id.* at 783.

<sup>8</sup> See *In re Turner*, 04-40267DRD, 2005 WL 1397150 (Bankr. W.D. Mo. 2005); *In re McClain*, 281 B.R. 769 (Bankr. M.D. Fla. 2002); *In re Pich*, 253 B.R. 562 (Bankr. D. Idaho 2000).

homestead exemption is SUSTAINED as to the remaining portions of the property based on the following facts:

- a. Room 1 / Entrance Foyer<sup>9</sup>: From the Debtor's own testimony and the pictures admitted into evidence, it is undisputed that patients must walk into "Room 1," the entrance foyer, to be seen by the Debtor for treatment. From this room, patients may proceed to the right and into a "visiting room" ("Room 2") that functioned as a small lobby, or to the left and into the back office. The Debtor's argument, that because no medical services were provided in Room 1 the room is entitled to homestead protection, is not supported by the case law. Regardless of where the Debtor performed the actual medical services to her patients, Room 1 was used as the entryway for the Debtor's patients and did not function solely for residential purposes.
- b. Room 2 / Lobby / Visiting Room: At the hearing on October 16, 2013, the Debtor introduced self-serving photos, recently taken, of the property in its current use.<sup>10</sup> These photos showed that Room 2, right off of Room 1, is now being used as a bedroom for the Debtor and contains an actual bed, rather than a rollaway or folding cot. Virginia Pearce introduced photos taken of the property on April 26, 2012 that showed that the Debtor was using Room 2 as a lobby area for patients.<sup>11</sup> Because the date relevant to this Court's determination is the petition date, not a date some eleven months later, the Court finds the Creditor's photos more persuasive to show how Room 2 functioned as of the petition date. Other facts support this finding. Carlene Larson, a friend and patient of the Debtor, testified at the

---

<sup>9</sup> All references to room numbers are to Debtor's Ex. 1, introduced in evidence at the October 16 hearing. This document is also attached to this Order.

<sup>10</sup> Debtor's Ex. 3.

<sup>11</sup> Creditor's Ex. 27.

October 16 hearing that the bed in the Debtor's photos was a gift she gave the Debtor in June 2013, which was post-petition. The Debtor's prior testimony was that she slept on a folding rollaway bed.<sup>12</sup> The Creditor's photos show the rollaway bed folded up in the large office.<sup>13</sup> From this evidence, the Court infers that if the Debtor slept in Room 2 on the petition date, she did so at night using the rollaway bed but that during the day the room was used as a lobby for her patients.

c. Room 5 / Office: Room 5 was irrefutably the room where the Debtor treated her patients. At the hearing on October 16, 2013, the Debtor and one of her patients, Carlene Larson, testified that this room is where the Debtor spoke with patients, filled out their paperwork, and provided her patients medical care.<sup>14</sup> The Debtor argued that she only treated her patients for a maximum of 10 to 15 minutes in this room, and that while it may be of mixed use, the room was primarily used for residential purposes. This argument, while it may be based on fact, is insufficient under the case law to support a finding that this room should be considered the Debtor's exempt homestead. The amount of time the Debtor spent with patients in this room is, for all intents and purposes, irrelevant. The issue for the Court's determination was what portion of the property functioned *solely* as the Debtor's residence.<sup>15</sup> The mixed use of Room 5 renders that area non-exempt.

d. Room 6 / Stairs and Hallway, Rooms 7 and 8 / "Examination Rooms," Rooms 9 & 10 / Second Floor: The only pictures of the remaining rooms introduced into

<sup>12</sup> Carlene Larson testified at the hearing on March 27, 2013 that the rollaway bed was stationed in the kitchen area. Creditor's Ex. 22 at 41, 44.

<sup>13</sup> Creditor's Ex. 27.

<sup>14</sup> The Debtor testified that during the past few years her medical care consisted primarily of taking vital signs, reviewing medical records from other doctors and hospitals, and making recommendations for possible alternative treatments or referral to other physicians.

<sup>15</sup> *In re Wilson*, 393 B.R. at 783.

evidence at the October 16 hearing were the Debtor's photos taken in preparation for that hearing. These photos appeared staged to make it look like the Debtor used these areas strictly for residential purposes. The photos were not enough, however, when combined with the Debtor's and other witnesses' testimony, to prove that these areas were used, as of the petition date, *solely* as the Debtor's residence. The Debtor's photos of Room 6, the stairs and hallway show an eye chart and scales. The photos of the examination rooms (Rooms 7 and 8) show medical charts on the walls. The Debtor testified in a deposition in June of 2012 that she stored medical records on the second floor, Rooms 9 and 10.<sup>16</sup> The testimony at the hearings was that the Debtor was continuing to conduct her medical practice in this building, and that these rooms and areas were more used for the Debtor's medical practice and storing medical and other business records, than for residential purposes on the petition date. The only "evidence" that these areas were used strictly for residential purposes as of the petition date was the Debtor's self-serving testimony and her photos. The Debtor took the photos after this Court had already ruled, and she knew, that only that portion of the property that the Debtor was using solely for residential purposes would be exempt homestead. Virginia Pearce met her burden of proof that these areas of the Debtor's property were not being used strictly for residential purposes as of the petition date. The Debtor's "evidence" was not sufficient to prove otherwise.

- e. Exterior: In order to gain entry into the clinic, the Debtor's patients must walk across the front porch of the clinic, park in the parking lot, and walk across the

---

<sup>16</sup> Creditor's Ex. 23 at 13. The testimony of Richard Powell, the attorney who represented the Creditor in April of 2012 and whose photographs were admitted into evidence at the October 16 hearing, was that the Debtor would not permit him into the back area of the building. This testimony was given at the October 16, 2013 hearing.

parking lot. None of the exterior of the building was, or is, used by the Debtor solely for residential purposes.

The objecting party, here Creditor Virginia Pearce, bears the burden of proving that an exemption was not properly claimed.<sup>17</sup> The Creditor has met this burden for all portions of the Debtor's property other than the bathroom and approximately one-half of the kitchen area, which the Court finds are exempt homestead based on the following facts:

- f. Room 3 / Kitchen, Computer, and Dining Room: This room functioned as a type of multipurpose room with a kitchenette area, desk space with a printer and computer, and filing cabinets. The Debtor testified at the October 16, 2013 hearing that she uses her computer to go online and conduct medical research, as well as for personal matters. She testified that the cabinets may contain some patient progress charts and that she used the kitchenette area in which to prepare meals for only herself. The Debtor made no argument and gave no testimony that anything in this room had changed since the petition date. Virginia Pearce did not introduce any evidence that the kitchenette portion of this room was used for anything other than the Debtor's personal use in preparing meals. Based on the evidence presented, the Court finds that the kitchenette portion of Room 3 was solely used for residential purposes on the petition date.
- g. Room 4 / Bathroom: At the October 16, 2013 hearing, the Debtor testified that starting in 2008 patients were no longer permitted to use her bathroom when being treated at the clinic. This testimony was corroborated by her patient and friend, Carlene Larson. At the prior hearing on March 27, 2013, another of the Debtor's patients, Lynn Stefanik, testified that sometime before December of

---

<sup>17</sup> See Rule 4003(c) of the Federal Rules of Bankruptcy Procedure.

2007 she began noticing toiletries in the bathroom.<sup>18</sup> The bathroom is a half bath, containing a sink, toilet, and a removable plastic tub that the Debtor stands in to bathe herself.<sup>19</sup> There was no evidence that the bathroom was used by anyone other than the Debtor as of the petition date, or that the bathroom was not being used solely for the Debtor's residential use.

Based on the above findings, and in order to establish the portion of the property that qualifies as exempt homestead, the Court used the parties' stipulation of undisputed facts (Doc. 150) and the scale of the floor plan on the Creditor's Exhibit 32. Using the following measurements based on that scale, the Court finds that 7.31% of the property, comprised of 112.8 ft<sup>2</sup>, is exempt homestead:

- h. First Floor: The ground floor, excluding the exterior, measures 20' x 54', giving a total area of 1080 ft<sup>2</sup>. Of this, the bathroom measures 6' x 6'8", and so contains a total of 40 ft<sup>2</sup>. The kitchenette portion of Room 3 measures 6' x 12', making an area of 72 ft<sup>2</sup>. These measurements show a total exempt area on the ground floor of 112.8 ft<sup>2</sup>.
- i. Second Floor: The parties' stipulation of undisputed facts gives a total measurement of the second floor of 464 ft<sup>2</sup>.
- j. The total interior area of both floors is 1544 ft<sup>2</sup>. The total exempt area is 112.8 ft<sup>2</sup>. Dividing the exempt area by the total area results in an exempt portion of 7.31%.

The Eleventh Circuit has held that when property cannot be divided, the appropriate solution is to sell the property and apportion the proceeds between the homestead and non-homestead

---

<sup>18</sup> Creditor's Ex. 22 at 47, 51.

<sup>19</sup> *Id.* at 63; Creditor's Ex. 23 [Dep. Carol Kain taken on June 12, 2012] at 33.

portion of the property.<sup>20</sup> The *Wilson* court found that this approach has been followed consistently when courts are faced with the issue of a debtor residing in a building that is used both for residential and commercial purposes.<sup>21</sup> This Court finds that the apportionment approach should be taken here.

Based on the findings above, it is ORDERED:

1. The portion of the property to which the Creditor's Objection to Debtor's claim of homestead exemption is SUSTAINED is 92.69%.
2. The portion of property to which the Creditor's Objection to Debtor's claim of homestead exemption is OVERRULED, and the percentage of the property that constitutes the Debtor's exempt homestead, is 7.31%.
3. The Trustee is authorized to use her best efforts to sell the subject property at a price that is commercially reasonable. The net proceeds of the sale shall be divided between the Trustee and the Debtor, with the non-exempt portion (92.69%) paid to the Trustee and the exempt portion (7.31%) paid to the Debtor. The expenses of sale shall be pro-rated between the exempt and non-exempt portions.
4. Upon finding a buyer, the Trustee shall file a notice and, if needed, motion seeking leave to sell the property in accordance with the Local Rules and Federal Rules of Bankruptcy Procedure, as she would with any such property of the Estate.

DONE and ORDERED in Tallahassee, Florida this February 14, 2014.



KAREN K. SPECIE  
United States Bankruptcy Judge

cc: all parties in interest

<sup>20</sup> *In re Englander*, 95 F.3d 1028, 1032 (11th Cir. 1996).

<sup>21</sup> *Wilson*, 393 B.R. at 783.