

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Southern Division

In re:) Bankr. No. 98-40153
) Chapter 7
JEROME DEAN GEBUR)
a/k/a J. D. GEBUR) MEMORANDUM OF DECISION RE:
Soc. Sec. No. 529-02-6739) TRUSTEE'S MOTION FOR
) TURNOVER OF CERTAIN FUNDS
Debtor.)

The matter before the Court is the Motion to Compel Turnover filed by Trustee Lee Ann Pierce and Debtor Jerome Gebur's response thereto. This is a core proceeding under 28 U.S.C. § 157(b)(2). This Memorandum of Decision and accompanying Order shall constitute the Court's findings and conclusions under F.R.Bankr.P. 7052. As set forth below, the Court concludes that the Trustee's Motion must be granted and that Jerome has no homestead interest in the funds held by the title company.

I.

On October 16, 1995, Karen L. Gebur and Jerome D. Gebur were divorced. The divorce court ordered Karen to pay Jerome \$11,000.00 to recognize his share of equity in the marital home. Karen was allowed to pay Jerome over ten years at 7% interest. Jerome obtained a lien on the home for this debt.

On October 27, 1995, Jerome quit claimed his interest in the marital home to Karen. The deed was recorded November 6, 1995.

Jerome filed a Chapter 7 petition in bankruptcy on March 3, 1998. On his schedules, he did not acknowledge any interest in real property. He did not specifically list the lien on Karen's home as an asset but he did state, "Property settlement of about

\$15,000 due me that is on [sic] offset to my child support owed by me." Jerome did not declare any property exempt as a homestead.

In the autumn of 1998, Karen sold the home. Land Title Guaranty Company is holding \$11,403.86 in escrow to satisfy Jerome's lien. On October 21, 1998, Jerome filed a satisfaction of judgment regarding his lien on the home.

On December 8, 1998, Trustee Lee Ann Pierce filed a motion seeking a turnover to her of the \$11,403.86 held by the title company. Jerome responded to the motion and stated that the funds constituted his exempt homestead proceeds. On February 4, 1999, Jerome filed an amendment to his schedule of exemptions to add his former marital home as an exempt homestead valued at \$25,000.00.

A hearing was held February 9, 1999. Robert G. Fite appeared for the Trustee. Chan B. Masselink appeared for Debtor Jerome Gebur. Attorney Fite argued that the provision of S.D.C.L. § 43-31-1 regarding the exemption of homestead proceeds does not apply because Jerome did not voluntarily sell the home and because the home was not sold under state law. He also emphasized that Jerome had no intent to use the lien funds to buy another homestead but had instead allowed child support he is required to pay to be offset from what Karen owed him.

Attorney Masselink argued that the funds Karen was ordered to pay were always in the nature of the homestead and that Jerome intended to use the lien proceeds both for a new homestead and to pay child support. He was unable to identify what actions Jerome had taken to obtain a new homestead.

At the hearing, the Court ruled preliminarily that Jerome could not declare his former marital home exempt as a homestead because he had quit claimed his interest in it pre-petition. The issue of whether the funds represented by the lien could be declared exempt as the proceeds of a homestead was taken under advisement.

II.

In the District of South Dakota, the bankruptcy court looks to state law to define the allowed exemptions. 11 U.S.C. § 522(b)(2)(A) and S.D.C.L. § 43-45-13. In South Dakota, certain personal property and a homestead are absolutely exempt under S.D.C.L. §§ 43-35-1, 43-45-2, and 43-45-3. A debtor's entitlement to an exemption is determined on the day he files his bankruptcy petition. See *Armstrong v. Peterson (In re Peterson)*, 897 F.2d 935 (8th Cir. 1990) (debtor's post-petition death did not result in reversion of exempt property to estate); *Armstrong v. Harris (In re Harris)*, 886 F.2d 1011 (8th Cir. 1989) (cites therein); and *In re Myers*, 17 B.R. 339, 340 (Bankr. D.S.D. 1982).

An exempt homestead in South Dakota must embrace a house used as a home by the owner. S.D.C.L. § 43-31-2; *United States v. Nelson*, 969 F.2d 626, 631 (8th Cir. 1992) (homestead must be owned to be declared exempt). An exemption may also be declared in \$30,000.00 in proceeds from the sale of a homestead.

In the event such homestead [as defined and limited by S.D.C.L. ch. 43-31] is sold under the provisions of chapter 21-19, or is sold by the owner voluntarily, the

proceeds of such sale, not exceeding the sum of thirty thousand dollars, is absolutely exempt for a period of one year after the receipt of such proceeds by the owner.

S.D.C.L. § 43-45-3(2) (in pertinent part).

III.

When S.D.C.L. § 43-45-3(2) is applied to the facts in this case, it is clear that the funds from Jerome's lien on his former wife's home are not qualified homestead proceeds that may also be declared exempt as a homestead. The Trustee is, therefore, entitled to the funds from the title company that were generated from the lien.

First, Jerome's lien on his former wife's home was not the product of a voluntary sale by the owner or a forced sale under S.D.C.L. ch. 21-19. Instead, Jerome received the lien under a divorce decree. The actual sale of the home was by his former wife, who was the current owner. While the Court must construe a claimed homestead exemption liberally in favor of Jerome, *In re Corbly*, 61 B.R. 843, 850 (S.D. 1986) (cite therein), it cannot go beyond the plain terms of the statute.

Second, but probably just as important, Jerome took no action within one year of October 16, 1995 -- when he received his lien -- to turn that lien into another homestead. Therefore, even if the lien could be considered homestead proceeds, it lost that characteristic after one year. That loss occurred well before his petition in bankruptcy and well before Karen sold the house. Karen's post-petition sale of the home could not alter the status of the lien on the petition date or create a new one-year period in

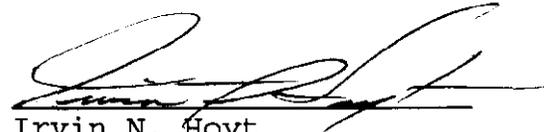
which Jerome had to convert the lien into a new homestead.

Finally, there is no evidence that Jerome ever considered or treated the lien as homestead proceeds. The only thing he did with the lien was to allow his child support obligations to be offset from it. He offered no evidence of any intent he had on the petition date to convert that lien into a new homestead for himself.

An order granting the Trustee's Motion for Turnover shall be entered.

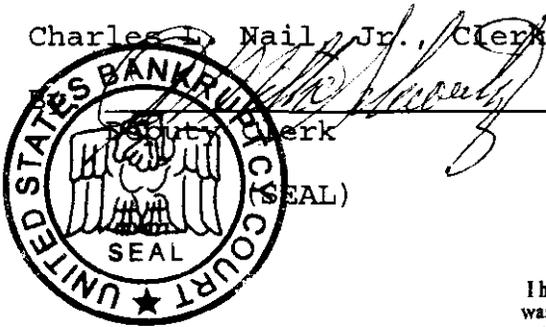
So ordered this 18 day of March, 1999.

BY THE COURT:


Irvin N. Hoyt
Bankruptcy Judge

ATTEST:

Charles L. Nail, Jr., Clerk



I hereby certify that a copy of this document was mailed, hand delivered, or faxed this date to the parties on the attached service list.

MAR 19 1999

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court, District of South Dakota
By MA

NOTICE OF ENTRY
Under F.R. Bankr. P. 9022(a)
Entered

MAR 19 1999

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota

Case: 98-40153 Form id: 122 Ntc Date: 03/19/1999 Off: 4 Page : 1

Total notices mailed: 4

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