

UNITED STATES BANKRUPTCY COURT

DISTRICT OF SOUTH DAKOTA

ROOM 211

FEDERAL BUILDING AND U.S. POST OFFICE

225 SOUTH PIERRE STREET

PIERRE, SOUTH DAKOTA 57501-2463

IRVIN N. HOYT
BANKRUPTCY JUDGE

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September 28, 1988

James Carlon, Esq.
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Re: Lee Scott Larson
Chapter 7 88-30004

Gentlemen:

I have considered the record, briefs, and transcript in this matter and render the following decision.

Trustee Lovald objects to Debtor's claimed exemption for \$4,000.00 in miscellaneous personal property allowed under SDCL 43-45-4 to the head of a household. Because this property is not absolutely exempt, it can be claimed only by a resident of South Dakota. SDCL 43-45-7. The Trustee alleges the Debtor is neither a resident of South Dakota nor the head of a household.

The Debtor filed his chapter 7 Petition on January 29, 1988. Mr. Larson has resided in Dickenson, North Dakota since "the latter part" of October, 1987. Transcript of July 5, 1988 at 5 (herein trans.). Prior to moving, the Debtor lived in Midland, South Dakota at all relevant times. He testified that he intended to file in the District of North Dakota, but was informed by a North Dakota attorney that he could not file in that district until he had resided there for at least six months.

Section 522(b) of the Bankruptcy Code is the controlling

[A]n individual debtor may exempt from property of the estate the property listed in either paragraph (1) or, in the alternative, paragraph (2) of this subsection. ... Such property is -

(1) property that is specified under subsection (d) of this section, unless the State law that is applicable to the debtor under paragraph (2) (A) of this subsection specifically does not so authorize; or, in the alternative,

(2)(A) any property that is exempt under Federal law other than subsection (d) of this section, or State or local law that is applicable on the date at the filing of the petition at the place in which the debtor's domicile has been located for the 180 days immediately preceding the date of the filing of the petition, or for a longer portion of such 180-day period than in any other place ...

Judge Ecker has construed the statute as follows: "The location of the debtors' domicile during the longer portion of the 180-day period immediately preceding tiling of the petition governs the determination of applicable state [exemption] law." Tn re yolk, 26 B.R. 457 (Bkrtcy. 1983).

Under Bankruptcy Rule 9006(a) all prepetition days are counted. There were 28 prepetition days in January, 1988; 31 such days in December, 1987; and 30 such days in November, 1987, for a total of 89 days. I assume that by moving to Dickenson in the "latter part" of October, 1987 the Debtor resided in Dickenson for at least two days of that month. Accordingly, it appears that the greater amount of the 180 day prepetition period was spent residing in North Dakota.

This determination regarding residency does not by itself determine the applicable state law. Section 522(b) speaks to domicile not residence. The two terms have distinct meanings. A domicile "is that 'permanent fixed place of abode which [a] person intends to be his residence and to which he intends to return despite temporary residences elsewhere or despite temporary absences.'" Stoner v. State Farm Mut. Auto Ins. Co., 780 F.2d 1414 (8th Cir. 1986) (quoting Black's Law Dictionary 807 (5th ed. 1979)); citing Spurlin v. Siebrasse, 49 N.W.2d 604 (S.D. 1951); Appeal of Lawrence County, 21 N.W.2d 57 (S.D. 1945). See also yolk In re Wellberg, 12 B.R. 48 (Bkrtcy. E.D. Va. 1981) (defining domicile for section 522(b) purposes under state law, noting uniformity of definitions among the states); 3 Collier on Bankruptcy para. 522.06 (15th Ed. 1988).

Prior to moving his residence to Dickenson, the Debtor's domicile clearly was in Midland, South Dakota. According to his schedules, Midland is the only other place he lived for the six years preceding filing his petition. The question is whether this domicile changed upon the move to North Dakota. Mr. Larson

testified he was "pushed out" of the family elevator business at Midland prior to his move. Trans. at 7. This important tie with South Dakota was thereby severed. The Debtor presently resides in Dickenson with his wife, and is employed in that city by Ready Mix. The Debtor gave no testimony indicating an intent to return to South Dakota to make his residence.

The Court is convinced that Mr. Larson's domicile changed from South Dakota to North Dakota upon his late October, 1987 move, and that he was domiciled in North Dakota for the majority of the 180 day prepetition period. North Dakota is therefore the governing state law under Section 522(b)(2)(A).

North Dakota has opted out of the federal bankruptcy exemptions. N.D.C.C. 28-22-17. The Debtor therefore may claim exemptions as allowed under North Dakota law and federal nonbankruptcy law. 11 U.S.C. §522(b). It is immaterial that claimed exempt property may lie outside of North Dakota. ~ 3 Collier on Bankruptcy para. 522-28 (15th Ed. 1988)

Both parties have proceeded under the mistaken assumption that South Dakota law governs. Although the exemptions provided in the South Dakota Code and North Dakota Code are similar (both are partially derived from the California Code), they are not identical. Compare S.D.C.L. chs. 43-45 and 43-31 with N.D.C.C. chs. 28-22 and 47-18. Accordingly, the Debtor must amend his Schedule B-4 in accordance with Bankruptcy Rule 1009 and Local Rule 208 to claim exemptions as allowed under North Dakota law. Interested parties may then object to the amendment as allowed under Bankruptcy Rule 4003. The Trustee's present objection is overruled without prejudice.

This decision makes no determination whether North Dakota law governs or does not govern any other facet of this case. Nor have I addressed the Trustee's arguments concerning venue and the Debtor's failure to schedule assets, as they are not properly before this Court since the Trustee's motion and notice concerned only an improper claim of exemptions. Nor have I addressed the potential question concerning a homestead exemption. See N.D.C.C. 47-18-01.

This matter constitutes a core proceeding under 28 U.S.C.157(b)(2). This letter opinion shall serve as findings of fact and conclusions of law. The Court shall enter an Order of even date.

Very truly yours,

Irvin N. Hoyt
Bankruptcy Judge

INH/sh

CC: Bankruptcy Clerk