

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF SOUTH DAKOTA  
Northern Division

In re:	)	Bankr. No. 00-10159
	)	
CLIFFORD E. MENDEL	)	Chapter 7
Soc. Sec. No. 506-88-8828	)	
Tax I.D. No. 46-0423232	)	DECISION RE: DEBTOR'S
	)	CLAIMED HOMESTEAD EXEMPTION
Debtor.	)	

The matter before the Court is Debtor's claimed homestead exemption and Ag Services of America, Inc.,'s objection to it. This is a core proceeding under 28 U.S.C. § 157(b)(2). This Decision and accompanying Order shall constitute the Court's findings and conclusions under Fed.Rs.Bankr.P. 7052 and 9014. As set forth below, the Court concludes that the objection must be overruled and Debtor's claimed homestead exemption must stand.

I.

Clifford E. Mendel ("Debtor") filed a Chapter 7 petition in bankruptcy on August 4, 2000. In his schedules filed the same day, Debtor stated he was the co-owner of some real property in Spink County valued at \$201,000. He described 16.60 acres of the total 580 acres as a homestead, valued it at \$30,000, and declared it exempt.

Ag Services of America, Inc., ("Ag Services") objected to the claimed homestead on September 13, 2000. It argued the exemption was not "warranted under either applicable fact or law." On September 14, 2000, Trustee William J. Pfeiffer also objected to Debtor's claimed homestead. He argued that the property did not possess the characteristics of a homestead, that it exceeded the value allowed by state law, and that Debtor had moved away. Debtor

48.

responded to the objections on September 20, 2000. He said that the claimed homestead was within the allowed value and that it did possess the characteristics of a homestead on the petition date. Trustee Pfeiffer withdrew his objection on September 20, 2000 because secured claims on the property would not render any equity for the bankruptcy estate.

A hearing on Ag Services' objection was held October 26, 2000. The parties were given until December 5, 2000 to complete discovery. On December 5, 2000, the parties agreed to submit the matter on depositions and briefs.

In his deposition taken November 20, 2000, Debtor testified that he had purchased the subject 16.6 acres on contract in 1992 with other tracts. He lived off the place between April 1994 and August 1999, moving several times for different jobs and because of a divorce from his first wife Melanie. A neighbor's son lived in the house from some time in 1994 to the spring of 1997. Debtor's brother Miles and his wife lived on the place from the spring of 1997 to August of 1999. Debtor moved back onto the place in August 1999 with his present wife Angela and their children. Debtor farmed the property continuously from 1992 until he quit farming in 1998. A neighboring Hutterite colony farmed the land in 1998. A brother farmed the land in 1999. The farm ground, excluding the 16.6 acres, was sold in 1999 with some equipment. Debtor drove truck during most of the times when he was not farming.

Debtor further testified that in July 2000, he decided to take

a job in Henderson, Nebraska with a cousin that ran a feed lot. He and his wife made a couple trips to Henderson to find a house to rent. They signed a lease for a house in mid-August, when he started work in Henderson. At the time of the deposition, Debtor and his wife were living in the leased home in Henderson and they were renting out the house on the 16.6 acres back in Spink County. Debtor stated then that he hoped to return to farming someday, but he had no specific plans for doing so. He had offered to sell the 16.6 acres in Spink County for sale, but has not been able to sell it at a satisfactory price, yet. He had no definite plans to return to the 16.6 acres in Spink County. In October 2000, he registered to vote in Nebraska. He has a bank account in Nebraska. He owns one old pickup titled in Nebraska. His church membership continues in South Dakota. His wife's car remains titled in South Dakota.

Based on this testimony, Ag Services argued that Debtor did not have a present intent to make his home on the 16.6 acres when he filed bankruptcy on August 4, 2000 because he had already accepted the job in Henderson and had no plans to return to the 16.6 acres in South Dakota. Debtor argues that he lived on the 16.6 acres on the petition date and that he had not foreclosed the possibility of returning there someday. By affidavit dated after the deposition, Debtor now has informed the Court that he will return to South Dakota to work in Huron beginning in January 2001. He intends to again live on the 16.6 acres and commute to Huron.

## II.

As this Court recently noted in *In re Fredricks*, Bankr. No. 00-40484, slip op. 3-5 (Bankr. D.S.D. Sept. 27, 2000), a bankruptcy debtor's entitlement to an exemption is determined on the day he files his petition. 11 U.S.C. § 522(b)(2)(A); *Mueller v. Buckley* (*In re Mueller*), 215 B.R. 1018, 1022 (B.A.P. 8th Cir. 1998) (cites therein); *Harris v. Herman* (*In re Herman*), 120 B.R. 127, 130 (B.A.P. 9th Cir. 1990). Exemptions are construed liberally in favor of the debtor. *Wallerstedt v. Sosne* (*In re Wallerstedt*), 930 F.2d 630, 631 (8th Cir. 1991). Homestead laws, in particular, are construed "for the creation and protection of the family home." *In re Corbly*, 61 B.R. 843, 850 (Bankr. D.S.D. 1986) (citing *Ramsey v. Lake County*, 14 N.W.2d 125, 126 (S.D. 1944)). "The underlying purpose is to 'provide the security of a home to a family against the claims of creditors.'" *Corbly*, 61 B.R. at 850 (quoting *Speck v. Anderson*, 318 N.W.2d 339, 343 (S.D. 1982)).

Under South Dakota law, an exempt homestead 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). In determining whether a homestead character has attached to a house, the most important factor to consider is the debtor's intent. *Corbly*, 61 B.R. at 850

(cites therein).

The South Dakota Supreme Court has recognized circumstances which may necessitate a debtor's absence from a homestead, but which do not cause the debtor's house to lose its homestead characteristic. These circumstances include when the absence is due to work elsewhere, health problems, or remarriage without the establishment of a new homestead, *Yellowhair v. Pratt*, 182 N.W. 702 (S.D. 1921), and *Hewitt v. Carlson*, 244 N.W. 108, 109 (S.D. 1932), when the debtor has claimed no other property as a homestead, *Warner v. Hopkins*, 176 N.W. 746, 748 (S.D. 1920), or when a debtor lives elsewhere because of financial difficulties. *Id.*; *In re Hansen*, 17 B.R. 239, 241-42 (Bankr. D.S.D. 1982). Even renting out the property for a time or offering it for sale, without more, does not constitute an abandonment of a homestead. *Yellowhair*, 182 N.W. at 704-05; *Hansen*, 17 B.R. at 241-42.

While a party leaving a homestead must, in good faith, intend to return to it at some future date, such date need not be "fixed or definite" as to time; neither need such intent be an intent to return regardless of all possible contingencies; but if there is an honest believe that at some time in the future the party will reoccupy the property as a home, and such party does no act inconsistent with such relief and intent, the homestead right is not forfeited.

*Yellowhair*, 182 N.W. at 704.

III.

When South Dakota's homestead laws are construed liberally in Debtor's favor, the Court may only conclude that the 16.6 acres in Spink County were Debtor's homestead on the petition date and that he validly declared the 16.6 acres exempt. On that date, Debtor had not yet done anything inconsistent with a homestead claim on this land. That he had taken employment elsewhere and would be moving in the near future is not controlling. *In re Lippert*, 113 B.R. 576, 578-79 (Bankr. N.D. 1990). The circumstances and Debtor's intent on the petition date are controlling. On that date, Debtor actually occupied the home as his homestead and he intended it to be his homestead. *Clark v. Evans*, 60 N.W. 862, 864 (SD. 1894). At most, that day he also had a present intent to change his homestead in the near future. He had not yet, however, abandoned his present homestead by taking a job in Nebraska and making a permanent home there.

An order will be entered overruling Ag Services' objection.

Dated this 31<sup>st</sup> day of January, 2001.

BY THE COURT:

  
 Irvin N. Hoyt  
 Bankruptcy Judge

ATTEST:  
Charles L. Nail, Jr., Clerk

By   
 Deputy Clerk



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

**JAN 31 2001**

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

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.

**JAN 31 2001**

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

Case: 00-10159 Form id: 122 Ntc Date: 01/31/2001 Off: 3 Page : 1

Total notices mailed: 6

Debtor Mendel, Clifford E. 212 Road 3, Henderson, NE 68371-8842

Aty Ewinger, Curt R. PO Box 96, Aberdeen, SD 57402-0096

Trustee Pfeiffer, William J. PO Box 1585, Aberdeen, SD 57402-1585

Aty Gauer, Keith A. PO Box 1030, Sioux Falls, SD 57101-1030

Aty Gering, Bruce J. Office of the U.S. Trustee, #502, 230 South Phillips Avenue, Sioux Falls, SD 57104-6321

Aty Schrempp DuPris, Cheryl Assistant U.S. Attorney, 225 South Pierre Street #337, Pierre, SD 57501