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Homestead Exemption  
Constructive Occupancy

In re Howard and Lillian Tremblay

600-60689-fra7

8/8/00

Alley

Unpublished

At the time Debtors filed their bankruptcy petition they owned two residential properties: one in Aurora, Ore. and one in Hammond, Ore. The Aurora property had been the Debtors' principal residence for many years and they acquired the Hammond property in 1994, intending to spend their retirement there. In December 1999, due to the downturn in their financial prospects, the Debtors decided to move permanently to Hammond and abandon the Aurora property to the mortgagees. In January 2000 they directed the bank to discontinue making automatic payments on the Aurora property, but not on the Hammond property, understanding that failure to make the payments would likely result in foreclosure of the Aurora property. Debtors also instructed their attorney to claim the Hammond property as exempt on their bankruptcy schedules.

By the time the petition was filed in February 2000, Debtors were spending about 25% of their time at the Hammond property and 75% at Aurora. By March the transition was complete and the Debtors were spending 100% of their time in Hammond. In May, the lender on the Aurora property filed an unopposed motion for relief from stay to foreclose its security interest, and an order to that effect was thereafter entered. The Trustee filed an objection to the Debtors' claimed homestead exemption in the Hammond property.

Under the doctrine of "constructive occupancy," which the court characterized as consistent with Oregon law, a debtor who acquires a homestead with the intent to occupy it, and who does so within a reasonable time, may claim the property as exempt from the time of acquisition. While the court noted that the transition to the Hammond property was incomplete at the petition date, it held that the Debtors had made sufficient effort to establish the Hammond property as their "abode" at the petition date, noting that exemption statutes are to be liberally construed in order to advance their purpose.



1 directed their bank to discontinue automatic payments on the Aurora  
2 property, but not on the Hammond property. They understood at the  
3 time that the result would likely be a foreclosure on the Aurora  
4 property. Also, Debtors instructed their bankruptcy attorney to  
5 claim the Hammond property as exempt in their bankruptcy schedules.<sup>1</sup>

6 By the time the petition was prepared and filed the Debtors  
7 were spending 25% of their time at the Hammond property, and 75% at  
8 Aurora. They testified that, by that time, they fully intended to  
9 make the Hammond property their permanent residence. By March they  
10 had completed the transition and were spending no time at all in the  
11 Aurora property. On May 17 the lender on the Aurora property filed  
12 a motion for relief from the automatic stay to allow it to  
13 foreclose, which motion was not contested.

14 It should be noted that the transition was incomplete on the  
15 date of the petition in many respects. For example, at the time the  
16 petition was filed they were still receiving their mail at the  
17 Aurora address. The Aurora address was given in Debtors' papers  
18 filed with this court.

## 19 II. DISCUSSION

20 Bankruptcy Code §522(b)(2)(A) excludes from the bankruptcy  
21 estate property which is exempt under applicable state law. Oregon  
22 law provides for an exemption of \$33,000 in a homestead, which the  
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24 <sup>1</sup> This was not done: the original Schedule C listed the Aurora  
25 property as exempt. An amended Schedule C claiming the Hammond  
26 property as exempt was filed on May 10. It appears that the  
treatment of the homes in the first Schedule C was an error on the  
attorney's part.

1 statute states "must be the actual abode of and occupied by the  
2 owner."<sup>2</sup> The question here is: was the Hammond property the Debtors'  
3 "actual abode" under the statute?

4 Exemption statutes such as ORS 23.240 are to be liberally  
5 construed in order to advance their purpose. In re Earnest, 42 B.R.  
6 395 (Bankr. D. Or. 1984). The purpose of the Oregon homestead  
7 exemption is to ensure that debtors may continue to reside in their  
8 homes "sheltered beyond the reach of urgent creditors or economic  
9 misfortune." In re Laughlin's Estate, 170 Or. 450, 454, 134 P.2d  
10 961, 963 (1943).

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13 <sup>2</sup> **ORS 23.240 Exemption of homestead or proceeds thereof;**  
14 **duration of exemption.** (1) A homestead shall be exempt from sale on  
15 execution, from the lien of every judgment and from liability in any  
16 amount in value of \$25,000, except as otherwise provided by law. The  
17 exemption shall be effective without the necessity of a claim  
18 thereof by the judgment debtor. When two or more members of a  
19 household are debtors whose interests in the  
20 homestead are subject to sale on execution, the lien of a judgment  
21 or liability in any form, their combined exemptions under this  
22 section shall not exceed \$33,000. The homestead must be the actual  
23 abode of and occupied by the owner, or the  
24 owner's spouse, parent or child, but the exemption shall not be  
25 impaired by:  
26 (a) Temporary removal or temporary absence with the intention to  
reoccupy the same as a homestead;  
(b) Removal or absence from the property; or  
(c) The sale of the property.  
(2) The exemption shall extend to the proceeds derived from such  
sale to an amount not exceeding \$25,000 or \$33,000,  
whichever amount is applicable under subsection (1) of this section,  
if the proceeds are held for a period not exceeding  
one year and held with the intention to procure another homestead  
therewith.  
(3) The exemption period under subsection (1)(b) and (c) of this  
section shall be one year from the removal, absence or  
sale, whichever occurs first.

1           In this case I believe that the Debtors had made sufficient  
2 effort to establish the Hammond property as their "abode" by the  
3 time they filed their petition for relief. Most significantly, they  
4 had cut themselves off from the Aurora property by discontinuing  
5 their payments. ORS 23.240 provides that temporary absence from a  
6 homestead with the intent to return does not impair the exemption.  
7 Here the requisite intent to return is obviously missing. While  
8 they may have been spending a majority of their time in Aurora in  
9 February, 2000, it is clear that they would, eventually, depart  
10 permanently. It follows that any right to claim an exemption in the  
11 Aurora property has been abandoned. See Fleischhauer v. Bilstad,  
12 233 Or. 578, 379 P.2d 880 (1963).

13           Under the doctrine of constructive occupancy a debtor who  
14 acquires a homestead with the intent to occupy it, and who does so  
15 within a reasonable time, may claim the property as an exempt  
16 homestead from the time of the acquisition. In re McElroy, 204 B.R.  
17 62 (Bankr. D. Kan. 1996), In re Lehman, 44 B.R. 946 (Bankr. D. Minn.  
18 1984), In re Cottingim, 7 B.R. 56, (Bankr. S.D. Ohio 1980), See also  
19 In re Cameron, 25 B.R. 119 (Bankr. N.D. Ohio 1982).

20           As the Oregon statute gives effect to debtor's intentions  
21 respecting temporary absence, I believe it likewise looks to their  
22 intent in establishing the homestead in the first instance, and that  
23 the rule of constructive occupancy is consistent with Oregon law.  
24 The Debtors satisfied the rule by taking steps to retain the Hammond  
25 property, including continued payments, and instructions to counsel  
26 to claim the exemption in that property. The record is also clear

1 of their intent ultimately to abide in the Hammond property as their  
2 home.

3 III. CONCLUSION

4 The Debtors' real property in Hammond, Oregon, qualifies for  
5 Debtors' claim of exemption under ORS 23.240. The trustee's  
6 objection to that claim should be overruled, and an order to that  
7 effect will be entered.

8 The foregoing constitutes the court's findings of fact and  
9 conclusions of law.

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12 FRANK R. ALLEY, III  
13 United States Bankruptcy Judge  
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