

CLERK, U.S. BANKRUPTCY COURT
DISTRICT OF MICHIGAN

Bankr. R. 9006(f)
Judicial estoppel

'88 SEP 19 8 02

LOG # _____
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In re Claibourn
687-07408-W7
9/14/88
E-88-22(10)
PSH

The trustee objected to the debtors' claim of a homestead exemption. In the case of an objection the court issues a self-executing notice and order that states that the exemption will be disallowed unless within 20 days of mailing the debtors request a hearing. Debtors requested a hearing 21 days after mailing and argued that Bankr. R. 9006(f) provides an additional three days. The court agreed. The filing of an objection to an exemption is a contested matter under R. 9014. The motion must be served. The service of the contested matter that required a subsequent act (requesting a hearing) falls within the ambit of R. 9006(f).

Though the debtors had presented inconsistent statements to the court concerning their place of residence they had not obtained relief by so doing. Thus, they were not judicially estopped from claiming a homestead exemption.

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

IN RE)
EDWIN LEE CLAIBOURN and)
NANCY DIANE CLAIBOURN,)
_____ Debtors.)

Case No. 687-07408-W7
MEMORANDUM OPINION

This matter initially came before the court upon the trustee's objection filed on January 11, 1988, to the debtors' claim of a homestead exemption in a residence located at 200 Skyway, Grants Pass, Oregon. The court issued an order and notice which stated that the debtors' exemption claim would be automatically disallowed pursuant to the trustee's objection, unless within 20 days of the mailing date the debtors filed with the Clerk of the Court a request for a hearing. The document was mailed on January 12, 1988. The 20th day under Bankruptcy Rule 9006(a) would have been February

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MEMORANDUM OPINION-1

1 1, 1988.¹ On February 2, 1988, the debtors filed a request for
2 a hearing on the trustee's objection and a motion to file the
3 request out of time accompanied by their attorney's affidavit.
4 The affidavit indicated that the request for a hearing had been
5 filed out of time due to a break down in the attorney's calendaring
6 system. The trustee objected to the debtors' motion to allow a
7 late filing claiming that under Bankr. R. 9006(b)(1) the debtors
8 had shown neither "cause" nor "excusable neglect" to permit such a
9 filing. The debtors then withdrew their motion for leave to file
10 out of time claiming that Bankr. R. 9006(f) added an additional
11 three days to the time limit stated in the court's order and notice
12 and thus their request for a hearing was timely. The trustee
13 contested that interpretation of Bankr. R. 9006(f). The trustee
14 alternatively contended that the debtors are judicially estopped
15 from claiming a homestead exemption in Oregon since they previously
16 had taken a contradictory position in the schedules filed in the
17 case.

18 The court must first determine whether the debtors are
19 judicially estopped from claiming a homestead exemption in Oregon.
20 If the debtors are not estopped the court must decide whether
21 Bankr. R. 9006(f) affords the debtors, under these facts, an
22 additional three days within which to file their request for a
23 hearing. Finally, if the court holds against the debtors under

24 ¹The 20th day after mailing did not fall on a Saturday, Sunday or
25 legal holiday or on a day when weather or other conditions had made
26 the clerk's office inaccessible and thus the period was not
extended, pursuant to Bankr. R. 9006(a), until the end of the next
day which was not one of those.

MEMORANDUM OPINION-2

1 Bankr. R. 9006(f), it must determine if debtors' failure to timely
2 request a hearing under the facts constitutes excusable neglect.

3 1. Judicial Estoppel

4 The court holds that the debtors are not judicially estopped
5 from now claiming a homestead in Oregon.

6 On November 8, 1985, the debtors filed a Chapter 11 petition
7 in the Eastern District of California. In that petition the
8 debtors stated:

9 1. Petitioner's mailing address, including county,
10 12841 Butterfly Drive, Nevada City, California 95959,
County of Nevada.

11 2. Petitioners have resided within this district
for the preceding 180 days.

12 The debtors' memorandum in support of their claim for an Oregon
13 homestead states that Nancy Claibourn signed Edwin Claibourn's name
14 to this petition pursuant to a power of attorney.

15 On November 25, 1985, the debtors filed their schedules.

16 Their Schedule A-2 indicated the following:

17	1. Name of... creditor...	2. ...security & when obtained	3. When claim was incurred & the consideration	5. H W or J	6. Market Value	7. Amount of claim ...
18			...	J		

19	SPIROS-JEAN	1984	RESIDENCE	W	\$150,000	\$165,000
20	BILIOURIS		12841 BUTTERFLY DR.			
21	25 LA RANCHERIA RD.		NEVADA CITY, CA 95959			
22	CARMEL VALLEY, CA 93924		NOTE AND DEED OF TRUST			

23	JACKSON COUNTY	1970	RESIDENCE	J	65,000	22,000
24	FEDERAL SAVINGS		200 SKYWAY			
25	AND LOAN		GRANTS PASS, OR 97527			
26	2 E. MAIN ST.					
	MEDFORD, OR 97501		NOTE AND DEED OF TRUST			

1 The debtors did not file a Schedule B-4 (claiming a homestead
2 exemption) in their Chapter 11 proceeding.

3 On June 3, 1986, the debtors filed an application for an order
4 excusing Edwin Claibourn from appearing at any California § 341
5 meetings. That application included an affidavit of Nancy
6 Claibourn. The affidavit stated among other things:

7 5. EDWIN CLAIBOURN presently resides in Grants
8 Pass, Oregon.

9 6. EDWIN CLAIBOURN was unable to appear at the
10 first setting of the First Meeting of Creditors in this
11 proceeding, set January 3, 1986 because of his health.
12 Accordingly that meeting was continued to March 21, 1986.
13 EDWIN CLAIBOURN began to make the trip to Sacramento to
14 appear on March 21, 1986, but en route had to be
15 hospitalized.

16 On October 9, 1986, the mortgagees of the residence located on
17 Butterfly Drive in Nevada City, California, moved for relief from
18 stay. The movants' attorney's affidavit stated that the debtors
19 had been in default on the property since May of 1985. Relief was
20 granted on November 10, 1986. The debtors did not appear at the
21 hearing held on November 4, 1986, and there is no indication in the
22 file that the debtors resisted the motion or claimed any homestead
23 rights in the California property.

24 On December 16, 1986, the case was converted to a proceeding
25 under Chapter 7. On January 5, 1988, the debtors amended their
26 schedules and claimed a homestead exemption in the Grants Pass
property.² On January 15, 1987, Alvin Bass, the debtors'

27 ²The date a debtor files a Chapter 11 petition, rather than the
28 date of conversion to a Chapter 7, is the date on which exemption
29 eligibility is determined. In re Thurmond, 71 Bankr. 596, 597
30 (Bankr. D.Or. 1987).

1 California attorney, in his application and declaration for an
2 order extending the time within which to file schedules, stated
3 that the "[d]ebtors. . . have moved to Oregon." The debtors, in
4 their motion for a change of venue to Oregon filed on February 17,
5 1987, indicated that their assets were split between Oregon and
6 California. The motion included statements that eleven of the top
7 twenty creditors were located in Oregon, eleven of the thirteen
8 priority creditors were located in Oregon, two of the five secured
9 creditors were located in Oregon, and four of the six parcels of
10 real property owned by the debtors were located in Oregon. The
11 debtors' present attorney stated in the request for hearing on
12 trustee's objection filed on February 2, 1988, that at the time the
13 debtors filed their petition Mrs. Claibourn was living in
14 California and Mr. Claibourn was living in Oregon.

15 The trustee believes that because the debtors invoked both the
16 jurisdiction and venue of the California court thus forcing Oregon
17 creditors to litigate in California, because the petition indicated
18 that both debtors had resided in California for 180 days prior to
19 filing, and one of their attorneys made a statement to the court
20 that the debtors had moved to Oregon thus contradicting other
21 statements the debtors made in their schedules, the debtors are now
22 judicially estopped from claiming the Grants Pass, Oregon house as
23 their residence for purposes of claiming a homestead exemption.

24 The defense of judicial estoppel comprises the equitable
25 concept that a party who has obtained judicial relief by asserting
26 and offering proof on a certain position in one proceeding may not
advocate a contrary position in another proceeding. In re Marino,

1 813 F.2d 1562, 1566 (9th Cir. 1987); United States v. Lehman, 756
2 F.2d 725, 728 (9th Cir. 1985); Melridge, Inc. v. Bank of America
3 National Trust and Savings Association (In re Melridge), Case No.
4 387-06589 P-11, Adv. No. 87-0726, slip op. at 5 (Bankr. D.Or. July
5 13, 1988). Relief is the benefit a complainant seeks at the hands
6 of the court. Black's Law Dictionary 1161 (5th ed. 1979).

7 In Marino, the creditor asserted that a partnership existed
8 among the owners of the buildings and leasehold of some apartments
9 and therefore liability for partnership debts could not be avoided
10 by the trustee as successor to one of the partner's interests under
11 11 U.S.C. § 544(a)(3). The trustee argued that the creditor was
12 judicially estopped from asserting a partnership existed as it had
13 affirmatively prayed for an order to sell the apartments under 11
14 U.S.C. § 363(h) which section only applies to property held in
15 tenancy in common, joint tenancy, or tenancy by the entirety. The
16 court held that though the creditor had gained an opportunity to
17 purchase the apartments from the trustee by asserting inconsistent
18 positions since no relief had been obtained from an adversary,
19 judicial estoppel was inapplicable. Marino, 813 F.2d at 1566.

20 As in Marino, the trustee's estoppel claim must fail because
21 no specific relief has previously been obtained from the court by
22 the debtors as a complainant or respondent by their allegations in
23 their petition that they had resided within the California district
24 for 180 days prior to filing. After filing no creditor raised an
25 issue of venue. Nor did the debtors in the bankruptcy court allege
26 that the California residence was their homestead in order to
attempt to defeat the motion for relief from stay in that property.

MEMORANDUM OPINION-6

1 Furthermore, the debtors never filed a disclosure statement nor
2 plan prior to conversion of their case. Thus, the debtors did not
3 allege the availability of a homestead exemption in any property to
4 support a position under § 1129(a)(7). No specific reason arose
5 for the debtors to claim a homestead exemption while in Chapter 11.
6 The bare assertions that the debtors had resided in California for
7 180 days or, later, that they had moved to Oregon, did not enable
8 the debtors to obtain any relief. See, Marino, 813 F.2d at 1566;
9 and, see, Melridge, slip op. at 5.

10 2. Bankruptcy Rule 9006(f)

11 The court holds Bankr. R. 9006(f) under these facts does
12 afford the debtors an additional three days from the date the order
13 and notice was mailed to request a hearing.

14 Bankr. R. 9006(f) states:

15 (1) Additional Time After Service by Mail. When there
16 is a right or requirement to do some act or undertake
17 some proceedings within a prescribed period after service
18 of a notice or other paper and the notice or paper other
19 than process is serviced by mail, three days shall be
20 added to the prescribed period.

21 Bankr. R. 9006(f) is modeled after Fed. R. Civ. P. 6(e).
22 Rule 6(e) is intended to protect parties who are served by mail
23 from suffering a systematic diminution of time available to respond.
24 Wright & Miller, Federal Practice and Procedure, Civil 2d § 1171.

25 The filing of an objection to a claim of exemption is a
26 contested matter under Bankr. R. 9014. Advisory Committee Note,
Bankr. R. 9014 (1983). In a contested matter relief should be
requested by motion. Bankr. R. 9014. However, within this
district the court has approved the use of a form entitled

MEMORANDUM OPINION-7

1 "Trustee's Objections To Claimed Exemptions" which the trustee must
2 use to object to an exemption. It substitutes for a motion. The
3 fact that this form is used does not mean that the proceeding is
4 not a contested matter. Bankr. R. 9014 states that the "motion
5 shall be served" (emphasis added) as in Bankr. R. 7004, unless the
6 court otherwise directs. Bankr. R. 7004(b) authorizes service by
7 mail. Bankr. R. 9006(e) provides that service is complete upon
8 mailing. Thus, without Bankr. R. 9006(f) those parties served by
9 mail in a contested matter, as opposed to those served personally,
10 would suffer a systematic diminution of time within which a
11 response or subsequent act was required after service.

12 The fact that the Oregon court, rather than the trustee,
13 serves the objection on the debtor and that the court uses an order
14 which is self-executing does not in any way change the fact that
15 the notice involved is notice of a contested matter.

16 The debtors were required to do the act of requesting a
17 hearing after service of the notice of the trustee's objection to
18 their claim of exemption. This clearly falls within the type of
19 response granted the three day extension by Bankr. R. 9006(f).

20 Cases that have found Bankr. R. 9006(f) does not apply to
21 grant a party an additional three days are distinguishable. See,
22 e.g., In re Williams, 75 Bankr. 887 (Bankr. D.Or. 1987); In re
23 Sanders, 59 Bankr. 414 (D.Mont. 1986); In re Allin, Case No.
24 87-0963-PA (D.Or. Nov. 9, 1987). In those cases a specific date
25 pursuant to a statute, regulation or rule triggered the running of
26 time within which to do an act, rather than the service of a
pleading in a contested matter or adversary proceeding. In

1 Williams, Bankruptcy Judge Albert Radcliffe held that Bankr. R.
2 4007(c) establishes that the § 341 meeting date and not the
3 issuance of the notice of the meeting triggers the time within
4 which a complaint for the discharge of a debt must be filed.
5 Williams, 75 Bankr. 887. In Allin, District Court Judge Owen
6 Panner held the deadline for filing proofs of claim pursuant to
7 Bankr. R. 3002 was triggered by the § 341 meeting date and not the
8 issuance of the notice of the meeting. Allin, Case No. 87-0963-PA,
9 citing, In re Whitten, 49 Bankr. 220 (Bankr. N.D. Ala. 1985). In
10 Sanders the court held that Bankr. R. 9006(f) is inapplicable in
11 extending the appeal period of ten days prescribed by Bankr. R.
12 8002. The courts strictly construe the time for filing an appeal
13 both under the federal rules and the bankruptcy rules. Neither
14 Fed. R. Civ. P. 6(e) nor Bankr. R. 9006(f) affect the time for
15 filing an appeal when that time period is set forth in another rule.
16 The courts construe the ten-day filing requirement of Bankr. R.
17 8002(a) as jurisdictional and thus unaffected by Bankr. R. 9006(f).
18 Sanders, 59 Bankr. 414.

19 The court, having held in favor of the debtors on this issue
20 need not address the potential issue under Bankr. R. 9006(b)(1).

21 The court will schedule a hearing for presentation of
22 evidence on this matter. This is a core proceeding under 28 U.S.C.
23 § 157(b)(2)(B).

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1 This memorandum opinion contains the court's findings of fact
2 and conclusions of law and pursuant to Bankruptcy Rule 9014, which
3 incorporates Rule 7052, they will not be separately stated.

4 An order consistent herewith shall be entered.

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8 POLLY S. HIGDON
9 Bankruptcy Judge
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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

IN RE)	
)	
EDWIN LEE CLAIBOURN and)	Case No. 687-07408-W7
NANCY DIANE CLAIBOURN,)	
)	ORDER
_____ Debtors.)	

The court, having entered its memorandum opinion in the above-entitled proceedings, and based thereon,

IT IS HEREBY ORDERED that the debtors' request for a hearing on the trustee's objection to the debtors' claim of a homestead exemption is hereby granted; and

IT IS FURTHER ORDERED a hearing on the claim shall be set in due course.


POLLY S. HIGDON
Bankruptcy Judge

ORDER-1