

ORS 23.164(2)
Homestead exemption
Proceeds (from sale of homestead)
Sale proceeds
Earnest money agreements

GRASSMUECK v. CLOUGH (In re Clough), Adv. No. 688-5079-W
(Bankr. D. Or. August 22, 1989) (J., Higdon - unpublished)
Op. # E89-17(8)

Trustee sought turnover of proceeds from debtors' postpetition sale of their homestead (a mobile home and real property), as they failed to reinvest the sale proceeds in another homestead within one year pursuant to ORS 23.164(2). Debtors claimed the homestead property exempt although they signed an earnest money agreement prepetition to sell the property. The trustee agreed to abandon the property and not object to its exemption provided the sale proceeds were reinvested in another homestead. Trustee moved for summary judgment.

Held: In Chapter 7 cases, entitlement to exemptions is determined at the bankruptcy filing date. If debtors qualify for a homestead exemption on that date and claim it without objection, they may thereafter sell the property and keep the proceeds free and clear of Oregon's statutory reinvestment provision. In this particular case, the debtors did not sell the homestead prepetition, when they signed the earnest money agreement, because the agreement was contingent upon events set to occur postpetition. Therefore, as they had no proceeds at filing and still owned the homestead, they could exempt it with impunity.

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U.S. BANKRUPTCY COURT
DISTRICT OF OREGON
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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

IN RE)
MICHAEL A. GRASSMUECK, INC.,)
Plaintiff,)
vs.)
VICKI A. CLOUGH and)
JAMES L. MUNDEE,)
Defendants.)
VICKI A. CLOUGH,)
Third Party Plaintiff,)
vs.)
MICHAEL D. CLOUGH,)
Third Party Defendant.)

Adversary No. 688-5079-W

MEMORANDUM OPINION

Before the court are three motions for summary judgment.¹
The first is a motion for summary judgment by plaintiff, Michael A. Grassmueck, Inc., Trustee, against defendant/debtor, Vicki A. Clough that will be treated by the court as a motion for summary judgment, pursuant to Fed.R.Civ.P. 12(c) and Fed.R.Civ.P. 56, incorporated by Bankr.R. 7012 and 7056, as matters outside the pleadings have been presented and not excluded.

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1 Clough ("wife"). The second is a motion for partial summary
2 judgment by the plaintiff/trustee against defendant James L. Munde
3 ("wife's father"). The third motion was filed by third party
4 defendant/debtor Michael D. Clough ("husband") against
5 plaintiff/trustee. Husband and wife are now divorced. As husband
6 is not named as a defendant in plaintiff/trustee's complaint he has
7 no standing to request summary judgment against the trustee.
8 Defendant wife did not file a summary judgment motion, nor did
9 defendant James Munde.

10 On March 20, 1986, debtors filed a Chapter 7 bankruptcy
11 petition and claimed their mobile home and real estate on which it
12 was located exempt under ORS 23.164. This statute allows them to
13 exempt up to \$20,000 of their homestead, or the proceeds from the
14 sale thereof, "while the proceeds are held for a period not
15 exceeding one year and with the intention to procure another mobile
16 or other homestead therewith." ORS 23.164(2).

17 Between February 28 and March 13, 1986, prior to filing
18 bankruptcy, the debtors negotiated and signed an earnest money
19 agreement to sell their mobile home and real estate contingent
20 upon: 1) the buyer obtaining \$13,000 cash by April 5, 1986; 2)
21 closing the sale before May 5, 1986; and 3) no assumption fee or
22 prepayment penalty being levied on the existing private trust deed.
23 The title company received \$1,000 earnest money from the buyer,
24 which was refundable if a well test, to be conducted by sellers
25 within five days of acceptance of the offer, failed to meet
26 agreed-upon specifications.

1 On April 5, 1986, the trustee learned of the earnest money
2 agreement and intended sale. He claims he informed debtors'
3 attorney of his position that the proceeds were property of the
4 estate and were exempt for one year only if held with the intent to
5 be reinvested in another homestead, and must indeed be so invested.
6 Debtors' attorney assured trustee that debtors intended to reinvest
7 the proceeds accordingly and the trustee indicated he would monitor
8 the situation.

9 On May 5, 1986, the trustee signed escrow instructions and the
10 sale was closed. At the \$ 341² creditors' meeting on May 12,
11 1986, trustee directly informed debtors of his position regarding
12 the sale proceeds and received their assurance that they intended
13 to reinvest the proceeds accordingly. On June 16, 1986, the
14 trustee executed a notice of abandonment on the mobile home.

15 On June 27, 1986, the proceeds check was negotiated to wife's
16 father in payment of a postpetition debt. On February 26, 1988,
17 the trustee examined husband and discovered the homestead proceeds
18 had not been reinvested in another home. On May 12, 1988, the
19 trustee filed its adversary complaint to obtain the sale proceeds.

20 The question presented to this court is whether Oregon's
21 exemption for homestead proceeds applies when debtor/sellers sign
22 an earnest money agreement to sell their home prepetition but
23 receive the proceeds postpetition. Based on the parties'
24 pleadings, memoranda and affidavits there are sufficient undisputed

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26 ²All statutory references are to 11 U.S.C. § 101 et. seq. unless
otherwise indicated.

1 facts on which the court may base its decision on summary judgment.

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3 As Oregon is an opt-out state, Oregon exemption statutes apply
4 to homestead exemptions. ORS 23.164 provides:

5 Exemption of mobile home and property on which
6 situated. (1) A mobile home, and the property on
7 which the mobile homes is situated, that is the actual
8 abode of and occupied by the owner, or the owner's
9 spouse, parent or child, when that mobile home is
10 occupied as a sole residence and no other homestead
11 exemption exists, shall be exempt from execution and from
12 liability in any form for the debts of the owner to the
13 value of \$15,000, except as otherwise provided by law.
14 When two or more members of the household are debtors
15 whose interests in the homestead are subject to sale on
16 execution, the lien of a judgment or liability in any
17 form, their combined exemptions under this section shall
18 not exceed \$20,000. The exemption shall be effective
19 without the necessity of a claim thereof by the judgment
20 debtor.

21 (2) The exemption provided for in subsection (1)
22 shall not be impaired by temporary removal or absence
23 with the intention to reoccupy the mobile property as a
24 home, nor by the sale thereof, but shall extend to the
25 proceeds derived from such sale up to \$15,000 or \$20,000,
26 whichever amount is applicable under subsection (1) of
this section while the proceeds are held for a period not
exceeding one year and with the intention to procure
another mobile or homestead therewith.

19 The trustee contends that because debtors signed an earnest
20 money agreement prepetition, they "sold" their homestead
21 prepetition within the meaning of ORS 23.164(2). Thus the
22 provisions of that subsection, rather than subsection (1), are the
23 provisions which determine the debtors' homestead exemption rights
24 as of the petition date. As the debtors did not invest the
25 proceeds in another home within one year of the sale as required by
26 that subsection, they are not exempt and must be turned over to the
trustee. In support of this position the trustee cites Giustina v.

1 U.S., 190 F.Supp. 303 (D.C. Or. 1960). This court disagrees with
2 the trustee.

3 Giustina held that the purchaser of standing timber to be cut
4 and removed under a "timber sale agreement" with the U.S. Forest
5 Service was the "owner" of the property for purposes of taking
6 advantage of capital gains deductions. The court defined a "sale"
7 in both law and equity as "a contract between the parties to give
8 and to pass rights of property for money, which the buyer pays or
9 promises to pay to the seller for the thing bought or sold." Id. at
10 309. There "the purpose and effect of the Timber Sale Agreement
11 was to commit the capital and credit of the partners to the
12 acquisition of the timber and to transfer to the partners the
13 beneficial interest and investment risk in it." United States v.
14 Giustina, 313 F.2d 710, 712 (1962) (affirming in part Giustina, 190
15 F. Supp. 303). The purchasers "owned" the timber as of the date of
16 sale, which was the date the Forest Service accepted the
17 purchaser's bid, thus forming a binding contract. Under the terms
18 of that contract, both parties were bound to perform their
19 obligations when the government accepted the purchaser's offer and
20 the parties executed the sale agreement.

21 The facts of the instant case are distinguishable. Unlike the
22 Timber Sale Agreement, the earnest money agreement was a contingent
23 contract. Depending on its terms an earnest money agreement may be
24 a completed agreement between the parties or may only be a bargain
25 in a rough form to be followed by a final contract, Sunland Inv.,
26 Inc. v. Bill Wolfe Ranches, Inc., 46 Or. App. 145, 610 P.2d 1253
(1980); or it may be a valid and binding contract, although

1 liability of one or both parties does not arise until the happening
2 of a condition. Davis v. Dunigan, 186 Or. 147, 205 P.2d 839 (1949).
3 "'Conditions precedent' are those facts and events, occurring
4 subsequently to the making of a valid contract, that must exist or
5 occur before there is a right to immediate performance, before
6 there is a breach of contract duty, before the usual judicial
7 remedies are available." Dann Bunn, Inc. v. Brown, 285 Or. 131,
8 590 P.2d 209, 215 (1979). Courts may not order specific
9 performance of a contract unless conditions precedent have been
10 satisfied. Id. After performing all required conditions, a
11 purchaser may be entitled to specific performance, where the seller
12 refuses to sell, if the earnest money agreement contains "a
13 description of the property, a certain price, and an agreed upon
14 form of financing." Spinner v. Stacy, 45 Or. App. 483, 608 P.2d
15 609 (1980).

16 In the instant case mutual promises to buy and sell in the
17 earnest money agreement were contingent upon events to occur after
18 the debtors filed bankruptcy. The debtors were not bound to sell
19 the property until and unless the purchaser obtained \$13,000 cash
20 on April 5, 1986. Until then the purchasers had no right to
21 require title to be transferred and the debtors had no right to
22 receive sale proceeds. Therefore, under the facts I find there was
23 no "sale" of the homestead within the meaning of ORS 23.164(2) at
24 the time of the filing of the bankruptcy petition.

25 The court also notes that if it adopted the trustee's
26 contention that this "sale" occurred when the earnest money
agreement was signed, the one year reinvestment period would run

1 from that date. If the sale closing then were significantly
2 delayed the debtors' statutorily granted one year period for
3 reinvestment would be significantly reduced. This result would be
4 contrary to the expressed intent of the legislature to allow
5 sellers a full year to locate and reinvest in another home.

6 In Chapter 7 bankruptcies, whether a debtor qualifies for an
7 exemption is determined on the petition date. See In re Earnest,
8 42 Bankr. 395 (Bankr. D. Or. 1984); see also In re Winchester, 46
9 Bankr. 492 (9th Cir. BAP 1984); In re Thurmond, 71 Bankr. 596
10 (Bankr. D. Or.), affirmed, 825 F.2d 414 (9th Cir 1987). It may be
11 possible for debtors on occasion to avoid the one year reinvestment
12 restriction on proceeds by intentionally foregoing sale of a home
13 until just prior to bankruptcy. This court previously addressed
14 its concern of exemption planning by noting, "[t]his court concedes
15 that as long as the legislature determines as a social policy that
16 certain debtor's property should be exempt from creditors, the
17 exemption system will be subject to unilateral manipulation by the
18 debtor; however, that manipulation occurs because exemptions are
19 allowed at all." In re Earnest, 42 Bankr. at 399.

20 The trustee's motions for summary judgment are denied. As
21 defendants Vicki Clough and James Mundeel did not file motions for
22 summary judgment no relief can be granted them at this time.

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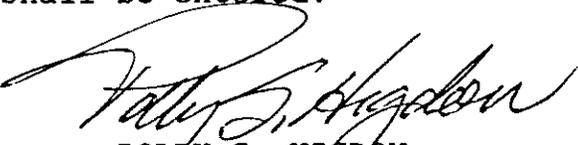
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1 This Memorandum Opinion contains the court's findings of fact
2 and conclusions of law and pursuant to Bankruptcy Rule 7052, they
3 will not be separately stated.

4 An order consistent herewith shall be entered.

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7 POLLY S. HIGDON
8 Bankruptcy Judge
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UNITED STATES BANKRUPTCY COURT
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Defendants.)
VICKI A. CLOUGH,)
Third Party Plaintiff,)
vs.)
MICHAEL D. CLOUGH,)
Third Party Defendant.)

Adversary No. 688-5079-W

ORDER

The court, having entered its Memorandum Opinion in the
above-entitled proceedings, and based thereon,

IT IS HEREBY ORDERED the motion for summary judgment filed
by plaintiff Michael A. Grassmueck, Inc., Trustee, against
defendant/debtor Vicki A. Clough is denied; and

1 IT IS FURTHER ORDERED the motion for partial summary
2 judgment filed by plaintiff Michael A. Grassmueck, Inc., Trustee,
3 against defendant James L. Munde is denied; and

4 IT IS FURTHER ORDERED the motion for summary judgment
5 filed by third party defendant Michael D. Clough is denied.

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8 POLLY S. HIGDON
9 Bankruptcy Judge