

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF IOWA**

In the Matter of:

John A. Dittmer,

Case No. 09-04669-als7

Debtor

Chapter 7

In the Matter of:

Bonny K. Dittmer,

Case No. 09-04862-als7

Debtor

Chapter 7

**MEMORANDUM OF DECISION
(date entered on docket: January 12 , 2011)**

COURSE OF PROCEEDINGS

An involuntary petition under chapter 7, involving John A. Dittmer, was filed by Northwest Bank & Trust Co., Great Plane Model and Hobby Town Unlimited, Inc. as petitioning creditors on September 25, 2009. Bonnie K. Dittmer was named as a debtor in an involuntary chapter 7 proceeding initiated by the same petitioning creditors on October 5, 2009. Orders for relief were entered in both cases on December 21, 2009.

The matter before the Court arises from the timely objection by Northwest Bank & Trust Co. ("Bank") to the Debtors' claims of homestead exemption. In lieu of an evidentiary hearing, the parties agreed that the pending objections could be submitted on stipulated facts, documents and affidavits. Pursuant to the Proceeding Memo and Order entered on June 11, 2010, filing deadlines were established for these items. The matters are now fully submitted. Identical facts and legal issues are raised in each of the filings

captioned above, and the Court addresses the disputed matters in a single ruling. For the reasons set forth below, the Objections are overruled and the claims of exemption are granted.

FACTS

In June 2003, John A. and Bonny K. Dittmer (“Debtors” or “Dittmers”) acquired real estate located at 21450 Great River Road, Le Claire, Iowa (“21450 Great River Road”) which consisted of a home and an adjacent 6.53 acres of bare ground. The Debtors executed a promissory note and mortgage with the Bank on April 4, 2003 which encumbered the house. A mortgage was not obtained by the Bank on the remaining 6.53 acres. Debtors resided at 21450 Great River Road, continuously, until February 16, 2010 at which time they acquired their current homestead at 1538 W. High Street, Davenport, Iowa (“1538 W. High Street”). Schedule C filed by each Debtor claimed a “[o]ne half interest in residence at 1538 W. High Street” as exempt pursuant to Iowa Code § 561.2 (2010).¹

Prior to the filing of the involuntary petitions, Costas L. Constantinou and Yvonne Constantinou (“Constantinous” or “Purchasers”) offered \$350,000 to buy the house and adjacent 6.53 acres. The terms of sale provided that: “[p]urchasers will give sellers the option to live in the home for up to one year from the closing but sellers shall agree to sign a document showing their commitment to being responsible for repairs and utilities.” On April 7, 2009 the Debtors accepted the purchase offer. On July 2, 2009 the 6.53 acre tract was conveyed to the Purchasers for the amount of \$135,000. The net proceeds

¹ The schedules were not filed until February 22, 2010 and February 25, 2010. This date was after acquisition of the new homestead. Schedule A of the filings set forth the real estate which is claimed as exempt on Schedule C of each filing. The fact that the real estate is claimed on the Debtor’s filing, rather than the actual sale proceeds which were held in trust at the time the cases were commenced results in a distinction without a difference. Pursuant to Iowa law, the sale proceeds would have qualified as exempt to the Dittmers in the same manner as the real estate. See Westmeyer, 2010 WL 2103571; In re Karrer, 183 B.R. 177 (Bankr. N.D. Iowa 1994); Millsap v. Faukes, 20 N.W.2d 40 (Iowa 1945); Campbell v. Campbell, 105 N.W. 583 (Iowa 1906).

received by the Debtors from this transaction totaled \$110,357.05. These funds were placed in the Dittmers' attorney's trust account. The house located at 21450 Great River Road was conveyed to the Purchasers on August 28, 2009 for \$215,000. All net proceeds from this transaction were paid to the Bank pursuant to its note and mortgage.

DISCUSSION

Timely objections to the claims of homestead exemption were filed by the Bank, based upon three arguments. First, that due to the timing and circumstances of the transfers, the Debtors abandoned any homestead rights in the 6.53 acres and in its net sale proceeds. In support of this position, the Bank points to the fact that separate listing agreements, sale and closing dates applied to the residence located at 21450 Great River Road and the 6.53 acres.

Iowa has opted out of the federal exemption provisions at 11 U.S.C. section 522, and its residents must utilize state law exemptions in bankruptcy. See Iowa Code § 627.10 (2010). Issues involving the homestead and its exemptions are contained in Iowa Code Chapter 561. Under Iowa law, a homestead is generally not subject to execution to satisfy its owner's debts. See Iowa Code § 561.16 (2010). A homestead is defined as:

[T]he house used as a home by the owner . . . It may contain one or more contiguous lots or tracts of land, with the building and other appurtenances thereon, habitually and in good faith used as part of the same homestead.

Iowa Code § 561.1 (2010). If a homestead is located within a city plat, it is restricted to one-half acre in size, and if outside these limits, a homestead exemption is available for up to forty acres. See Iowa Code § 561.2 (2010). At the outset, it must be noted that the parties appear to agree that the house and 6.53 acres, collectively, at one time, constituted

the Debtors' homestead as permitted under Iowa law. Consequently, the Court will construe this fact as undisputed.

Under Iowa law, “[a] homestead may be lost or abandoned by actual removal from the home under circumstances clearly indicating that such removal is not merely temporary.” In re Westmeyer, No. 09-03590, 2010 WL 2103571 at *2 (Bankr. N.D. Iowa May 24, 2010) (citing Shaffer v. Miller, 192 N.W. 868, 872 (Iowa 1923)). See also In re Devine, No. 05-01292M, 2005 WL 1926038 at *3 (Bankr. N.D. Iowa Aug. 5, 2005) (“The owner may remove from the established homestead, but the homestead character of the property is still preserved, so long as the owner has an intention to return.”). The Bank argues that the Debtors’ sale of the 6.53 acres constitutes abandonment because such a disposition is not a temporary circumstance which would enable the Debtors to establish an intent to return. “Whether a homestead has been abandoned is a question of intent to be determined from the specific facts of each case.” Westmeyer, 2010 WL 2103571 at *2 (citing Charter v. Thomas, 292 N.W. 842, 843 (Iowa 1940)).

Debtors argue that they are entitled to utilize the proceeds from the sale of their homestead to acquire a new residence as provided for at Iowa Code section 561.20 which states:

Where there has been a change in the limits of the homestead, or a new homestead has been acquired with the proceeds of the old, the new homestead, to the extent in value of the old, is exempt from execution in all cases where the old or former one would have been.

(2010). Merely selling one’s homestead is not abandonment if the seller has the intent to apply those proceeds to the purchase of a new homestead. See Schuttloffel v. Collins, 67 N.W. 397, 399 (Iowa 1896) (referencing State v. Geddis, 44 Iowa 537 (Iowa 1876))

(“The sale may be on time, and, if the intention is to invest the proceeds, when realized, in the new homestead, such proceeds will be exempt.”); Elliot v. Till, 529 N.W. 460, 463 (Iowa 1935). The Iowa Supreme Court has noted that “the owner of a homestead may change his homestead, and that he may sell the old and acquire a new one without any interruption in his homestead rights, and that *he is entitled to a reasonable time to accomplish such change.*” Vittengl v. Vittengl, 135 N.W. 63, 65 (Iowa 1912) (emphasis added). The court has also noted that “[t]here is no prescribed method as to how this shall be done.” Geddis, 44 Iowa at 539; see also In re Wastaney, No. 02-03910-rjh, 2004 WL 5851525 at *11 (Bankr. S.D. Iowa August 11, 2004). “The statute does not provide that the sale must be for money in hand, which must be immediately invested in the new homestead; that is, that the selling of the old and purchasing the new must be simultaneous acts.” Geddis, 44 Iowa at 539.

The record establishes that under the purchase agreement, the Dittmers sold their *entire* homestead to the Constantinous.² The terms of the purchase agreement specifically reserved the right for the Debtors to continue to reside at 21450 Great River Road “for up to one year from closing” Affidavits submitted by the Debtors’ state that their intention was to apply whatever proceeds were received from the sale of the 6.53 acres and the 21450 Great River Road real estate to the purchase of a new homestead. The record contains information that during the interim period, prior to acquiring a new home, the sale proceeds from the 6.53 acres remained in Dittmers’ attorney’s trust account and were not put to any intervening use. See Geddis, 44 Iowa at

² Notwithstanding the purchase agreement, the respective properties were ultimately conveyed to the Constantinous on separate dates. The 6.53 acres was conveyed on July 2, 2009, and the 21450 Great River Road real estate was conveyed on August 28, 2009. No explanation was provided as to this timing.

539 (When “the proceeds are not put to any intervening use, they are exempt while thus in *transitu*, so to speak, from the old homestead to the new.”).

Iowa’s homestead exemption is construed broadly and liberally to implement the statutory intent. See In re Takes, 334 B.R. 642, 647 (Bankr. N.D. Iowa 2005) (citing In re Estate of Tolson, 690 N.W.2d 680, 682 (Iowa 2005); Frudden Lumber Co. v. Clifton, 183 N.W.2d 201, 203 (Iowa 1971); Poffinbarger v. Adm'r of Poffinbarger's Estate, 206 Iowa 961, 221 N.W. 550, 551 (Iowa 1928); Charless v. Lamberson, 1 Iowa 435, (Iowa 1855); see also Charter v. Thomas, 292 N.W. 842, 843 (Iowa 1940) (noting the Iowa Supreme Court's “holdings involving homesteads have strongly leaned, as they should, to the protection of the homestead estate”)).

Intent is the overriding factor in determining whether a homestead has been abandoned. Based upon the record, the Debtors’ intentions to maintain their exemption has been established. The Debtors did not actually remove themselves from their original homestead, although its limits may have changed. Notwithstanding the fact that separate transfers of parcels occurred on separate dates, the proceeds from the first sale were continuously segregated with the intent of reinvestment in a new homestead. The time period of seven months to acquire a new homestead was also reasonable given the terms set forth in the purchase agreement. To conclude that the Debtors’ homestead exemption is unavailable to them based upon separate listing agreements, and the timing of the transfers to finalize the sale, would be contrary to the intent of the statute.

Second, the Bank asserts that the Debtors homestead was acquired after the filing of the involuntary petition and no court approval was obtained. Under the bankruptcy code, a debtor may continue to acquire or dispose of property until the order for relief is

entered, and the involuntary filing does not restrict these activities. See 11 U.S.C. § 303(f) (2010). The Code provides a remedy to prevent disposition of estate assets by allowing a party in interest to request the appointment of an interim trustee. See 11 U.S.C. § 303(g) (2010). No such request was made in this proceeding. No authority is cited in support of the Bank's argument that the Dittmers' were not permitted to utilize the sale proceeds to purchase their current home after the involuntary bankruptcies were filed.

The final objection raised by the Bank is that the Debtors' claimed exemptions in 1538 W. High Street are subject to the provisions of 11 U.S.C. section 522(o) (2010). According to the Bank's commercial loan officer's affidavit, John Dittmer made statements in 2008 indicating that the 6.53³ acres of contiguous land were going to be sold and that there was an intent to remain at the house located at 21450 Grand River Road. The Debtors' affidavits state that they always intended to reinvest the proceeds. This is the only information supplied to the Court which relates to the Bank's allegation under 11 U.S.C. section 522(o) (2010) which provides:

The value of an interest in real or personal property . . . [used] as a residence . . . shall be reduced to the extent such value is attributable to any portion of any property that the debtor disposed of in the 10-year period ending on the date of the filing of the petition with the intent to hinder, delay or defraud a creditor and that the debtor could not exempt, or that portion that the debtor could not exempt . . . if on such date the debtor had held the property so disposed of.

The circumstances presented do not satisfy the statutory requirements to apply this remedy. First, there is no evidence which indicates that the debtor utilized non-

³ The affidavit actually references a five acre parcel which appears to be an inadvertent error based upon the actual legal description.

exempt assets to obtain the homestead. This element is required to establish imposition of the restriction on the exempt property obtained within the previous ten year time period. Second, there is no evidence which supports a finding that any non-exempt property was disposed of with the intent to hinder, delay or defraud creditors. The Bank's affidavit is not sufficient to meet this burden.

For the reasons stated herein, the objections to the Debtors' claims of exemption in the homestead property are overruled and the claims of exemption in the homestead property located at 1538 W. High Street, Davenport, Iowa are granted.

/s/ Anita L. Shodeen
Anita L. Shodeen
U.S. Bankruptcy Judge

Parties receiving this Memorandum of Decision from the Clerk of Court:
Electronic Filers in these Chapter Cases