

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO
Honorable Howard R. Tallman**

In re:)
)
VIRGINIA N. DELAP,) **Case No. 04-28349 HRT**
)
Debtor.) **Chapter 7**
)

**ORDER SUSTAINING, IN PART, AND OVERRULING, IN PART, AMENDED
OBJECTION TO CLAIM OF EXEMPTION BY VIRGINIA N. DELAP**

This case comes before the Court on creditor Renee Ezer's Amended Objection to Claim of Exemption by Virginia N. Delap. On March 2, 2005, the Court held an evidentiary hearing on Ms. Ezer's Amended Objection. Nancy Miller appeared on behalf of the Debtor; Renee Ezer appeared *pro se*; and Jeffrey Weinman, Trustee, appeared *pro se*.

The Court has considered the pleadings, the evidence taken at the hearing, and the arguments of the parties.

I. FACTS

Renee Ezer is a creditor of this bankruptcy estate by virtue of her service as Limited Conservator for the Debtor, Virginia Delap, during the pendency of a domestic proceeding filed in the District Court for the City and County of Denver, Colorado. She objects to the Debtor's claim of a homestead exemption on the former marital residence as well as the amount of that claimed exemption. At hearing, the Debtor conceded that she is only entitled to claim half of the homestead exemption amount. Therefore, the Court will sustain that portion of Ms. Ezer's Objection concerning the exemption amount.

The Court finds the facts to be as follows:

1. On August 23, 2004, [the "Petition Date"] the Debtor filed her voluntary chapter 7 petition in this case.
2. On the Debtor's Schedule A, she lists an interest in real estate located at 200 Ivy Street, Denver, Colorado [the "Ivy Street Property"].
3. On the Debtor's Schedule C, she claimed a homestead exemption in the amount of \$45,000.00, in the Ivy Street Property. However, at hearing, Debtor stipulated that she is only claiming one-half of the homestead exemption amount, or \$22,500.00, as applicable to her interest in that residence.
4. Prior to November of 2003, the Debtor resided, with her husband, at the family home on Ivy Street.

5. In November of 2003, the Debtor moved permanently to 13890 E. Marina Drive, #610, in Aurora, Colorado [the “Heather Gardens Property”] in anticipation of the sale of the Ivy Street Property.
6. Debtor’s husband, Herbert Delap, was the record owner of the Ivy Street Property until the residence was sold.
7. Debtor’s husband is currently the record owner of the Heather Gardens Property.
8. A state court Decree of Legal Separation, dated May 12, 2004, incorporates the parties’ Separation Agreement (the “Separation Agreement”). The Separation Agreement provides that the Ivy Street Property is marital property and, upon sale of that residence, the net sale proceeds are to be divided equally between the Debtor and Mr. Delap.
9. The Separation Agreement also creates an interest in the Debtor with respect to the Heather Gardens Property. It provides that, upon the sale of the property, Debtor shall receive the sum of \$19,500.00 plus 4% simple interest as her share of the equity in the property.
10. On the Petition Date, the Debtor listed the address of the Heather Gardens Property as her street address.
11. At the hearing on this matter, Debtor’s counsel declared the Debtor’s intention to claim a homestead exemption only for the Ivy Street Property and not to make a claim of exemption as to the Heather Gardens Property.
12. Subsequent to the Petition Date, on January 19, 2005, the Ivy Street Property was sold. After payment of all liens and costs of sale, the net sale proceeds amounted to \$65,539.34 [the “Sale Proceeds”]. As of the hearing date, the Sale Proceeds were on deposit in the registry of the District Court for the City and County of Denver, Colorado.

II. DISCUSSION

A. Debtor’s Motion to Dismiss at the Close of Objector’s Evidence

At the close of Ms. Ezer’s evidence, the Debtor made an oral motion to the Court to dismiss the objection. The Court took the motion under advisement. The Court has reviewed the evidence submitted at hearing and finds that Ms. Ezer’s evidence was sufficient to meet her burden of presenting a *prima facie* case. The Court will, therefore, deny the Debtor’s motion.

B. Statutory Basis for the Claim of Exemption

For the purposes of this bankruptcy case, the Debtor may claim as exempt “any property that is exempt under . . . State or local law that is applicable on the date of the filing of the [bankruptcy] petition . . .” 11 U.S.C. § 522(b)(2)(A).

The Colorado state law that was applicable on the Petition Date and which grants individuals an exemption in homestead property is COLO. REV. STAT. § 38-41-201 et seq. The question of whether or not the Debtor is entitled to take advantage of a homestead exemption for her interest in the Ivy Street Property begins with that statute. It reads

Every homestead in the state of Colorado occupied as a home by the owner thereof or his or her family shall be exempt from execution and attachment arising from any debt, contract, or civil obligation not exceeding in value the sum of forty-five thousand dollars in actual cash value in excess of any liens or encumbrances on the homesteaded property in existence at the time of any levy of execution thereon.

COLO. REV. STAT. § 38-41-201.

C. The Colorado Homestead Exemption is an *In Rem* Right

The case law establishes that the Colorado homestead exemption statute does not create a personal right, but creates an *in rem* exemption from execution for a property which meets the requirements of a Colorado homestead under COLO. REV. STAT. § 38-41-201. *Pruitt v. Wilson* (*In re Pruitt*), 829 F.2d 1002, 1004 (10th Cir. 1987) (“[L]ooking to the Colorado law to find a definition of the homestead exemption, we find it has always been regarded as an exemption which attached to the realty itself and not to a debtor personally.”); *In re Wallace's Estate*, 246 P.2d 894, 900 (Colo. 1952) (A Colorado homestead exemption “is more in the nature of a lien that has attached to the home property . . .”); *see, also, In re Bryant*, 221 B.R. 262, 264 (Bankr. D. Colo. 1998); *In re Robinson*, 44 B.R. 292, 293-94 (D. Colo. 1984). Thus, under the structure of the Colorado homestead statute, the exemption attaches to the homestead property.

The Colorado homestead exemption statute also provides that the exemption attaches to proceeds of the homestead property:

The proceeds from the exempt amount under this part 2, in the event the property is sold by the owner, or the proceeds from such sale under section 38-41-206 paid to the owner of the property or person entitled to the homestead shall be exempt from execution or attachment for a period of one year after such sale if the person entitled to such exemption keeps the exempted proceeds separate and apart from other moneys so that the same may be always identified. If the person receiving such proceeds uses said proceeds in the acquisition of other property for a home, there shall be carried over to the new property the same homestead exemption to which the owner was entitled on the property sold. Such homestead exemption

shall not be valid as against one entitled to a vendor's lien or the holder of a purchase money mortgage against said new property.

Colo. Rev. Stat. § 38-41-207; *see, also, Swartzendruber v. FDIC (In re Swartzendruber)*, 72 B.R. 463, 464 (Bankr. D. Colo. 1987); *In re Hoover*, 35 B.R. 709 (Bankr. D. Colo. 1984).

D. The Debtor is an “Owner” Who is Entitled to Claim the Exemption

Even though the Debtor is not a record owner of the Ivy Street Property, she has a sufficient interest in the property to allow her to claim a homestead exemption in it. Under the provisions of the Separation Agreement, the Debtor is an equitable joint owner of the property. The Colorado Court of Appeals, in *Dallemand v. Mannon*, 35 P. 679 (Colo. App. 1894), said

It has been repeatedly, and, in so far as we know, uniformly, held that an ownership in fee is not essential; that an equitable title, a lease for a term of years, or any title which may be the subject of levy and sale may also be the subject of a homestead claim.

Id. at 681; *see, also, In re Hellman*, 474 F. Supp. 348, 350 (D. Colo. 1979). As an owner, under the plain language of the Colorado homestead exemption statute, the Debtor is entitled to claim her share of the homestead exemption applicable to the homestead property.

E. The Debtor Does Not Need to Reside in the Homestead to Claim the Exemption

The fact that the Debtor moved out of the Ivy Street Property in November of 2003 is not dispositive of whether or not she has a right to claim the homestead exemption in that property.

Under § 38-41-201, a property may be claimed as exempt to the extent of \$45,000.00 so long as it is “occupied as a home by the owner thereof or his or her family.” In this case, on the Petition Date, the Ivy Street Property was occupied by Mr. Delap. He was the record owner of the property, so the property qualifies as a homestead property under Colorado law.

The cases are clear that, under the Colorado homestead exemption statute, “there is only one homestead, and it attaches to the realty in such a way its protection cannot be claimed by one joint owner to the exclusion of the remainder.” *In re Pruitt*, 829 F.2d at 1005; *see, also, In re Robinson*, 44 B.R. 292, 294 (D. Colo. 1984); *In re Larson*, 260 B.R. 174, 194 n.26 (Bankr. D. Colo. 2001); *In re Pastrana*, 216 B.R. 948, 950 (Bankr. D. Colo. 1998); *In re Bryant*, 221 B.R. at 264; *In re Dickinson*, 185 B.R. 76, 78 (Bankr. D. Colo. 1995). Thus, under Colorado homestead law, Mr. Delap is not permitted to claim the homestead exemption for the Ivy Street

Property to the exclusion of Mrs. Delap's joint ownership interest. As co-owners of the property, both Mr. and Mrs. Delap are entitled to share the homestead exemption.¹

The case of *In re Dickinson*, involved an ex-husband's objection to the debtor's claim of a homestead exemption. Mr. Dickinson did not reside in the property. His interest derived from a marital separation agreement that was incorporated into the decree of divorce. That agreement provided that the home was to be sold and that, after deduction of the mortgage pay-off and costs of sale, Mr. Dickinson would receive \$52,000.00, to reimburse him for money that he contributed to buy the home, plus one-half of the remaining net equity. The debtor claimed that the homestead exemption should be deducted from the sale proceeds *before* determining Mr. Dickinson's net equity share. The result would have been that she would have received the full \$30,000.00 exempt amount. The court held that Mr. Dickinson was entitled to a share of the homestead exemption. It noted that, as a result of the state court domestic proceedings, Mr. Dickinson was entitled to one-half of the balance of the net proceeds from the sale of the residence. "Included in that 'balance of the net proceeds' is his share of the homestead exemption amount" *In re Dickinson*, 185 B.R. at 78.

III. CONCLUSION

The Court finds that the Debtor, Virginia Delap, is entitled to claim one half of the \$45,000.00 Colorado homestead exemption with respect to her share of the net Sale Proceeds which were derived from the sale of the Ivy Street Property. The Court will, therefore, allow the Debtor's homestead exemption in the Ivy Street Property in the amount of \$22,500.00.

¹ At least one court has held that, in and of itself, having an ownership interest in homestead property occupied by a family member is not enough to entitle an individual to claim the homestead exemption. In *In re Rodriguez*, 38 B.R. 297 (Bankr. D. Colo. 1984), the mother had deeded her residential property to herself and her two grown children as joint tenants. The debtor was one of those children and no longer resided in the property when he filed his bankruptcy petition. He had not paid any consideration for the transfer of the interest and did not contribute to the costs of paying for or maintaining the property. Because there was no dependency relationship between the mother who resided in the homestead and the debtor/son who was a nominal co-owner of the property, the court denied his claim of exemption. *Id.* at 298. In this case, Mrs. Delap's circumstance is substantially different. She continues to be dependent upon Mr. Delap who is obligated to pay a maintenance allowance as well as defray certain of Mrs. Delap's living expenses. Also, the Separation Agreement acknowledges that the Ivy Street Property is a marital asset.

As noted above, the net Sale Proceeds amount to \$65,539.34. Under the terms of the Separation Agreement, the Debtor is entitled to 50% of the net equity in the property or \$32,769.67. Since the Debtor is entitled to claim her half of the homestead exemption in her share of the proceeds, the portion of that net equity that carries an exempt status is \$22,500.00 and the portion that is non-exempt property of the bankruptcy estate is \$10,269.67.

The net Sale Proceeds have been placed in the registry of the state domestic court awaiting this determination of the rights of the parties in those funds. Those funds should be apportioned among the interested parties as follows:

\$32,769.67 to Herbert Delap
\$22,500.00 to Virginia Delap
\$10,269.67 to Jeffrey Weinman as trustee of Virginia Delap's chapter 7 bankruptcy estate.
\$65,539.34

Any interest which the Sale Proceeds have earned while in the registry of the court should be divided among the above parties pro-rata in proportion to the division of the principal amount.

In accordance with the above discussion, it is

ORDERED that the Debtor's oral motion to dismiss Ms. Ezer's objection made at the close of Ezer's evidence is DENIED; it is further

ORDERED that Renee Ezer's Amended Objection to Claim of Exemption by Virginia N. Delap is SUSTAINED IN PART and OVERRULED IN PART. The Court hereby allows the Debtor, Virginia Delap, to claim a homestead exemption in real property located at 200 Ivy Street, Denver, Colorado, in the amount of \$22,500.00; it is further

ORDERED that the Debtor's bankruptcy estate is entitled to \$10,269.67, plus applicable interest, as the non-exempt portion of the net Sale Proceeds from 200 Ivy Street which were allocated to the Debtor by way of the parties' Separation Agreement.

Dated this 16th day of May, 2005.

BY THE COURT:

/s/ Howard Tallman
Howard R. Tallman, Judge
United States Bankruptcy Court