Charles M. Walker
U.S. Bankruptcy Judge
Dated: 11/3/2020

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

IN RE:	)
	) Case No: 3:18-bk-06311
Alan James Ferguson,	) Chapter 7
	) Honorable Charles M. Walker
Debtor.	)
	)

ORDER OVERRULING THE TRUSTEE'S OBJECTION

This matter came before the court pursuant to the Chapter 7 Trustee's Objection to Homestead Exemption (the "Trustee's Obj") (Dkt #60). The Debtor opposed the relief requested and the matter was set for hearing on September 22, 2020.

Debtor filed a voluntary Chapter 13 bankruptcy on September 21, 2018 (the original "Petition Date"), which was ultimately converted to a case under Chapter 7 of the bankruptcy code on July 14, 2020. On the Petition Date, the Debtor was employed by Global Aerospace Logistics overseas in Abu Dhabi, United Arab Emirates. The Debtor was laid off in December 2019 and returned to Tennessee in early 2020 which triggered the voluntary conversion to Chapter 7.

At the 341 meeting of creditors, the Debtor testified that on the Petition Date he owned the Clarksville property and rented it out, and that his legal residence was changed to Abu Dhabi when he moved there. At the September 22nd hearing on the Trustee's Obj, the Debtor testified that his prior statements at the 341 meeting of creditors did not accurately describe what he believed to be his legal residence. The Debtor contradicted his statements from the 341 meeting of creditors and said the meeting of creditors "went super-fast" and he "didn't really understand

what [the trustee was] asking." The Debtor further testified that he thought the trustee, in asking about a change of legal residence, was referring to his visa status because he was legally there and residing in Abu Dhabi. When asked by his counsel on September 22nd whether it was his intent to permanently move overseas at the time his employment started, the Debtor unequivocally said "no" and went on to explain that he knew he could not live in the UAE permanently. The Debtor understood that the UAE only offered two to three year "residency visas" that correspond with employment, and if he lost his job, he would have to quickly find a new job or get out the country.

After the 341 meeting of creditors, pursuant to Rule 4003(b)(1)[1], the Trustee filed a timely objection to the claimed exemption. It is worthy to note that the Trustee's Obj would not have been possible, if it were not for the Debtor filing a new Schedule C with his amended Schedules on July 29, 2020. Since the original Chapter 13 confirmation order had been entered on November 13, 2018, Rule 4003(b)(1) and Rule 1019(2)(B) were in play when Attorney Robert Moyer ("Debtor's Counsel") prepared the amended schedules.

Rule 4003(b)(1) states that "a party in interest may file an objection to the list of property claimed as exempt within 30 days after the meeting of creditors held under § 341(a) is concluded or within 30 days after any amendment to the list or supplemental schedules is filed, whichever is later." *See* Rule 4003(b)(1). However, since it had been more than a year after the entry of the first order confirming Debtor's Chapter 13 plan, Rule 1019(2)(B)(i) states that one of the exceptions to establishing a new time period for objecting to a claim of exemptions is when a

[1] Any reference to "Rule" is a reference to the Federal Rules of Bankruptcy Procedure, while "LBR" references the Local Bankruptcy Rules for the Middle District of Tennessee.

case is converted to Chapter 7 from Chapter 13 if "the case was converted to chapter 7 more than one year after the entry of the first order confirming a plan under chapter . . . 13 . . . ."

Debtor's Counsel opened the door for the Trustee to contest the homestead exemption when he failed to heed LBR 1017-1 which was specifically put in place to avoid the situation that has been created in this case. The local rule excludes Schedule C, Property Claimed as Exempt, from the schedules that must be amended upon conversion so that the new deadline to object will not be triggered. Further, Debtor's Counsel kept the door open by not appearing at the 341 meeting of creditors. He basically left the Debtor unrepresented at the 341 meeting of creditors with another lawyer "sitting in" for him as the Chapter 7 Trustee asked direct questions that would materially impact whether the trustee would object to the homestead exemption.

Fortunately for the Debtor, in this instance, the fact that Debtor's Counsel missed one of the most basic points when representing consumer debtors, failed to attend the 341 meeting of creditors and failed to provide the representation that the Debtor was due as part of the basic bundle of services owed to him, will not have a devasting impact. In this instance, well-settled public policy grounds drive the Court to liberally construe exemption statutes in favor of the claimant. Additionally, the Debtor's recent testimony and the surrounding circumstances of the Chapter 7 meeting of creditors make it improper for this court to invoke judicial estoppel. The homestead exemption and judicial estoppel will be each discussed in turn.

First, Tennessee law determines the scope of the homestead exemption. The homestead exemption under Tenn. Code Ann. § 26-2-301 must be liberally construed in favor of the claimant. This principle comes from *White v. Fulghum*, 10 S.W. 501, 502-03 (1888) wherein the Tennessee Supreme Court said "the homestead exemption is a favorite in this country, and all laws concerning it are . . . liberally construed in favor of the claimant." Additionally, the narrow

issue of whether continued occupancy is required to invoke the homestead exemption was considered in the family law context in *Grier v. Canada*, 107 S.W. 970, 976 (1907). In *Grier*, the Tennessee Supreme Court found "the right of homestead is not dependent upon occupancy, and hence assigned homestead is not abandoned by removal from the premises, except by *permanent* removal beyond the limits of the State. (*emphasis added*)."

The Debtor's invocation of the homestead exemption is well founded. This Court, in analyzing the applicability of the homestead exemption, considered the testimony of the Debtor on September 22nd and weighed it in light of the fact that the prior inconsistent testimony was made in the absence of his counsel. When the Debtor moved abroad, he knew his time there was finite because of the legal restrictions on residence in the UAE. For that reason, he asked his sister to maintain his home while he was away. He also maintained a driver's license and voter registration in Tennessee. For these reasons, it is apparent the Debtor did not intend to permanently abandon his primary residence.

Second, "[t]he doctrine of judicial estoppel bars a party from (1) asserting a position that is contrary to one that the party has asserted under oath in a prior proceeding, where (2) the prior court adopted the contrary position 'either as a preliminary matter or as part of a final disposition.'" *Browning v. Levy*, 283 F.3d 761, 775 (6th Cir. 2002) (*quoting Teledyne Indus., Inc. v. NLRB*, 911 F.2d 1214, 1218 (6th Cir. 1990)). This doctrine should not be applied where the omissions "are the result of mere mistakes or inadvertent conduct." *Eubanks v. CBSK Fin. Grp., Inc.*, 385 F.3d 894, 898 (6th Cir. 2004). In the Sixth Circuit, there are two scenarios where a debtor's failure to disclose may be deemed inadvertent: "one is where the debtor lacks knowledge of the factual basis of the undisclosed claims, and the other is where the debtor has no motive for concealment." *Browning v. Levy*, 283 F.3d 761, 776 (6th Cir. 2002).

In *Slater v. United States Steel Corp.*, 871 F.3d 1174, 1180 (11th Cir. 2017), the *pro se* debtor misunderstood a question and failed to disclose a civil lawsuit in his bankruptcy filings. *Id.* at 1186. The court understood the debtor's confusion, saying "Although the question asking for a list of 'all suits and administrative proceedings to which the debtor is or was a party' seems more straightforward, as Slater's testimony shows, it nevertheless may be misunderstood." *Id.* To help determine if the debtor's omission was intentional as opposed to inadvertent, the *Slater* court weighed factors including: "the [debtor's] level of sophistication, his explanation for the omission, whether he subsequently corrected the disclosures, and any action taken by the bankruptcy court concerning the nondisclosure." *Id.* at 1176-77. According to the Sixth Circuit, the doctrine of judicial estoppel should be applied with caution. *Eubanks*, 385 F.3d at 897. This equitable doctrine is meant to "[prevent] a party from abusing the judicial process through cynical gamesmanship . . . ." *Teledyne Indus., Inc. v. NLRB*, 911 F.2d 1214, 1217-18 (6th Cir. 1990).

There was clearly no gamesmanship on the part of Mr. Ferguson here. The Debtor was the one who would suffer from his prior misstatement about his legal residence, so he had no motive to hide the truth. The Debtor's level of sophistication led him to hire counsel to be his advocate. The misstatement occurred when his counsel was travelling during the meeting of creditors, and the attorney that sat in was neither attentive nor informed enough to guide Mr. Ferguson during questioning. The Debtor, essentially acting *pro se* like in *Slater*, misunderstood a seemingly simple question. The Debtor later corrected his testimony and provided an explanation the Court found credible. Given these factors and the Sixth Circuit's admonition to invoke judicial estoppel with caution, this Court declines to invoke judicial estoppel.

Now, to address the underlying problem that created this contested issue. As discussed above, had Debtor's Counsel provided the competent representation that he owed the Debtor, the door would have been closed to the Chapter 7 Trustee ever challenging the homestead exemption. But, the Chapter 7 Trustee, after hearing the Debtor's testimony at the 341 meeting of creditors, was duty bound to pursue this matter and acted as he should have, by attempting to secure a possible asset for the estate. When an attorney fails to attend the meeting of creditors and it causes a domino effect, it is reasonable and necessary to award the fees incurred for such a headache to the trustee. 11 U.S.C.S. § 105; *In re Zepecki*, 224 B.R. 907, 911 (Bankr. E.D. Ark. 1998). Therefore, the Court finds that the fees and expenses associated with bringing this matter should be charged to Debtor's Counsel and the Chapter 7 Trustee should be reimbursed by the Debtor's Counsel.

THEREFORE, IT IS HEREBY ORDERED that the Trustee's Objection to the Debtor's homestead exemption is **OVERRULED**.

IT IS FURTHER ORDERED that the Trustee's reasonable and necessary fees and expenses incurred in bringing this adversary proceeding shall be paid by Debtor's Counsel based on his failure to provide adequate representation to the Debtor which necessitated the filing of the instant proceeding by the Trustee. The Trustee shall submit a proposed order with accompanying affidavit detailing his fees and expenses within 7 days from entry of this Order which directs Debtor's Counsel, Attorney Robert Hamm Moyer, to pay said fees and expenses.

THIS ORDER WAS SIGNED AND ENTERED ELECTRONICALLY AS INDICATED AT THE TOP OF THE FIRST PAGE