



Featured Article

HOW TO LOSE THE HOMESTEAD EXEMPTION

By Seth Harris, Esq., McCarthy Holthus, LLP

It is not uncommon to see debtors try and hide their assets when filing bankruptcy. It is human nature to cling onto everything one has, especially when it comes to a residence. However, as we learn from *Elliott v. Weill (In re Elliot)* 544 B.R. 421, there are significant consequences once a bankruptcy trustee discovers that the debtor has been concealing assets – including a potential waiver of the homestead exemption.

In re Elliott has been before the United States Bankruptcy Appellate Panel (“BAP”) three times. Each appeal dealt with the debtor’s property which he had concealed during the pendency of his bankruptcy. Prior to filing his bankruptcy, Elliott transferred his real property residence to his wholly-owned corporation. Elliott ultimately transferred the property back to himself once he received his chapter 7 discharge. However, neither the residence nor his corporation were included in Elliott’s bankruptcy schedules. Elliott additionally lied about his address and did not disclose creditors from a 2006 fraud judgment or any creditors holding secured claims. It was not until the fraud judgment creditors discovered Elliott’s discharge, that the bankruptcy was reopened and the chapter 7 trustee ultimately discovered Elliott’s residence.

Once forced to disclose the real property, Elliott claimed a \$175,000 homestead exemption on his residence. The homestead exemption protects a portion of the debtor’s interest in real property from unsecured creditors. The trustee initially objected to Elliott’s claimed homestead exemption solely based on bad faith and won. However, the BAP reversed this ruling and held based on the Supreme Court’s ruling in *Law v. Siegel*, 134 S.Ct. 1188 (2014) that bankruptcy courts were precluded from denying claimed exemptions based on bad faith.

Finding that Elliott’s residence offered a benefit to the estate, the bankruptcy court granted the trustee’s motion to turn over the property to the trustee for liquidation and distribution. Then the court set out to revisit the issue of whether the Trustee’s objection to Elliott’s homestead exemption could be

sustained. This time, the trustee relied on 11 U.S.C. § 522(g)(1) (B) which only allows a debtor to exempt recovered property if the debtor did not conceal the property. The bankruptcy court sustained the objection to the homestead exemption and after Elliott appealed, the BAP affirmed.

The court held that the trustee successfully recovered property that the debtor had transferred to a company he solely owned and then transferred it back to himself once he received his discharge. As such, this case fell squarely under § 522 and its limitations and upheld the objection to the homestead exemption.

“

... there are multiple tools in the trustee’s box which allow him to attack exemptions specifically, even if not broadly.

”

but when it comes to exemptions, finding a specific exception may be key.

The BAP is sending a clear message that justice will prevail. As the Supreme Court has stated, the “purpose of the Bankruptcy Code is to grant a ‘fresh start’ to the ‘honest but unfortunate debtor.’”



Seth M. Harris is an associate in the Civil Litigation Department at McCarthy & Holthus. Mr. Harris handles complex litigation and appeals and has developed specialties in eminent domain and receivership actions. He can be reached at sharris@mccarthyholthus.com.