

IS FLORIDA STILL A DEBTOR'S HAVEN ON THE EVE OF BANKRUPTCY?

(An Analysis of BAPCPA and the Kaplan Case)

By

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and are not intended and should not be construed either as a statement of substantive law or legal advice.*

Introduction

In In re Kaplan, 331 B.R. 483 (Bankr. S.D. Fla. 2005), the court held that the “homestead cap” of \$125,000 set forth in section 522(p) of the Bankruptcy Code, as amended by section 322 of the Bankruptcy Abuse Prevention and Consumer Protection Act (“BAPCPA”) applied to the equity a debtor acquired in a home during the 1215 days prior to filing a bankruptcy case. Florida and Puerto Rico attorneys will take particular note that in the past, many debtors have converted non-exempt assets into cash and invested the proceeds into homestead properties in Florida to protect their assets from an imminent bankruptcy case.

I. HOMESTEAD EXEMPTIONS UNDER FLORIDA LAW

Under the Florida Constitution, a creditor’s right to enforce a judgment is subject to a debtor’s right to designate as certain property as exempt from foreclosure for the payment of debts. Specifically, the Constitution provides that one hundred sixty acres of contiguous land and improvements for property located outside of a municipality, and one-half acre of contiguous land located within a municipality is exempt from a forced sale, without regard to its value. Art. X, § 4(a)(1), Fla. Const. Moreover, also exempt are proceeds of the property’s voluntary sale if the owners intend to reinvest them in a new homestead within a reasonable time, and do not commingle the proceeds with other funds. Orange Brevard Plumbing & Heating Company v. La Croix, 137 So.2d 201 (Fla. 1962).

II. EXEMPTIONS UNDER THE BANKRUPTCY CODE

Under the Bankruptcy Code, a debtor may also exempt certain property from the claims of creditors; and Section 522 of the Bankruptcy Code sets forth the categories and maximum values of such property. 11 U.S.C. § 522(d). A debtor is not limited, however, to the exemptions set forth in the Bankruptcy Code because a state may “opt out” of the federal exemptions and establish the types and values of properties that are subject to exemption. 11 U.S.C. § 522(b).

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”) amended section 522 and included two new subsections to “prevent the debtor from taking full advantage of state homestead exemptions under certain circumstances.” 4 Collier, Bankruptcy ¶ 522.13[1] (15th ed. 2006). Section 522(p) limits the homestead exemption to \$125,000 for property acquired within 1215 days before the commencement of the bankruptcy case. Section 522(p)(1) specifically provides the following:

(p)(1) Except as paragraph (2) of this subsection and sections 544 and 548, as a result of electing under subsection (b)(3)(A) to exempt property under State or local law, a debtor may not exempt any amount of interest that was acquired by the debtor during the 1215-day period preceding the date of the filing of the petition that exceeds in the aggregate \$125,000 in value in—

(A) real or personal property that the debtor or a dependent of the debtor uses as a residence;

- (B) a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence;
- (C) a burial plot of the debtor or a dependent of the debtor; or
- (D) real or personal property that the debtor or dependent of the debtor claims as homestead.

Section 522 applies “only when the debtor seeks to exempt an interest in homestead property under section 522(b)(3)(A) (formerly section 522(b)(2)(A)) by claiming exemptions under state law or local law.” 4 Collier, Bankruptcy ¶ 522.13[1]. The provision does not restrict, however, “the ability of the debtor to exempt property under section 522(b)(2) by asserting the federal homestead exemption under section 522(d)(1), or to exempt an interest in property under section 522(b)(3)(B) (formerly section 522(b)(2)(B)) held as a tenant by entirety or by joint tenancy to the extent that interest would have been exempt from process under non-bankruptcy law.” Id.

III. ANALYSIS OF KAPLAN

A. FACTUAL AND PROCEDURAL BACKGROUND

According to the facts of the case, Elona Kaplan (“Kaplan” or “Debtor”) was the owner of a property in Sunny Isles Beach, Miami (the “Property”), which she acquired in April 2003. Debtor filed a bankruptcy petition under chapter 7 of the Bankruptcy Code on May 17, 2005, less than 1215 days after she acquired the Property. In her schedules, Debtor valued the condo at \$280,000 and listed a first mortgage in the amount of \$181,000. Debtor then claimed that the Property was exempt. The Chapter 7 trustee objected to Debtor’s claimed exemption. The Chapter 7 trustee alleged that an appraisal of the Property showed that it was worth between \$325,000 and \$350,000, and she had approximately \$144,000 to \$169,000 in equity. According to the trustee, the equity was not exempt under BAPCPA because the Property had been acquired within 1215 days of the bankruptcy petition date.

The Bankruptcy Court sustained the Chapter 7 trustee’s objection holding that Florida’s real property homestead exemption is subject to a \$125,000 cap (or \$250,000 for joint filers) under BAPCPA.

B. Legal Analysis

In support of its position, the Debtor argued that section 522(p) of the Bankruptcy Code is not applicable in Florida pursuant to In re McNabb, 326 B.R. 785 (Bankr. D.Ariz. 2005), which held that the \$125,000 cap in section 522(p) only applies in non opt-out states. Moreover, the Debtor objected to the Trustee’s valuation of the Property.

After analyzing the McNabb decision and the legislative history of section 522(p), the court rejected the Debtor’s argument and scheduled a valuation hearing to determine the amount of non-exempt equity in the Property. According to the court, a review of the legislative history was proper in this case due to the ambiguity of the statute. Thus, “[c]ontrary to the assertion in McNabb that the legislative history ‘is virtually useless as an aid to understanding the language and intent,’ the Reform Act is replete with references demonstrating that the new homestead limitations in § 522(p) and (q) were intended to apply to all states in which debtors could

previously exempt amounts in excess of \$125,000.” 331 B.R. at 487 (citations omitted). After reviewing the legislative history, the court concluded that “[t]here is no single shred of legislative history or commentary during the several years of debate regarding the homestead exemption suggesting that Congress intended to apply the new caps in only a couple of opt-out states. In fact, it is common knowledge that Florida’s unlimited homestead was at the heart of the legislative debate.” 331 B.R. at 488. Following the House Report, the court held the purpose of the bill was to restrict the “mansion loophole,” which debtors used previously to shield all of their equity in their homes. *Id.* Thus, before a debtor can claim the homestead exemption under state law, the debtor must be (i) “a domiciliary of the state for at least two years before she or him can claim that state’s homestead exemption;” and (ii) “own the homestead for at least 40 months before he or she can use state exemption law.” *Id.*

IV. CONCLUSIONS

Kaplan raises concerns for asset protection planners. It was the first opinion issued in Florida interpreting the homestead cap in section 522(p), and contradicted the McNabb opinion from Arizona, which as Florida, had opted out of the federal exemptions. Other Florida bankruptcy courts have followed the Kaplan. See, e.g., In re Buonopane, 344 B.R. 675 (Bankr. M.D. Fla. 2006) and In re Landahl, 338 B.R. 920 (Bankr. M.D. Fla. 2006) (Judge May). Nonetheless, In re Wayrynen, 332 BR 479 (Bankr. S.D. Fla. 2005), held exempt a property purchased 1,215 days prior to the bankruptcy petition exempt under Florida law, and not subject to the \$125,000 cap. In view of the BAPCPA amendments to homestead exemptions, Florida may no longer be a “safe haven” for those seeking to protect their assets in the eve of bankruptcy. To invoke Florida’s homestead exemptions, debtor must have resided in Florida for 730 days prior to the bankruptcy petition date, and own a homestead property for 1,215 days prior to said filing. Thereafter, the debtor may only claim \$125,000 (or \$250,000 if filing jointly).