

MAR 11 2016

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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

ORDERED PUBLISHED

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT**

In re:) BAP No. CC-15-1219-GDKi
)
 6 ANDY DIAZ,) Bk. No. 8:13-19194-CB
)
 7 Debtor.)
)
 8 _____)
)
 9 ANDY DIAZ,)
)
 10 Appellant,)
)
 11 v.) **O P I N I O N**
)
 12 WENETA M.A. KOSMALA, Trustee,)
)
 13 Appellee.)
)
 14 _____)

Submitted on January 21, 2016
at Pasadena, California

Filed - March 11, 2016

Appeal from the United States Bankruptcy Court
for the Central District of California

Honorable Catherine E. Bauer, Bankruptcy Judge, Presiding

21 _____
 21 Appearances: Michael J. Carras of Conforti & Carras, APC argued
 22 on behalf of Appellant Andy Diaz; Erin P. Moriarty
 23 of the Law Offices of Weneta M.A. Kosmala argued
 on behalf of Appellee Weneta M.A. Kosmala,
 Trustee.

24 Before: GAN,¹ DUNN, and KIRSCHER, Bankruptcy Judges.

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 26
 27
 28 _____
¹ Hon. Scott H. Gan, Bankruptcy Judge for the District of
 Arizona, sitting by designation.

1 GAN, Bankruptcy Judge:

2
3 Debtor Andy Diaz ("Diaz") appeals from a final order
4 granting the motion of the chapter 7² trustee, Weneta M.A.
5 Kosmala ("Trustee"), to disallow Diaz's homestead exemption
6 claimed under California law. The Trustee's motion was joined by
7 Susan Wilson, Diaz's former mother in law and creditor in the
8 case. Because the bankruptcy court incorrectly interpreted
9 California homestead law, we VACATE and REMAND.

10 **I. FACTS**

11 Prior to 2011, Diaz was married to Rebecca Wilson Diaz, and
12 lived at a residence in Fullerton, CA. ("Property"). The couple
13 had a son, who is now about eight years old. In October, 2011,
14 Diaz suffered two major brain aneurysms which required multiple
15 surgeries and initially left him in a coma for several weeks.
16 After some time, Diaz awoke from the coma, but was unable to walk
17 or talk. The aneurysms caused symptoms similar to a stroke.
18 Diaz began recovering from the aneurysms, and after a few months,
19 was released to the care of his mother, who lived across the
20 street and six doors down from the Property. As Diaz's recovery
21 progressed, he regained the ability to walk and talk, however, he
22 remains unable to work and continues to receive Social Security
23 Disability benefits. Diaz and Rebecca Wilson Diaz divorced in
24 2011. On November 9, 2013, Diaz filed his chapter 7 case.

25
26 ² Unless otherwise indicated, all chapter and section
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.
28 "Rule" references are to the Federal Rules of Bankruptcy
Procedure, Rules 1001-9037, and all "Civil Rule" references are
to the Federal Rules of Civil Procedure, Rules 1-86.

1 Originally, Diaz claimed the California "wildcard"
2 exemptions of Cal. Civ. Proc. Code § 703.140(b). After the
3 Trustee moved for turnover of the Property in 2015, Diaz filed an
4 amended schedule C to claim the automatic homestead exemption
5 under Cal. Civ. Proc. Code § 740.730(a)(3). Because Diaz was
6 disabled, the amount of the exemption was \$175,000.³

7 Trustee objected to the claimed homestead exemption on the
8 basis that Diaz did not reside in the Property on the date of
9 filing, and that his absence could not be considered temporary
10 for the purposes of claiming the exemption under California law.
11 Specifically, the Trustee argued that Diaz lacked a foreseeable
12 prospect of having the ability to resume occupancy of the
13 Property.

14 The Trustee's objection was supported by declarations of
15 Rebecca Wilson Diaz and her mother Susan Wilson, which are
16 virtually identical. Their statements are as follows:

- 17 1. Diaz spent several months in hospitals and therapy
18 facilities before being released to his mother's house;
- 19 2. Even 3½ years after the aneurysms, Diaz cannot care for
20 himself;
- 21 3. Diaz is never left alone and requires constant care
22 from his mother or brother Gilbert;
- 23 4. The Property is occupied by Diaz's brother and sister-
24 in-law, Arthur and Priscilla;
- 25 5. Debtor has been allowed to spend the night at the
26

27 ³ Trustee has not contested Diaz's disability, therefore if
28 he is eligible to claim the homestead exemption, the amount would
be \$175,000.

1 Property a few times, but only in the capacity of a
2 "visitor" and with his mother and Gilbert continuing to
3 provide care. In the morning, Diaz is returned to his
4 mother's house;

5 6. The bulk of Diaz's personal effects remain at his
6 mother's house;

7 7. Visitations with Diaz's son occur at his mother's
8 house; and

9 8. All correspondence is sent to Diaz's mother's house and
10 all interactions between Wilson Diaz and Diaz have
11 taken place there.

12 Diaz responded to the Trustee's objection and argued that
13 his condition had improved dramatically and that he had returned
14 to living in the Property on a full-time basis. Diaz questioned
15 the Trustee's reliance on Susan Wilson's testimony because as the
16 estate's largest creditor, she would benefit from disallowing the
17 exemption. Diaz supported his opposition with a declaration in
18 which he made the following statements:

19 1. Diaz has made great strides in his recovery as
20 evidenced by letters from his doctors (attached to the
21 declaration and to a supplemental declaration);

22 2. Diaz maintains the Property as his address on his
23 California Drivers License and voter's registration and
24 receives all mail at the Property;

25 3. The mortgage and utilities at the Property are in
26 Diaz's name;

27 4. Diaz's personal belongings are at the Property;

28 5. Diaz maintains a separate bedroom in the Property;

1 6. Arthur and Priscilla also live in the Property; and

2 7. Diaz is taking independent living classes.

3 Arthur and Gilbert Diaz also filed declarations stating that Diaz
4 resides in the Property.

5 Trustee filed a reply to Diaz's opposition and argued that
6 Diaz provided no evidence that his absence was temporary.
7 Trustee argued that because Diaz was living nearby at his
8 mother's house, and the Property was occupied by family members,
9 Diaz did not need to change address information. The mortgage
10 and utilities could remain in Diaz's name but be paid by Arthur
11 and Priscilla. Trustee argues that because Diaz was living at
12 his mother's house, he had no use for his furniture and other
13 household items, which remained at the Property for the use of
14 Arthur and Priscilla. Trustee again argued that Diaz was not
15 able to live alone or care for himself, so his absence could not
16 be temporary.

17 On June 30, 2015, the bankruptcy court held a hearing on the
18 Trustee's motion. At the end of the hearing, the court granted
19 the Trustee's motion to disallow the homestead exemption, ruling:

20 And, you know, this is a sad situation, but I am
21 going to grant the motion of the Trustee. This
22 has to do with a very substantial homestead, the
23 highest homestead that would be available. And I
24 cannot find that the debtor is entitled to this
25 homestead because at the time of the bankruptcy
three and a half years ago he was not living in
the property and it does appear to me that the
folks that have benefitted from this three and a
half years of bankruptcy are the relatives, so I
am going to grant the motion.

26 June 30, 2015 Hr'g Tr., at 16:11-20.

27 After the ruling, Diaz's attorney asked if it would change
28 the court's analysis if Diaz had been in a rehabilitation

1 hospital instead of recovering at his mother's house. In
2 response, the court clarified the ruling:

3 Well, I -- I'd have to look at the law. You're
4 free to appeal. I'm not saying I enjoyed making
5 this type of decision, but we do have to look at a
6 snapshot at the time of filing. And there has
7 been a substantial period of time that has gone by
8 before he was able to move back into the house.
9 And as I said, I'm also a little suspicious, I've
10 got to tell you, that Mr. Diaz probably was not
11 capable of making the decision to file bankruptcy
12 and that the benefit totally went to his relatives
13 who stayed in that house. And now - you know, now
14 \$175,000 homestead exemption seems like an
15 incredibly large exemption for someone who hasn't
16 lived in the house for a number of years.

17 June 30, 2015 Hr'g Tr., at 17:6-18.

18 On July 8, 2015, the bankruptcy court entered an order
19 granting the Trustee's motion. Diaz timely appealed.

20 **II. JURISDICTION**

21 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
22 §§ 1334 and 157(b) (2) (B). A bankruptcy court's order denying an
23 exemption is a final, appealable order. Preblich v. Battley, 181
24 F.3d 1048, 1056 (9th Cir. 1999). We have jurisdiction under 28
25 U.S.C. § 158.

26 **III. ISSUE**

27 Did the bankruptcy court err in interpreting the California
28 homestead exemption statute?

29 **IV. STANDARDS OF REVIEW**

30 "The right of a debtor to claim an exemption is a question
31 of law that we review de novo." Elliott v. Weil (In re Elliott),
32 523 B.R. 188, 191 (9th Cir. BAP 2014). The bankruptcy court's
33 interpretation of state exemption laws is reviewed de novo.
34 Calderon v. Lang (In re Calderon), 507 B.R. 724, 728 (9th Cir.

1 BAP 2014). De novo review requires that we consider a matter
2 anew, as if no decision had been rendered previously. Id.

3 **V. DISCUSSION**

4 When a debtor files a Chapter 7 petition, all of the
5 debtor's legal or equitable interests in property become property
6 of the estate, subject to the debtor's right to reclaim certain
7 property as exempt. Schwab v. Reilly, 560 U.S. 770, 774 (2010).
8 Section 522 provides a default list of exemptions, but allows
9 states to opt out of the federal scheme and define their own
10 exemptions. 11 U.S.C. §§ 522(b)(2), (b)(3)(A), (d). California
11 has opted out of the federal exemption scheme. Cal. Civ. Proc.
12 Code § 703.130. The bankruptcy court decides the merits of state
13 exemptions, but the validity of the exemption is controlled by
14 California law. LaFortune v. Naval Weapons Ctr. Fed. Credit
15 Union (In re LaFortune), 652 F.2d 842, 846 (9th Cir. 1981).
16 Therefore, we must interpret and apply California law to
17 determine whether Diaz was entitled to claim the homestead
18 exemption.

19 **A. California Homestead Exemption**

20 Diaz has claimed the "automatic" homestead exemption of Cal.
21 Civ. Proc. Code §§ 704.710-704.810. The automatic homestead
22 exemption protects a debtor from a forced sale and requires that
23 the debtor reside in the homestead property at the time of a
24 forced sale. Redwood Empire Prod. Credit Ass'n v. Anderson (In
25 re Anderson), 824 F.2d 754, 757 (9th Cir. 1987); Cal. Civ. Proc.
26 Code §§ 704.710(a)-(c), 704.720, 704.730, 704.740. The filing of
27 a bankruptcy petition constitutes a forced sale for purposes of
28

1 the automatic homestead exemption. Kelley v. Locke (In re
2 Kelley), 300 B.R. 11, 21 (9th Cir. BAP 2003).

3 Section 704.710(c) provides:

4 "Homestead" means the principal dwelling (1) in which
5 the judgment debtor or the judgment debtor's spouse
6 resided on the date the judgment creditor's lien
7 attached to the dwelling, and (2) in which the judgment
debtor or the judgment debtor's spouse resided
continuously thereafter until the date of the court
determination that the dwelling is a homestead.

8 Cal. Civ. Proc. Code § 704.710(c) was amended in 1983 to
9 remove the word "actually," which appeared before "resided," in
10 order to avoid a possible construction that a temporary absence,
11 such as a vacation or hospitalization, would defeat a debtor's
12 right to claim the exemption. See 17 Cal.L.Rev.Comm. Reports 854
13 (1983). Several courts have relied on this amendment to find
14 that a debtor who did not physically occupy a property on the
15 filing date would not be precluded from claiming the automatic
16 homestead exemption if the absence was temporary. See, e.g., In
17 re Pham, 177 B.R. 914, 918-20 (Bankr. C.D. Cal. 1994); In re
18 Bruton, 167 B.R. 923, 926 (Bankr. S.D. Cal. 1994); In re Dodge,
19 138 B.R. 602, 607 (Bankr. E.D. Cal. 1992).

20 Trustee construes the homestead law as creating a rule with
21 an exception. According to the Trustee, the rule is that a
22 debtor must physically occupy the property on the filing date
23 with an intent to remain there, subject to an exception for
24 temporary absences. Trustee argues that Diaz admits that he did
25 not reside in the Property on the petition date and urges us to
26 evaluate Diaz's subsequent actions to determine whether his
27 absence was temporary.

1 Diaz does not concede that the Property was not his
2 residence on the filing date. Trustee's suggested construction
3 improperly shifts the analysis from the Debtor's intent to reside
4 in the Property and focuses instead on the Debtor's temporary
5 absence and his intent to return to occupancy of the Property.

6 The purpose of the "continuous residency" requirement is to
7 prevent a judgment debtor from moving into a property after the
8 creation of a judgment lien or levy in order to establish an
9 exemption. Hastings v. Holmes (In re Hastings), 185 B.R. 811,
10 814 (9th Cir. BAP 1995). However, the filing of the petition
11 serves as both a hypothetical levy and as the operative date of
12 the exemption. See Wolfe v. Jacobson (In re Jacobson), 676 F.3d
13 1193, 1199 (9th Cir. 2012) ("bankruptcy exemptions are fixed at
14 the time of the bankruptcy petition"); Nadel v. Mayer (In re
15 Mayer), 167 B.R. 186, 189 (9th Cir. BAP 1994) ("[t]he filing of
16 the petition constitutes an attempt by the trustee to levy on the
17 property. It is this hypothetical levy the court must focus on
18 in analyzing [the debtor's] entitlement to a homestead
19 exemption.").

20 Consequently, in a case where the filing of the petition
21 serves as the hypothetical levy, a debtor will always satisfy the
22 continuous occupancy requirement of the California automatic
23 homestead exemption because the date of attachment and the date
24 of the court determination that the exemption applies occur
25 simultaneously. Therefore, Diaz is entitled to claim the
26 exemption only if he resided in the Property on the petition
27 date.

1 Under California law, the relevant factors for determining
2 if a debtor resides in a property are the physical fact of the
3 occupancy of the property and the debtor's intention to live
4 there. Kelley v. Locke (In re Kelley), 300 B.R. 11, 21 (9th Cir.
5 BAP 2003) (citing Ellsworth v. Marshall, 196 Cal.App.2d 471, 474
6 (1961)).

7 Prior to the creation of the automatic homestead exemption
8 in 1975,⁴ California law provided that a party could obtain a
9 monetary exemption for his or her family residence only by
10 recording a declaration of homestead. Webb v. Trippet, 235
11 Cal.App.3d 647, 650 (1991). Actual residency was required to
12 claim the declared homestead. See former Cal. Civ. Code § 1237
13 ("The homestead consists of the dwelling house in which the
14 claimant resides. . . .").

15 California courts have long held that a lack of physical
16 occupancy does not preclude a party from establishing actual
17 residency and claiming the homestead, if the claimant intends to
18 return. See, e.g., Michelman v. Frye, 238 Cal.App.2d 698, 703-04
19 (1965) (holding that a wife who was forced to leave the family
20 dwelling could claim the homestead exemption despite not
21 physically residing there, if she intended to return); Catsiftes
22 v. Catsiftes, 29 Cal.App.2d 207, 210 (1938) ("residence can be
23 changed only by the union of act and intent"); Guiod v. Guiod, 14
24 Cal. 506, 507-08 (1860) (holding that temporary removal for a
25

26 ⁴ See former Cal. Civ. Proc. Code § 690.235, providing for
27 an automatic "dwelling house" exemption; see also Krause v.
28 Super. Ct., 78 Cal.App.3d 499 (1978). For a detailed history of
California homestead exemptions, see Taylor v. Madigan, 53
Cal.App.3d 943 (1975).

1 specific purpose would not preclude a claim of homestead); Harper
2 v. Forbes, 15 Cal. 202, 204 (1860) ("The necessities of the
3 family, their maintenance, their health, or the education of the
4 children, may often require a temporary change of residence. In
5 such cases the premises will still retain their original
6 character as a homestead."); Moss v. Warner, 10 Cal. 296, 297-98
7 (1858) (holding that a three-year absence from the homestead did
8 not preclude claiming a homestead exemption because the family,
9 who temporarily lived with acquaintances due to safety concerns,
10 intended to return).

11 Conversely, physical occupancy on the filing date without
12 the requisite intent to live there, is not sufficient to
13 establish residency. In Ellsworth v. Marshall, the court
14 determined that the Ellsworths did not "actually reside" in the
15 subject property despite their physical occupancy. 196
16 Cal.App.2d 471 (1961). The court found that they had moved into
17 the property and declared a homestead exemption the day before a
18 scheduled sale and therefore did not have a "bona fide intention
19 to make the premises their home or residence." Id. at 476.

20 Physical occupancy on the petition date is therefore neither
21 a necessary nor sufficient condition of residency. However,
22 whether the debtor physically occupies the property or not, the
23 debtor must have an intention to reside there.

24 In the present case, the bankruptcy court interpreted the
25 California homestead exemption as requiring physical occupancy on
26 the filing date. The court's decision was also apparently based
27 in part on the amount of the exemption, the finding that Arthur
28 and Priscilla Diaz benefitted from the bankruptcy and would

1 benefit from the homestead exemption, and the finding that a
2 substantial amount of time had gone by before Diaz resumed
3 occupancy. There is no evidence that the court considered Diaz's
4 intent to reside in the property on the filing date or evaluated
5 the evidence supporting his intent.

6 When the bankruptcy court has applied an incorrect legal
7 standard, we typically vacate the decision and remand so that the
8 bankruptcy court can apply the correct law to the facts.
9 Calderon v. Lang (In re Calderon), 507 B.R. 724, 733 (9th Cir.
10 BAP 2014).

11 In this case, we find that the record was not sufficiently
12 developed on the issue of Diaz's intent to make the Property his
13 residence. Because the declaration evidence focused on Diaz's
14 ability to physically occupy the Property without assistance, the
15 record should be reopened to permit evidence of Diaz's intent on
16 the filing date. While a debtor's intent can be inferred from
17 surrounding circumstances, the debtor's inability to live
18 unassisted, the amount of the claimed exemption, or the fact that
19 family members may also benefit from the exemption are not
20 relevant factors to the analysis.

21 **B. Burden of Proof**

22 Trustee urges us to conclude that based on the Supreme Court
23 decision in Raleigh v. Illinois Dep't of Revenue, 530 U.S. 15
24 (2000), Diaz should bear the burden of proof to establish his
25 right to claim the exemption.

26 Generally, a debtor's claimed exemption is presumptively
27 valid, and the party objecting to a debtor's exemption has the
28 burden of proving that the exemption is improper. Carter v.

1 Anderson (In re Carter), 182 F.3d 1027, 1029 n.3 (9th Cir. 1999);
2 Rule 4003(c). If the objecting party can produce evidence
3 sufficient to rebut the presumption of validity, then the burden
4 of production shifts to the debtor to provide unequivocal
5 evidence to demonstrate that the exemption is proper. Carter,
6 182 F.3d at 1029 n.3. The burden of persuasion always remains
7 with the objecting party who must provide sufficient proof to
8 meet the preponderance of the evidence standard. Id.

9 Trustee argues that in Raleigh, the Supreme Court held that
10 the burden of proof is a substantive aspect of a claim, so in the
11 absence of a federal interest requiring a different result, the
12 state law allocation of the burden should apply in an objection
13 to the claim in bankruptcy. 530 U.S. at 20-21. California has
14 mandated the use of state exemptions in bankruptcy and has placed
15 the burden of proof on the party claiming the exemption. See
16 Cal. Civ. Proc. Code §§ 703.580(b), 704.780(a).

17 At least three bankruptcy courts have held that Raleigh
18 requires the use of the California burden of proof in deciding an
19 exemption objection. See In re Tallerico, 532 B.R. 774, 788
20 (Bankr. E.D. Cal. 2015); In re Pashenee, 531 B.R. 834, 837
21 (Bankr. E.D. Cal. 2015); In re Barnes, 275 B.R. 889, 898 n.2
22 (Bankr. E.D. Cal. 2002); see also Gonzalez v. Davis (In re
23 Davis), 323 B.R. 732, 740 (9th Cir. BAP 2005) (Klein, J.,
24 concurring). We have previously acknowledged the possibility
25 that Raleigh requires use of the state law burden of proof for
26 state law exemptions, and have affirmed this procedure in an
27 unpublished memorandum. Lopez v. Gill (In re Lopez), 2015 WL
28 5309580, *3 (9th Cir. BAP, September 3, 2015).

1 Trustee argues that the application of the state law burden
2 of proof is further supported by the Ninth Circuit's holding in
3 In re Jacobsen, that when exemptions are determined by state law,
4 "it is the **entire** state law applicable on the filing date that
5 is determinative' of whether an exemption applies." 676 F.3d
6 1193, 1199 (9th Cir. 2012) (citation omitted).

7 In re Carter, was decided prior to Raleigh, and there is no
8 subsequent Ninth Circuit authority addressing the burden of proof
9 with respect to an exemption objection. We are persuaded by the
10 reasoning in In re Tallerico and conclude that where a state law
11 exemption statute specifically allocates the burden of proof to
12 the debtor, Rule 4003(c) does not change that allocation.

13 **VI. CONCLUSION**

14 The bankruptcy court incorrectly interpreted the California
15 homestead exemption statute. For the reasons set forth above, we
16 VACATE the bankruptcy court's order sustaining the Trustee's
17 motion for disallowance of homestead exemption, and we REMAND for
18 further proceedings consistent with this decision.