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OCT 19 2015

CLERK U.S. BANKRUPTCY COURT
Central District of California
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**UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION**

In re:

Kathy Banuelos,

Debtor(s).

Case No.: 2:14-bk-29414-NB

CHAPTER 13

**MEMORANDUM DECISION ON
APPORTIONMENT OF HOMESTEAD
EXEMPTION UNDER CCP § 704.730**

Date: October 8, 2015

Time: 8:30 a.m.

Courtroom: 1545


At the date, time and place set forth above, this court held a continued hearing on (1) an objection to the debtor's claim of exemption under California Code of Civil Procedure § 704.730 (dkt. 59), and this court's rulings at that hearing also clarified this court's earlier order (dkt. 68) sustaining a parallel objection by the Chapter 13 Trustee (dkt. 65) (collectively, the "Banuelos Exemption Objections"), and (2) objections to certain exemptions claimed by the debtor's spouse, Pedro Salcido ("Mr. Salcido"), who is a debtor in his own chapter 7 case (case no. 2:15-bk-24374-NB, dkt. 51, the "Salcido Exemption Objections"). Appearances were as noted on the record.

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1 For the reasons stated in the tentative ruling (attached hereto as **Exhibit A** and
2 incorporated herein by this reference), as supplemented by the statements on the
3 record, this court has determined that the debtor and Mr. Salcido are each individually
4 entitled to a maximum exemption of \$50,000, and any asserted exemption above that
5 dollar amount will be disallowed pursuant to separate orders to be entered in this
6 bankruptcy case and in the Salcido bankruptcy case, and to that extent the Salcido
7 Exemption Objections and the Banuelos Exemption Objections will be sustained.

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24 Date: October 19, 2015
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Neil W. Bason
United States Bankruptcy Judge

EXHIBIT A

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Hearing Room 1545

8:30 AM

2:14-29414 Kathy Banuelos

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#16.00 Cont'd hrg re: Objection to debtor's exemption
under California Code of Civil Procedure
Section 704.730
fr. 6/18/15, 8/27/15

Docket 59

Tentative Ruling:

Revised Tentative Ruling for 10/8/15:

Consistent with Judge Bason's order (dkt. 68) sustaining the chapter 13 trustee's objection to the claim of exemption by the debtor-wife Ms. Banuelos (case no. 2:14-bk-29414-NB, dkt. 58), and also with Judge Johnson's proceedings with respect to the chapter 7 trustee's objection to the claim of exemption by the debtor-husband Mr. Salcido (Case No. 2:15-bk-24374-NB, dkt. 51), both the debtor and her spouse are entitled to only one combined exemption of \$100,000 which they must split between them in the amount of \$50,000 in each case, for the reasons set forth below. Appearances required to address future proceedings in these cases in view of the foregoing tentative ruling.

Proposed order: Movant is directed to serve and lodge a proposed order via LOU within 7 days after the hearing date, and attach a copy of this tentative ruling, thereby incorporating it as this court's final ruling.

Reasons: Two primary factors support this court's ruling: (1) California Code of Civil Procedure ("C.C.P.") section 704.730(b) and (2) the fact that this is an instance in which the debtors are asserting the homestead exemptions simultaneously (or concurrently), not sequentially.

(A) C.C.P. section 704.730(b). C.C.P. section 704.730(b) states that "(b) Notwithstanding any other provision of this section, the combined homestead exemptions of spouses on the same judgment shall not exceed the amount specified in paragraph (2) or (3), whichever is applicable, of subdivision (a), regardless of whether the spouses are jointly obligated on the judgment and regardless of whether the homestead consists of community or

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separate property or both. Notwithstanding any other provision of this article, if both spouses are entitled to a homestead exemption, the exemption of proceeds of the homestead shall be apportioned between the spouses on the basis of their proportionate interests in the homestead."

This statute clearly provides for apportioning the homestead exemption under certain circumstances. When doing so, the exemption is "apportioned between the spouses on the basis of their proportionate interests in the homestead." The debtor asserts that the property is held by her and her spouse as joint tenants, and she and her spouse are each a joint tenant. Section 683 of the California Civil Code states that a "joint interest is one owned by two or more persons in equal shares" so, by definition, if parties are joint tenants in property they have equal shares in the property. Thus, if two debtors own property as joint tenants, they own it equally and, therefore, they each have a 50% interest in any homestead exemption. This leads to the conclusion that the \$100,000 homestead exemption should be split equally. The debtor should receive a \$50,000 exemption and her spouse should receive a \$50,000 exemption.

The debtors have suggested that they can allocate the \$100,000 exemption between their cases as they see fit, such as \$1 to one debtor's case and \$99,999 to the spouse's case. This court is not persuaded. C.C.P. states that "the exemption of proceeds of the homestead shall be apportioned between the spouses on the basis of their proportionate interests in the homestead." It does not state the parties have the power to decide how the exemption is apportioned between their two cases.

An equal division of the exemption avoids the potential for harming creditors and gamesmanship. For example, in these cases, although the debtors assert that they will not seek a combined exemption of more than \$100,000, they apparently seek to leave their choice of allocation ambiguous until the last minute. That could mean that the chapter 7 trustee of the debtor-husband will essentially be forced not to seek to administer the asset because it could be subject to a \$99,000 exemption (so, if he pursues recovery on that asset, he could render the chapter 7 estate administratively insolvent), and therefore that asset would have to be abandoned back to the debtor-husband by operation of law. At that point the debtors could decide at

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the last minute, once the husband's equity in the property is safe from his creditors, to allocate \$99,000 of the exemption to the debtor-wife in her chapter 13 case. In other words, the debtors could evade payments to both sets of creditors by keeping their allocation ambiguous.

Another example is that, even if the debtors decided today that the debtor-wife would assert only a \$1 exemption in her chapter 13 case, and that the debtor-husband would assert a \$99,999 exemption in his chapter 7 case, the creditors in the chapter 7 case would be harmed (because the trustee in the chapter 7 case would recover less money). The parties could reach a deal that would allocate the proceeds in a way that harms one group of creditors and benefits another. This could be advantageous to the debtors if one of them has a nondischargeable and/or priority debt and the other debtor does not have a nondischargeable and/or priority debt.

It is possible that the trustees in both cases could work around any such gamesmanship by entering into a deal of their own. The two trustees could agree (subject to court approval) that regardless of how the debtors allocate the two homestead exemptions, they will transfer proceeds between the two estates to ensure that each estate receives the same net amount of funds.

But, if C.C.P. section 704.730(b) is interpreted according to its plain terms then the potential for gamesmanship is avoided entirely. The exemption is split equally, the debtors are treated equally and the creditors are treated equally.

This court notes that C.C.P. section 703.110(c) suggests that spouses may be able to allocate exemptions in any manner they desire. C.C.P. section 703.110(c), however, is the general statute that applies to all exemptions unless a more specific statute applies for a specific exemption. C.C.P. section 704.730(b) is a specific statute which applies to the homestead exemption. Thus, it appears that the latter is the controlling statute when considering the homestead exemption.

Alternatively, supposing for the sake of discussion that C.C.P. 704.730(b) were not controlling and that the spouses were able to allocate their exemptions in any manner that they desire, the debtors have not shown that they actually have chosen an allocation (they have left it ambiguous), so they

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have forfeited any such election.

Alternatively, supposing for the sake of discussion that they had not forfeited any such allocation, they have not shown any justification for an allocation different from 50% to each of them, and in the absence of any such justification anything other than a 50% allocation appears to lack good faith and to be for purposes of gamesmanship. A lack of good faith is a basis to deny confirmation of any chapter 13 plan, and also a basis to dismiss a chapter 7 or chapter 13 case.

For each of these reasons, even if the debtors theoretically were able to allocate their exemptions, they have either forfeited that allocation or they would have to allocate 50% to each of them or else, on this record, their cases would have to be dismissed (or converted, or any other remedy for lack of good faith). Therefore, again, a 50% allocation is required.

(b) Simultaneous exemptions. The other important issue is that debtors are both asserting the \$100,000 homestead simultaneously.

In the case of *In re McFall*, 112 B.R. 336 (9th Cir. BAP 1990), a husband filed a bankruptcy case. His wife did not. The husband and wife owned their home as tenants in common and the trustee sold the property in bankruptcy. The debtor husband asserted the full \$45,000 homestead exemption. The wife asserted no homestead exemption.

The trustee argued for apportionment of the exemption between the two spouses but the BAP rejected this argument. The wife was not in bankruptcy. She was not a judgment debtor. So she was not entitled to assert the exemption. The husband who was in bankruptcy was entitled to assert the exemption. So he received all of it. If the wife later filed her own bankruptcy case, she would not be entitled to any homestead exemption.

McFall stands for the proposition that if one joint tenant files for bankruptcy but the other does not, the tenant who files can assert the entire homestead exemption. No apportionment is required.

In the cases before this court, both joint tenants have filed for bankruptcy. Accordingly, both the debtor and her spouse are entitled to assert the same

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\$100,000 exemption. This is when C.C.P. section 704.730(b) applies. Apportionment should occur and each should receive \$50,000.

In arguing against this result, the debtor's spouse relied on *In re Bartlett*, 24 B.R. 605 (9th Cir. BAP 1982), but that case is clearly distinguishable. In *Bartlett*, a husband and wife owned their home as community property. The husband filed his bankruptcy case first and, later, the wife filed a separate bankruptcy case. In each case, each debtor asserted the full homestead exemption. The home was apparently worth \$95,000 and subject to \$60,000 in liens, leaving equity of approximately \$35,000.

In the husband's case, the entire property came into the bankruptcy estate and the husband asserted the full homestead exemption, and the property was not liquidated. In the wife's subsequent case, the same thing happened: the entire property came into the bankruptcy estate and the wife asserted the full homestead exemption. Because the property was community property, the entire property came into both bankruptcy estates (first the husband's and then later the wife's). In each case, the corresponding debtor asserted the exemption and the property was not liquidated. This was not a case of a husband and wife doubling up on the exemption. Instead, unlike in the debtor's case, they each just used the same one exemption sequentially (not simultaneously).

Bartlett involved community property in two bankruptcy cases filed sequentially. Apportionment of the exemption was not necessary because the residence was not apportioned (100% of the residence was in each bankruptcy estate filed sequentially). In the cases before this court, the subject property is held as joint tenants in two simultaneous cases. That means one-half of the property is in each estate and since the property has been apportioned between the two bankruptcy cases, the \$100,000 exemption must also be apportioned between the two simultaneous bankruptcy cases.

This court notes that some of the cases addressing this issue discuss the homestead exemption "floating" between spouses. This concept makes sense when dealing with community property. For example, in *Bartlett*, the residence was community property and had only \$35,000 in equity. The

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husband filed first (without his wife) and asserted the homestead exemption. The trustee did not liquidate the home and then, later, the wife filed her own bankruptcy case (without the husband). Again, the wife asserted the homestead exemption and protected the property. In each case, the entire property came into the bankruptcy estate and the exemption "floated" between the properties.

A floating exemption also makes sense when the husband and wife own the property as joint tenants and file bankruptcy cases sequentially (*i.e.*, not simultaneously). When the first spouse files, the first spouse can use the entire homestead exemption on his or her 50% interest in the property. If the trustee does not sell that 50% interest, then the other spouse can assert the entire exemption on her 50% interest in the property if the other spouse later files her own bankruptcy case. Once again, the key is that the cases are filed *sequentially*, not *simultaneously*.

If the trustee in the first case sells the home (either the estate's 50% interest or, more likely, the entire 100% interest using section 363(h)), then (according to the *Bartlett* decision), the spouse in bankruptcy can assert the full 100% exemption. The non-filing spouse cannot assert the homestead exemption.

On the other hand, when you have simultaneous bankruptcy cases as in this case, apportionment is necessary and a "floating" exemption is not permissible.

If you wish to dispute the above tentative ruling, please see Judge Bason's Procedures (posted at www.cacb.uscourts.gov) then search for "tentative rulings".

Tentative Ruling for 10/8/15:

This court anticipates posting a tentative ruling at a later time.

Tentative Ruling for 8/27/15:

Continue to 10/13/15 at 8:30 a.m. for the following reasons. Appearances are not required on 8/27/15.

Reasons: At the 6/18/15 hearing on the motion, this court continued the

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hearing to allow the parties additional time to resolve the movant's substantially similar motion filed in the concurrent bankruptcy case of the debtor's spouse (6:14-bk-19098-WJ, dkt. 51). On 8/13/15, the presiding judge in that concurrent case entered an order setting a further hearing on the motion for 9/22/15 at 2:00 p.m. (see dkt. 74, Ex.A).

If you wish to dispute the above tentative ruling, please see Judge Bason's Procedures (posted at www.cacb.uscourts.gov) then search for "tentative rulings".

**Revised Tentative Ruling for 6/18/15:
Appearances required.**

Key documents reviewed (in addition to motion papers): 70, 71.

There is no tentative ruling, but the movant should be prepared to address the timing issues raised by the debtor in her opposition (dkt. 71, p. 5:7-18). The debtor's amended Schedule C (dkt. 70) clarifies that the debtor is not seeking a combined exemption of \$200,000 with her husband. What further amendment, if any, is required? Based on the debtor's opposition papers (dkt. 71) it appears that the trustee seeks to force her to allocate the homestead exemption between her and her husband at this time - is that appropriate?

If you do not appear, and the matter is not adequately resolved by consent, then you may waive your right to be heard on matters that are appropriate for disposition at this hearing.

Tentative Ruling for 6/18/15:
This court anticipates posting a tentative ruling at a later time.

Party Information

Debtor(s):

Kathy Banuelos

Represented By
Ramiro Flores Munoz

Trustee(s):