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8 UNITED STATES BANKRUPTCY COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

10 In re:) Case No. 05-02594-H7
11)
11 MARILYN K. CRABB,) MEMORANDUM DECISION
12)
12 Debtor.)
13)

14 Chapter 7 trustee, Gregory A. Akers ("trustee") objected to
15 Marilyn K. Crabb's ("debtor") homestead exemption. Under
16 California law, the debtor must reside in the dwelling claimed as
17 her homestead when the petition is filed in order to be entitled
18 to the "automatic" homestead exemption. At issue is debtor's
19 residency since debtor was incarcerated and did not occupy the
20 dwelling at the time of her filing.

21 For the reasons stated below, the Court finds that debtor's
22 incarceration is a temporary absence from her homestead that will
23 not defeat her exemption.

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1 I.

2 FACTS

3 Debtor was incarcerated on or about July 20, 2004. Debtor
4 was released on bail on or about September 20, 2004. Debtor's
5 criminal trial started on or about October 18, 2004, at which
6 time she was returned to jail and remained there until her
7 sentencing.

8 On March 29, 2005 ("petition date"), Debtor filed the
9 present Chapter 7.¹ On or about April 27, 2005, debtor was
10 sentenced to six years in prison where she remains to date.

11 On May 1, 2006, this Court entered an order authorizing the
12 trustee to sell debtor's real property located at 10541 Cerveza
13 Drive, Escondido, California (the "residence"). Prior to the
14 bankruptcy, the residence suffered major mold damage and was in a
15 state of disrepair. The residence has been sold by the trustee.

16 Although not set forth in debtor's Schedule C, debtor claims
17 the automatic homestead exemption pursuant to California Code of
18 Civil Procedure ("CCP") § 704.710(c). The trustee objected to
19 her exemption.

20 II.

21 DISCUSSION

22 The trustee has the burden of establishing that debtor is
23 not entitled to her claimed homestead exemption of \$75,000.

24 In re Pham, 177 B.R. 914, 917 (Bankr. C.D. Cal. 1994) ("The
25

26 ¹ This is debtor's third bankruptcy filing. Debtor filed her first
27 chapter 13 case on December 2, 2003. See Case No. 03-10797. The case was
28 dismissed on September 1, 2004. Debtor filed her second chapter 13 case on
September 21, 2004. This case was dismissed with a 180-day bar for refileing a
Chapter 11 or 13 case on December 1, 2004. See Case No. 04-08297.

1 objecting party to a claim of exemption has the burden of proving
2 that the exemption is not properly claimed"). The California
3 homestead statutes are to be liberally construed so that debtors
4 do not lose their homes through a technicality. In re Canino,
5 185 B.R. 584, 590 (B.A.P. 9th Cir. 1995).

6 Under California law, the automatic homestead is available
7 when a party has continuously resided in a dwelling from the time
8 that a creditor's lien attaches until a court's determination in
9 the forced sale process that the exemption does not apply.

10 California Code Civil Procedure § 704.710(c) provides:

11 'Homestead' means the principal dwelling (1)
12 in which the judgment debtor . . . resided
13 on the date the judgment creditor's lien
14 attached to the dwelling, and (2) in which
15 the judgment debtor . . . resided
continuously thereafter until the date of the
court determination that the dwelling is a
homestead.

16 For purposes of the statute, debtor must have been residing in
17 her residence on the petition date. It is undisputed that debtor
18 was incarcerated on the petition date and therefore was
19 physically absent from her residence.

20 In determining residency for homestead exemption purposes,
21 the court must consider 1) physical occupancy of the property and
22 2) the intention with which the property is occupied. In re
23 Pham, 177 B.R. at 918 (citations omitted). The Pham court noted
24 that CCP § 704.710(c) was amended in 1983 to delete the
25 requirement of actual residency on the date of the automatic
26 homestead exemption is made. Id. at 918-919 (explaining that the
27 amendment was made to make clear that a temporary absence from
28 the residence, for, e.g., "vacation or hospitalization, would not

1 destroy the characteristic of the residence as the principal
2 dwelling") (citation omitted). Thus, a debtor's temporary
3 absence from his or her residence does not necessarily defeat the
4 debtor's automatic homestead exemption.

5 In determining whether an absence is temporary for purposes
6 of the automatic homestead exemption, the debtor should
7 demonstrate, rather than merely claim, his or her "intent to
8 return to their home after the absence." See In re Bruton, 167
9 B.R. 923 (Bankr. S.D. Cal. 1994) (debtor's four month absence
10 from his condominium as a result of employment found to be
11 temporary when debtor left behind furniture and belongings,
12 retained his address at the condominium, and returned for long
13 weekends).

14 The trustee contends that debtor's six-year prison sentence
15 is not a "temporary absence" so as to excuse debtor's failure to
16 occupy the residence on the petition date. Specifically, the
17 trustee alleges that as of the petition date, the debtor had been
18 incarcerated since July 2004, and had not made any payments
19 toward the residence for at least two years. According to the
20 trustee, debtor's failure to maintain the residence and pay any
21 of its expenses for its upkeep for at least two years before the
22 bankruptcy, coupled with her criminal conviction and
23 incarceration, demonstrate that her absence from the residence as
24 of the petition date, was "in no sense of the word 'temporary.'"

25 Debtor argues that she was never "that much" in arrears to
26 either her first or second trust deed holders. She contends that
27 she repaired the second floor of her residence when she was out
28 of jail in late 2004, and that she actually began this work prior

1 to being jailed on July 20, 2004. Debtor contends that she and
2 her 16-year-old daughter expected to return to live in the
3 residence as soon as debtor was released from custody. Debtor
4 also explains that she tried to obtain insurance on the
5 residence, but was denied because the home was not repaired and
6 because it was near a fire area. Debtor points out that she was
7 not sentenced to a six-year prison sentence on the petition date
8 and that she reasonably expected to be sentenced to probation
9 until she could overturn the convictions on appeal. Lastly,
10 debtor states that all her possessions were at the residence on
11 the petition date and at all times she intended to return to the
12 residence.

13 The trustee acknowledges, and the Court agrees, that there
14 are no California cases that discuss how a debtor's incarceration
15 affects his or her "residence" for exemption purposes.² The
16 trustee relies upon In re Chase, 2003 WL 22454876 (Bankr. D.N.H.
17 2003) as a case being factually similar. In that case, the
18 debtor assaulted a neighbor and, as a condition of bail, was
19 ordered not to come within a hundred yards of the victim's home.
20 Since the debtor's home was within a hundred yards of the
21 victim's home, the debtor moved in with her mother. The victim

22
23 ² The trustee recites facts from In re Anderson, 824 F.2d 754 (9th Cir.
24 1987) (four months prior to filing their bankruptcy petition, debtors purchased
25 second home and leased former residence); In re Yau, 115 B.R. 245 (Bankr. C.D.
26 Cal. 1990) (six-month absence not temporary); In re Bruton, 167 B.R. 923
27 (Bankr. S.D. Cal. 1994) (debtor demonstrated intent to return to condominium
28 since he left furnishings and belongings and returned for long weekends); In
re Pham, 177 B.R. 914 (Bankr. C.D. Cal. 1994) (debtors rented apartment during
week, but returned to claimed homestead property on weekends and holidays);
and In re Kelly, 300 B.R. 11 (BAP 9th Cir. 2003) (finding debtor had no intent
to reside at property even though he occasionally returned to repair vandalism
damages and continued to store household furniture and certain personal
possessions at the property). In none of these cases was the debtor
incarcerated.

1 and her family moved. But, over a half year later, the debtor
2 continued to reside with her mother. Thereafter, the debtor pled
3 guilty and was incarcerated.

4 The debtor filed bankruptcy while incarcerated. Some
5 creditors objected to her claimed homestead exemption on the
6 grounds that the debtor's absence from the property was voluntary
7 since the criminal act which resulted in her arrest and the
8 imposition of the bail conditions was an intentional act. They
9 also argued that even if the absence was involuntary, she was not
10 compelled to live away from the property after the victim and her
11 family moved away.

12 The debtor argued that her conditional bail and her
13 incarceration were involuntary absences from the property. She
14 argued that she intended to return to the property and reside
15 there. She also argued that she did not attempt to sell or rent
16 the property in order to preserve it as a home to which she may
17 return after her incarceration. Lastly, she argued that she did
18 not reside in the property after the victim moved away since she
19 could not afford the expense of maintaining a residence.

20 The Chase court found that the debtor's admitted financial
21 inability to occupy the property as her home after the victim
22 moved away, coupled with the pending criminal charges, and her
23 payment of a significant portion of her income to her mother as
24 rent compelled a finding that the debtor had established her
25 "home" with her mother. The court further explained that
26 "[w]hile a temporary absence from a 'home' with an intent to
27 return does not result in the abandonment of the homestead, in
28 this case the Debtor did not have the financial ability to live

1 in the Property as her home and has presented no evidence or made
2 any offer of proof that she had any prospect of a change in her
3 financial condition." Id. at *3. In addition, the court found
4 that the word "temporary" is "an adjective describing something
5 that continues for a limited time, usually short and transitory
6 in nature." Id. The court concluded that the Debtor's homestead
7 right in the Property was lost by her voluntary absence from the
8 Property between July 2002 (when the victim moved away) and
9 January 2003 (when she was sentenced to prison).

10 The Court does not find Chase persuasive. Unlike the debtor
11 in Chase, the debtor in this case was not paying rent to her
12 mother nor anyone else during her absence from the residence.
13 Debtor's contention that her personal property was at the
14 residence on the petition date has not been refuted by the
15 trustee. Further, debtor began repairs on the property prior to
16 her incarceration and evidently even returned to the property
17 during the short time she was out of jail. These circumstances
18 indicate that debtor did not establish another "home."

19 The Court also gives little weight to the fact that debtor
20 was in arrears on her mortgage payments. In Chase, the debtor
21 did not have the financial ability to live in the home or make an
22 offer of proof that her situation was likely to change. In
23 contrast, debtor is an attorney and declared that in her last
24 months of employment before her incarceration, she earned more
25 than \$30,000 per month. This evidence has not been refuted by
26 the trustee. Debtor's testimony regarding her income supports
27 her contention that she had the ability to pay her mortgage debt.

28 Lastly, the Court finds that regardless of the nature of

1 debtor's crime, or her proclaimed innocence, her absence from the
2 residence was involuntary. See In re Buick, 237 B.R. 607, 610
3 (Bankr. W.D. Pa. 1999) (noting that absence from the homestead
4 that is involuntary or compulsory generally does not constitute a
5 relinquishment of homestead rights).

6 The Court finds that debtor has always regarded the
7 residence as her home and intended to return to the residence
8 following her incarceration.

9 The tentative ruling in connection with debtor's motion for
10 reconsideration is incorporated herein.

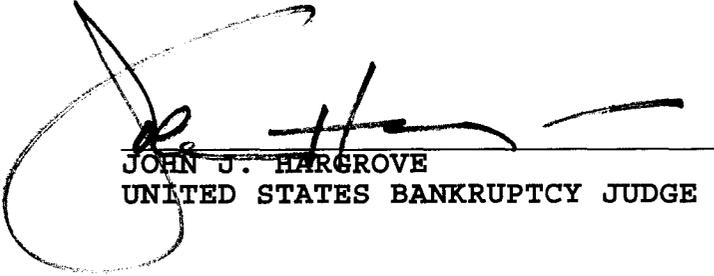
11 IV.

12 CONCLUSION

13 The Court finds that debtor is entitled to her automatic
14 homestead exemption in the amount of \$75,000.

15 This Memorandum Decision constitutes findings of fact and
16 conclusions of law pursuant to Federal Rule of Bankruptcy
17 Procedure 7052. Since the debtor is pro se, the Court will
18 prepare the order.

19
20 Dated: June 21, 2007

21 
22 JOHN J. HARGROVE
23 UNITED STATES BANKRUPTCY JUDGE
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28 S:\Crabb Homestead.wpd