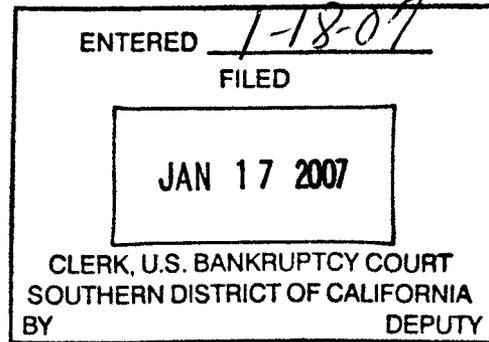


1 **WRITTEN DECISION - NOT FOR PUBLICATION**



9 UNITED STATES BANKRUPTCY COURT

10 SOUTHERN DISTRICT OF CALIFORNIA

11 In re ) Case No. 05-14027-PB7

12 )

12 MARA E. FELSEN, ) ORDER ON TRUSTEE'S

13 ) OBJECTION TO DEBTOR'S

13 Debtor. ) CLAIM OF EXEMPTIONS

14 )

15 Prior to filing the petition, the Debtor deposited certain

16 funds into an escrow account to purchase real property with her

17 father. Postpetition the escrow account closed and the funds

18 were transferred to the seller. Thereafter, the Debtor amended

19 her schedules to claim an exemption in the funds which she had

20 deposited and which had already been transferred to the seller.

21 The Trustee filed an objection to the claim of exemption.

22 However, both parties agree that the funds are no longer (if they

23 ever were) property of the bankruptcy estate. Therefore, the

24 Court finds no issue before it which would have any impact on

25 this bankruptcy case as currently postured. Accordingly, the

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1 Court declines to rule on the Trustee's objection. The matter is  
2 taken off calendar.

3 This Court has subject matter jurisdiction pursuant to 28  
4 U.S.C. § 1334 and General Order No. 312-D of the United States  
5 District Court for the Southern District of California. This is  
6 a core proceeding under 28 U.S.C. § 157(b)(2)(A) and (L).

7  
8 **FACTS**

9 On October 14, 2005, the Debtor filed this case. In her  
10 petition she indicated that she resided at 222 South Helix  
11 Avenue, #5, Solana Beach, California 92075. Later that year  
12 Debtor filed amended schedules which included an addition to  
13 Schedule B (Personal Property) of a "Down payment for 4401 Moraga  
14 Street (offer to sell accepted October 1, 2005; \$35,227.25  
15 deposited with escrow on October 13, 2005; escrow closed November  
16 10, 2005 and the money was distributed to seller)." Debtor also  
17 amended Schedule C (Property Claimed as Exempt) to claim an  
18 exemption in the "down payment for 4401 Moraga Street" pursuant  
19 to CCP §§ 704.140(b)(11)(D) (personal injury causes of action,  
20 etc.,) and 703.140(b)(5) ("wild card").

21 The Trustee filed an objection to the claim of exemption on  
22 the ground that the Debtor had voluntarily transferred the  
23 \$35,227.25 as a down payment and the transfer was avoidable by  
24 the Trustee as a fraudulent conveyance.

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26 \\\

1 On September 11, 2006, a hearing was held on the Trustee's  
2 objection at which point the Court took the matter under  
3 submission.

4  
5 **DISCUSSION**

6 The Debtor has claimed an exemption in property which both  
7 she and the Trustee acknowledge was transferred into escrow on  
8 October 13, 2005 and to the sellers on November 10, 2005. The  
9 Trustee has objected to the claim of exemption although both he  
10 and the Debtor agree that the funds have been transferred to the  
11 seller. The Trustee acknowledges that the funds were irrevocably  
12 transferred when they were deposited into the escrow account --  
13 prepetition. See Reply 2:9-13. Thus, the fact before this Court  
14 is that funds, the claim of exemption to which is in dispute,  
15 would not be property of the estate, exempt or otherwise unless  
16 somehow set aside and recovered for the benefit of the estate.  
17 That has not occurred to date.

18 The Trustee argues that Debtor "is not entitled to claim any  
19 exemptions in the 50% equitable interest in the Moraga  
20 property..." However, so far as this Court can tell, the Debtor  
21 has made no such claim. Similarly, the Trustee argues that he  
22 can recover Debtor's 50% equitable interest in the Moraga real  
23 property as a fraudulent conveyance. However, he makes no  
24 argument that he is able to recover the funds themselves, nor has  
25 he commenced any action to do so.

26 ///

1 At the hearing neither party shed any light on what property  
2 they were actually fighting over. The Court suggested that the  
3 Trustee may be seeking a ruling on whether any property interest  
4 acquired as a result of the payment into escrow may or may not be  
5 exempt if and when identified. However, counsel for the Trustee  
6 made no response.

7 Bankruptcy Code § 522(b) provides that under certain  
8 circumstances "an individual debtor may exempt from property of  
9 the estate" certain identified assets. At this point the Debtor  
10 has claimed an exemption in the funds which were deposited  
11 prepetition into escrow. Both parties recognize that those funds  
12 no longer exist, if ever they did, in the Debtor's bankruptcy  
13 estate. See, e.g., Simons and Wells, "Is It In or Is It Out?  
14 Determining the Operative Transfer Date for Escrow Accounts in  
15 Preference Litigation", 28 Cal.Bankr.J. 574 (2006). The Court  
16 finds the issue of whether those funds, if in the estate, would  
17 be properly exempted, a moot point at this point in the case.

18 If at some time a property interest, perhaps in the Moraga  
19 property, is recovered by the estate, the parties can determine  
20 their respective positions on whether that property interest is  
21 properly exempted. At that time, if there is an issue, the  
22 parties can seek a ruling of this Court through the proper  
23 proceedings. At present, however, the Court finds that the issue  
24 of whether the Debtor may claim an exemption in property which is  
25 not asserted to be property of the estate by either party, is

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1 really no issue at all. Therefore, the Court declines to rule on  
2 the Trustee's objection.

3 **CONCLUSION**

4 For the reasons set forth above, the Court declines to rule  
5 on the Trustee's objection to Debtor's claim of exemption and  
6 this matter is taken off calender.

7  
8 IT IS SO ORDERED.

9 DATED: JAN 17 2007

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14 PETER W. BOWIE, Judge  
15 United State Bankruptcy Court  
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