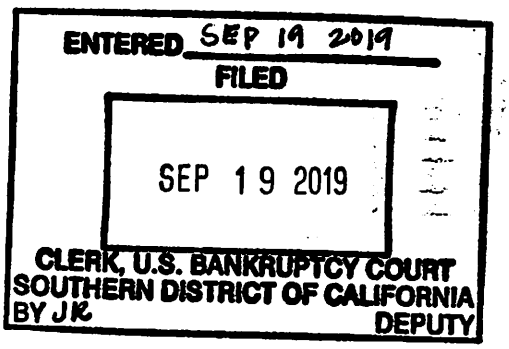

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF CALIFORNIA

In re:	BK. No. 18-05407-LT7
JEFFREY F. JOHNSON & LISA J. BRANDOLO JOHNSON,	MEMORANDUM DECISION
Debtors.	

INTRODUCTION

This case involves highly cooperative debtors and an objection to their homestead exemption. The Johnsons were residents in their home on the petition date but immediately thereafter moved the family to a rental in the face of its near certain marketing and sale. Under the undisputed facts of the case, the Court determines that they created a valid homestead years before the bankruptcy and that they did not abandon the homestead when they faced reality and cooperated with the chapter 7[1] sales process.

FACTS

Debtors Jeffrey F. Johnson and Lisa J. Brandolo Johnson purchased a home at 8437 Kern Crescent, San Diego (the "Home") in 2013. After purchase, and except for a single weekend of AirBnB rental, the Johnsons and their three children lived there continuously and treated the Home

[1] Unless otherwise indicated, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§101–1532. References to "C.C.P." are to the California Code of Civil Procedure.

as their family residence. But approximately five years of mortgage expense and home maintenance costs later, their financial situation was dire. On September 6, 2018 (the "Petition Date"), they filed a chapter 7 voluntary bankruptcy petition.

In their bankruptcy schedules, the Johnsons valued the Home at $830,000; their schedule D evidenced a mortgage on the Home securing a debt in the outstanding principal amount of $598,891. And on Schedule C, they claimed a $100,000 homestead exemption in the Home under the automatic homestead exemption of C.C.P. § 704.730. But, assuming costs of sale of 6% and even after consideration of the exemption, the math made clear that their post-bankruptcy retention of the Home was highly unlikely. Its sale could yield approximately $66,000 for the bankruptcy estate and the Johnsons' creditors. A chapter 7 trustee would be derelict if she did not attempt to achieve a sale and recovery of this equity for the benefit of the estate.

So, while the Johnsons did not want to leave the Home, they were resigned and realistic. They felt that "any opposition [to a sale by the trustee] would be futile and could potentially be viewed as frivolous and in bad faith." Dkt. No. 44 at ¶ 9. They were also concerned that it would be harder to get an acceptable rental once they filed their bankruptcy case. So, on August 19, 2018 (three weeks before the Petition Date), they executed a Lease Agreement for a four-bedroom, three-bathroom house (the "Rental"). And approximately three days before the Petition Date, they executed an Agreement for Moving Services. The day after they filed bankruptcy, they moved most of their belongings to the Rental.

At the 341(a) Meeting of Creditors, the Johnsons explained their decision to enter into a rental agreement prepetition:

> MRS. JOHNSON: We thought it was going to be sold, fast.
> GLADSTONE: So when did you list it?
> MRS. JOHNSON: We thought you had to list it.
> MR. JOHNSON: We did not list it.
> GLADSTONE: Ok, so.
> MR. JOHNSON: It's never been listed.
> GLADSTONE: Alright, and so why did you move?
> MR. JOHNSON: We wanted to get a rental before we filed for bankruptcy.
> GLADSTONE: Ok. And why is that?
> MR. JOHNSON: We were just afraid we wouldn't get approved for a place for us and our kids.
> GLADSTONE: Ok. Ok. So you're not intending to live in your home anymore?
> MR. JOHNSON: No.

MRS. JOHNSON: Well I thought it was going to be sold.

Dkt. No. 43-1 at 5:16–29.

Mrs. Johnson was not even certain they had the right to reside in the Home postpetition; she asked the Trustee "Can you live there until it is sold?" *Id.* at 6:30. Mr. Johnson understood that the Home became property of the estate under the control of the Trustee: "The house is the Trustee's, it's her house." *Id.* at 7:6. The Johnsons also testified that they had been told (presumably by counsel) that they were entitled to the homestead exemption. *Id.* at 8:6.

The Johnsons' foresight proved accurate. The Trustee promptly filed an *ex parte* application to employ a real estate broker to market the Home for sale. No one opposed, and the Court approved the employment of a broker. To date, the Court has not been asked to approve a sale.

But the Trustee was presented with an unusual set of facts as a result of the Johnsons' cooperation and these facts led to an objection to their homestead exemption (the "Objection") and the present dispute. The Trustee viewed the § 341(a) meeting testimony as tantamount to an admission that the claim of exemption was subject to set aside. In her view, the undisputed facts relating to the prepetition rental agreement and moving company contract coupled with the immediate postpetition move to the Rental required a determination that the Home did not qualify for a California automatic homestead exemption. The Trustee argues that her objection to the Johnsons' claim of a homestead exemption in the Home must be sustained because their prepetition actions established that they had no intent to reside in the Home postpetition.

The Johnsons responded with declaratory evidence stating that they would happily return to the Home if the Trustee did not sell it. In their view, they did not abandon either the Home or the homestead exemption; instead, they were pragmatic and cooperative. They also emphasized that they continued to store personal property at the Home and on occasion, even after the move to the Rental, one or more of the family members stayed in the Home for several days. The Johnsons emphasized that: "If there was any avenue by which we could keep [the Home], we would do so, as it is and has always been our home." Dkt. No. 44 at ¶ 8.

While there are facial evidentiary issues and the Court offered to hold an evidentiary hearing, the Trustee elected not to require such a hearing. Thus, as the Trustee understands, the

Court is entitled to treat the Johnsons' declaratory evidence and oral statements at the § 341(a) meeting as truthful. The Trustee argues that despite this evidence, as a matter of California law and binding Ninth Circuit authority, the Johnsons are not entitled to a homestead on the Home under the facts of this case.

So, case resolution requires that the Court plumb the depths of California homestead exemption law and then unwind the strands of thought when this law is applied in the context of a chapter 7 case. The Court metaphorically journeyed back to wild west days, considered the divergence of the California statutes as the homestead law divided between the declared and automatic homestead exemptions, considered the intersection of this law with a bankruptcy case, and took account of important policy considerations. At end, the Court applied its analysis to the facts of this case and determined that the Johnsons retained a homestead exemption in the Home and that the Objection must be overruled.

DISCUSSION

California Homestead Law

The California Constitution of 1849 provided in article XI, § 15 for a homestead and stated: "The Legislature shall protect by law, from forced sale, a certain portion of the homestead and other property of all heads of families."[2] Thus, as the California Supreme Court has noted for well over a century: "The preservation of the homestead for the family is a marked feature of our law. It is enjoined by the state constitution itself." *Southwick v. Davis*, 78 Cal. 504 (1889).

After California was admitted to the Union in 1850, the Legislature passed the first homestead statute in 1851. The law allowed a broad $5,000 exemption on land and a dwelling selected by the owner. Statutes of 1851, ch. 31.[3] But the California Supreme Court quickly

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[2] California amended its Constitution in 1879; it included language regarding homesteads that is identical to that in the 1849 Constitution except as to punctuation. Cal. Const. (1879), art. XVII, § 1. While thereafter amended, it continues to provide for a homestead exemption. See Cal. Const. Art. XX § 1.5 ("The Legislature shall protect, by law, from forced sale a certain portion of the homestead and other property of all heads of families.").

[3] Shockingly from a modern view, originally the husband had the unilateral right to select and abandon the homestead as: "[t]he wife, from the nature of her dependent relation to her husband – a relation not only essential to the peace and happiness of the family itself, but to the well-being of society – must abide the consequences of [the husband's] abandonment. *Guiod v. Guiod*, 14 Cal.

recognized that the statute's failure to require any record of the selection of a homestead created problems, and it branded the statute "lame" in this regard. *Cook v. McChristian*, 4 Cal. 23, 26 (1854). The Legislature responded in 1860 and enacted the first declared homestead statute. Cal. Stats. 1860, ch. 366, p. 357.

For almost a century, the declared homestead was the only method for obtaining a homestead exemption on California real property. Historically, and in its current form, it requires compliance with certain procedural requirements, including recordation of a declaration of homestead in the office of the county recorder. C.C.P. §§ 704.920–704.930. The declared homestead provides protection against involuntary liens filed after its recordation and can be asserted in both voluntary and involuntary sale situations. *See In re Mulch*, 182 B.R. 569, 573 (Bankr. N.D. Cal. 1995) (citing *Redwood Prod. Credit Ass'n v. Anderson (In re Anderson)*, 824 F.2d 754, 757 (9th Cir. 1987)). The Johnsons never recorded a declaration of homestead in connection with the Home.

Later, the California legislature expanded the homestead protection and enacted law providing for the automatic homestead exemption in its current form. The automatic homestead exemption requires no recordation and protects a debtor in a forced sale situation; it, however, provides no protection in a voluntary sale situation. *See* C.C.P. §§ 704.740–704.800 & 704.720(b).

The automatic homestead procedures require a judgment creditor, in most cases, to obtain a court order before sale of a dwelling. C.C.P. § 704.740. The application for such an order must indicate whether the dwelling is a homestead and, if so, the amount of the applicable homestead exemption. C.C.P. § 704.760(b). It must also detail all liens encumbering the dwelling. C.C.P. § 704.760(c). At the hearing on the application, if the state court concludes that a dwelling is a homestead, it will also value the homestead and issue an order allowing sale only if the sales proceeds will exceed the amount necessary to payment of senior liens and the entire homestead. C.C.P. § 704.780(b). In other words, the judgment creditor cannot compel sale of a homestead if it will not allow the judgment debtor to receive his homestead exemption in full. For purposes of this discussion, the Court will refer to the process leading up to the order allowing a forced sale of a

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506, 507 (1860).

California homestead as the "Forced Sale Process" and an order allowing a Forced Sale as a "Forced Sale Order".

The California statutes define "homestead" for the purposes of the automatic homestead exemption as: "the principal dwelling (1) in which the judgment debtor or the judgment debtor's spouse resided on the date the judgment creditor's lien attached to the dwelling, and (2) in which the judgment debtor or the judgment debtor's spouse resided continuously thereafter until the [decision in the Forced Sale Process] that [a dwelling] is a homestead." C.C.P. § 704.710(c). So, under the California automatic homestead statutes, once the judgment debtor establishes entitlement to an automatic homestead through the Forced Sale Process, she may vacate the home before the now judicially mandated sale and nonetheless preserve the right to recover the homestead exemption from net forced sale proceeds.

The intersection between the California exemption statutes and bankruptcy.

The filing of a chapter 7 bankruptcy petition creates a bankruptcy estate. 11 U.S.C. § 541(a). And at filing, the debtor's assets become property of the estate until they are exempt. *See id.*; 11 U.S.C. § 522. Section 522 provides a default list of exemptions but allows states to opt out of the federal scheme and define their own exemptions. 11 U.S.C. §§ 522(b)(2), (b)(3)(A), (d).

California elected to be an opt-out state. C.C.P. § 703.130. As a result, "[t]he bankruptcy court decides the merits of state exemptions, but the validity of the exemption is controlled by California law." *Diaz v. Kosmala (In re Diaz)*, 547 B.R. 329, 334 (BAP 9th Cir. 2016). And, as the Ninth Circuit recently emphasized, bankruptcy courts must liberally construe the law and facts to promote the beneficial purposes of the homestead legislation and to benefit the debtor. *Phillips v. Gilman (In re Gilman)*, 887 F.3d 956, 964 (9th Cir. 2018) (citing *Tarlesson v. Broadway Foreclosure Invs., LLC*, 184 Cal. App. 4th 931, 936 (2010)).

Consistent with this mandate, bankruptcy courts provide debtors with the benefit of both the declared and automatic homestead exemptions. *See In re Mulch*, 182 B.R. at 574; *Nadel v. Mayer (In re Mayer)*, 167 B.R. 186, 189 (BAP 9th Cir. 1994); *Harris v. Herman (In re Herman)*, 120 B.R. 127, 130 (BAP 9th Cir. 1990). *See also In re Gilman*, 887 F.3d at 964 (treating this conclusion as

appropriate in an alleged automatic exemption situation). In short, these cases hold that the filing of a bankruptcy triggers application of the automatic homestead exemption. *Id.*

But application of the automatic homestead exemption in a bankruptcy case obviously involves some artificiality. First, where the chapter 7 trustee sells a homestead, he does so under the Bankruptcy Code and federal law. So, the bankruptcy courts do not follow the Forced Sale Process. Further, the Trustee sells the homestead for the benefit of the entire estate and not as a single judgment creditor. Nevertheless, bankruptcy courts recognize that the filing of a bankruptcy causes the equivalent of a forced sale within the meaning of the California automatic exemption laws. And it is also clear that a debtor, in effect, stipulates to the ability of the trustee to sell her dwelling even if it is a homestead. So, for purposes of an analysis of the intersection of the California automatic exemption and a chapter 7 bankruptcy, the filing of the petition is the equivalent of the conclusion of the Forced Sale Process and the entry of the Forced Sale Order. And consistent with this conclusion is the caselaw recognition that the determination regarding a debtor's claim of a homestead exemption is based on the facts as they existed on the petition date.

The Court determines that the Johnsons sufficiently established intent to treat the Home as a homestead as of the Petition Date and at any point before sale.

There is no dispute that the Johnsons were physically present at the Home on the Petition Date. It is also beyond cavil that they intended to be there on that date, as there is no suggestion that anyone forced them to be there. Nevertheless, the Trustee argues that the Johnsons are not entitled to the automatic homestead exemption because they did not intend to reside in the Home after the petition date. Trustee supports this position by reference to the prepetition lease of the Rental, the prepetition engagement of a moving company, the move to the Rental promptly after the Petition Date, and a one-month default in mortgage payments. The Johnsons contend that it is enough that they resided in the Home from the purchase date through the Petition Date. And they further argue that they had not abandoned the homestead and did not intend to do so until it was sold. If viewed through a California lens, the Court agrees that they adequately established a homestead on the Petition Date.

California law does not require an intent to reside in the homestead after the conclusion of the Forced Sale Process.

As noted, there is no requirement of an intent for post-Forced Sale Process residency in the California automatic homestead statute. And the Trustee provided no California case requiring an intent to continue to reside in the homestead after the conclusion of the Forced Sale Process. Indeed, as discussed, the language of C.C.P. § 704.710(c) is to the contrary. And this makes sense; why would California law require an intent to continue to reside in a homestead after the conclusion of the Forced Sale Process, when the resulting sale deprives the homeowner of both legal title and the right to possession?

But having so noted, it is also clear that intent is an important concept in California homestead jurisprudence. Generally, issues of intent arise in two contexts. First, it is sometimes important to ask if the judgment debtor intended to create a homestead. And second, it is sometimes critical to determine if a judgment debtor abandoned a homestead. The California law on these topics informs the Court's analysis of how such intent issues should be addressed in a chapter 7 case.

California cases require an actual intent to create a homestead for purposes of the homestead exemption; and bankruptcy cases may deny a homestead exemption where such intent is lacking. From an early point in California law, courts confronted situations where the creation of a homestead suggested fraud. The creation of the declared homestead was easy. It required only that a person reside on the property on the day they recorded the homestead declaration. And generally, the statute was construed liberally in favor of the party asserting the homestead. But the California courts rapidly developed a corollary rule: there must be "actual residence". This requirement is strictly construed. *Tromans v. Mahlman*, 92 Cal. 1, 8 (1891) ("*Tromans I*").

Several California cases make this point.

In *Tromans I*, the debtors failed to establish that they resided on the alleged homestead when they located there for the day of homestead declaration, Mr. Troman, and one additional day,

Mrs. Troman. 92 Cal. at 5–6. The California Supreme Court, in rendering its decision, did not use the term intent or intend, but explained:

> The obvious purpose of the statute in providing for the selection of a homestead was to thereby make a home for the family, which neither of the spouses could incumber or dispose of without the consent of the other, and which should always be protected against creditors. To effect its purpose the statute has been liberally construed in some respects, but the requirement as to residence at the time the declaration is filed has been strictly construed. Thus, this court has many times used and emphasized the word "actually," to show that the residence must be real, and not sham or pretended.

Id. at 8.

In *Tromans v. Mahlman*, 111 Cal. 646 (1896) ("*Tromans II*"), the court, which considered the same facts, directly referenced the intentions of the homestead claimant:

> The physical fact of her occupancy, as well as the intention with which she occupied the house, were both elements to be considered in determining actual residence, and the court was not bound to accept her statement that she intended to reside thereon as conclusive, if other facts to which she testified were inconsistent with such intention.

Id. at 647.

In *Lakas v. Archambault*, 38 Cal. App. 365 (1918), Mr. Lakas was living in Stockton with his 90 plus year old grandmother when financial problems came to a head. He apparently considered giving an aggressive creditor a mortgage on some acreage but reconsidered and then attempted a five week "residence", with an ailing grandmother in tow, coupled with the filing of a declaration of homestead to defeat a forced sale of his real property. *Id.* at 366–68. The trial court carefully considered all evidence and determined that Mr. Lakas did not intend to actually reside on the property; the court of appeal affirmed. *Id.* The court of appeal emphasized that intent was required in the creation of the homestead. *Id.* at 371–72.

And in *Ellsworth v. Marshall*, 196 Cal. App. 2d 471 (1961), Mr. Ellsworth agreed to entry of a judgment, provided that an abstract would not issue until March 4, 1958. *Id.* at 475–76. On March 3, he moved back to a home that he had previously vacated and recorded a declaration of homestead. *Id.* at 476. The trial court found, based on the facts, that there was no actual intent to make the allegedly homesteaded property into his residence. *Id.* The Court of Appeal affirmed. So, again *Ellsworth* involved the intent to create a homestead – and the intent finding included a

determination that Mr. Ellsworth did not actually intend to create a homestead; he merely wanted to "beat" the expected execution on a judgment. *Id.*

Each of these cases involved an actual fraud. In the face of a pending judgment or execution on a judgment, a judgment debtor moved for a short time to another location and recorded a homestead. They thereafter promptly decamped or remained only in order to disguise the fraud. In these cases, the California courts determined that there was no "actual intent" to create a homestead. Instead, there was an attempt to circumvent collection. And as a result, the Courts declared the alleged declared homestead invalid.

There is a clear bankruptcy analogue to such schemes. In a typical scheme, the debtor owning two homes allegedly moves from an over-encumbered home to another that has equity and asserts the automatic homestead as to this dwelling in a bankruptcy petition. The move preserves the equity in the second dwelling while the debtor is comfortable that the trustee will not sell the now unoccupied home because it has no equity available for creditors. If successful, the debtor emerges from bankruptcy with two homes. And if necessary, he could then file a chapter 13 case and attempt to cure any arrearage on the over-encumbered home free of the requirement of § 1325(a)(4) that he pay unsecured creditors on account of the equity in the other property; he would have discharged unsecured claims in the prior case.

A bankruptcy court is not without remedies if it discovers such schemes late in the process, but it is better to identify such fraud early. In such a context, it is critical that the debtor's intention in creating the homestead be evaluated. Was this intent an actual intent to reside in a new dwelling or was the intent to defraud creditors? Where fraud in the creation of a homestead is suspected, the intent as to continued residency must be evaluated in order to rule out fraud and to establish that the asserted homestead is actual.

California caselaw is tolerant when evaluating abandonment; and bankruptcy courts should not be stricter.

Also, from the early days of California homestead law, the Courts confronted cases where a judgment creditor argued that the homestead had been abandoned. California law developed tolerance for temporary absence; evidence of a vacation of the homestead was not dispositive

evidence of abandonment. And even a long absence from the homestead was not an abandonment if the judgment debtor intended to return at a future point in time.

In *Moss v. Warner and Wife*, 10 Cal. 296 (1858), Mr. Warner's creditor sought to foreclose on a mortgage not executed by his wife. *Id.* at 296–97. Mrs. Warner asserted that the mortgage, thus, was unenforceable because it encumbered the family homestead. *Id.* at 297. The problem was that neither Mr. nor Mrs. Warner lived on the alleged homestead at the time of the mortgage; nor did either live there at the time of the lawsuit. *Id.* at 296–97. No one questioned that they properly established a homestead when they moved there in 1844, but the creditor asserted abandonment. *Id.* The California Supreme Court determined otherwise.

The evidence established that the Warners were compelled to leave the homestead in 1851 "on account of the hostility of the Indians of the vicinity, by whom their dwelling house was burned, and four hundred head of their stock driven away." *Id.* The court acknowledged Mr. Warner's subsequent abandonment of his family, Mrs. Warner's itinerant lifestyle thereafter, and the fact that she could not safely reside on the homestead during the years from 1851 to the time of decision. *Id.* Under these facts and despite the long absence from the homestead, it did not find abandonment. *Id.* at 297–98. Instead, it determined that Mrs. Warner was a mere sojourner in San Diego and that abandonment could not be inferred when removal occurred as a result of "very just apprehensions for the safety of his family". *Id.*

Similarly, in *Michelman v. Frye*, 238 Cal. App. 2d 698 (1965), the court of appeal determined that Mrs. Frye's declaration of homestead remained valid notwithstanding a temporary absence from the home. She left with her children in August of 1963 after violent attack and threats from her husband; it took seven months and a court order for her to gain ouster of Mr. Frye and sole possession of the home. *Id.* at 700. Once again, the trial court found that a move under coercion was not an abandonment where there was an intention to return; the appellate court affirmed.

And in *Tarlesson*, the judgment debtor resided in her home and treated it as her principal dwelling throughout the time of the dispute. 184 Cal. App. 4th at 935. But at some point during the residency, she sold the home to a relative. *Id.* As she had never recorded a declaration of homestead and the automatic homestead does not provide protection in a voluntary sale situation, the judgment

creditor asserted that she effectively abandoned the homestead. *Id.* at 936–37. The trial court disagreed, and the court of appeal affirmed. *Id.* at 938. What was critical was her intent (and ability) to continue in residency – not ownership of the home.

Bankruptcy courts must also determine whether a claimed homestead was abandoned as of the petition date.

In *In re Diaz*, Mr. Diaz was involved in a serious accident prepetition. 547 B.R. at 331. As a result, he moved from his home to live with relatives. *Id.* But when his homestead was challenged, he argued that he did not intend permanent abandonment. *Id.* at 332. The bankruptcy court determined that Mr. Diaz abandoned his homestead. *Id.* at 333. The BAP reversed and remanded for further findings. It stated: "[u]nder California law, the relevant factors for determining if a debtor resides in a property are the physical fact of the occupancy of the property and the debtor's intention to live there." *Id.* at 335. It determined that his absence from the alleged homestead created a factual issue but was not tantamount to a loss of the right to the homestead. *Id.* *Diaz*, thus, is best understood as a case that says that absence on the petition date raises a factual question but does not necessarily rule out the right to the automatic homestead.

And more recently, in *In re Gilman*, the Ninth Circuit relied on *Diaz* and *Tarlesson* when it required an intent determination before the court sustained an objection to Mr. Gilman's claim of a homestead exemption. Mr. Gilman entered into a contract for sale of his home before he filed bankruptcy. 887 F.3d at 960. As noted, the automatic homestead does not continue into the proceeds of a consensual sale. Nonetheless, he claimed an automatic homestead exemption in his schedules. *Id.* The bankruptcy court held that the sale did not necessarily forfeit his homestead exemption; the Ninth Circuit agreed: "California law rejects Phillips' argument that title to the property is necessary to claim a homestead exemption." *Id.* at 965. The Ninth Circuit then remanded for a determination of Mr. Gilman's intent to reside in the alleged homestead after sale.

It stated:

> At the same time, the bankruptcy court made no findings regarding Gilman's intent to continue to reside in the property. "[P]hysical occupancy on the filing date without the requisite intent to live there, is not sufficient to establish residency." *See Diaz*, 547 B.R. at 336 (emphasis added). For instance, *Ellsworth* held that a couple claiming a homestead exemption did not actually reside in the property—despite

> their legal title and physical occupancy—because they moved into the property a day before a scheduled sale and lacked the "bona fide intention to make the premises their home or residence." 196 Cal. App. 2d at 474–76. Likewise, *Diaz* vacated and remanded a bankruptcy court decision that focused on the debtor's physical occupancy in another dwelling and failed to consider his intent. 547 B.R. at 336.
>
> Because the bankruptcy court made no determination as to whether Gilman intended to continue to reside in the property, we vacate the decision and remand so that the bankruptcy court can apply the correct law to the facts and conduct such additional factfinding as may be necessary. *See Diaz*, 547 B.R. at 336.

Id. at 966.

Where a debtor is absent from the alleged homestead on the petition date or sold the alleged homestead prepetition, the bankruptcy court must determine whether she intended to abandon the homestead. But facts suggesting abandonment – including absence or sale – are not dispositive. The debtor's legitimate intent to retain the homestead is dispositive.

The Johnsons established a homestead in the Home, continued in residency on the Petition Date, and did not abandon their homestead.

Here, no one argues that the Johnsons did not "actually" intend to create a homestead in the Home. The Johnsons moved to the Home approximately five years before their chapter 7 case, maintained the Home through the Petition Date, and apparently missed only one prepetition mortgage payment. There is no evidence of fraud and no suggestion that the assertion of the homestead in the Home is part of a fraud on creditors.

And given that we treat the Petition Date as the functional equivalent of the conclusion of the Forced Sale Process for purposes of the automatic homestead exemption, we also have the continued residency required for the automatic homestead under California law. *See* C.C.P. § 710(c). We are aware of no case that requires a debtor to remain continuously in residence after the conclusion of the Forced Sale Process or after the petition date in order to retain the right to a homestead exemption. In the Court's view, the analysis could end here.

But the Trustee, in effect, argues that the Johnsons abandoned the homestead by renting another dwelling prepetition and promptly moving after the Petition Date. The Court disagrees. Again, under California law they needed to stay in residency until the conclusion of the Forced Sale Process. As the Petition Date is its equivalent, California law would not require more. But even if

the Court is incorrect in this conclusion, California law would not deprive the Johnsons of their homestead.

The Court in no way equates the chapter 7 Trustee here (or in any case before it) with the marauding house burners of *Moss* or the knife wielding assailant of *Michelman*; the Johnsons obviously could have stayed in the Home without physical injury. But the advent of bankruptcy created risks that justified them in seeking shelter in another place. First, there was a virtual certainty that the Trustee would sell the Home. Thus, they needed to ensure that a roof was over their children's head. And there is a critical piece of evidence that brings this case squarely into line with the cases just referenced – they did not leave with a fixed intent of never returning. Instead, they were clear in their evidence before the Court: if the Trustee refused or failed to sell the Home, they would do whatever they could to return to what had always been the family home.

In short, the Johnsons had a reasonable apprehension of an impending loss of the Home and a legitimate fear of the consequences of ignoring this risk. They did not contemplate a move out of a desire for a new home or a desire to disadvantage their creditors for their own benefit. Instead, they contemplated leaving because they had a more than reasonable apprehension that staying would endanger the family's ability to stay safely and securely in an appropriate dwelling. These facts do not demand a determination of homestead abandonment. And this is particularly true as the Johnsons resided in the Home on the Petition Date, maintained the Home, paid the mortgage until the near eve of bankruptcy, and provided evidence that they left the Home only because the bankruptcy filing deprived them of a reasonable chance of staying there.

And cases from or within the Ninth Circuit do not require a different result. *Gilman*, the most recent word on the topic, saw the Ninth Circuit remanding for an intent finding where a debtor sold the homestead pre-petition. If relevant, *Gilman* stands for the point that a properly established homestead will not be deemed abandoned where future occupancy remains possible. The Ninth Circuit's reliance on *Diaz* underscores this point.

Policy considerations support the Court's analysis. Under the Trustee's interpretation of the law, if debtors recognize that a home with equity over the homestead amount is likely to be sold by the chapter 7 trustee and, thus, make appropriate arrangements for a postpetition home for their

family, they risk loss of the automatic homestead exemption. This result is inconsistent with important policy considerations under both California and bankruptcy law.

First, we emphasize the requirement that courts "adopt a liberal construction of the law and facts to promote the beneficial purposes of the homestead legislation to benefit the debtor." *Tarlesson*, 184 Cal. App. 4th at 936. And this is true because the "primary purpose of the Homestead Law is not to protect creditors, but to protect the home against creditors of the declarant and thereby preserve a home for the family." *In re Eade*, 237 F. Supp. 320, 323 (S.D. Cal. 1964). The homestead statutes should be interpreted to fulfill the purpose of the automatic homestead exemption and to allow "the homesteader to receive the value of the exemption if the property is sold to satisfy a judgment lien." *Id.* (citing *Wells Fargo Financial Leasing, Inc. v. D & M Cabinets*, 177 Cal. App. 4th 59, 68 (2009)). Requiring a debtor to prove an unreasonable intent to remain in the homestead is inconsistent with a liberal interpretation of the California homestead statutes.

Second, where there is no evidence of fraud in the creation of the homestead, the heightened scrutiny applicable in a determination of the "actual intent" to create a homestead is not appropriate. And this decision in no way undercuts the trustee's ability to seek homestead exemption disallowance where the evidence suggests a feigned or fraudulent intent to create a homestead.

Third, as a policy matter in a bankruptcy context, we should not penalize the realistic and cooperative. If debtors must require that a trustee force them from the homestead in order to preserve it, bankruptcies would become much more costly and unwieldy. We should not require an intent untethered from state law that will result in frustration of the bankruptcy goal of efficient and cost-effective liquidation of assets.

In short, the Trustee's proposed result would do havoc to the principles that underlie California homestead exemption law and would create a systemic incentive for a lack of cooperation in future bankruptcy cases.

CONCLUSION

While the Trustee is correct that a debtor's intent to reside in a home is a factor to be considered in determining entitlement to a homestead exemption, the Court concludes that for the purposes of the automatic homestead exemption, which is triggered by the petition, the proper focus

is on intent and residency prior to and as of the petition date. The Court concludes that the Johnsons clearly intended to reside in the Home from the date of purchase through the date of the bankruptcy filing. The Court cannot find that the Johnsons' prepetition planning and efforts to secure housing for their family was an abandonment of the homestead, particularly where they reasonably believed that the Home would be listed and sold promptly. An interpretation and application of an intent requirement that punishes the responsible Johnsons and rewards the unplanning, irrational, or obstreperous debtor cannot be what was intended by the California legislature or the courts of this Circuit. And where the Johnsons expressed a believable intent to return to the Home if not sold, any question regarding the appropriateness of the Court's conclusion is resolved in favor of overruling the Objection.

DATED: September 19, 2019

LAURA S. TAYLOR, Chief Judge

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA
325 West "F" Street, San Diego, California 92101-6991

In re JEFFREY F. JOHNSON & LISA J. BRANDOLO JOHNSON, Bk. No. 18-05407-LT7

CERTIFICATE OF MAILING

The undersigned, a regularly appointed and qualified employee in the office of the United States Bankruptcy Court for the Southern District of California, at San Diego, hereby certifies that a true copy of the attached document, to wit:

MEMORANDUM DECISION

was enclosed in a sealed envelope bearing the lawful frank of the bankruptcy judges and mailed via first class mail to the party at their respective address listed below:

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Said envelope(s) containing such document was deposited by me in the City of San Diego, in said District on September 19, 2019.

/s/ Regina Fabre
Regina Fabre, Judicial Assistant