STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.	**Filed May 10, 2007**	**SUPERIOR COURT**
ALAN A. NUNES	:	
v.	:	**C.A. No. PB 05-0456**
SAMUEL CELONE	:	

DECISION

SILVERSTEIN, J. Before this Court is a motion by Defendant Samuel Celone (Celone) to dissolve the attachment on his home which was granted in favor of Plaintiff Alan A. Nunes (Nunes) on February 5, 2007. Celone relies upon G.L. 1956 § 9-26-4.1, which exempts the debtor's homestead from attachment "to the extent" of $300,000. Nunes objects to dissolving the attachment on the grounds that Celone violated the Rhode Island Uniform Fraudulent Transfer Act (UFTA),[1] that the exemption statute does not apply because Celone's debts were allegedly contracted prior to his purchase of the home, and that the value of the property exceeds the allowable amount of $300,000.

I
Facts and Travel

The background of this dispute is described more fully in this Court's recent decision. Nunes v. Celone, No. 05-0456, 2007 R.I. Super. LEXIS 41 (Mar. 9, 2007). That decision involved Celone's motion, based upon § 9-26-4(13), to exempt his automobile from attachment. The Court granted his motion and dissolved the attachment. Celone has now brought a motion for similar relief under § 9-26-4.1 to dissolve the

[1] G.L. 1956 §§ 6-16-1 to 6-16-12.

attachment on his home at 26 Jane Lane in Bristol, Rhode Island (Jane Lane property). Nunes has obtained an execution from this Court and has expressed his intention to levy on this property as soon as practicable, pending the result of this decision.

The facts pertinent to this motion are largely undisputed. Under § 9-26-4.1, a debtor's homestead estate is exempt from attachment by creditors such as the Plaintiff, but that exemption does not apply to "debts contracted" prior to the purchase of the home. Defendant purchased the Jane Lane property in December 1992, so the central question is when the debts at issue were contracted.

In November 1989, Celone and Nunes executed an agreement to become partners in the Broward Partners Partnership. That partnership incurred substantial debt upon its inception, borrowing approximately $650,000[2] from the Durfee-Attleboro Bank. Durfee-Attleboro Bank was subsequently acquired by South Shore Bank, which began foreclosure proceedings against the partnership assets in August 1993. In order to avoid foreclosure, third parties—who happened to be Nunes' parents—paid the debt to South Shore Bank on behalf of the partnership. In 1995, the partnership executed a promissory note in favor of Nunes' parents for repayment of that debt. The judgment in this case reflects that each partner is responsible for one half of the outstanding debt on this obligation.

In addition to obtaining loans, the partnership was financed through capital contributions by each of the two partners. Nunes and Celone contributed various, unequal amounts of capital to the partnership throughout its existence from 1989 to 1999. The judgment in this case contains a sum to be paid by Celone to Nunes to equalize the

[2] When referring to dollar amounts, the Court will generally round the value to the nearest thousand dollars unless the context requires a specific amount. Therefore, the values stated should only be considered as approximate.

capital contributions of each partner, since the assets of the partnership were apparently insufficient to repay the contributions of either partner. The Court found that Nunes had contributed $212,000 more than Celone, so that Celone should pay $106,000 to Nunes to equalize their contributions. Exhibit 3 to the Verified Complaint in this action contains a table outlining those contributions and the dates they were made. That table reflects that on the date Celone purchased his home, Nunes had contributed $171,000 and Celone had contributed $46,000, for a difference of 125,000.[3]

The only pertinent factual issue in dispute is the value of Celone's property. The Court held an evidentiary hearing on March 22, 2007. Each party presented testimony from appraisers who testified to their opinion of the property's value. Nunes' appraiser valued the property at $ 390,000 on January 22, 2007, while Celone's appraiser valued the home at $ 330,000 on February 26, 2007. Their appraisal reports are attached to the parties' respective memoranda. There is a first mortgage on the property which secures outstanding debt of approximately $ 65,000.[4] The Court will resolve the valuation issue if necessary to the outcome of this motion.

Nunes objects to the dissolution of the attachment on three grounds. The Court will first address Nunes argument that Celone fraudulently transferred his non-exempt assets into exempt assets and, therefore, his exemption should be reduced to the extent of the fraudulently transferred assets. The Court will then consider whether Celone's debt to Nunes was incurred prior to the acquisition of Celone's home. If so, the exemption

[3] Plaintiff argued in his brief that Nunes had contributed $41,000, relying on the table attached to the complaint. This appears to be a computational error, as the table reflects $46,000 of contributions prior to the December 29, 1992 purchase of the Jane Lane property.

[4] Celone has alleged that a second mortgage exists in favor of a relative. It is not known whether this mortgage is valid or, if so, whether it would take priority over Nunes' attachment. It is not necessary to know these details in order to decide this motion.

statute would not apply. Finally, if necessary, the Court will address whether Celone's homestead exemption exceeds the $300,000 threshold so that the attachment may still remain in place and be subject to execution and levy.

II
Fraudulent Transfer

During the pendency of this suit, Celone had a significant amount of money in a brokerage account which he spent, inter alia, on upgrades and repairs to his home. Nunes asks this Court to find that those expenditures, which had the effect of converting non-exempt assets into exempt assets, were fraudulent transfers because they were made with the intent of placing assets out of the reach of Celone's creditors. He further asks this Court to deny Celone the benefit of the homestead exemption to the extent of approximately $80,000, which is the amount allegedly spent on the home upgrades.

The Court addressed the fraudulent transfer issue in its previous decision with respect to the automobile exemption. Nunes v. Celone, 2007 R.I. Super. LEXIS 41, *11–*14 (Mar. 9, 2007). Although the Court did find that Celone had converted non-exempt assets into exempt assets, the Court did not reach the issue of whether Celone's actions constituted a fraudulent transfer. The Court found that even if the transfer was fraudulent, the Court did not have the power to disregard the exemption statute applicable to motor vehicles. Therefore, the Court did not resolve the factual issue of whether Celone had the requisite fraudulent intent.

The substance of Nunes' position now is to ask this Court (1) to find that a fraudulent transfer occurred with respect to funds spent in remodeling Celone's home; and (2) to reconsider its conclusion that it lacks the power to deny an exemption, where the debtor has converted non-exempt assets into exempt assets through a fraudulent transfer. This Court generally declines to reconsider issues which are based upon grounds or authority which were or should have been presented in the first instance. Compare Jackson v. Medical Coaches, 734 A.2d 502, 505 (R.I. 1999) (finding that Rule 60(b) could not be used "to reconsider [a] previous judgment[] in light of later-discovered legal authority that could have and should have been presented to the court before the original judgments entered"). In this case, although the context has moved from an automobile exemption to a homestead exemption, the legal question is essentially the same as that previous decided. The Court finds that it would be appropriate to explain its reasoning more thoroughly, though not to revise its conclusion.

In support of its argument, Nunes points out that in Jensen v. Dietz (In re Sholdan), 217 F.3d 1006, 1008 (8th Cir. 2000), the court found that a fraudulent transfer occurred and that it was sufficient grounds upon which to deny a homestead exemption. In Jensen, the court of appeals was reviewing a district court's affirmance of a bankruptcy court order, and relied upon Minnesota exemption laws. 217 F.3d at 1008; see Sholdan v. Dietz, 108 F.3d 886, 888 (8th Cir. 1997) (relying on Minnesota's version of the uniform act now known as the Uniform Fraudulent Transfer Act and Minnesota case law). The Supreme Court of Minnesota clearly had decided that a fraudulent transfer of non-exempt into exempt assets precludes the use of a homestead exemption. See In re Tveten, 402 N.W.2d 551, 555-556 (Minn. 1987) cited in Sholdan v. Dietz, 108 F.3d at 888. Moreover, the Tveten court relied upon the former Uniform Fraudulent Conveyance Act which appears for present purposes to be substantially similar to the UFTA effective in Rhode Island. See G.L. 1956 §§ 6-16-1 to 6-16-12. The question, then, is whether the decision in Tveten reflects the law of Rhode Island, and the Court has found no Rhode Island decision directly on point.

The problem with the analysis in Tveten is that, while it appropriately addressed whether the transaction in question was a fraudulent conveyance under the fraudulent conveyance statute, it did not address the remedy provisions of the UFTA. The remedy section provides for certain specifically enumerated remedies. See § 6-16-7. Most of these remedies provide for a creditor to seek satisfaction of its claims from the recipients of fraudulently transferred property. See, e.g. § 6-16-7(a)(1), (2) (allowing for "avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim" or attachment of "the asset transferred or other property of the transferee"). Nunes' proposed remedy, however, is directed at the presumably insolvent judgment debtor, and the statute does not provide for the type of remedy it seeks.

At best, Nunes' claims could fit within the open-ended provision of § 6-16-7(a)(3)(iii), which provides for, "[s]ubject to applicable principles of equity . . . any other relief the circumstances may require." However, after considering the purposes of the exemption statutes, the Court cannot find that applicable principles of equity would simply permit the Court to ignore its provisions.

It should be clear that the purpose of the exemption statutes is not the benefit of creditors. 31 Am. Jur. 2d Exemptions § 4 (2002). Rather, such statutes reflect a legislative determination that

> "debtors should retain some form or amount of property at the expense of creditors. Such an approach is based on the premise that it is better that an ordinary creditor's claims remain partially unsatisfied than that a state resident be

> placed in an untenable financial position resulting in the debtor and his family becoming charges of the state." Id.[5]

The crafting of exemption statutes involves a balancing of policy concerns which is best left to a legislature. Indeed, the legislature has specifically set forth certain situations where the exemptions should not apply, one of which is addressed in the next section of this decision. However, the conversion of exempt assets into non-exempt assets is not one of those exceptions, even where it might amount to a violation of the UFTA. Therefore, even if the Court found that the circumstances of this case justified disallowing Celone his statutory exemption, the legislature has not provided this Court with the means to do so in either the UFTA or the exemption statute.

III
Debts Contracted Prior to Acquisition of Home

The homestead exemption statute provides that "an estate of homestead to the extent of three hundred thousand dollars ($300,000) in the land and buildings may be acquired pursuant to this section by an owner or owners of a home . . . who occupy or intend to occupy the home as a principal residence." Section 9-26-4.1. The estate of homestead is "exempt from the laws of attachment, levy on execution and sale for payment of debts or legacies." Id.

The statute provides certain exceptions, however, where the homestead exemption does not apply. The pertinent exception states that the homestead exemption shall not apply to "a debt contracted prior to the acquisition of the estate of homestead." Section 9-26-4.1(a)(2). The two debts at issue, which formed the basis for the judgment in this

[5] "Providing debtors the means to support themselves enables debtors to be productive members of society, enhances human dignity, and avoids increased public assistance expense and the oft-accompanying social costs. Clearly, exemption statutes further an important public purpose. In re Eldridge, 22 B.R. 218, 222 (Bankr. D. Me. 1982).

case, are the capital contribution debt and the debt represented by the promissory note to Nunes' parents. Therefore, the Court will analyze whether either of those debts were contracted prior to December 1992 so that the homestead exemption would not apply.[6]

A.
Loans to the Partnership

With respect to the debt to Nunes' parents, it is undisputed that the parents advanced those funds no earlier than 1993, which was after Celone purchased his home. Nunes argues, however, that because the proceeds of the loan were used to pay off the prior loan to South Shore Bank, and in fact were paid directly to the bank on behalf of the partnership, the parents' loan should be treated as relating back to the prior loan incurred in 1989. The authority upon which Nunes relies, however, does not support his position.

Nunes relies upon the following quote interpreting a similar homestead statute in Massachusetts: "a note given after the acquisition of a homestead to renew a note given before the acquisition was a "debt contracted" when the original note was given. In re Miller, 113 B.R. 98, 102 (Bankr. D. Mass. 1990) (citing Tucker v. Drake, 93 Mass. 145, 148 (Mass. 1865)). In the Tucker case, the debtor had caused his creditors to exchange their promissory notes for new notes, which were dated after the acquisition of the homestead estate, and which contained the same payment terms, parties, and time for payment. See Tucker, 93 Mass. at 148. Essentially, the "renewal" of the promissory notes was merely a sham to avoid the operation of the "debts contracted" exception to the homestead statute, and the Court declined to give it effect.[7] Unlike that case, however,

[6] Both of the debts are partnership debts. Under the relevant statutes, it is clear that partners are liable for the debts of the partnership. See G.L. 1956 § 7-12-26(a).

[7] The Court distinguished between a promissory note which was given to in payment of a prior obligation, and the mere "renewal" of an existing promissory note. "The reasons given for the exchange, that the old notes were covered with indorsements, or that the new ones were on handsomer paper, or that some persons

the debt to Nunes' parents involves a completely different loan transaction, with different parties and different terms of payment.

The Court sees no compelling reason to find that any contract between Nunes' parents and the partners, which came into existence no earlier than 1993, should be considered a "debt contracted" prior to the December 1992 homestead acquisition. Therefore, the Court finds that the portion of the judgment represented by the parents' debt is not a "debt contracted" prior to the purchase of the homestead, and the exemption may be asserted against that debt.

B.
Debts Arising from Unequal Capital Contributions

With respect to the capital contribution claims, the question is more complex. Nunes argues that the portion of the judgment attributable to the capital contribution claim ($160,000) arises from the 1989 partnership agreement. Therefore, that claim would be a "debt contracted" prior to the purchase of the homestead, and the exemption could not be asserted against that portion of the judgment. Celone argues, however, that any capital contribution claim only came into existence after the December 1992 home purchase and, therefore, the exemption statute applies to those debts. In essence, he argues that until judgment entered against him, any capital contribution claim was not a "debt contracted."

The Court finds that there are generally two types of cases which have applied the "debts contracted" language. On one end of the spectrum are tort cases. Such cases are generally not found to be "debts contracted" at the time of the acts giving rise to liability.

---

thought an old note not so good as a new one, would lead to no other conclusion. The notes taken did not vary the obligation of those for which they were exchanged in any particular except by having a new date. . . ." Tucker, 93 Mass. at 147. Thus, a mere renewal did not change the fact that the underlying obligation was a debt contracted prior to the acquisition of the homestead.

See, e.g., In re Miller, 113 B.R. 98, 102 (Bankr. D. Mass. 1990) (citing two cases which expressly hold that "debts contracted" exclude "tort damages not reduced to judgment"). See id. at 103. Rather, such cases are considered "debts contracted" only when a judgment enters. The rationale given is that neither the fact of liability, nor the amount of liability, is known or readily determinable until reduced to judgment.

At the other end of the spectrum, however, are simple debts or promissory notes. Because the parties willingly enter into such arrangements, the fact of liability is usually known from the moment the parties enter into the transaction. Similarly, the amount of liability is either known or at least susceptible to mathematical computation with reference to known facts. Therefore, courts are apt to find that such arrangements are "debts contracted" from the moment the agreement is reached. See Gruet v. FDIC, 879 F. Supp. 153, 155 (D. Mass. 1995) (distinguishing between debts contracted and torts not reduced to judgment to find a loan guarantee was a "debt contracted" when the agreement was signed, and not when reduced to judgment).

The Court finds that the obligation from Celone to Nunes is contractual in nature, and was established by the decision to enter into the partnership agreement in 1989. Throughout the history of the partnership, Nunes had more of his capital at risk than Celone. If the business was successful, than each partner's contributions would eventually be repaid and the inequality would be of no consequence. If not, however, then equal contributions would ensure that both partners would share equally in the loss. At any given moment, therefore, Nunes was entitled to have Celone contribute an equal share, even if Nunes never enforced that right. Moreover, the amount which Celone was obligated to pay was readily ascertainable at any given moment with reference to the amounts contributed by each partner. Therefore, it is more akin to a contractual obligation on a promissory note than an unliquidated, disputed tort claim.

However, at the time the homestead was acquired, the amount of Nunes' claim was approximately $62,500. Therefore, even though that claim eventually increased to $160,000, the Court finds that only $62,500 of this claim is a "debt contracted" prior to the homestead acquisition, to which the exemption does not apply. Consequently, the Court finds that the homestead exemption may be asserted only against the remaining portion of the capital contribution claim which arose post-acquisition.

IV
Value of Celone's Homestead Estate

Having found that the judgment in this case includes debt for which Celone may not assert his homestead exemption, it follows that Nunes may levy and execute upon the home in order to satisfy that portion of the judgment. Therefore, the Court need not resolve the factual issue as to the valuation of the home, because it will be resolved conclusively by the execution sale. However, the Court finds that there remains an issue that needs to be resolved, and which the parties have not yet addressed.

Assuming arguendo that Nunes valuation is correct,[8] the property has a fair market value of $390,000, but is subject to a first mortgage securing $65,000.[9] Because any purchaser at an execution sale would take the property subject to that mortgage, the

[8] For completeness, the Court notes that it found Nunes' evidence of the Jane Lane property's value to be more persuasive. The Court found that 1) Nunes' appraiser's analysis was more complete because it analyzed the effect of the zoning district on the property value, and 2) Nunes' appraiser selected homes for comparison which were more similar to the condition of Celone's home after the upgrades. Therefore, even if the Court found that the capital contribution claim was not a debt contracted prior to the acquisition of the homestead, it would not dissolve the attachment because the value of Celone's equity in the homestead estate would exceed $300,000.

[9] The Jane Lane property may also be subject to a second mortgage according to Celone's memoranda. It is not known whether that mortgage, if valid, would take priority over Nunes' attachment.

most an execution sale could generate—in theory—should be $325,000.[10] After satisfaction of the portion of Nunes' capital contribution claim arising prior to December 1992 ($62,500), there could be some $262,500 remaining as proceeds from the execution sale. However, the rest of Celone's debt to Nunes is debt for which he could have asserted his homestead exemption. Therefore, it is not clear whether Nunes would be entitled to such proceeds—to the extent necessary to satisfy his judgment—or whether any such proceeds ought to be returned to Celone as the proceeds of exempt property.

The disposition of the proceeds of the contemplated sale is akin to deciding what happens when an asset exceeds the allowable exemption amount. Clearly that asset is subject to sale, but:

> "[i]n some jurisdictions, where a single chattel is worth more than the prescribed maximum exemption, there is no exemption as to any part of it and the chattel in its entirety is subject to attachment [and therefore levy and execution]. 31 Am. Jur. 2d Exemptions § 34 (2002) (footnotes omitted).

However, in some jurisdictions,

> "[i]f the property is not susceptible of segregation without substantial prejudice, in some jurisdictions the whole may be sold, provided the debtor is paid the full amount of the exemption." 40 Am. Jur. 2d Homestead § 86 (2006).[11]

In this case, the asset will be sold because of the prior contracted debts exception, not because the value exceeds the exemption limit. However, the scenarios are similar

[10] The parties appear to agree, as does this Court, that the value of any mortgages on the property should reduce the value of the homestead estate for purposes of applying the exemption statute. See In re Ryan, 265 B.R. 521, 523 (Bankr. D.R.I. 2001) (using only the value of the debtor's equity in the property, and not the unencumbered value, when applying § 9-26-4.1); see also Hoy v. Anderson, 39 Neb. 386, 389 (Neb. 1894) (finding that if "an interest in land less than the fee is sufficient to entitle a claimant to the benefits of the provisions of the homestead act, and there can be no doubt of it, it follows logically that the extent of a homestead is to be determined by the value of the claimant's interest in the land, whatever it may be"). But see Calmer v. Calmer, 15 N.D. 120, 128 (N.D. 1906) (applying a similar homestead exemption to the entire value of the property, not the debtor's equity).

[11] The Court presumes that an in-kind division of the Jane Lane property would not be practicable.

because proceeds from the judicial sale will likely be available to satisfy a portion of Nunes' claim which otherwise would be subject to exemption.

For example, in Levin v. Mauro, the Court considered how to deal with an automobile which was worth $1,000 in light of a statute which exempted automobiles "not exceeding seven hundred dollars in value." 425 F. Supp. 205, 206 (D. Mass. 1977). That court concluded that "a debtor owning a car in excess of the limit should be required to turn it over to the trustee for liquidation, but would be permitted to purchase another vehicle with $700 derived from liquidation proceeds." Id. at 207. Levin suggests that when exempt property is sold, the debtor retains a setoff of the proceeds up to the amount of the exemption limit. Presumably, the exempt amount retained by the debtor would be used to purchase a replacement—of lesser value—for the property which was levied upon. The Court has not found any Rhode Island authority on this subject.

Therefore, the question remains as to whether this Court should give effect to the exemption statute by exempting the proceeds of the sale or whether Nunes should be able to satisfy his entire claim with the proceeds. Therefore, the Court will order further proceedings to resolve this question.

Conclusion

After due consideration of the arguments advanced by counsel at oral argument and in their memoranda, the Court will not dissolve the attachment with respect to the Jane Lane property and will permit it to be sold via execution and levy.

The Court will order, however, that upon any sale of Celone's interest in 26 Jane Lane Bristol, Rhode Island, pursuant to an execution and levy, Nunes may keep only so much of the proceeds—approximately $62,500—which are attributable to the amount of his capital contribution claim in existence in December 1992. To the extent that the sale proceeds exceed that amount, Nunes shall cause such proceeds to be deposited into the Registry of the Court pending further proceedings to resolve the entitlement to such proceeds.

Counsel for Plaintiff may present an order consistent with the foregoing after due notice to Defendant's counsel.