

**IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF ARKANSAS
HOT SPRINGS DIVISION**

IN RE: GARY RUSSELL GIBBS, Debtor

**No. 6:18-bk-73270
Ch. 7**

**ORDER OVERRULING IN PART OBJECTIONS
TO DEBTOR'S EXEMPTIONS**

Before the Court are the *Objection to Debtor's Exemptions* filed by Richard Cox, chapter 7 trustee [Cox or trustee], on February 28, 2020, the *Objection to Debtor's Exemptions* and the *Amended Objection to Debtor's Exemptions* filed by SBN V FNBC LLC [SBN or creditor] on February 28, 2020, and the debtor's responses filed April 13, 2020. The Court held a telephonic hearing on July 22, 2020, on the narrow issue of whether the debtor could claim exemptions under the laws of the state of Florida. All remaining issues raised in the objections of the trustee and creditor [collectively, objecting parties] will be heard at a later date. Kevin Keech appeared for the debtor; Jim Smith appeared for the trustee; and Charles Coleman appeared for SBN. Following the conclusion of closing arguments, the Court took the matter under advisement. For the reasons cited below, the Court finds that the debtor's domicile is the state of Florida, and the objections by the trustee and the creditor as to the debtor's domicile are overruled.

Jurisdiction

The Court has subject matter jurisdiction under 28 U.S.C. § 157(b)(1). This matter is a core proceeding under 28 U.S.C. § 157(b)(2)(A) and (B) and is a contested matter under Federal Rule of Bankruptcy Procedure 9014. This order contains findings of fact and conclusions of law under Federal Rule of Bankruptcy Procedure 7052(a)(1).

Background

On December 11, 2018, an involuntary chapter 7 petition was filed for Gary Gibbs [debtor or Gibbs]. The debtor filed his schedules, including Schedule C: The Property You Claim as Exempt, on April 30, 2019, claiming exemptions allowed by the state of Florida. In his

response to question 2 on the Statement of Financial Affairs [SOFA], which asked the debtor to list all of the places he had lived in the past three years, the debtor stated that he had lived at 518 Bayshore Drive, Miramar Beach, Florida from September 2017 to October 2018; at 31 Governors Way, Brentwood, Tennessee, from May 2010 to July 2017; and at 101 Breaker Circle, Brentwood, Tennessee, from July 2017 to October 2018. Presumably based at least in part upon the debtor's answer to question 2, the creditor and the trustee objected to the debtor's use of Florida exemptions. On July 22, 2020, the Court held a telephonic hearing on the narrow issue of whether the state of Florida was the debtor's domicile during the relevant periods, such that the debtor could claim Florida exemptions.

During the hearing, Gibbs testified that he leased a house at 31 Governors Way, Brentwood, Tennessee [Governors Way property] in May 2010, exercised his option to purchase the property for investment purposes in May 2012, and sold it in July 2017.¹ He stated that he purchased 518 Bayshore Drive, Miramar Beach, Florida [Bayshore property] in September 2010 and sold it in October 2018. According to the debtor, he executed an *Original Application for Homestead and Related Tax Exemptions* [Florida exemption application] for and in the state of Florida in February 2013. (Debtor's Ex. 9). The Florida exemption application reflects Gibbs's address as 518 Bayshore Dr., Miramar Bch [sic], Florida, and identifies the Governors Way property as his previous residence, which the application reflects was terminated in 2011. Gibbs testified that he obtained his Florida driver's license in 2010 and introduced into evidence a copy of his current Florida license. (Debtor's Ex. 2). He stated that he voted in the Florida 2016 national election and introduced into evidence a copy of his 2012 Florida voter registration, listing the address of the Bayshore property. (Debtor's Ex. 1). In addition, Gibbs presented evidence that he paid the water bill for the Bayshore property for several months in 2016, all of 2017, and several months in 2018. (Debtor's Ex. 10). Gibbs also testified and introduced evidence that he paid real property taxes in Florida for the year 2017 and the Bayshore address is reflected on his 2016 and 2017

¹ Gibbs testified that he was involved in real estate development, property management and construction between 2011 and December 11, 2018.

federal income tax returns. (Debtor's Ex. 3, 4 and 11). Gibbs admitted that he owned real property both in Florida and Tennessee between June 2016 and July 2017. He testified that between June 2016 and December 2016, he spent about 20 nights at the Governors Way property and spent the remainder of his time at the Bayshore property. According to the debtor, he was living at the Bayshore property when it sold in October 2018.

During cross-examination, Gibbs agreed that during his creditors' meeting on July 16, 2019, he had testified that part of the reason he had gone to Brentwood, Tennessee in 2010 was to be near his grandchildren. He also testified that while he and his wife owned the Governors Way property, they considered building another house in March 2017 for investment purposes on a lot owned by his wife in the same subdivision, but had decided against it because of an expense related to a retaining wall. He said that when the Governors Way property sold in July 2017, he and his wife leased a house at 101 Breaker Circle, Brentwood, Tennessee until October 2018. According to Gibbs, after the sale of the Bayshore property in October 2018, he spent several days packing and moving items from the Breaker Circle property into a house that he and his wife had leased in Niceville, Florida.

Summary of Parties' Arguments

The objecting parties argue that the debtor established a permanent residence in Tennessee when he leased the Governors Way property in 2010 to be near his grandchildren and then bought the Governors Way property in 2012. The objecting parties argue that further evidence of Tennessee as the debtor's domicile is supported by the debtor's plans to build another house in the same area as the Governors Way property, even if the debtor later abandoned those efforts. They further assert that because the debtor sold the Governors Way property in 2017, the Court must look to the 180 days preceding the 730 days of the filing of the petition for a determination of domicile, and argue that the debtor spent a greater portion of that 180 days in Tennessee—rather than Florida—and, therefore, Gibbs cannot claim Florida exemptions. Accordingly, if Tennessee is determined to be the debtor's domicile, then the debtor cannot use Florida exemptions.

Gibbs asserts that the state of Florida was his domicile during the 730 days immediately preceding the filing of his bankruptcy petition and the 180 days preceding the 730-day period, and, therefore, he has properly claimed Florida exemptions.

Law and Analysis

Section 522(b)(1) of the bankruptcy code permits a debtor to exempt certain property from the bankruptcy estate.² A debtor is allowed to exempt estate property under the federal exemptions enumerated in § 522(d), “unless the State law that is applicable to the debtor under paragraph (3)(A) specifically does not so authorize.” *See* 11 U.S.C. § 522(b)(2). In other words, if a state has “opted-out” of the federal exemptions, then a debtor must take the state exemptions applicable as of the petition filing date. The state of Florida is an “opt-out” state. *See* Fla. Stat. § 222.20 (“residents of this state shall not be entitled to the federal exemptions provided in § 522(d) of the Bankruptcy Code.”).

If a debtor has been domiciled in more than one state prior to the filing of a bankruptcy case, § 522(b)(3)(A) identifies two “look-back” periods to determine which exemptions should apply.

(3) Property listed in this paragraph is

(A) subject to subsections (o) and (p), any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law that is applicable on the date of the filing of the petition to the place in which the debtor’s domicile has been located for the 730 days immediately preceding the date of the filing of the petition or if the debtor’s domicile has not been located in a single State for such 730-day period, the place in which the debtor’s domicile was located for 180 days immediately preceding the 730-day period or for a longer portion of such 180-day period than in any other place[.]

11 U.S.C. § 522(b)(3)(A).

Therefore, the issue before the Court is whether the debtor’s domicile was located in Florida continuously for the two years immediately preceding the date the petition was filed—in this

² 11 U.S.C. § 541 describes what is included in a debtor’s bankruptcy estate.

case, from December 10, 2016, to December 10, 2018. In the event the debtor's domicile was not located continuously in Florida between December 10, 2016 and December 10, 2018, then the Court must decide where the debtor was domiciled in the 180 days preceding December 10, 2016, or where the debtor was domiciled for the longer portion of such 180-day period.³ See 11 U.S.C § 522(b)(3)(A). For the reasons stated hereafter, the Court finds that Florida is the debtor's domicile under § 522(b)(3)(A).

There is a distinction between a debtor's residence and a debtor's domicile. Domicile is defined as:

The place at which a person has been physically present and that the person regards as home; a person's true, fixed, principal and permanent home, to which that person intends to return and remain even though currently residing elsewhere.

Black's Law Dictionary 592 (10th ed. 2014). Residence is defined as “[t]he act or fact of living in a given place for some time” or “[t]he place where one actually lives as distinguished from a domicile[.]” *Id.* at 1502.

“‘Domicile’ is not necessarily synonymous with ‘residence[.]’” *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48 (1989). “This is because an individual ‘can reside in one place but be domiciled in another.’” *Wagstaff & Cartmell, LLP v. Lewis*, No. 18-00870-CV-W-GAF, 2019 U.S. Dist. LEXIS 225399, *6 (W. D. Mo. Mar. 19, 2019) (quoting *Holyfield*, 490 U.S. at 48); see also *Eckerberg v. Inter-State Studio & Publ’g Co.*, 860 F.3d 1079, 1084 (8th Cir. 2017) (one can reside in one state, but be domiciled in a different state); *In re Keifert*, Case No. 12-62069, 2013 Bankr. LEXIS 1111 (Bankr. W.D. Mo. Mar. 22, 2013) (despite the fact that the debtors had been physically present in California for periods of time during the 730-day look-back period, they were domiciled in Missouri and subject to Missouri exemptions). “[D]omicile is established by physical presence in a place in connection with a certain state of mind concerning one’s intent to remain there.” *Holyfield*, 490 U.S. at 48. “[T]he fact that one has a residence in a state does not make that person a

³ The 180-day period from June 13, 2016 to December 10, 2016 is applicable here.

domiciliary of that state.” *Blattner Energy, Inc. v. Jones*, No. 19-cv-2681 (WMW/LIB), 2020 U.S. Dist. LEXIS 96588, *10 (Minn. June 2, 2020).

Section 522(b)(3)(A) does not define the word “domicile.” For purposes of § 522, domicile is determined under federal common law. *In re Dufva*, 388 B.R. 911, 914 (Bankr. W.D. Mo. 2008); *In re Mendoza*, 597 B.R. 686, 688 (Bankr. S.D. Fla. 2019); *see also* 4 Collier on Bankruptcy P 522.06, n.16 (16th ed. 2018). Two elements are required to establish a domicile under § 522(b)(3)(A): a presence in the state of alleged domicile and the intention to remain there. *Sheehan v. Gustafson*, 967 F.2d 1214, 1215 (8th Cir. 1992) (resolution of a party’s domicile—who had a presence in multiple states—would determine whether a federal court had diversity jurisdiction); *see also Yeldell v. Tutt*, 913 F.2d 533, 537 (8th Cir. 1990) (“To establish domicile, an individual must both be physically present in the state and have the intent to make his home there indefinitely.”).

During both relevant look-back periods, the debtor had a physical presence in two states: Florida and Tennessee. The Court must then determine the debtor’s intent to make Florida his home indefinitely. To determine intent, courts rely on objective factors, including current residence; voter registration; driver’s license; vehicle registration; location of depository accounts; payment of taxes; location of medical providers; location of spouses, among others. *See Eckerberg*, 860 F.3d at 1085 (enumerating objective factors a court may use to determine intent); *see also Altimore v. Mount Mercy Coll.*, 420 F.3d 763, 769 (8th Cir. 2005).

In *Sheehan*, the Eighth Circuit affirmed a district court’s findings that the facts supporting a Nevada domicile included, among other things, a Nevada driver’s license, filing of Minnesota tax returns as a non-resident with a Nevada permanent address, and a Nevada voter registration. *Sheehan*, 967 F.2d at 1215. In determining domicile, the Eighth Circuit found these facts to be more indicative of a presence and intent to remain in Nevada than were business contacts and an occasional presence in Minnesota. *Id.*

In 2019, a Florida bankruptcy court compared Florida law and federal law as it relates to a determination of domicile. *In re Mendoza*, 597 B.R. 686, 687 (Bankr. S.D. Fla. 2019) (both Florida and federal law “similarly distinguish a person’s domicile from a person’s residence by reference to permanency.”). “Florida law is only applicable to debtors who have been domiciled in Florida for at least 730 days prior to filing for bankruptcy relief. In short, the determinative issue here is domicile, not residency.” *Id.* The court said:

Generally, under Florida and federal law, a person’s residence is a place (or places) in which such person lives and keeps belongings, whereas a person is domiciled only in the place where such person intends to make a permanent home. (citations omitted). Thus, a person can have multiple residences, but only one domicile, and domicile importantly includes the extra element of intent to remain indefinitely.

Id. at 688-89. Florida’s permanent residency statute sets “forth a nonexclusive list of factors to be considered when determining intention to establish a permanent Florida residence.” *Id.* at 689; *see also* Fla. Stat. § 196.015 (objective factors include a formal declaration of domicile by the applicant recorded in the public records; applicant’s previous permanent residency of a state other than Florida terminated; proof of voter registration; a valid Florida driver’s license; address shown on federal income tax returns; and proof of payment for utilities at the property for which permanent residency is being claimed.).

Voting in a particular state supports a finding of domicile in that state. *Eckerberg*, 860 F.3d at 1086 (keeping Florida voting registration was evidence of Florida domicile); *see also* *Altimore*, 420 F.3d at 768 (voting in Pennsylvania supported a Pennsylvania domicile). Paying taxes in Florida weighs in favor of finding of a domicile in Florida. *Eckerberg*, 860 F.3d at 1086-87 (filing taxes in Florida was evidence of intent to maintain a Florida domicile); *Altimore*, 420 F.3d at 769 (paying taxes in Pennsylvania supported a Pennsylvania domicile); *see also* *Wagstaff*, 2019 U.S. Dist. LEXIS 225399 at *22 (continuing to pay taxes in Indiana supported a domicile in Indiana rather than Missouri). Licenses and registrations weigh in favor of a finding that Gibbs’s domicile is in Florida. *Eckerberg*, 860 F.3d at 1086-87 (maintaining Florida driver’s license supported a Florida domicile); *Yeldell*, 913 F.2d at 538 (an insurance license in Arkansas was evidence of an Arkansas domicile); *Wagstaff*,

2019 U.S. Dist. LEXIS 225399 at *22 (maintaining an Indiana driver's license was evidence of domicile in Indiana rather than Missouri).

Here, in addition to having a physical presence in Florida during the relevant look-back periods, the debtor has been registered to vote in Florida since 2012 and testified that he voted in Florida during the 2016 elections. The debtor submitted evidence that he paid property taxes in Florida and used the Bayshore address on his 2016 and 2017 federal income tax returns. The debtor testified that he has had a Florida driver's license since 2010 and his current driver's license is issued by the state of Florida. He also submitted evidence reflecting that he paid utility bills for the Bayshore property during the relevant look-back periods. Furthermore, the record reflects that the debtor executed the Florida homestead application in 2013 and listed the Bayshore property as his homestead address. The Florida homestead application also shows a Florida vehicle tag. Although admittedly self-serving, the debtor testified that he intended for Florida to be his home and domicile, even if he owned or leased property in Tennessee during the look-back periods.

The objecting parties have the burden of proving that the debtor is not entitled to claim Florida exemptions. *See* Fed. R. Bankr. P. 4003(c). Despite the objecting parties' vigorous argument that Gibbs established a Tennessee domicile in 2010 when he leased or owned real property in Tennessee to be near his children and grandchildren, the objecting parties offered no evidence—contrary to the debtor's exhibits or testimony—that would support a finding that the debtor had any intent to be domiciled in Tennessee during the relevant look-back periods.

Conclusion

The overwhelming evidence before this Court—and the lack of any contradictory evidence offered by the objecting parties—supports the conclusion that the debtor intended for Florida to be his domicile during the 910 days prior to the filing of his bankruptcy case on December 11, 2018, even though he stayed from time to time at property owned or leased in Tennessee. The single fact that the debtor had a Tennessee residence during a portion of the time

between June 13, 2016, and December 10, 2018, does not outweigh all the objective facts previously discussed which establish Florida as the debtor's domicile. For these reasons, the objection to the state of Florida as the debtor's domicile is overruled. The remaining objections to the debtor's exemptions are continued to a date to be determined.

IT IS SO ORDERED.

A handwritten signature in black ink that reads "Ben Barry". The signature is written in a cursive style and is positioned above a horizontal line.

Ben Barry
United States Bankruptcy Judge
Dated: 08/14/2020

cc: Charles Coleman
Richard Cox
Kevin Keech
James Smith
United States Trustee
Gary Gibbs