

**FILED**

JAMES J. WALDRON, CLERK

[July 29, 2011]

U.S. BANKRUPTCY COURT  
CAMDEN, N.J.

BY: /s/ Margaret McGettigan, Deputy

July 29, 2011

LETTER OPINION

Mr. Daniel F. Flynn  
40 Hickory Court  
Marco Island, FL 34145

Larry Lesnik, Esquire  
Norris, McLaughlin & Marcus, PA  
PO Box 5933  
Bridgewater, NJ 08807-5933

Re: Daniel F. Flynn, Debtor  
Case No. 09-20417 (GMB)

Dear Mr. Flynn and Mr. Lesnik:

This matter has come before the Court upon consideration of the Chapter 7 Trustee's Objection to the Debtor's Amended Schedule C, based upon the Debtor's failure to establish his domicile in Florida pursuant to 11 U.S.C. §522(b)(2)(A). The Court, having heard the testimony and observed the demeanor of the witness, observed and examined the evidence presented, having heard the arguments of counsel, and being otherwise fully advised, hereby finds as follows:

**I. FACTS**

Daniel Flynn ("the Debtor") filed a voluntary petition under Chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code") on April 26, 2009 (the "Petition Date"). He declared under penalty of perjury that his schedules were true and correct. The Debtor listed his address on his bankruptcy petition as 313 Gull Road, Ocean City, NJ. The Debtor listed his County of Residence or Principal Place of Business as Cape May, New Jersey. Debtor filed his schedule of assets and liabilities which reflected, *inter alia*, joint ownership of property located in Marco Island, Florida (the "Florida Property") with a value of \$700,000.00 and liens of \$471,000.00. Schedule C filed by the Debtor on the Petition Date provided that Debtor was electing to take the Federal exemptions pursuant to §522(d) of the Bankruptcy Code. On December 14, 2009, an order was entered converting Debtor's chapter 11 case to a case under chapter 7. On that same day, Brian Thomas, Esq., was appointed as the Chapter 7 Trustee (the "Trustee").

On September 17, 2010, The Debtor filed an Amended Schedule C, wherein the Debtor attempted to elect state exemptions under Florida Constitution Article X, Section 4, Florida

Statute 222.01, 222.02 & 222.05.<sup>1</sup> Debtor also made the notation of “TBE” in his Amended Schedule C, presumably indicating that he was alleging that certain of the property was exempt as “Tenancy by the Entirety” property.

The Trustee objected to the Amended Schedule C, arguing that the Debtor offered insufficient evidence to establish the Debtor’s domicile to be in Florida for the requisite time period (the “Trustee’s Objection”). The Debtor filed a response to the Trustee’s Objection on November 24, 2010 wherein he alleged that he was and is a Florida resident by virtue of the following actions, among others: (1) he registered to vote in Florida; (2) he obtained a Florida’s Driver’s license; and (3) he filed a Florida Homestead Exemption Notice. A hearing was held on December 6, 2010, wherein this Court directed Debtor to provide further support for his position that all of the property on his Amended Schedule C could be properly exempted under Florida state law. Shortly thereafter, on December 10, 2010, the Debtor submitted additional documents in further support of his position. Specifically, the Debtor attached an Appendix to a Bankruptcy Manual for the State of Florida, Debtor’s Application for a Florida *ad valorem* tax exemption from 2005, a Homestead Exemption receipt on the Florida Property from 2006, and a copy of a 2004 Voter Registration Card from the state of Florida.

An evidentiary hearing on the Trustee’s Objection to Debtor’s Amended Schedule C was held on January 27, 2011. Both the Trustee and Debtor presented several documents which were admitted into evidence and both parties solicited the Debtor’s testimony regarding the exemption issue. This Court has considered the record and the applicable provisions of the Bankruptcy Code and makes the following conclusions of law.

## **II. DISCUSSION**

This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§157 and 1334(b). This is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(B).

Under Federal Rule of Bankruptcy Procedure 4003(c), the objecting party bears the burden of establishing that the exemption is not properly claimed. Therefore, the Trustee must prove that the Debtor is not entitled to the Florida exemptions pursuant to §522(b)(2)(A).

The Trustee’s Objection to the Debtor’s claimed exemptions should be sustained. The Debtor’s domicile was not located in Florida for the 730 days (2 years) immediately preceding the Petition Date, or for the 180 days that preceded such 730 days. Pursuant to §522(b)(3)(A) of the Bankruptcy Code, therefore, Florida law is not the law that applies to the Debtor’s claims of exemption.

### **A. Applicable State Law**

A debtor’s claim of exemptions is governed by §522 of the Bankruptcy Code and generally provides that a debtor may exempt from property of the estate the property listed in

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<sup>1</sup> While the Debtor checked the box “11 U.S.C. §522(b)(2)” in his Amended Schedule C, this Court assumes that the Debtor intended to check the box “11 U.S.C. §522(b)(3),” which permits Debtor to elect the state exemption scheme of the location where Debtor was domiciled for the requisite time period.

either subparagraph (2) or, alternatively, subparagraph (3) of §522(b). 11 U.S.C. §522(b)(2), (3). Section 522(b)(2) provides that a debtor may elect the federal exemptions under §522(d), “unless the State law that is applicable to the debtor under paragraph (3)(A) specifically does not so authorize.” 11 U.S.C. §522(b)(2). On the other hand, §522(b)(3)(A) provides that a debtor may exempt property that is exempt under the state or local law that is applicable in the place that is determined in accordance with the rules contained in that section.

The property that a debtor may exempt under §522(b)(3)(A) as currently in effect is as follows:

(b)(3) Property listed in this paragraph is

(A) subject to subsection (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 at 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 debtors’ domicile has not been located at 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). Accordingly, the test for determining which state’s exemption laws apply depends on whether the debtor has lived in the state for at least two years immediately preceding the filing.

The Debtor in this case filed his bankruptcy petition on April 26, 2009. Therefore, under §522(b)(3)(A) the Court must determine whether the Debtor’s domicile was continuously located in any single state for the two years immediately preceding April 26, 2009; in this case either Florida or New Jersey. If the Debtor’s domicile was not continuously located in either of these single states between April 26, 2007 and April 26, 2009, then this court must look to the place in which the Debtor’s domicile was located for 180 days immediately preceding the 730-day period. As more fully set forth below, this Court concludes that the Debtor’s domicile for the 730 days immediately preceding the date of the filing of the petition is not Florida, but rather New Jersey. Having so concluded, this Court need not look to the 180 day period immediately preceding the 730-day period to determine the applicable exemptions in the Debtor’s case. Florida’s exemption laws are not applicable in this case.

“Where a debtor is domiciled is a matter of federal common law.” In re Welton, 448 B.R. 76 (Bankr. M.D. Fla. 2011) *citing* In re Dinan, 2007 Bankr. LEXIS 556 (Bankr. D. Mass. Feb. 15, 2007). As one court put it:

Domicile is established by physical presence in a place in connection with a certain state of mind concerning one’s intent to remain there...[o]ne can reside in one place but be domiciled in

another...[a] person can have but one domicile, which when once established, continues until he renounces it and takes up another...

In re Dufva, 388 B.R. 911, 914 (Bankr.W.D. Mo. 2008). Thus, a person establishes domicile by being “physically present in a location with an intent to remain there.” In re Capps, 438 B.R. 668, 672 (Bankr. D. Idaho 2010). When determining whether a person has established a new domicile, a court must evaluate all relevant facts and circumstances because no single factor can conclusively establish domicile. In re Ring, 144 B.R. 446, 450 (Bankr. E.D. Mo. 1992); See also In re Hodgson, 167 B.R. 945, 950 (D. Kan. 1994).

In District of Columbia v. Murphy, 314 U.S. 441 (1941), the United States Supreme Court discussed several factors a court should consider when determining a person’s domicile. These factors include: current residence, voting registration and practices; location of spouse and family; location of personal and real property; location of brokerage and bank accounts; membership in churches, clubs, and other organizations; location of the person’s doctors, dentist, accountant and lawyers; place of employment or business; driver’s license and automobile registration; and payment of taxes. Id. All of these factors are evidence of intent to establish a domicile in a particular location.

In this case, the Court finds that the Debtor’s domicile was not located in Florida for the two years immediately preceding the filing of his bankruptcy petition. The evidence clearly shows that the Debtor was not physically present in Florida for the 730-day period with an intent to remain in the state indefinitely. The Court reaches this conclusion for the following reasons:

(a) The Debtor used his New Jersey address on the following documents: Chapter 11 Petition filed on April 26, 2009; Federal Tax Returns from the years 2006, 2007 and 2008; 2009 insurance applications for three motor vehicles owned in whole or in part by Debtor; three proofs of claim which were filed by Debtor in his own bankruptcy proceeding on January 11, 2010; various letters sent to the United States Bankruptcy Court for the District of New Jersey, the United States District Court for the District of New Jersey, the United States Attorney's Office, and the United States Trustee’s Office.

(b) The Debtor owned the New Jersey Property, which he used as his address during the period from April 2007 until at least March 29, 2010, when the Debtor filed his first Change of Address form with the Court. The Debtor also used the New Jersey Property as his address in the following instances, among others: (i) bank accounts maintained at PNC Bank and Cape May Bank; (ii) Wachovia Investment Account Statement for 2008; (iii) 2010 boat registration; (iv) 2010 Florida vehicle registration; (v) 2009 insurance application for three motor vehicles; (vi) communications from his financial advisor at Wells Fargo Advisors, LLC; (vii) and pleadings filed continuously with this Court.

(c) The account statements of the Debtor’s bank accounts at Cape May Bank and PNC Bank indicate that Debtor’s address on file was the New Jersey Property.

(d) The Debtor was employed in New Jersey up and until the Petition Date and thereafter, as he was operating eight Burger King franchises in New Jersey in which he had an ownership interest. In a pleading filed by the Debtor on November 24, 2010 in the Adversary Proceeding No. 10-01435 regarding turnover of two of Debtor's jointly owned vehicles, the Debtor stated:

The detriment to the Defendant[s] is significant if they are deprived of this property...[t]he Debtor maintains that the availability of an automobile is critical to his efforts to secure a living and to conduct this matter...how would he appear in Camden if he was deprived of a vehicle.

See Doc. 22, Adv. No. 10-01435, p. 2.

(e) The Debtor's spouse was a volunteer in the State of New Jersey during the time in question. In a pleading filed by the Debtor on November 24, 2010 in the Adversary Proceeding No. 10-01435 regarding turnover of two of Debtor's jointly owned vehicles, the Debtor stated:

Michelle has worked as a nurse for forty years. At this time she is a volunteer for Atlanticare Hospice and she is a valued asset of the program... [a]t this time her patients are located anywhere between Cape May and Manahawkin.

See Doc. 22, Adv. No. 10-01435, p. 2.

(f) On numerous occasions the Debtor has indicated to the Court that he was unable to attend hearings due to medical conditions and when asked to provide documentation, said documentation revealed that the doctor caring for the Debtor was located in the State of New Jersey. For example, on February 22, 2011, attached to the Debtor's Motion to Amend Joint Scheduling Order was a letter from Dr. James Kauffman dated December 30, 2010. The letter from Dr. Kauffman, an endocrinologist located in Egg Harbor Township, N.J., states that "Mr Flynn is an established patient since August 2004..." See Doc. No. 35, Case No. 10-01393.

(g) Finally, the Debtor's spouse, Michelle Flynn, testified that they did not live in Florida for the majority of each and every month over the last two and a half years. The following testimony of Michelle Flynn is telling:

Q. Did you spend a couple of months there [referring to Florida] over the winter, or what did you do?

A. Yes.

Q. Did you spend the other months in New Jersey?

A. Yes.

Q. I assume Dan did likewise?

A. Yes.

...

Q. Again, that was a few months over the winter?

A. Usually two and a half.

See Exhibit D-5 (Feb. 8, 2011 Hrg.).

The evidence establishes that the Debtor was not physically present in Florida and did not live in the Florida Property for the two years preceding the filing of the Debtor's bankruptcy petition. There is virtually no evidence in the record to show that the Debtor continuously resided in Florida and used the Florida Property as his permanent address. Based upon the abundance of evidence in the record indicating that Debtor continuously resided in New Jersey for the 730 days immediately preceding the Petition Date, and based upon the complete lack of evidence to the contrary, this Court finds that the Debtor's domicile was not located in Florida for the relevant time period.

The Court acknowledges the fact that the Debtor seems to have taken affirmative steps in an effort to attain "residency" in Florida, however, his intent is not sufficient in this case to overcome the evidence establishing that he was not physically present in the state of Florida for a sufficient amount of time to satisfy the requirements for establishing a domicile. Specifically, the Debtor obtained Florida Driver's Licenses with an issuance date of April 26, 2004 listing the Florida Property address. See Exhibit D-20 (Feb. 8, 2011 Hrg.). The Debtor also provided the Court with a copy of a Florida Voter Registration Information Card, also issued on April 26, 2004. The Debtor provided the Court with copies of the "State of New Jersey Income Tax Nonresident Returns" for the tax years, 2007, 2008, and 2009. See Exhibit D-19 (Feb. 8, 2011 Hrg.). The Debtor has also provided the Court with a statement from Mutual of Omaha Bank addressed to Debtor and his spouse at the Florida Property address from January 10, 2011 showing an average daily balance of \$286.58. See Exhibit D-18 (Feb. 8, 2011 Hrg.). While the aforementioned documents may evidence some intent by the Debtor and his spouse to establish residency in Florida, for whatever purpose, this conduct alone does not defeat the overwhelming evidence contrary to Debtor's position.<sup>2</sup>

In this case, the evidence firmly establishes that the Debtor was domiciled in the State of New Jersey for the two years preceding the filing of his bankruptcy petition.<sup>3</sup> Therefore, the

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<sup>2</sup> It should also be noted that several of the documents presented by the Debtor in support of his position were only recently attained. For example: (a) the Certificate of Title for the 2008 Lexus was issued in Florida on November 29, 2010; (b) the Certificate of Title for the 2004 Mercedes Benz was issued in Florida on November 29, 2010; and (c) the Mutual of Omaha Bank statement with the Florida Property Address from Mutual of Omaha Bank only indicated activity from as far back as July 31, 2010. See Exhibits D-14, D-15, and D-18 (Dec. 9, 2010) respectively.

<sup>3</sup> Even if the Debtor was to allege and he was able to show, which he cannot, that his domicile was changed within the 730-day period, the Debtor would still not be entitled to avail himself of the Florida exemptions. §522(b)(3)(A) provides that, if a debtor's domicile has not been located in a single state within the 730-day period immediately preceding the filing of the bankruptcy petition, the debtor's exemption rights are determined according to the law of "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). This section provides that "if a debtor did not live in a state for 730 days immediately preceding the filing of the petition, the debtor's exemptions are governed by the state law where the debtor resided for the 180 days preceding the 730-

Debtor is entitled to claim any exemptions available to debtors domiciled in New Jersey. In re Johnson, 184 B.R. 141 (Bankr. D. Wyo. 1995). The State of New Jersey has not opted out of the federal exemption scheme, and consequently the Debtor should be permitted to elect the federal exemptions under §522(b)(2) or the state exemption scheme applicable to a New Jersey domiciliary available under §522(b)(3)<sup>4</sup>.

This Court will give the Debtor an additional thirty (30) days from the date of this Letter Opinion, in which to file a Second Amended Schedule C and consult with counsel if he so desires, regarding this election. The Debtor must elect either the federal exemptions available under §522(b)(2), or in the alternative, the exemptions available under §522(b)(3) which are afforded to domiciles of the State of New Jersey. If the Debtor fails to amend within the time allotted, the Debtor will be deemed to have elected the federal exemptions consistent with his Schedule C as initially filed.

Sincerely,



Gloria M. Burns,  
U.S. Bankruptcy Judge

GMB/nar

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day period. In re George, 440 B.R. 164 (Bankr. E.D. Wis. 2010) This Court would additionally find that due to the Debtor's spouse's admission, in addition to all of the other evidence referenced above, the Debtor would have been domiciled in New Jersey for the majority of the 180 days immediately preceding the 730 days preceding the Petition Date.

<sup>4</sup> On Debtor's Amended Schedule C he claims property, allegedly owned by Debtor and his wife as tenants by the entireties (the "TBE Property"), under Article 10, Section 4 of the Florida Constitution. The Debtor did not, and has not, claimed that the TBE Property is exempt under §522(b)(3)(B). However, if the Debtor were to elect the New Jersey State exemptions pursuant to §522(b)(3)(B), it is conceivable that certain real property located in Florida might be exempt under applicable non-bankruptcy law. In re Garrett, 435 B.R. 434 at 455 (Bankr.S.D.Tex. 2010) (holding that Texas law governed a North Carolina debtor's tenancy by the entirety exemption rights under §522(b)(3)(B) because the property at issue was located in Texas); See also, In re McNeilly, 249 B.R. 576, 581 (1st Cir. BAP 2000) (holding that Rhode Island law governed a Vermont debtor's tenancy by the entirety exemption rights because the property at issue was located in Rhode Island).