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NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA
FRESNO DIVISION

In re)	Case No. 09-61112-B-7
Donna Morris,)	DC No. TGM-1
Debtor.)	

**MEMORANDUM DECISION REGARDING TRUSTEE’S
OBJECTION TO CLAIM OF AMENDED EXEMPTION**

This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

Trudi G. Manfredo, Esq., of The Law Office of Trudi G. Manfredo, appeared on behalf of the chapter 7 trustee, James E. Salven (the “Trustee”).

William C. Collier, Esq., of McDonald & Collier, appeared on behalf of the debtor, Donna Morris who also was present and addressed the court (the “Debtor”).

The Trustee objects to the Debtor’s amended homestead exemption (the “Objection”). The Debtor’s residence appears to be unencumbered and the Debtor has exempted its full value, scheduled in the amount of \$170,000. The Debtor contends that the full exemption is proper because she is permanently disabled and eligible for an exemption under California law up to \$175,000. For the reasons set forth below, the Objection will be sustained. The Debtor’s homestead exemption will be allowed in the amount of \$75,000.

1 This memorandum decision contains the court's findings of fact and
2 conclusions of law required by Federal Rule of Civil Procedure 52(a), made
3 applicable to this contested matter by Federal Rule of Bankruptcy Procedure
4 7052. The court has jurisdiction over this matter under 28 U.S.C. § 1334, 11
5 U.S.C. § 522,¹ and General Orders 182 and 330 of the U.S. District Court for
6 the Eastern District of California. This is a core proceeding as defined in 28
7 U.S.C. §§ 157(b)(2)(A) & (O).

8 **Background and Findings of Fact.**

9 The Debtor filed a voluntary petition under chapter 7, without the
10 assistance of legal counsel, on November 13, 2009. On schedule A, the Debtor
11 valued her single family residence located in Coarsegold, California, at \$75,000
12 (the "Coarsegold Residence" or the "Residence"). The Debtor claimed the
13 basic homestead exemption for the Residence under California Code of Civil
14 Procedure § 704.730(a)(1) in the amount of \$75,000.² The Debtor's schedule I
15 states that she was unemployed and living off of the income from some rental
16 property in the amount of \$2,200 per month.³ The schedules do not reveal the
17 receipt of any disability income. The meeting of creditors concluded on
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20 ¹Unless otherwise indicated, all bankruptcy, chapter, code section and rule
21 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and to the Federal Rules
22 of Bankruptcy Procedure, Rules 1001-9036, as enacted and promulgated *after* October
23 17, 2005, the effective date of The Bankruptcy Abuse Prevention and Consumer
24 Protection Act of 2005, Pub. L. 109-8, Apr. 20, 2005, 119 Stat. 23.

25 ²Unless otherwise indicated, all references to statutory exemption law are to the
26 California Code of Civil Procedure ("Cal.CCP").

27 ³The Debtor also scheduled a "rental property" in Seaside, California, which she
28 valued at \$134,000. The court recently approved a sale of the Seaside property for
\$280,000.

1 January 29, 2010. The Trustee did not object to the original homestead
2 exemption, but he did file a notice that there would be assets for distribution to
3 unsecured creditors.

4 The Trustee contends that the Coarsegold Residence has a value of
5 approximately \$229,000. After the Debtor unsuccessfully tried to convert the
6 case to chapter 13, the Trustee filed an application to employ a real estate
7 broker to sell the Coarsegold Residence. The Debtor then moved
8 unsuccessfully to dismiss the case. On June 9, 2010, the Debtor amended her
9 schedules to increase the value of the Coarsegold Residence to \$185,000 and to
10 increase the exemption for the Residence to \$175,000 pursuant to Cal.CCP
11 § 704.730(a)(3). The amended schedules stated for the first time that the Debtor
12 is disabled.

13 The Trustee timely objected to the amended homestead exemption. On
14 September 3, 2010, after the Trustee filed his Objection, the Debtor again
15 amended her schedules to value the Coarsegold Residence at \$170,000. She
16 amended her exemption schedule to exempt the full value of the property.

17 **Issues Presented.**

18 The Trustee's position is that the Debtor is not eligible for the homestead
19 exemption claimed in the amended schedules, and that the Debtor qualifies only
20 for the basic \$75,000 homestead exemption claimed in original schedules. That
21 question turns on whether the Debtor is "disabled" within the meaning of the
22 California exemption statute. The Debtor contends that she has been disabled
23 and unemployed continuously since 2000 due to a work-related injury to her
24 back that occurred in 1996. The Debtor asserts that she is unable to engage in
25 "substantial gainful employment" as a result of her disability. In support of his
26 Objection, the Trustee filed a declaration, based on the Debtor's testimony at
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1 the meeting of creditors, stating that the Debtor applied for and was denied
2 disability benefits by the Social Security Administration on three occasions.
3 The Trustee also contends that the homestead exemption was amended in bad
4 faith in an effort to frustrate his ability to sell the Coarsegold Residence after he
5 discovered that it had been grossly undervalued on the original schedules.

6 **Analysis and Conclusions of Law.**

7 **Applicable Law.** “Exemptions serve to protect and foster a debtor’s
8 fresh start from bankruptcy.” *In re Rolland*, 317 B.R. 402, 412-13 (Bankr. C.D.
9 Cal. 2004), citing *In re Hice*, 223 B.R. 155, 157 (Bankr. N.D. Ill. 1998).
10 “Under the [Bankruptcy] Code and California law, exemptions are to be
11 construed broadly and liberally in favor of the debtor.” *Rolland*, 317 B.R. at
12 413, citing *In re Arrol*, 207 B.R. 662, 665 (Bankr. N.D. Cal. 1997).

13 The issue here is whether the Debtor is entitled to claim a homestead
14 exemption of \$175,000 under § 704.730(a)(3)(B), or whether the homestead
15 exemption should be limited to \$75,000 under § 704.730(a)(1). Section
16 704.730(a) provides three different exemption amounts depending on a debtor’s
17 particular circumstances, of which only two are at issue here.

18 Section 704.730(a)(1) allows a basic homestead exemption of \$75,000
19 *unless*,

20 the judgment debtor or spouse of the judgment debtor who resides in the
21 homestead is at the time of the attempted sale of the homestead a member
22 of a family unit, and there is at least one member of the family unit who
owns no interest in the homestead or whose only interest in the homestead
is a community property interest with the judgment debtor.

23 The Trustee does not dispute that the Debtor qualifies for a homestead
24 exemption under § 704.730(a)(1). He asks that the exemption be allowed based
25 on this section. However, § 704.730(a)(3)(B) allows a homestead exemption of
26 \$175,000 (the “Disability Exemption”) if,

1 the judgment debtor or spouse of the judgment debtor who resides in the
2 homestead is at the time of the attempted sale of the homestead any one of
the following:

3 *A person physically or mentally disabled who as a result of that disability*
4 *is unable to engage in substantial gainful employment.* There is a rebuttable
5 presumption affecting the burden of proof that a person receiving disability
6 insurance benefit payments under Title II or supplemental security income
payments under Title XVI of the federal Social Security Act satisfies the
requirements of this paragraph as to his or her inability to engage in
substantial gainful employment. (Emphasis added.)

7 Section 704.730(a)(3)(B) sets forth a two-part test to determine if a
8 debtor is eligible for the Disability Exemption. A debtor must (1) have a
9 physical or mental disability, and (2) as a result of that disability, be unable to
10 engage in substantial gainful employment. These two conditions must exist as
11 of the date of the bankruptcy petition. *In re Rostler*, 169 B.R. 408, 411 (Bankr.
12 C.D. Cal. 1994), citing *In re Dore*, 124 B.R. 94, 98 (Bankr. S.D. Cal. 1991).
13 The Trustee therefore, as the objecting party, has the initial burden of rebutting
14 the presumption in favor of the exemption's validity; he must make a showing
15 that the Debtor is "unable to satisfy one or more elements of California Code of
16 Civil Procedure section 704.730(a)(3)(B)." *Rolland*, 317 B.R. at 419. Fed. R.
17 Bankr.P. 4003(c).

18 Although the two elements are separately stated in the statute, logic
19 suggests that they are mutually interdependent. The second element must exist
20 "as a result of" the first element. However, a finding for the Debtor on the
21 second element would tend to compel a finding for the Debtor on the first
22 element as well. It would be almost nonsensical to find that a debtor is "unable
23 to engage in substantial gainful employment" and also conclude that this
24 condition is not caused by some physical or mental disability. The term
25 "unable" as used in the Disability Exemption statute relates to the claimant's
26 physical and mental abilities, and requires substantially more than a showing
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1 that the claimant is merely “unemployed.” *Dore*, 124 B.R. at 97 (interpreting
2 the term “unable to take care of or support himself or herself” in
3 § 704.710(b)(2)(D)).

4 Turning to the first element of § 704.730(a)(3)(B), the Trustee asserts
5 that the Debtor is not disabled. Section 704.730(a)(3)(B) does not define the
6 terms “disabled” or “disability.” Mental disabilities are often harder to ascertain
7 than physical disabilities. *See Rostler*, 169 B.R. at 411 (stating “[i]n general,
8 mental disorders cannot be ascertained and verified like physical illnesses
9 because, unlike other parts of the body, the mind cannot be probed by
10 mechanical devices to obtain objective clinical manifestations of mental
11 illness.”).

12 In *Rolland*, the debtor was suffering from severe depression. Mrs.
13 Rolland’s doctor testified, by declaration, that she was treating Mrs. Rolland for
14 depression. The doctor diagnosed her as suffering from severe depression, and
15 opined that Mrs. Rolland was mentally disabled. In *Rostler*, the debtor suffered
16 from memory deficiency and mental confusion. Ms. Rostler’s doctor diagnosed
17 her as having Eosinophilia Myalgia Syndrome (“EMS”) and concluded that Ms.
18 Rostler was incapable of substantial gainful employment. Ms. Rostler also
19 testified that she had the symptoms of EMS when she filed her petition. In both
20 *Rolland* and *Rostler*, each court found that the first requirement of
21 § 704.730(a)(3)(B) was satisfied. In each case, the trustee failed to offer
22 evidence to respond to or contradict the debtor’s evidence, and failed to meet
23 the burden of proof on that issue.

24 As to the second factor, the court must decide whether the Debtor is
25 unable to engage in substantial gainful employment as a result of her disability.
26 Section 704.730(a)(3)(B) does not define the term “substantial gainful
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1 employment,” and California courts have provided little guidance with
2 interpreting the term. In what appeared to be a case of first impression, the
3 *Rostler* court tried to define the term “substantial gainful employment” as used
4 in § 704.730(a)(3)(B). The court first looked to the rebuttable presumption
5 found in § 704.730(a)(3)(B), that one is presumed to be unable to engage in
6 substantial gainful employment if he or she is receiving Social Security
7 disability benefits. *Rostler*, 169 B.R. at 412. To qualify for benefits under the
8 Social Security Act, one must be unable to engage in “substantial gainful
9 activity.” Because the statutory presumption refers to the Social Security Act,
10 and the operative language in the Act and the State statute are virtually
11 identical, the court looked to cases interpreting the Social Security Act to define
12 the term “substantial gainful employment.” *Id.* Looking to the case of *Corrao*
13 *v. Shalala*, 20 F.3d 943 (9th Cir. 1994),⁴ for guidance, the *Rostler* court
14 determined that to meet the second requirement of § 704.730(a)(3)(B), the
15 debtor must have been unable to “(1) perform meaningful mental or physical
16 work-related activity; (2) in a competitive or self-employed position; (3) that
17 normally results in pay or profit.” *Rostler*, 169 B.R. at 413.

18 Before embarking on this analysis, this court would interject two caveats.
19 First, there is no requirement that a debtor qualify for government benefits of
20 any kind to be “disabled” within the meaning of the Disability Exemption; there
21 is no reason that a debtor cannot prove “disability” without ever having applied
22 for Social Security benefits.

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25 ⁴ The *Corrao* court held that “the definition of ‘substantial gainful activity’ under
26 the Act focuses on the nature of the claimant’s work activities.” *Rostler*, 169 B.R. at 412.
27 The *Corrao* court held that “work activity is ‘substantial’ if it involves significant
28 physical or mental activities[,]” and “[w]ork activity is ‘gainful’ if it is the kind of work
usually done for pay or profit, whether or not a profit is realized.” *Id.*

1 Second, the Disability Exemption, by its own terms, qualifies the term
2 “gainful employment” with the adjective “substantial.” It is clear from the
3 statute, and the *Rostler* test, that “any employment,” or even “part-time
4 employment” does not necessarily rise to the level of “substantial” or “gainful”
5 employment. Even, as here, a debtor’s physical and mental ability to move
6 around and care for herself does not necessarily equate to an ability to (1) get
7 employed by an employer trying to make a profit in a competitive environment,
8 or (2) make an income from such employment that is “substantial.” The *Rostler*
9 court observed that a work activity is “substantial” if it involves significant
10 physical or mental activities. 169 B.R. at 412, citing *Corrao*, 20 F.3d at 946.
11 However, the term “substantial” also modifies the term “gainful,” which
12 suggests that the debtor must be physically, mentally and emotionally able to
13 work enough hours, at a high enough net wage, to overcome the inherent costs
14 of that employment, such as transportation, and materially contribute to his or
15 her support.

16 **Presumption of Validity and the Burden of Proof.** A claimed
17 exemption is “presumptively valid.” *Carter v. Anderson (In re Carter)*, 182
18 F.3d 1027, 1029 n.3 (9th Cir. 1999). In *Carter*, the Ninth Circuit prescribed the
19 presumption and burden of production that govern the procedure for objecting
20 to a claim of exemption as follows:

21 Once an exemption has been claimed, it is the objecting party’s burden
22 (the trustee in this case) to prove that the exemption is not properly
23 claimed. *See* Fed. R. Bankr.P. 4003(c). Initially, this means that the
24 objecting party has the burden of production and the burden of
25 persuasion. The objecting party must produce evidence to rebut the
26 presumptively valid exemption. *In re Lester*, 141 B.R. 157, 161
27 (S.D. Ohio 1991). If the objecting party can produce evidence to rebut
28 the exemption, the burden of production then shifts to the debtor to come
forward with unequivocal evidence to demonstrate that the exemption is
proper. *See In re Moneer*, 188 B.R. 25, 28 (Bankr.N.D.Ill.1995);
Fed.R.Evid. 301. The burden of persuasion, however, always remains
with the objecting party. . . .

1 The Debtor may amend her exemption schedule at any time as a matter
2 of course. However, the court is not required to allow the amended exemption
3 upon a showing by the Trustee that the exemption was amended in bad faith.
4 *Arnold v. Gill (In re Arnold)*, 252 B.R. 778, 784 (9th Cir. BAP 2000). In the
5 Ninth Circuit, the Trustee's burden of persuasion is by a preponderance of the
6 evidence. *Tyner v. Nicholson (In re Nicholson)*, __ B.R. __, 2010 WL 3312590
7 (9th Cir. BAP 2010).

8 Here, the evidence shows that the Debtor's injury occurred 14 years
9 before she filed her bankruptcy petition. She apparently continued to work in
10 some capacity for four more years before she applied to the Social Security
11 Administration for disability benefits. The Debtor is not currently receiving any
12 disability income and her request for disability benefits has been denied three
13 times by the Social Security Administration. The evidence offered by the
14 Trustee includes a copy of a letter produced by the Debtor, a letter dated
15 November 2, 2000, from the Social Security Administration which explains
16 why the Debtor's request for benefits was denied. The letter is particularly
17 prejudicial to the Debtor's position. It states in pertinent part:

18 We are writing about your claims for Social Security and
19 Supplemental Security Income (SSI) disability benefits. Based on
20 a review of your health problems you do not qualify for benefits
on either claim. *This is because you are not disabled or blind*
under our rules.

21 . . .

22 *We have determined that your condition is not severe enough to*
23 *keep you from working.* We considered the medical and other
24 information, your age, education, training, and work experience in
determining how your condition affects your ability to work.

25 . . .

26 The medical evidence shows that you experience discomfort due
27 to your back. However, you retain the ability to move about
without assistance. You are able to attend to your own personal

1 needs and perform most of your daily activities. There is no
2 indication of significant muscle weakness or nerve damage. Back
3 x-ray and MRI shows no evidence of abnormalities. (Emphasis
4 added.)

5 The Trustee also states in his declaration that the Debtor never
6 mentioned her disability during the meeting of creditors. Of course, at that time
7 the Debtor was not claiming the Disability Exemption and the issue would not
8 have been particularly relevant. He also notes that the Debtor failed to fairly
9 and accurately value the Coarsegold Residence and failed to disclose her
10 “disability” until after the Trustee began the process of trying to sell the
11 Coarsegold Residence, facts which suggest that the homestead exemption was
12 amended in bad faith. Bad faith, in the context of amended exemptions, is
13 determined by the totality of the circumstances. *Rolland*, 317 B.R. at 414.
14 Based on this record, the court concludes that the *prima facie* presumption of
15 validity has been rebutted for the Disability Exemption. The Debtor therefore
16 has the burden of producing some evidence to show that she is eligible for the
17 Disability Exemption.

18 **The Debtor’s Evidence Does Not Support the Disability Exemption.**

19 There is no dispute here that the Debtor is unemployed. She blames the
20 failure to timely disclose her “disability” on the “paralegal” who prepared her
21 bankruptcy schedules. However, paralegals are not lawyers. As a matter of
22 law, paralegal “petition preparers” are only authorized to prepare bankruptcy
23 documents based on information provided by the debtors. The Debtor offers no
24 explanation for her failure to review and approve the schedules after they were
25 typed and before they were filed. Similarly, she offers no explanation for her
26 failure to fairly value the Coarsegold Residence in the initial schedules until
27 after the Trustee began the process to sell it. The Debtor had a duty to file

1 complete and accurate schedules, and she had an absolute duty to review and
2 approve the content of those schedules before she signed them under penalty of
3 perjury. The failure to do so can have significant consequences. *See Kavanagh*
4 *v. Leija (In re Leija)*, 270 B.R. 497, 503 (Bankr. E.D. Cal. 2001) (debtor's
5 execution of "blank" schedules which were subsequently filled with inaccurate
6 information, and which he did not review, constituted a false oath and grounds
7 to deny his discharge). The court may accept representations of fact in the
8 Debtor's schedules as an admission of fact under Fed.R.Evid. 801(d)(2) even if
9 she subsequently amended the schedules to change the disputed information.
10 *Heath v. American Express (In re Heath)*, 331, B.R. 424, 431 (9th Cir. BAP
11 2005). Statements in bankruptcy schedules are executed under penalty of
12 perjury and when offered against a debtor are eligible for treatment as judicial
13 admissions. The Debtor may not adopt a cavalier attitude toward the accuracy
14 of her schedules by arguing that they are not precise and correct. When
15 schedules are amended, the old schedules do not become nullities. They are
16 still fully subject to consideration by the court as an evidentiary admission. *In*
17 *re Bohrer*, 266 B.R. 200, 201 (Bankr. N.D. Cal. 2001).

18 With her initial opposition, the Debtor lodged copies of correspondence
19 to and from various medical providers relating to the Debtor's medical issues.
20 The documents were not supported by a declaration from the Debtor's
21 physician. The Trustee objected to the admissibility of these documents
22 because they were not authenticated, they constitute hearsay, and they lack
23 foundation. That evidentiary objection is well taken. The court cannot consider
24 the documents submitted by the Debtor as evidence to support a finding that she
25 is "disabled" within the meaning of Cal.CCP § 704.130(a)(3)(B).

26 After oral argument on the Objection, the court granted additional time
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1 for the Debtor to obtain and produce supplemental evidence to support her
2 Disability Exemption claim. In that application, the Debtor stated that she had
3 not seen her doctor for more than one year and that the doctor was “unwilling to
4 sign any declaration stating that [the Debtor] was unable to engagement [sic] in
5 substantial employment.” The Debtor requested additional time to see another
6 doctor.

7 After the extension of time, the Debtor filed a supplemental response
8 which refers to additional documents, Exhibits A and B. Unfortunately, the
9 additional documents were not filed with the supplemental response. They are
10 not part of the evidentiary record, and cannot be considered by this court.⁵ The
11 Debtor relies solely on the documents she has lodged, or tried to lodge, with the
12 court to show that she is “disabled” within the meaning of Cal.CCP
13 § 704.130(b)(3). It is undisputed that the Debtor has been unemployed since
14 2000, but she has also been enjoying an income from her rental property in
15 Seaside, California, during some or all of that time. She offers no evidence or
16 discussion regarding her educational background, her qualifications for
17 employment, or her efforts to seek alternative “gainful” employment since she
18 first applied for disability benefits in 2000.

19 **Conclusion.**

20 Based on the foregoing, the court is not persuaded that the Debtor is
21 physically or mentally disabled such that she is unable to engage in substantial
22 gainful employment. Accordingly, she is not entitled to claim a homestead
23 exemption in the amount of \$175,000 under Cal.CCP § 704.730(a)(3)(B). The
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25 ⁵The Trustee filed a reply to the supplemental response which suggests that
26 Exhibits A and B were served on the Trustee. The Trustee raised the same foundational
27 evidentiary objection to the supplemental response. Because those documents are not in
28 the evidentiary record, the court need not rule on their admissibility.

1 Trustee's Objection will be sustained. The Debtor's homestead exemption in
2 the Coarsegold Residence will be allowed under Cal.CCP § 704.730(a)(1) in the
3 amount of \$75,000.

4 Dated: October 7, 2010

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6 /s/ W. Richard Lee
7 W. Richard Lee
8 United States Bankruptcy Judge
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