Declaration of Homestead Extends to Adjacent Parcels

A debtor who, at the time of homestead declaration, was actively using adjoining parcels he owned was entitled to homestead protection on those parcels, the Bankruptcy Appellate Panel for the 1st Circuit has decided.

U.S. Bankruptcy Court Judge Henry J. Boroff had reviewed the steps that the debtor had taken toward splitting his land into four lots, one of which was contemplated as the possible site of a new home and the other two of which would be donated and preserved as open space. Boroff concluded that he "simply [did] not believe that the debtor ever rescinded his intention to subdivide the property."

But the BAP said Boroff's analysis was faulty.

Boroff's focus should not have been on the debtor's intent to subdivide the property between 2004 and 2011, but on his family's actual use of the property at the time of the declaration in 2013, Judge Bruce A. Harwood said on behalf of the three-judge BAP panel.

"When a debtor actually occupies property and uses the surrounding land in connection with his principal residence, his past or future intention regarding the property is not controlling," Harwood added.

The 25-page decision is *In Re: Nealon, Christian,* Lawyers Weekly No. 03-004-16.

An uphill battle

The debtor's Boston attorney, Richard N. Gottlieb, said that he found Boroff's analysis "surprising." Nonetheless, he said he thought long and hard about whether to file the appeal, knowing that the challenge of overturning the judge's factual determinations would be an "uphill climb."

While the judge got caught up in the status of the subdivision — the debtor's claim was that the effort had been abandoned in 2011, two years before the homestead declaration; the creditor argued his efforts were "continuous and active" — that issue proved to be a "red herring," according to Gottlieb.

"It only confused the matter, in retrospect," he said.

The lesson fellow attorneys should take from his battle is to "keep your eye on the ball," Gottlieb said, even as your opponent is "focusing on extraneous issues" and, in this case, taking a lower court judge along for the ride.

Gottlieb not only pointed the BAP to a line of Massachusetts bankruptcy decisions that established the standard it should apply, but he also was able to illustrate that, in the words of the Supreme Judicial court in the 1996 case *Dwyer v. Cempellin,* the state homestead exemption "should be construed liberally in favor of the debtors."

For example, past cases have maintained the homestead exemption applies to a property where a debtor had left the homestead property (but where his spouse and minor children remained), and also applies to the entirety of properties from which the resident-owner may be deriving rental income.

“Very few states provide the protection that the Commonwealth of Massachusetts does for homeowners,” Gottlieb said. “Essentially, it needs to be utilized more by lawyers who represent consumers in Massachusetts.”

The creditor’s Boston counsel, Jason A. Webber, argued that a greater degree of deference should have been given to Boroff’s fact-finding. He said he and his client were still reviewing their options in light of the BAP’s decision.

Sharing Webber’s viewpoint is Adam J. Ruttenberg, co-chairman of the Boston Bar Association’s Bankruptcy Section. The types of property usage that the debtor outlined could be seen as either peripheral or integral to his enjoyment of his homestead.

Between Boroff and the BAP, “I can’t tell who got it right,” Ruttenberg said, suggesting that Boroff’s determination should have carried the day.

But Michael J. Goldberg, who helped draft the 2010 amendments to the homestead statute, thinks the BAP decided the case properly. He noted that, to the extent there is prior case law on the issue, courts have been “disinclined to lop off a parcel and exclude it” from the homestead.

The decision reinforces that the threshold of what constitutes “use” in this context is “pretty low,” the Boston attorney added. He noted that use of land for playing, hunting or fishing, or simply providing a buffer or privacy screen has been found to qualify.

While consistent with precedent, the subjective analysis employed by the BAP is a reminder that, unlike in much of bankruptcy law, there is some unpredictability for creditors with the homestead exemption, said Boston’s Richard L. Levine.

“In law, you have to deal with the hand you are dealt,” he said.

The statute may limit the exemption monetarily (up to $500,000), but it does not do so geographically, Goldberg noted. Given that, Massachusetts creditors have never been granted a right of partition, even in large parcels. A finding for the creditor here would have been the functional equivalent, Goldberg said.

“I don’t think we’re going there,” he added.

Gottlieb argued successfully that Boroff had placed a burden on his client that never should have been there. He asserted that the creditor did not meet her burden to produce evidence that his client neither occupied nor intended to occupy the entirety of his property at the time of the homestead declaration.

But even if the burden had shifted back to his client, Gottlieb said he had produced “uncontroverted testimony and photographs” that established use of the land by the client and his family.

Boroff simply “focused on the wrong time” — the stretch of development-related activity between 2004 and 2011 — and “discounted down to nothing” the debtor’s testimony about his use of the property, Goldberg said.

However, the BAP’s holding, he added, establishes that “if there is testimony about actual use and conflicting testimony about intent, actual use is more important.”

Goldberg agreed that the BAP seemed to be adhering to the SJC's guidance in *Dwyer* to construe the exemption liberally, at least when, as here, there is a "textual basis for doing so."

Plans go awry

Christian and Lynette Nealon bought their home on a 13-acre lot in Hopkinton in 2005, financing the purchase with a mortgage from Milford Federal Savings & Loan.

Over the next several years, Christian Nealon, a contractor, took several steps toward subdividing the property. The plan was to create a new 169,000-square-foot lot, Lot 2A, on which he would build a home for his family, while two other lots, Lots 2C and 2D, consisting mainly of wetlands, would be preserved as open space through the granting of a conservation easement.

After several hearings, the Hopkinton Planning Board on Sept. 30, 2009, approved the subdivision plan with several conditions.

The Nealons' plans to place the conservation restriction on Lots 2C and 2D hit a snag in March 2011, however, as they were going through the checklist of steps required by the Executive Office of Energy and Environmental Affairs, Division of Conservation Services. Milford Federal Savings & Loan demanded the Nealons pay down their mortgage by $70,000 before it would partially release its mortgage.

That essentially ended the plans for the subdivision and new home, the Nealons later explained. However, in November 2011, they executed and recorded a Declaration of Restrictive Covenant, limiting the area of wetlands alterations that could take place on the property.

More than two years later, in December 2013, they filed their homestead declaration. Christian Nealon's Chapter 7 bankruptcy petition followed in April 2014.

Among his creditors was Theresa Matthews, at whose Wayland home Nealon had been the general contractor for an extensive renovation project that had gone awry, leading to an arbitration award of more than $280,000 in her favor.

In July 2014, Matthews objected to Nealon's homestead declaration, asserting that it should apply only to Lot 2B, on which his home sat, and not the other three lots in the subdivision.

At the April 9, 2015, evidentiary hearing on the objection, Nealon and his wife described the family's use of the vacant lots surrounding his house both before and after the filing of the homestead declaration for sledding, snowshoeing, cross-country skiing, hiking, snowboarding, riding off-road vehicles, storing boats during the winter, and gathering lumber, firewood and holiday greens. In some cases, they supplemented their testimony with photographs.

In an oral ruling from the bench, Boroff explained his decision was based, "at least in part," on the Nealons' credibility.

Nealon then appealed.

Broad interpretation of 'home'

In the absence of guidance from the SJC or the 1st Circuit on the central issue in the case, the BAP turned to a line of Massachusetts bankruptcy cases it found to be on all fours with *Nealon.*

Chief among them was a pair of cases also involving contiguous parcels, *In re: Edwards* and *In re: Fiffy*. In *Edwards*, a later-acquired vacant lot was found to be part of a homestead after the debtor testified that his daughter played on the parcel, he had landscaped a portion of the land, built a shed and a dog run, and constructed a wildflower garden.

The creditors argued that the parcel had been purchased as an investment and possible site of a home the debtor might one day build for his daughter. But that argument failed to hold sway.

In *Fiffy*, the debtor prevailed after the BAP determined that the Bankruptcy Court below had failed to conduct a "fact-specific inquiry into the nature and use, or the intended use" of the contested lot. The debtor had testified that he used the lot to maintain the privacy of his home, as well as for hiking and picnics. He also had a boat ramp, grew Christmas trees and stored landscaping materials on it.

The BAP contrasted the cases with *In re Kology*, in which a debtor was found to have only once, a year before trial, scavenged the lots in question for broken branches to fuel his woodstove. In that case, the debtors' homestead exemption was limited to the lot upon which their home was located.

"It is apparent from cases such as *Edwards, Fiffy*, and *Kology* that, in determining whether parcels adjacent to the property on which a debtor's home is located are part of the debtor's principal residence for purposes of the Massachusetts homestead statute, Massachusetts bankruptcy courts primarily examine the debtor's actual use (if any) of the adjacent parcels, rather than the configuration of the land or the debtor's subjective intent with respect to the adjacent parcels," the BAP wrote.

While Boroff had acknowledged the Nealons' various activities, his focus remained on their plans for the land, calling their activities "neither consistent nor inconsistent with any intention to retain the property."

However, the BAP concluded that, based on cases such as *Edwards*, *Fiffy* and *Kology*, "these are precisely the kinds of activities that establish a debtor's use and occupancy of surrounding land in connection with a principal residence for purposes of the Massachusetts homestead statute."

By: Kris Olson