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THE AVAILABILITY OF FLORIDA'S WILDCARD PERSONAL PROPERTY EXEMPTION TO DEBTORS OWNING HOMESTEAD PROPERTY AND NOT CLAIMING A HOMESTEAD EXEMPTION

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Recently, a Florida Bankruptcy Court discussed whether a debtor in bankruptcy who owns a home worth less than the balance on his mortgage may claim the wildcard personal property exemption found in Fla. Stat. § 222.25 and still keep his homestead. *In re Iuliano*, 2010 WL 5452726 (Bkrtcy. M.D. Fla. Dec 28, 2010) (pdf).

The facts of the case are very common in 2011. The debtor purchased his primary residence several years ago, when the housing market was booming, and established the property as his homestead under Art. X, s. 4(a)(1) of the Florida Constitution, which exempts from forced sale and from judgment lien the primary residence of an individual and his family, and therefore excludes the residence from property of the individual's bankruptcy estate. The debtor mortgaged the property up to the then-current value, but since then, the property value has decreased at a rate much higher than the rate at which the mortgage is being paid down. As a result, the property is 'underwater'- the balance on the mortgage is substantially higher than the current value of the property, and the debtor therefore has no equity in the property.

At some point, the debtor ran into financial difficulties and filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code, seeking a discharge of his debt. In completing his bankruptcy schedules, the debtor did not claim the homestead exemption. If he had, the bankruptcy trustee could make no claim on the debtor's residence under the Florida Constitution. However, if the debtor claimed the homestead exemption on real property, the debtor could only exempt his personal property up to $1,000 in value, under Art. X, s. 4(a)(2) of the Florida Constitution. Choosing not to claim the homestead allows the debtor to exempt personal property up to $4,000 in value, according to Fla. Stat. § 222.25(4) (the "wildcard exemption"), which exempts:

> *"[a] debtor's interest in personal property, not to exceed $4,000, if the debtor does not claim or receive the benefits of a homestead exemption under s. 4, Art. X of the State Constitution."*

The bankruptcy trustee objected to the debtor's wildcard exemption claim and moved in the alternative for an order directing the debtor to turnover his homestead property, arguing that the debtor can't have his cake and eat it too- he is not entitled to claim the wildcard property exemption and keep his homestead. The debtor countered that he is not "claim[ing] or receiv[ing] the benefits of" the homestead exemption, inasmuch as there is no equity in his property for him to exempt, and he is therefore entitled to the wildcard exemption.

Some time ago, in *In re Dumoulin*, 326 Fed. Appx. 498 (11th Cir. 2009), the Eleventh Circuit Court of Appeals certified a similar question to the Florida Supreme Court:

> *"Whether a debtor who elects not to claim a homestead exemption and indicates an intent to surrender the property is entitled to the additional exemptions for personal property under Fla. Stat. § 222.25(4)."*

The issue in that case is similar, although not identical. In *Dumoulin*, the debtor indicated his intent to surrender his residence; in this case, he wants to keep it. The Florida Supreme court has not issued an opinion in *Dumoulin*, although oral argument has been concluded, and an opinion is therefore expected any time. The docket sheet can be accessed on the Florida Supreme Court's website (Case No. SC09-751),

and the briefs, including an Amicus brief filed by the Business Law Section of the Florida Bar arguing that the debtor should be allowed the wildcard exemption in *Dumoulin*, can be accessed here.

A resolution of the issue turns on the meaning of 'receives the benefits' in the statute. The trustee argues that this phrase should be construed broadly to mean that anyone who owns a homestead and claims the homestead exemption for tax purposes and for asset protection purposes outside of bankruptcy, or otherwise treats the property as a homestead, has received the benefits of the homestead exemption and is therefore not entitled to the wildcard exemption, without regard to the debtor's intentions in the bankruptcy case. The debtor argues for a narrow construction of the phrase to mean that inasmuch as the debtor does not specifically schedule the property as exempt under the Florida Constitution in his bankruptcy case, the trustee may take it, and therefore the debtor is not receiving the benefits of the homestead exemption. There is a split among Florida bankruptcy courts on this issue, with authority for both arguments. See *In re Abbott*, 408 B.R. 903 (Bkrtcy. S.D. Fla. 2009) for a brief survey of cases.

The *Iuliano* court refused to wait for the Florida Supreme Court, noting that the resolution of the certified question in *Dumoulin* would not be dispositive of the issue in *Iuliano*, inasmuch as the court's finding that the debtor can claim the wildcard exemption in a case where he is surrendering his homestead would not apply to a debtor who was keeping his homestead. Additionally, the *Iuliano* court found that the bankruptcy courts could not sit around and wait indefinitely for the Florida Supreme court, suggesting that an opinion in *Dumoulin* is overdue.

The Court chose to construe the statute narrowly, allowing the debtor to claim the wildcard exemption despite his stated intention to keep his residence. The Court reasoned that in general, exemptions are to be construed liberally in favor of the party claiming the exemption, and that where there is no equity in a property to exempt, the debtor does not receive the benefits of the homestead exemption. Therefore, the trustee's objection to the debtor's wildcard exemption was overruled. Incidentally, the court held that the debtor's declining to claim the homestead exemption subjected the property to the possibility of administration by the trustee as part of the estate, but that the trustee cannot liquidate property when doing so would have no benefit to the estate, and therefore, since the debtor has no equity in the property that would accrue to the estate through a sale of the property, the trustee must abandon the property. The court did give the trustee time to find a buyer for the property that would result in satisfaction of the mortgage and additional proceeds to the estate, but not surprisingly, no such buyer could be found.

Obviously this case has broad implications for debtors, as the circumstances here are common. Readers can expect to see more discussion of the issue to the extent this case, or one similar, is appealed. We await the decision of the Florida Supreme Court in *Dumoulin*, and will report on it when it is delivered.