NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE ROSA LEE BARNES, Debtor.	BAP No. NO-03-067
ROSA LEE BARNES, Appellant, v. STEVEN W. SOULÉ, Trustee, and UNITED STATES TRUSTEE, Appellees.	Bankr. No. 03-01592-R Chapter 7 ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court
for the Northern District of Oklahoma

Before CLARK, McNIFF, and THURMAN, Bankruptcy Judges.

PER CURIAM

The parties did not request oral argument, and after examining the briefs and appellate record, the Court has determined unanimously that oral argument would not materially assist in the determination of this appeal.[1] The case is therefore ordered submitted without oral argument.

Rosa Lee Barnes, the Chapter 7 debtor, timely appeals a final Order of the

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

[1] Fed. R. Bankr. P. 8012.

United States Bankruptcy Court for the Northern District of Oklahoma[2] denying her claim of exemption in certain proceeds from the prepetition sale of her home. The parties have consented to this Court's jurisdiction because they have not elected to have the appeal heard by the United States District Court for the Northern District of Oklahoma.[3] For the reasons stated below, the bankruptcy court's Order is AFFIRMED.

I. Background

Community Bank obtained a judgment against the debtor and her now deceased husband. As a result, a judicial lien was imposed against the couple's home (Community Lien).

After the Community Lien attached, the debtor sold her home, which generated proceeds in the amount of $47,331.50 (the "Proceeds"). On the same day that her home was sold, the debtor made two transfers from the Proceeds (the "Transfers"). First, the debtor attempted to pay her sister, Elzora Ervin, $4,500 by cashiers check, but the check was returned to the debtor. The debtor also transferred $15,000 of the Proceeds to her son, Gary Barnes. In addition to the Transfers, the debtor used approximately $8,800 of the Proceeds for her personal use. It is undisputed that none of the Proceeds were used to satisfy the Community Lien.

Several months after she sold her home, the debtor filed a Chapter 7 petition. At that time, the debtor was residing in an apartment in Tulsa, Oklahoma. She turned $18,984.60 of the Proceeds, that had been held in an account at Arvest Bank, over to the Chapter 7 trustee (Trustee). Also, the uncashed cashier's check made payable to Elzora Ervin was turned over to the Trustee.

---

[2] 28 U.S.C. § 158(a)(1); Fed. R. Bankr. P. 8002(a).

[3] 28 U.S.C. § 158(c); Fed. R. Bankr. P. 8001(e).

In the debtor's "Original Schedules," she claimed $44,611.82 of the Proceeds as exempt pursuant to Okla. Stat. Ann. tit. 31, §1(A)(1) and § 2 – provisions allowing persons residing in Oklahoma a homestead exemption. The Transfers are not disclosed in the Original Schedules.

At the debtor's meeting of creditors, she testified that she has no intent to establish a new homestead. It is undisputed that the debtor has at all times been living in the apartment that she resided in on her petition date.

After the meeting of creditors, the debtor filed her "Amended Schedules" where she continued to claim the Proceeds as exempt under Okla. Stat. Ann. tit. 31, § 1(A)(1) and § 2. Her Amended Schedule C lists an exemption in the Proceeds as follows: (1) Arvest Bank account with balance of homestead proceeds in the amount of $18,984.60; (2) Bank of Oklahoma cashier's check to sister, Elzora Ervin, in the amount of $4,500.00; and (3) remaining proceeds from the sale of homestead in the amount of $23,384.60.

The Trustee timely objected to the debtor's claim that the Proceeds were exempt under the Oklahoma homestead provisions. He argued that the debtor abandoned her homestead prepetition when the home was sold, and she showed no intent to reinvest the Proceeds in a new homestead (Exemption Objection).

After the Exemption Objection was filed, Frisco Title Company (Frisco), an apparent successor in interest to Community Bank, commenced an adversary proceeding against the debtor, claiming that the debtor's debt related to Community Bank's prepetition judgment was nondischargeable under § 523(a)(6). According to Frisco, the Proceeds were not paid to it when the debtor's home was sold because the debtor had intentionally removed the Community Lien from the abstract of title before the sale.

Subsequently, the debtor responded to the Trustee's Exemption Objection, but she did not contest the Trustee's allegations (the "Response"). Rather, apparently in response to Frisco's § 523(a)(6) action, she declared that she was

entitled to a homestead exemption and that the Community Lien was avoidable pursuant to § 522(f). The debtor's Response was not served on Frisco or Community Bank.

Prior to a hearing on the Exemption Objection, the Trustee filed a Trial Brief, responding to the debtor's Response. The Trustee argued that the debtor's claimed homestead exemption in the Proceeds was not allowable under Oklahoma law and, therefore, it should be denied. The Trustee also claimed that § 522(f) had no application to the Exemption Objection, and that neither Community Bank nor Frisco were parties to the dispute. Furthermore, the Trustee maintained that if the debtor's homestead exemption were denied, the Community Lien could not be avoided under § 522(f).

At the hearing on the Exemption Objection and the debtor's Response, the debtor stipulated to the Statement of Facts contained in the Trustee's Trial Brief, and to the admission of the Trustee's trial exhibits. No other evidence was submitted. Based on the stipulated facts and admitted exhibits, the bankruptcy court entered an Order Denying Exemption, sustaining the Trustee's Exemption Objection and denying the debtor's claimed homestead exemption (Exemption Order). The court concluded:

> The Debtor having stipulated that she has abandoned her homestead, and that she has no intent to reinvest the Proceeds in another homestead, just and sufficient cause exists under controlling Tenth Circuit law to grant the Objection and disallow the Debtor's claim of exemption in the Proceeds. See In re Lewis, 216 B.R. 644 (Bankr. N.D. Okla. 1998).[4]

The Exemption Order does not mention § 522(f).

This appeal followed.

II. Discussion

The debtor maintains that the bankruptcy court's Exemption Order should

---

[4] Exemption Order at 3, *in* Appellant's Appendix at 26.

be reversed for three reasons: (1) the bankruptcy court did not allow her counsel to present argument and authority in support of her claimed homestead exemption; (2) she is entitled to a homestead exemption under Oklahoma law because although she admitted that she had no intent to reinvest the proceeds at her meeting of creditors, "it does not mean that the Debtor could not or would not invest the proceeds in another homestead after the [Community Lien] is avoided"[5]; and (3) the bankruptcy court erred in not avoiding the Community Lien pursuant to § 522(f). For the reasons stated below, we conclude these arguments are without merit.

1. Arguments related to the bankruptcy court's decision to limit argument have been waived, or the bankruptcy court did not abuse its discretion in limiting argument.

The debtor states that the bankruptcy court did not allow her counsel to present argument and authority in support of her claimed homestead exemption.[6] This argument was been waived on appeal because, other than mentioning it in her "Statement of the Case," the debtor has not explained the argument or supported it in her Brief.[7] Even if we were to consider this point of error, however, our review of the record shows that it is without merit because the bankruptcy court did not abuse its discretion in limiting argument.

The hearing transcript in this case reveals that the Trustee stated the parties' intent to stipulate to the Statement of Facts set forth in his Trial Brief. In response, the bankruptcy court requested that debtor's counsel expressly stipulate to each paragraph contained in the Statement of Facts – which he did. The

---

5 Appellant's Brief at 2.

6 Id. at 1, Statement of the Case.

7 *See, e.g.,* Ambus v. Granite Bd. of Ed., 975 F.2d 1555, 1558 n.1 (10th Cir. 1992), *modified on other grounds on reh'g*, 995 F.2d 992 (10th Cir. 1993); Abercrombie v. City of Catoosa, 896 F.2d 1228, 1231 (10th Cir. 1990) (an issue listed or mentioned in an appeal brief, but not addressed, is deemed waived).

bankruptcy court then asked debtor's counsel what he would do in defense of the Trustee's case. Counsel responded:

> Your Honor, we do not intend to present any witnesses, or any additional testimony, or evidentiary material. I believe this boils down to a legal question. And I would — I do have some authority that I would rather submit to the Court in written form if I might have a couple of days to do that.[8]

The bankruptcy court then asked counsel what his authority would say, and he responded that it would deal with Ninth Circuit case law. When counsel indicated that he had no Tenth Circuit authority on point, the bankruptcy court ruled that post-trial briefs were unnecessary because the case was decided under In re Lewis.[9] The court stated: "I don't think it would be of any benefit to anyone to extend you additional time to file a brief that has non[-]Tenth Circuit law in it, unless you can persuade me otherwise."[10] To which counsel responded: "Very well."[11]

This record shows that the debtor was given an opportunity to present argument at the hearing, but failed to do so. The bankruptcy court's decision to refuse post-trial briefs was not "an arbitrary, capricious, whimsical, or manifestly unreasonable [judgment]."[12] Counsel should have been prepared to argue his authority at the hearing. Even if it had been argued, the bankruptcy court was correct in observing that the Ninth Circuit authority alluded to was not binding on it and, therefore, post-trial briefs discussing this law were unnecessary.

2. The bankruptcy court did not err in denying the debtor's claimed homestead exemption in the Proceeds.

---

8 Transcript at 8, *in* Appellant's Appendix at 34.

9 216 B.R. 644 (Bankr. N.D. Okla. 1998).

10 Transcript at 8, *in* Appellant's Appendix at 34.

11 Id.

12 Coletti v. Cudd Pressure Control, 165 F.3d 767, 777 (10th Cir. 1999) (quotation omitted).

The debtor claimed the Proceeds exempt pursuant to Okla. Stat. Ann. tit. 31, § 1(A)(1) and § 2, Oklahoma's homestead exemption provisions, the pertinent parts of which state:

> **§ 1. Property exempt from attachment, execution or other forced sale– Bankruptcy proceedings**
>
> A. Except as otherwise provided in this title and notwithstanding subsection B of this section, the following property shall be reserved to every person residing in the state, exempt from attachment or execution and every other species of forced sale for the payment of debts, except as herein provided:
>
> 1. The home of such person, provided that such home is the principal residence of such person[.]
>
> . . . .
>
> **§ 2. Homestead--Area and value--Indian allottees--Temporary renting**
>
> . . . .
>
> C. The homestead of any person within any city or town, owned and occupied as a residence only, or used for both residential and business purposes, shall consist of not exceeding one (1) acre of land, to be selected by the owner.
>
> For purposes of this subsection, at least seventy-five percent (75%) of the total square foot area of the improvements for which a homestead exemption is claimed must be used as the principal residence in order to qualify for the exemption. If more than twenty-five percent (25%) of the total square foot area of the improvements for which a homestead exemption is claimed is used for business purposes, the homestead exemption amount shall not exceed Five Thousand Dollars ($5,000.00).[13]

The bankruptcy court denied the debtor's claimed homestead exemption in the Proceeds under these sections, relying on its decision in Lewis.[14] In Lewis, the bankruptcy court stated that a homestead exemption under Okla. Stat. Ann. tit. 31, §§ 1-2 may not be claimed if the debtor has abandoned the homestead.

---

[13] Okla. Stat. Ann. tit. 31, §§ 1(A)(1) & 2(C).

[14] 216 B.R. at 644.

Abandonment is based on the intent of the person claiming the homestead, and circumstances indicating abandonment of a homestead "include the purchase of a new homestead; relinquishment of title to the property; and declarations and actions of the parties claiming homestead tending to indicate an intent not to return."[15] Proceeds from the sale of a home may be exempt under Okla. Stat. Ann. tit. 31, §§ 1-2, but such proceeds will "retain the homestead protection from creditors [only] if there is a good faith intent to reinvest the proceeds in another homestead and the reinvestment is made within a reasonable time."[16]

The debtor has not argued that the bankruptcy court's application of Lewis is incorrect as a matter of law and, therefore, the propriety of the rules established in that case will not be considered in this appeal. Rather, the debtor contends that even if she did not have a present intent to reinvest the Proceeds in another homestead, she is still entitled to claim a homestead exemption in them because there is a possibility that she would reinvest them in a home if the Community Lien were avoided. The debtor maintains, therefore, that an intent to reinvest the Proceeds in the future is sufficient to create a valid homestead exemption. This argument is without merit for two reasons.

First, the argument has been waived. The debtor raised this argument in the first paragraph of the Argument and Authority section of her Appellate Brief, but she did not in any way expand on it or support it later in her Brief. Accordingly, we will not consider whether the debtor's intent to invest the Proceeds into a homestead in the future preserves a homestead exemption under Oklahoma law.[17]

Second, any argument based on the debtor's intent to reinvest the Proceeds

---

[15] Id. at 647-48 (citations omitted).

[16] Id. at 648 (relying on Harrell v. Bank of Wilson, 445 P.2d 266, 268 (Okla. 1968)).

[17] *See* cases cited *supra* in n.7; *see also* Phillips v. Calhoun, 956 F.2d 949, 953-54 (10th Cir. 1992) (a party must support its arguments with legal authority).

in a homestead in the future must be rejected because she presented no evidence to the bankruptcy court, much less evidence related to such intent. Not only did the debtor stipulate that she did not have an intent to reinvest the Proceeds into another homestead, but the undisputed and stipulated facts related to the Transfers and the debtor's prepetition use of the Proceeds infer that she does not have an intent to reinvest the Proceeds, and could not reinvest them even if she had the intent to do so in the future.

3. The bankruptcy court did not err in failing to consider § 522(f), or in refusing to avoid the Community Lien under that section.

The debtor claims that the bankruptcy court erred in failing to consider § 522(f) and in refusing to avoid the Community Lien under that section. This argument is without merit. The bankruptcy court could not have considered the debtor's request in her Response to avoid the Community Lien under § 522(f) because notice of this request was not given to the holder of that Lien as required under Federal Rule of Bankruptcy Procedure 4003(d) and 9014(a) and (b). It is fundamental that a lien, such as the Community Lien, cannot be avoided without affording lien holders due process – notice and an opportunity to be heard.[18]

Furthermore, given the bankruptcy court's disallowance of the debtor's claimed homestead exemption, § 522(f) has no application to this case and, therefore, even avoidance under that section were considered, the bankruptcy court's failure to avoid the Community Lien was not in error. Section 522(f) provides that the fixing of a judicial lien may be avoided to the extent that it "impairs an exemption to which the debtor would have been entitled . . . ."[19] Here, for reasons discussed above, the debtor is not entitled to a homestead

---

[18] *See generally* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950); Reliable Elec. Co. v. Olson Constr. Co., 726 F.2d 620 (10th Cir.1984) (discussing principals of due process); In re Mayes, 294 B.R. 145 (10th Cir. BAP 2003) (discussing nature of § 522(f) action).

[19] 11 U.S.C. § 522(f)(1).

exemption in the Proceeds. Thus, § 522(f) does not apply.

The debtor's § 522(f) arguments are based primarily on In re Chiu,[20] which validated the avoidance of a lien impairing a debtor's homestead exemption pursuant to § 522(f) even though the home was sold prior to the filing of the § 522(f) motion. Reliance on this case is misplaced. Although Chiu is factually similar to this case to the extent that the debtor seeks to avoid the Community Lien pursuant to § 522(f) after the sale of her home, avoidance of the lien in that case was based on the assumption that a § 522(f) motion had been served on the lien holder and on the fact that the debtor had a valid homestead exemption. As discussed above, no § 522(f) motion was served on the holders of the Community Lien and the debtor does not have a valid homestead exemption. Chiu, therefore, has no application to this case.

III. Conclusion

For the reasons stated above, the bankruptcy court's Exemption Order is AFFIRMED.

---

[20] 304 F.3d 905 (9th Cir. 2002).