UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

In re:

BKY No. 97-30606

Mark John McGowan,

Debtor.

ORDER

This matter came before the Court on the Trustee's Objection to Claimed Exempt Property. Appearances are as noted in the record. This ORDER is now entered pursuant to the Federal and Local Rules of Bankruptcy Procedure.

I.
FACTS

In April 1995, the Debtor separated from his wife and moved out of his residence. In August 1996, a final order was entered dissolving the Debtor's marriage and awarding him possession of the house. The Debtor obtained possession of the house in September 1996. The Debtor stayed in the house a few nights, while making repairs. In October 1996, the Debtor leased the house to a third party for a term of 12 months. The lease gave the lessee exclusive rights to the property. The Debtor did not store any of his personal belongings on the property.

On January 31, 1997, the Debtor filed for bankruptcy protection under Chapter 7 of Title 11, and claimed the property exempt as his homestead. On February 3, Michael Dietz was appointed as the Chapter 7 trustee. Upon discovering a conflict, Mr. Dietz resigned as trustee on February 19. Charles Ries was appointed Chapter 7 trustee on February 21. The first date set for the Chapter 7 Section341 meeting of creditors was February 28. After the first trustee resigned, the date for the Section341 meeting was changed to April 11. On April 11, the Section 341 meeting was held. Trustee Ries filed his objection to the claimed exemption of the property on April 23.

II.
DISCUSSION

A. TIMELINESS OF THE OBJECTION

The first issue presented is whether the Trustee's objection to the claimed exemption was timely made.

11 U.S.C. Section 522(l) requires a debtor to

file a list of property claimed exempt and provides that "[u]nless a party in interest objects, the property claimed as exempt on such list is exempt." The time requirements for objecting to exemptions is set out in F.R.Bankr.P. 4003(b) which provides that objections to exemptions must be filed "within 30 days after the conclusion of the meeting of creditors". A creditor must file an objection within the 30 days or the exemption will be allowed, regardless of whether there is no basis in law for claiming the exemption. Taylor v. Freeland & Kronz, 503 U.S. 638, 644, 112 S.Ct. 1644, 1648 (1992).

The Debtor asserts that the Trustee's objections were untimely under Local Rule 2003-1. Local Rule 2003-1 states that:

> In a chapter 7, 12 or 13 case for purposes of Bankruptcy Rule 4003(b), the meeting of creditors shall be deemed concluded on the first date set for such meeting, unless within 30 days after such date the trustee serves and files a verified statement that the meeting has not been concluded. . . If such statement is served and filed, and unless ordered otherwise, the meeting shall not be deemed concluded until the case is closed or a report is filed by the trustee stating that the meeting has been concluded, whichever occurs first.

The Trustee argues that his objections were timely under F.R.Bankr. P. 4003(b), and claims that Local Rule 2003-1 is invalid. F.R.Bankr.P. 4003(b) provides:

> (b) Objections to Claim of Exemptions. The trustee or any creditor may file objections to the list of property claimed as exempt within 30 days after the conclusion of the meeting of creditors. . .

A local rule must meet two requirements to be considered a valid rule. A local rule will be valid only if:

> (a) it is consistent with the Bankruptcy Code in that it does not "abridge, enlarge, or modify any substantive right," as required by 28 U.S.C. Section 2075 and (b) it is "a matter of procedure not inconsistent with" the Bankruptcy Rules as required by Bankruptcy Rule 9029. In re Walat, 89 B.R. 11, 12 (E.D.Va.1988). If Local Rule 123 fails either prong of this two pronged test it is invalid. See Frank v. Arnold (In re Morrissey), 717 F.2d 100, 104 (3rd Cir.1983); Sunset Enters., Inc. v. B & B

> Coal Co., Inc., 38 B.R. 712, 715 (W.D.Va.1984), aff'd, 798 F.2d 1409 (4th Cir.1986).

Industrial Financial Corp. v. Falk, 96 B.R. 901, 904 (Bankr.D.Minn. 1989) (en banc).

At issue is the second part of the Falk test which requires a determination whether Rule 2003-1 is consistent with F.R.Bankr.P. 4003(b). F.R.Bankr.P. 9029 makes it clear that local bankruptcy rules must not be inconsistent with the Federal Bankruptcy Rules. It provides in relevant part:

> (a) Local Bankruptcy Rules
> (1) Each district court acting by a majority of its district judges may make and amend rules governing practice and procedure in all cases and proceedings within the district court's bankruptcy jurisdiction which are consistent with--but not duplicative of--Acts of Congress and these rules and which do not prohibit or limit the use of the Official Forms. Rule 83 F.R.Civ.P. governs the procedure for making local rules. A district court may authorize the bankruptcy judges of the district, subject to any limitation or condition it may prescribe and the requirements of 83 F.R.Civ.P., to make and amend rules of practice and procedure which are consistent with--but not duplicative of--Acts of Congress and these rules and which do not prohibit or limit the use of the Official Forms. Local rules shall conform to any uniform numbering system prescribed by the Judicial Conference of the United States.

The Debtor asserts that Rule 2003-1 is consistent with F.R.Bankr.P. 4003(b), as 2003-1 merely determines the date for the conclusion of the meeting of creditors, absent the filing of a contrary affidavit by the trustee, for purposes of application of F.R.Bankr.P. 4003(b). Therefore, the Debtor argues, Local Rule 2003-1 required the time for filing objections to start running on February 28, 1997, making the Trustee's objection untimely.

The Trustee argues that Local Rule 2003-1 is facially inconsistent with F.R.Bankr.P. 4003 because it shortens the time for filing objections to exemptions in violation of F.R.Bankr.P. 9029 and citing Industrial Financial Corp. v. Falk, 96 B.R. 901, 904 (Bankr.D.Minn. 1989) (en banc) for authority.

In Industrial Financial Corp. v. Falk, Local Rule 123 was found invalid under F.R.Bankr.P. 9029

because it was inconsistent with a Federal Rule. Local Rule 123 provided:

> Pursuant to Rule 4007(c), the time for the filing of a complaint to determine the dischargeability of any debt pursuant to Section 523(c) of the Code is extended to the same final date for filing a complaint objecting to discharge under Rule 4004(a).

F.R.Bankr.P. 4007(c) provided:

> (c) Time for Filing Complaint Under Section 523(c) in Chapter 7 Liquidation and Chapter 11 Reorganization Cases; Notice of Time Fixed. A complaint to determine the dischargeability of any debt pursuant to Section 523(c) of the Code shall be filed not later than 60 days following the first date set for the meeting of creditors held pursuant to Section 341(a). The court shall give all creditors not less than 30 days notice of the time so fixed in the manner provided in Rule 2002. On motion of any party in interest, after hearing on notice, the court may for cause extend the time so fixed under this subdivision. The motion shall be made before the time has expired. (emphasis added).

Local Rule 123 operated as an automatic extension of the sixty days provided for in 4007(c) to the hearing on confirmation without any finding of cause. Local Rule 123 was found invalid based in part on F.R.Bankr.P. 9006(b)(3) which provided:

> (3) Enlargement limited. The court may enlarge the time for taking action under Rules 1006(b)(2), 3002(c), 4003(b), 4004(a), 4007(c), and 8002 only to the extent and under the conditions stated in those Rules. (emphasis added).

The court held that Local Rule 123 "dispensed with the prerequisites for extension of the sixty day time period set forth in Rule 4007(c)" because "cause" was not shown for extending the time to object to discharge of a debt as specifically required by F.R.Bankr.P. 9006(b)(3) and 4007(c). Industrial Financial Corp. v. Falk, 96 B.R. at 905.

Local Rule 2003-1 differs from the local rule invalidated in Falk. F.R.Bankr.P. 4003(b) provides that objections to exemptions must be filed "within 30 days after the conclusion of the meeting of creditors". Local Rule 2003-1 provides that "the meeting of creditors shall be deemed concluded on the first date set for such meeting" (emphasis added). The purpose of 2003-1 is to

determine the date of the conclusion of the meeting of creditors absent the filing of a contrary affidavit by the trustee for purposes of application of F.R.Bankr.P. 4003(b). By "deeming" the meeting concluded, the local rule merely creates an irrebuttable presumption, in the absence of a contrary affidavit, as to the date the meeting is concluded; thereby precluding any argument as to the date the meeting was actually concluded. The local rule involved in Falk generally extended the time to object to discharge without any requisite finding of cause in each case, as explicitly required by F.R.Bankr.P 9006(b)(3) and 4007(c).

The creation of an irrebuttable presumption setting a date for the conclusion of the meeting of creditors through Local Rule 2003-1 is not inconsistent with F.R.Bankr.P. 4003(b). By "deeming" the meeting concluded absent contrary affidavit, the period to object is not automatically shortened. If the period to object is shortened from the actual conclusion of the first meeting, as was the case here, it is due to the failure of the trustee to file the requisite affidavit; not due to passive application, or natural consequence of the Rule. Therefore, Local Rule 2003-1 is not inconsistent with F.R.Bankr.P. 4003(b).

Accordingly, the Trustee had 30 days from the date first set for the meeting of creditors to object to exemptions. The first date set was February 28, and the Trustee did not file his objection to the claimed exemption until April 23. Therefore, the objection was untimely under the rules.

B. APPLICATION OF 11 U.S.C. Section 105(a)

Even though the objection was untimely under F.R.Bankr.P. 4003(b) and Local Rule 2003-1, the question arises whether the objection may be considered under Section 105(a).(1) 11 U.S.C. Section 105 gives courts the inherent power to prevent manifest injustice. Canino v. Bleau, 185 B.R. 584, 592 (B.A.P. 9th Cir. 1995), citation omitted; In re Staniforth, 116 B.R. 127, 131 (Bankr.W.D.Wisc. 1990).

> 11 U.S.C. Section 105(a) provides:
> (a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

The issue of untimely objections to exemptions was examined by the Supreme Court in Taylor v. Freeland & Kronz, 503 U.S. 638, 112 S.Ct. 1644 (1992). In Taylor, the court held that a creditor must file an objection within the 30 days or the exemption will be allowed, even where there is no basis in law for claiming the exemption. Taylor, 503 U.S. at 644, 112 S.Ct. at 1648. The Taylor trustee made the argument that Section 105 permits the court to disallow exemptions which have not been claimed in good faith. Id at 1649. The Supreme Court acknowledged that, "[s]everal courts have accepted this [the trustee's] position." Id. However, in reaching its holding the court did not consider the implications of Section 105. In fact, the court stated:

> We decline to consider Section 105(a) in this case because Taylor raised the argument for the first time in his opening brief on the merits. Our Rule 14.1(a) makes clear that "[o]nly the questions set forth in the petition [for certiorari], or fairly included therein, will be considered by the Court," and our Rule 24.1(a) states that a brief on the merits should not "raise additional questions or change the substance of the questions already presented" in the petition. citations omitted.

Taylor, 503 U.S. at 645, 112 S.Ct. at 1649.

Since the Taylor decision, courts have recognized that Section 105 may be used by a court to consider an untimely objection to exemption if the claimed exemption involved fraud or deceit upon the court. In re Brown, 178 B.R. 722 (Bankr.E.D.Tenn. 1995); Perkins Coie v. Sadkin, 36 R.3d 473 (5th Cir. 1994).(2) In considering whether fraud or deceit upon the court has occurred, a court should look to whether there is any evidence of an intent to deceive. See, In re Brown, 178 B.R. 722.

The record in this case is sufficient to show that the Debtor intended to deceive the Court in claiming a homestead exemption for the property. As this Court has previously found:

> Here, the Debtor [McGowan] intentionally deceived the Court, through the filing of false schedules and by lying at the Chapter 7 Section 341 meeting, both regarding his income and living arrangements, in order to keep valuable property from his estate. When the fraud and deceit were discovered, the Debtor sought escape to, and refuge in, Chapter

> 13. The conversion had nothing to do with fresh start or payment to creditors. It had to do with: avoiding the potential stigma of a judgment barring the discharge in Chapter 7; and, at least originally, with the protection of his interest in the property against potential disallowance of the exemption in the Chapter 7 case.

In re McGowan, August 29, 1997 Order.(3)

This Debtor has committed a fraud upon this Court through his intentional deceit in connection with claiming his homestead exemption. Therefore, review of the objection to the claimed exemption is within the scope of Section 105.

C. EXEMPTION ANALYSIS

1. Homestead

The Debtor has claimed his former residence exempt as his homestead under Minn. Stat. Section 510.01. Minn Stat. Section 510.01 sets out the homestead exemption. It provides in part:

> The house owned and occupied by a debtor as the debtor's dwelling place, together with the land upon which it is situated to the amount of area and value hereinafter limited and defined, shall constitute the homestead of such debtor and the debtor's family, and be exempt from seizure or sale. . .

Minn. Stat. Section 510.07 provides in part:

> The owner may sell and convey the homestead without subjecting it, or the proceeds of such sale for the period of one year after sale, to any judgment or debt from which it was exempt in the owner's hands, except that the proceeds of the sale are not exempt from a judgment or debt for a court ordered child support or maintenance obligation in arrears. The proceeds of an insurance claim for an exempt homestead are exempt for one year. The owner may remove therefrom without affecting such exemption, if the owner does not thereby abandon the same as the place of abode. If the owner shall cease to occupy such homestead for more than six consecutive months the owner shall be deemed to have abandoned the same unless, within such period, the owner shall file with the county recorder of the county in which it is situated a notice, executed,

> witnessed, and acknowledged as in the case of a deed, describing the premises and claiming the same as the owner's homestead.

The Eighth Circuit has recently held that an abandonment can occur within the six-month period set out in Minn. Stat. Section 510.07. Ries v. Thiesse, 61 F.3d 631 (8th Cir. 1995). A creditor has the burden of establishing abandonment through clear and convincing evidence. Id. "'Abandonment of a homestead results when the owner removes therefrom and ceases to occupy the same, with the intention of never returning, or with no intention of returning thereto to reside.'" Id. at 632; citing In re Hickman, 222 Minn. 161, 23 N.W.2d 593, 597 (1946). In examining whether an abandonment has occurred, the court must make specific findings as to both the Debtor's occupancy of the property and his intent to retain the property as homestead. Ries v. Thiesse, 61 F.3d at 632.

No dispute exists as to the Debtor's occupancy. He left the home in April of 1995 when he separated from his wife. He took possession of the property in September of 1996 and only briefly stayed in the house to make some repairs, and has not resided in the home since September 1996. In October 1996, the Debtor leased the home for a term of one year. The lease gave the lessee exclusive possession of the property. The Debtor did not even store any personal possessions at the house. The undisputed facts show that the Debtor intended to abandon the property as his homestead. While the Debtor did testify that he intended to move into the house after the lease expired, his testimony is not credible. Further, a mere statement of intent is not enough to establish homestead in Minnesota. In re Smoinikar, 200 B.R. 640, 644 (Bankr.D.Minn. 1996). Therefore, this Court finds that the Debtor abandoned his homestead because he was not occupying the house at the time of filing; he had leased the premises to a third party for one year; and, he had no intent to return thereto to reside. Based on these findings, the Debtor is not entitled to claim his homestead as exempt.

III.
DISPOSITION

Based on the foregoing,

IT IS HEREBY ORDERED THAT:

1. The Trustee's objection to the Debtor's claim of exemption of property legally described as: Lot 13, Block 1, East Abbott's Addition, Owatonna, Steele County, Minnesota, claimed as homestead is SUSTAINED, and the property remains property of the bankruptcy estate. In all other respects the

objection is OVERRULED.(4)

Dated: April 2, 1998 By the Court:

Dennis D. O'Brien
Chief United States
Bankruptcy Judge

(1). While the Trustee has not made an argument under Section 105, courts have the authority to raise Section 105 issues sua sponte based on the broad authority encompassed in Section 105. 11 U.S.C. Section 105(a); see, In re Budinsky, 119 W.L. 105640 (W.E.Pa. 1991).

(2). In light of the 8th Circuit's opinion in Halverson v. Peterson, 920 F.2d 1389 (8th Cir. 1990), it appears likely that the 8th Circuit would agree with the In re Brown, 178 B.R. 722 (Bankr.E.D.Tenn. 1995) and Perkins Coie v. Sadkin, 36 R.3d 473 (5th Cir. 1994) decisions. The Halverson court found the effects of a strict application of the 30 day rule set out in Rule 4003 to be undesirable, as such a bright line rule would "provide the debtors with an undeserved windfall" through "exemption by declaration". Id. at 1393. Instead the court adopted a rule which examined the good faith of the debtor in claiming the exemption because the court found it was the rule which would best effectuate the policies underlying Rule 4003(b). Id. While the 8th Circuit's general holding allowing untimely objections to exemptions under F.R.Bankr.P. 4003(b) is no longer valid law because of Taylor, the court's analysis is indicative of how it would likely address the use of Section 105 in connection with an untimely objection to an exemption claimed in actual fraud upon the court. It is clear from the opinion that the court was concerned with equity and possible bad faith of a debtor. It appears likely that the 8th Circuit, if presented with a situation involving fraud and deceit upon a court, would recognize the availability of Section 105 to remedy such a situation.

(3). The Debtor represented that he was currently living in the home at the time of filing the schedules, when he had not been living in the home for quite some time. The Debtor also failed to disclose the lease of the home on his schedules, and intentionally did not disclose the rental income from the premises. All are acts of intentional deceit upon the Court.

(4). The Trustee also objected to the following property as exempt: hockey equipment, ski equipment, dog, paintings, computer, 1989 Dodge Colt, 1989 Cadillac, and 1982 Wave Runner. Because there is no evidence of fraud upon the Court in connection with claiming those exemptions, the Court will not review those

exemptions under Section 105. Therefore, those exemptions will be allowed.