FILED
U. S. BANKRUPTCY OFFICE
WESTERN DISTRICT OF N. C.
JUL 07 1994
J. BARON GROSHON
BY: DEPUTY CLERK

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION

In Re:	)	Case No. 93-10397
	)	Chapter 13
TODD K. EICHOLTZ,	)	
	)	
Debtor.	)	JUDGEMENT ENTERED ON JUL - 7 1994
	)	

ORDER DENYING AMENDED OBJECTION TO PROPOSED ORDER FROM HEARING OF 3/22/94

This matter is before the undersigned Judge upon the Objection of William R. Eadie, Jr., and Jacqueline L. Eadie, (hereinafter the "Eadies"), to the portion of the plan proposing that the real estate commission from selling the home owned by the Debtor, Todd K. Eicholtz, and his wife, Jennifer Eicholtz, come from sale proceeds and that the Debtor and his wife each receive a full exemption of $10,000 from the sale proceeds free and clear from the claims of the Eadies and similar creditors.

The Eadies and similar creditors argue that the sale commission is a cost voluntarily incurred by the debtor. As such, the creditors argue that this voluntary expense should be paid from the debtor's otherwise available exemption. All parties agree that the wife's exemption cannot be affected by this court as she has not subjected herself to the jurisdiction of this court.

11 U.S.C. § 522(k)

Although this court is tempted to follow the creditors' reasoning in this case, as it has before under different factual

circumstances, this court must now allow the debtor's full exemption in light of the clear language found in the Bankruptcy Code. The Code states that aside from the set of narrowly carved exceptions, none of which are applicable to the matter at hand, "property that the debtor exempts under this section is not liable for payment of any administrative expense . . . ." 11 U.S.C. § 522(k).

Section 522(k) makes clear that a debtor typically is not liable for the payment of the administrative expenses affecting the exempted property. The real estate commission at issue constitutes an administrative expense. As such, the debtor will not be obligated to pay this expense from the proceeds representing his exemption, as requested by the Eadies and similar creditors.

The court also notes that although the creditors attempt to shift the sale expenses upon the debtor by characterizing this sale as a voluntary act of the debtor, the creditors clearly stand to gain from this act. The creditors will receive the proceeds in excess of the claimed exemptions. Furthermore, absent the debtor's sale, the creditors would likely be forced to pursue a foreclosure action themselves, which again would entail the payment of a real estate commission. In fact, the Record in this case includes numerous orders granting relief from stay to creditors if the debtor's home has not been sold by November 1, 1994. Regardless of who initiates this desired sale of the debtor's home, similar expenses will be incurred. Characterizing

this sale as a "voluntary" act of the debtor is misleading and of no importance as it mistakenly implies that the creditors lack any interest in the outcome or occurrence of this sale.

PAYMENT OF THE DEBTOR'S $10,000 EXEMPTION

The debtor's exemption is to be paid from the sale proceeds directly to the trustee to be held in escrow by the trustee on the debtor's behalf. However, these funds are to be distributed only for court approved purposes until such time as the debtor completes the chapter 13 plan. At such time, any remaining funds will be paid in full to the debtor.

This court recognizes the possibility that a chapter 13 debtor, after receiving either a partial or full distribution of their exempt proceeds, might later convert their chapter 13 proceeding to a chapter 7 proceeding and then attempt to claim a second full exemption in their chapter 7 case. Therefore, this court admonishes all parties that if in fact this case is later converted to a chapter 7, any proceeds distributed in the chapter 13 will count against any future exemption sought by the debtor.

$10,000 EXEMPTION OF THE DEBTOR'S WIFE

This court lacks the jurisdiction necessary to affect the exemption of Jennifer Eicholtz, the debtor's wife. Therefore, nothing herein shall be construed to affect her exemption;

however, it is the court's opinion that she is entitled to her full exemption. To preserve her exemption from the sale proceeds, $10,000 shall be held by the trustee on her behalf until such time as there is no dispute as to her right to these funds. Absent some form of agreement by the parties, resolution of any such dispute belongs in another forum. This court is under the impression that currently there exists no such dispute as to her rightful entitlement to her $10,000 exemption from the sale proceeds, free and clear of the claims of the Eadies and other similar creditors. If this is accurate, her $10,000 exemption from the sale proceeds could in fact be immediately distributed to her upon the sale of the home without the need of involving the trustee. The sole reason for directing the trustee to hold $10,000 on behalf of the debtor's wife is to preserve her exemption without affecting her exemption, which this court lacks the jurisdiction to do, as agreed in court by all parties.

It is therefore **ORDERED** that:

1. Pursuant to 11 U.S.C. § 522(k), the debtor is not liable for the payment of the real estate commission; therefore, the debtor is entitled to his full $10,000 exemption from the sale proceeds free and clear of the claims of the Eadies and similar creditors;

2. The real estate commission is to be paid as an administrative expense of the estate;

3. From the sale proceeds, the trustee is to hold in escrow the $10,000 exemption on behalf of the debtor; these funds are to be distributed only for court approved purposes until the debtor completes the chapter 13 plan, at which time any remaining funds will be paid in full to the debtor;

4. If the debtor converts this chapter 13 proceeding to a chapter 7 case, any amounts distributed in the chapter 13 will count against any future exemption sought by the debtor;

5. This court lacks the jurisdiction to affect the wife's exemption;

6. There shall be withheld $10,000 from the sale proceeds to preserve the wife's exemption which shall be distributed to her immediately following the sale if there is no dispute as to her entitlement; however, if there exists a disagreement as to her right to receive such proceeds, these proceeds shall be distributed in accordance with the resolution of such dispute by the appropriate forum.

7. After the debtor and the debtor's wife each have had their respective $10,000 exemptions withheld from the sale proceeds, all liens and encumbrances of record, including deeds of trust and ad valorem taxes, and other reasonable costs incidental to the closing procedure shall be paid from the net proceeds of the sale in this case;

8. The balance of the proceeds of the sale shall be paid in accordance with the proposed chapter 13 plan to the Eadies and like creditors;

9. The court on its own motion grants relief from the Section 1301 co-debtor stay to the Eadies so that they might litigate collection of the debt owed them against mrs. Eicholtz in such forum as they determine.

10. The Objection of the Eadies regarding the ability of the Debtor and his wife to each receive a full $10,000 exemption from the sale proceeds free and clear from the claims of the Eadies and similar creditors is hereby **DENIED.**

This the 6th day of July, 1994.

George R. Hodges
United States Bankruptcy Judge