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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re

JOHN and SHELLY MACLEAN,

No. 04-12764

Debtor(s).

Second Memorandum on Objections to Homestead Exemption

Chapter 7 debtors John and Shelly MacLean have claimed their home at 59 Mercury Drive, Tiburon, California, as exempt pursuant to California Code of Civil Procedure § 704.730. Creditor Elaine Sichel, joined by the Chapter 7 trustee, objects.

Although the property was duly scheduled, the MacLeans were not the record title holders when they filed their bankruptcy petition. The MacLeans had deeded the property to John's parents before filing their bankruptcy petition, although the MacLeans continued to live in the property and make the monthly payments. The sole purpose of the transfer was to facilitate refinance of the property, as the debtors' credit rating was too poor to allow them to refinance.

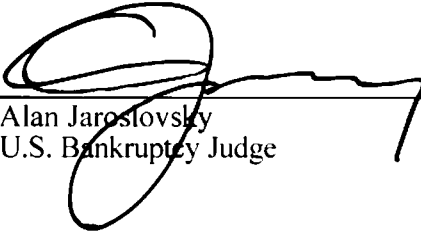
The MacLeans were not successful in refinancing, but did not ask John's parents to reconvey title. After bankruptcy, the parents listed the property for sale and attempted to sell it. The Trustee recovered the property for the estate pursuant to a compromise he reached with the parents which allowed him to sell the property free and clear of their claims.

The MacLeans argue that the transfer to John's parents was all a big mistake, but there is no evidence of this. This story is belied by John's own declaration, dated January 18, 2005, in which he stated unequivocally that "for purposes of refinancing we placed my parents on title." In it, he made no mention of any mistake. Also, his parents attempted to sell the property, resisted the Trustee's attempts

1 to recover it for the estate and never recorded a Notice of Nonacceptance as provided by California
2 Civil Code § 1058.5.¹

3 The transfer to John's parents was a voluntary fraudulent transfer. The property was recovered
4 for the estate by the actions of the Trustee. Accordingly, the MacLeans are barred by § 522(g) of the
5 Bankruptcy Code from exempting the property. The objections to their homestead exemption must
6 accordingly be sustained. Counsel for Sichel shall submit an appropriate form of order.²

7 Dated: May 5, 2006

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Alan Jaroslovsky
U.S. Bankruptcy Judge

15 ¹The court struck a later declaration of John MacLean because he failed to appear for cross-
16 examination.

17 ²The MacLeans argue that Sichel and the Trustee are judicially estopped from denying that the
18 deed to the parents was recorded by mistake because the Trustee had not contested this assertion in a
19 prior adversary proceeding (No. 05-1031) by him against the MacLeans. The court rejects this argument
20 for several reasons. First, Sichel was not a party to that adversary proceeding and it is unfair to bind her
21 to the Trustee's position in that case, notwithstanding her agreement to allow the Trustee a surcharge of
22 her lien. Second, for judicial estoppel to apply the party being charged must have *benefitted* from
23 having taken the initial position. See *In re Cheng*, 308 B.R. 448, 452-53 (9th Cir. BAP 2004). In the
24 prior case, the Trustee made *concessions* which weakened his case, in essence waiving the argument
25 that the parents' deed of trust had merged with record title.

26 The court feels in no way victimized by the conduct of the Trustee, and court victimization is at
the core of judicial estoppel. See Klein et al., "Principles of Preclusion and Estoppel in Bankruptcy
Cases," 79 Am.Bankr.L.J. 839, 865 (2005). The court also notes that the trial in the adversary
proceeding went forward after the court balked at the terms of a settlement of the case and that the court
treated the matter of the "big mistake" deed as a tacit stipulation, not a true fact.

Through misplaced cleverness, counsel for the MacLeans has been trying to manipulate the court
into a situation where issue preclusion, claim preclusion or estoppel prevents the court from finding the
true fact that his clients voluntarily transferred their home to John's parents. The court declines to be so
manipulated, and finds that none of these doctrines prevents it from adjudicating this matter on the merits.

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NORTHERN DISTRICT OF CALIFORNIA
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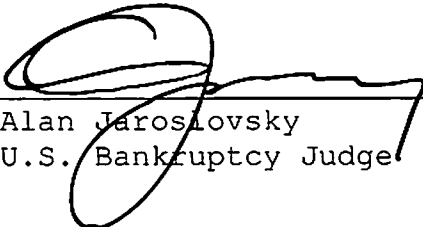
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11 In re Case No. 04-12764
12 JONATHAN MacLEAN Chapter 7
SSN xxx-xx-0324
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14 SHELLY HOKULANI STEWART MacLEAN
SSN xxx-xx-3197
15 Debtors
16 _____ /

17 ORDER SUSTAINING OBJECTIONS TO DEBTORS' HOMESTEAD EXEMPTION

18 Hearing on the objections to the Debtors' homestead exemption
19 in that real property located at 59 Mercury Avenue, Tiburon,
20 California ("subject real property"), made by Creditor, Elaine
21 Sichel, and joined in by Jeffry Locke, Trustee, having been held on
22 April 27, 2006, before the Honorable Alan Jaroslovsky in his
23 courtroom in Santa Rosa, Ray H. Olmstead having appeared on behalf
24 of the Trustee, David Cook having appeared on behalf of Creditor,
25 Elaine Sichel, and David Chandler having appeared on behalf of the
26 Debtors, good cause appearing, and for the reasons set forth in
27 that "Second Memorandum on Objections to Homestead Exemption",
28 filed herein on May 5, 2006,

1 IT IS HEREBY ORDERED, that the objections to the Debtors'
2 homestead exemption in the subject real property, and in the
3 proceeds from the sale of that real property, are sustained, and
4 that the homestead exemption is disallowed.

5 Dated: July 10, 2006

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8 Alan Jaroslovsky
9 U.S. Bankruptcy Judge
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