

***Maki v. Chong*, 119 Nev. Adv. Op. No. 46 (Aug. 29, 2003)¹**

**Civil Procedure – Entry of Judgments – Enforcement & Execution –
Exemptions**

Summary

Appeal from a district court order applying the statutory homestead exemption to a debtor's real property.

Disposition/Outcome

Reversed and remanded. The homestead exemption is inapplicable when the proceeds used to purchase real property can be traced directly to funds obtained through fraud or other tortious conduct.

Factual and Procedural History

Charles Maki, an Ely State Prison inmate, signed a limited power of attorney allowing his sister, Esther Chong, to cash his State Industrial Insurance System (SIIS) settlement check. The \$37,974.62 check was a permanent, partial disability benefit award. Chong was to open a savings account, deposit the check, and use the money to retain a criminal defense attorney to assist Maki on his appeal.

Chong did not open the account but, instead, cashed the check and purchased a home in Washoe County. Chong informed Maki that she cashed his SIIS check each month and would not be returning any funds.

Maki brought an action against Chong for breach of contract, fraud, and conversion. Maki sought declaratory and injunctive relief, compensatory damages, and court costs. Chong failed to answer and Maki was awarded a default judgment.

On March 10, 1998, Maki recorded a lien in Washoe County against any and all property Chong owned. Chong recorded a homestead declaration on December 31, 1998. Maki's motion of a writ of execution was subsequently granted. In response, Chong mailed an affidavit setting forth a claim for exemption² on the grounds that her equity did not exceed \$125,000 and that she had previously filed a homestead declaration.

The district court then granted Maki's motion for a hearing, finding that Chong's affidavit was null and void. Maki proceeded with the execution and sheriff's sale of the property was scheduled.

Chong filed a motion for relief from the district court's order eleven days before the scheduled sale. The district court ordered a stay and, after a hearing, found that Chong has filed a valid homestead declaration and that the equity was less than \$125,000.

¹ By Hilary Barrett

² NRS 21.112(1) states: “[i]n order to claim exemption of any property levied on, the judgment debtor must, within 8 days after the notice proscribed in NRS 21.075 is mailed, serve on the sheriff and judgment creditor and file with the clerk of the court issuing a writ of execution an affidavit setting out his claim of exemption.

Judge Steve L. Dobrescu of the Seventh Judicial District Court concluded the property was exempt from execution and vacated the district court's initial order.

Discussion

A homestead exemption prohibits a forced sale in order to protect the family home despite financial hardship or insolvency. The exemption is inapplicable to legal tax liens, mortgages, deeds of trust, homeowner's association liens, and child support obligations.³

Other jurisdictions have established that the doctrine of equitable liens precludes a person purchasing real property with the funds of another from defeating the right to enforce a lien on the grounds that the homestead exemption applies.⁴ Because the purpose of the homestead exemption is to protect those filing in good-faith, an individual purchasing real property through fraudulent means should not be afforded the same protection.

Chong acquired the property through fraudulent means and, therefore, the homestead exemption is invalid.

Conclusion

The homestead exemption is inapplicable when the proceeds used to purchase real property are can be traced directly to fraudulent or other tortious conduct.

³ See e.g., NRS 115.010(3); Philips v. Morrow, 104 Nev. 384, 385-86 (1988); Breedlove v. Breedlove, 100 Nev. 606, 608 (1984).

⁴ See e.g., Mack v. Marvin, 202 S.W.2d 590, 594 (Ark. 1947); Duhart v. O'Rourke, 221 P.2d 767, 769 (Cal. Ct. App. 1950); Jones v. Carpenter, 106 So. 127, 130 (Fla. 1925); In re Munsell's Guardianship, 31 N.W.2d 360, 367 (Iowa 1948); Long v. Earle, 269 N.W. 577, 582 (Mich. 1936); American Ry. Express Co. v. Houle, 210 N.W. 889, 890 (Minn. 1926); Wells Fargo Bank Intern. V. Binabdulaziz, 478 N.Y.S.2d 580, 582 (Sup. Ct. 1984); Curtis Sharp Custom Homes, Inc. v. Glover, 701 S.W.2d 24, 25-26 (Tex. App. 1985); Webster v. Rodrick, 394 P.2d 689, 691-92 (Wash. 1964); Warsco v. Oshkosh Savings & Trust Co., 208 N.W. 886, 887 (Wis. 1926).