

## Can a Recorded Homestead be Deemed Faulty?

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This is a question that was recently answered by Chief Justice Christopher J. Panos of the U.S. Bankruptcy Court, District of Massachusetts in the case of *In re Danny Lou*, Case No. 21-42033 CJP, finding that a defective notary invalidated the Debtor's recorded homestead declaration.



When an individual files for protection under the U.S. Bankruptcy Code, specifically under Chapter 7, the Chapter 7 Trustee is tasked with liquidating all of the unencumbered, unexempt property of the debtor(s) for the benefit of the debtor's unsecured creditors. Through the years this type of effort has resulted in a number of successful challenges based on faulty acknowledgements in the debtor's mortgage. Once the Trustee has successfully challenged the validity of the mortgage, the Trustee was then able to liquidate the debtor's residence for the benefit of creditors.

As I have reported in the past, there are many decisions within the First Circuit holding that defective notary clauses can be fatal to the validity of a mortgage. (See *Weiss vs. Wells Fargo Bank, N.A.*, 498 B.R. 392, 400 (1st Cir. BAP 2013) finding that the acknowledgment on a mortgage was materially and patently defective under Massachusetts law; *In re Reznikov*, Adversary Proceeding No. 15-1003 where the acknowledgement failed to state that the debtor executed the Mortgage voluntarily or as her free act and deed). With the advent of these, and many other cases, a careful review of the notary clause should be on the check list of every consumer bankruptcy attorney as well as every Chapter 7 Trustee. As a result of this most recent challenge, you can now add the notary clause on a homestead declaration to that list!

In a decision issued on April 18, Judge Panos found that a defective notary invalidated the debtor's recorded homestead declaration, thereby reducing the debtor's claimed homestead protection of \$500,000.00 to the automatic homestead protection of \$125,000.00 pursuant to M.G.L. ch. 188, §4! Unfortunately for the debtor, the equity in his home of \$324,960.00 was no longer protected from the reach of the Chapter 7 Trustee.

This case began on March 30, 2021 when the debtor filed for protection under Chapter 7 of the U.S. Bankruptcy Code. Within his bankruptcy schedules he listed his residence, that had equity of \$324,960.00, and claimed the Massachusetts Declaration of Homestead, pursuant to M.G.L. ch. 188, §3. While these actions should have been sufficient to protect the debtor's residence from the reach of the Trustee, it unfortunately was not. After filing several motions to extend time to object to the debtors claimed exemptions, the Trustee filed an objection to the debtor's homestead on August 3, 2021 alleging that the debtor's recorded homestead was defective claiming that: 1.) the debtor's spouse was not identified; 2.) it failed to "state that each person named therein occupies or intends to occupy the home as their principal residence; and 3.) that the homestead was not signed and acknowledged under the penalty of perjury. While the Trustee argued that each of these alleged deficiencies were sufficient to find the homestead deficient, Judge Panos first focused on the question of whether the homestead must be signed under the "penalty of perjury".

In order for a homestead to be valid, it must meet certain criteria. Pursuant to M.G.L. ch. 188, § 5(a), which states in pertinent part:

A declaration of homestead shall be in writing, signed and acknowledged under penalty of perjury by each owner to be benefitted by homestead ... [and, among other requirements] (1) each owner to be benefitted by the homestead, and the owner's non-titled spouse, if any, shall be identified; (2) the declaration shall state that each person named therein occupies or intends to occupy the home as their principal residence[.] emphasis added.

The Bankruptcy Court spent considerable time in its decision balancing numerous court decisions finding that the Massachusetts homestead exemption should be liberally construed in favor of the declarant versus the application of the plain and unambiguous language that the statute required. In review of the recorded homestead the Court found that the Debtor failed to sign or acknowledge the Homestead Declaration "under penalty of perjury" as expressly required by the statute. In so doing, the court found that the homestead was in fact defective, and that it was not necessary to reach the other objections claimed by the Trustee.

In conclusion, Judge Panos, stated that "this is a trap for the unwary and a harsh result for this Debtor, who used an incorrect form, I feel constrained by the express language of the statute and predict that the Supreme Judicial Court would determine

that the Homestead Declaration was not valid because it failed to satisfy a material requirement of Mass. Gen. Laws ch. 188, § 3 and 5(a).”

Since this decision was entered several weeks ago, the Chapter 7 Trustee has begun the process that will end with the liquidation of the debtor’s residence. While this can in no way be found to be “fair” it is the result of using an older, outdated form that no longer complies with the statutory requirements of signing and recording a declaration of homestead. Trap for the unwary indeed!