UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEW MEXICO

In re: TAMMY LEIGH MORRIS,

Debtor. Case No.: 19-12157-j7

MEMORANDUM OPINION AND ORDER REGARDING JADE RENTALS, LLC'S OBJECTION TO DEBTOR'S CLAIM OF EXEMPTION

THIS MATTER is before the Court on Jade Rentals, LLC's ("Jade Rentals") objection to Ms. Morris's claim of the exemption under 11 U.S.C. § 522(d)(1)[1] in two prefabricated buildings located on her real property. Doc. 18. The Court held a final hearing on Jade Rentals' objection on October 22, 2020. The parties and counsel who appeared at the hearing are noted in the record. The Court will overrule the objection.

PROCEDURAL HISTORY

Ms. Morris commenced this chapter 7 bankruptcy case on September 19, 2019 (the "Petition Date"). In her bankruptcy schedules, Ms. Morris claimed an exemption under § 522(d)(1) in two prefabricated buildings (collectively, the "Buildings") and in the land on which the Buildings were situated. She scheduled the Buildings together as having a value of $20,000 and the land as having a value of $2,000. Ms. Morris also claimed that other personal property, including art supplies and an air compressor, finished art works, nine dogs, nine goats, one pig, and 50 chickens, are exempt under §§ 522(d)(3) and (5). Jade Rentals objected to Ms. Morris's claim of exemption in the Buildings on the ground that the Buildings are storage sheds not intended for residential use and, under the New Mexico Administrative Code, Ms. Morris is not legally entitled to occupy them as a dwelling or residence.

[1] All future references to "Code," "Section," and "§" are to the Bankruptcy Code, Title 11 of the United States Code, unless otherwise indicated.

At the final hearing on Jade Rentals' objection to Ms. Morris's claim of exemption, Jade Rentals also argued that Ms. Morris was not using the Buildings as a residence on the Petition Date and, therefore, her claim of exemption must be disallowed.

FINDINGS OF FACT[2]

In 2017, Ms. Morris purchased the Buildings from Graceland Portables. She granted Graceland Portables a lien against the Buildings to secure payment of the purchase price. Ms. Morris's bankruptcy schedules reflect that Graceland Portables has a secured claim collateralized by the Buildings in the amount of $4,000. Each of the Buildings is 12 feet wide by 32 feet long with a metal roof and two lofts. After purchasing the Buildings, Ms. Morris had them placed on a lot she owned in Rio Rancho Estates near the intersection of 40th and 19th Streets (the "Old Lot"). In the purchase agreement, Ms. Morris acknowledged that each building was "for storage purposes only and is not to be used for a residence of any kind . . . ." Both Buildings bear a label that states, "NOT INTENDED FOR RESIDENTIAL USE."

While the Buildings were located on the Old Lot, Ms. Morris hired a contractor who installed French doors, windows, and a stairway to one of the lofts in one of the Buildings (the "Loft Building"). She also installed solar panels and batteries that provide power to a refrigerator, lights, and a pump for the water system. She installed a stove and a refrigerator and built a pantry and countertops. Ms. Morris used a portion of the space in the Loft Building for her bedroom, which included a bed and dresser. Ms. Morris erected a fenced enclosure for her dogs next to the Loft Building. Ms. Morris used the other building (the "Other Building"), which she refers to as the "garage," to store tools and other items and as an art studio.

[2] Any facts recited in the Discussion section of this opinion also constitute findings of fact by the Court.

In or around March 2019, Ms. Morris purchased a different 1.2-acre lot elsewhere in Rio Rancho Estates and moved the Buildings to the new lot (the "New Lot"). The two Buildings were placed near each other. After she moved the Buildings to the New Lot, Ms. Morris continued to live in the Loft Building and continued to use the Other Building for storage and as an art studio. She kept her goats and chickens in a fenced area next to the Other Building.

Pre-petition, Jade Rentals obtained a judgment against Ms. Morris issued by the New Mexico Thirteenth Judicial District Court on a debt unrelated to the Buildings. Jade Rentals obtained a writ of execution based on an unsecured deficiency still owing to it under the judgment. Ms. Morris listed the amount of the deficiency judgment as $9,596.92 in her bankruptcy schedules. Executing the writ, on or about July 30, 2019, while Ms. Morris watched, sheriff's deputies and Jade Rentals agents removed the Buildings from the New Lot. On September 13, 2019, the Thirteenth Judicial District Court denied Ms. Morris's motion for a preliminary injunction in which she sought to require Jade Rentals to return or permit her to retrieve the Buildings. Ms. Morris commenced her chapter 7 bankruptcy case six days later.

After Ms. Morris filed an adversary proceeding on October 3, 2020, seeking turnover of the Buildings, Jade Rentals permitted Ms. Morris to arrange for the return of the Buildings. *See* Adversary Proceeding 19-1074. Graceland Portables delivered the Buildings to the New Lot in November 2019.

There is conflicting evidence regarding whether Ms. Morris lived in the Buildings, regarding them as her residence, before Jade Rentals took possession of the Buildings. Ms. Morris has not updated her address on her driver's license or vehicle registration to reflect her address at the Old Lot or the New Lot since purchasing the Buildings. The Buildings are not resting on permanent foundations. Moreover, Ms. Morris does not have a certificate of occupancy for the

Buildings. The evidence is inconclusive regarding whether water tanks on the New Lot provided water to the bathroom or kitchen in the Loft Building at the time Jade Rentals took possession of the Buildings, and whether Ms. Morris variously lived in a tent and borrowed RV on the New Lot while Jade Rentals had possession of the Buildings.

After the Buildings were returned to her, Ms. Morris started the paperwork seeking permission to create a septic system on the New Lot and contacted the zoning authorities, but as of the hearing date, had not received a permit.

Despite the conflicting evidence, the Court finds that Ms. Morris actually did live in the Buildings and considered them to be her home from some time in 2017 until Jade Rentals took possession of the Buildings on or about July 30, 2019. Before the Petition Date, Ms. Morris modified the Loft Building to add solar panels and electrical wiring, a stairway, windows, and doors, and installed a refrigerator, stove, countertops, and pantry. Ms. Morris had a bed, dresser, and other furniture in the Loft Building, and she erected enclosures for her dogs, goats, and chickens next to the Buildings. Ms. Morris used the adjacent Other Building for storage and as an art studio. These modifications, together with Ms. Morris's testimony that she lived there full-time and intended to do so in the future, establish that she was living in the Loft Building before the Petition Date, intended to live in it indefinitely, and considered the Buildings to be her home.

Ms. Morris did not occupy the Buildings between the time Jade Rentals took possession of the Buildings and the time Graceland Portables delivered the Buildings back to the New Lot. That period included the Petition Date. However, Ms. Morris continued to regard the Buildings as her home during that time and filed her bankruptcy case to get the Buildings back so that she could continue to reside in and use the Buildings as her home. Ms. Morris once again lived in the Loft Building and used the Other Building after the Buildings were returned to the New Lot on

November 19, 2019. She still considers the Buildings to be her home. On the Petition Date Ms. Morris intended to resume occupancy of the Buildings as her home if and when her compelled absence from the Buildings ended.

No legal or administrative action has been taken or threatened against Ms. Morris asserting that her occupancy or use of the Buildings violates any laws or regulations.

DISCUSSION

In determining whether a debtor is entitled to claim an exemption, 'the exemption laws are to be construed liberally in favor of exemption.'" *In re Lampe*, 331 F.3d 750, 754 (10th Cir. 2003) (quoting *In re Ginther*, 282 B.R. 16, 19 (Bankr. D. Kan. 2002)). Ms. Morris claims that the Buildings are exempt under the federal bankruptcy exemption found at § 522(d)(1),[3] which grants an exemption in "[t]he debtor's aggregate interest, not to exceed [a specified amount] in value, in real property or personal property that the debtor or a dependent of the debtor uses as a residence . . . . ." Exemption rights are determined as of the time the debtor commenced the bankruptcy case. *Mansell v. Carroll*, 379 F.2d 682, 684 (10th Cir. 1967).[4] Jade Rentals argues that Ms. Morris's claim of exemption in the Buildings should be disallowed because (i) Ms. Morris did not live in the Buildings as a residence before Jade Rentals took possession of them, (ii) on the Petition Date, Jade Rentals had physical possession of the Buildings meaning that Ms. Morris necessarily did not use the Buildings as her residence when she commenced her bankruptcy case,

[3] A debtor may choose the federal bankruptcy exemptions or the exemptions available under other federal, state, or local law, unless the state does not authorize the debtor to choose the federal bankruptcy exemption scheme. *See* § 522(b); § 522(b)(2) (authorizing states to prohibit debtors from using the bankruptcy exemptions). States that prohibit debtors from choosing the federal bankruptcy exemption scheme are known as "opt out" states. New Mexico is not an "opt out" state. *In re Foah*, 482 B.R. 918, 919 n.1 (10th Cir. BAP 2012). Thus, New Mexico debtors may choose either the federal bankruptcy exemptions or the New Mexico exemptions. *Id*.

[4] *Accord In re Barrera*, No. BAP CO-20-003, 2020 WL 5869458, at *9 (10th Cir. BAP (Colo.) Oct. 2, 2020) (quoting *Mansell v. Carroll)*.

and (iii) the Buildings cannot as a matter of law constitute a residence because it was unlawful for Ms. Morris to live in them. Ms. Morris counters that she lived in the Buildings, which were her home, and she used the Buildings on the Petition Date as her residence under the doctrine of constructive occupancy.

Generally, the objecting party has the burden of proving that the claimed exemption is improper. Fed. R. Bankr. P. 4003(c) ("[T]he objecting party has the burden of proving that the exemptions are not properly claimed."); *Lampe*, 331 F.3d at 754.[5] However, because Ms. Morris's claim of constructive occupancy is an affirmative defense to a prima facie case that she was not using the property as a residence when she commenced her bankruptcy case, Jade Rentals bears the burden of going forward on the issue of constructive occupancy but Ms. Morris bears the ultimate burden of persuasion on that issue. *See In re Horn*, No. 13-62505-WSD, 2014 WL 4187374, at *3 (Bankr. E.D. Mich. Aug. 12, 2014) (the debtor bears the burden of proof on the defense of "constructive occupancy"); *In re Lusiak*, 247 B.R. 699, 703 (Bankr. N.D. Ohio 2000) (same).

Section 522(d)(1) grants an exemption in "real property or personal property that the debtor or a dependent of the debtor uses as a residence . . . ." A "residence" is "a home that a debtor owns and occupies at the time of the filing." *In re DeMasi*, 227 B.R. 586, 588 (D.R.I. 1998).[6] However,

[5] *See also In re Hodes*, 308 B.R. 61, 66 (10th Cir. BAP 2004) ("[T]he objecting [c]reditors have the burden of proving that the exemption is not properly claimed. The exemption is presumed to be valid, and the [c]reditors have the initial burden of producing evidence to rebut the presumption. Thereafter, the burden shifts back to the [d]ebtor to come forward with evidence to demonstrate that the exemption was proper.").

[6] *See also In re Tankersley*, 575 B.R. 848, 862 (Bankr. E.D. Ark. 2017) (quoting *DeMasi*); *In re Anderson*, 240 B.R. 254, 258 (Bankr. W.D. Tex. 1999) (same); *In re Cole*, 185 B.R. 95, 96 n 3 (Bankr. D. Me. 1995) (under § 522(d)(1), residence means "the place the debtor actually occupies as a home") (quoting 2 *Norton Bankruptcy Law and Practice 2d* § 46:10 at 46–17 (1993).

§ 522(d)(1) does not require a debtor to have physically occupied a property on the petition date. As the Court explained in *In re Lusiak*,

> if actual physical occupancy were an absolute condition precedent to the residency requirement of § 522(d)(1), then even a temporary absence from one's home, such as may occur when a person takes an extended vacation, would defeat a debtor's entitlement to claim an exemption in that house, a result clearly in contradiction to the purpose of the exemption statute.

247 B.R. at 702-03.[7] Although § 522(d)(1) requires the debtor or a dependent of the debtor to occupy the property as a residence when the bankruptcy case is commenced, "constructive occupancy" of the property as a residence can satisfy that requirement.[8]

Where a debtor's physical absence from the property on the date the bankruptcy case is commenced is involuntary, "constructive occupancy" and use of property as a residence on the petition date is established for purposes of § 522(d)(1) and the exemption should be allowed if:[9]

(a) the debtor or a dependent of the debtor actually occupied the property, which may be real or personal property, before the involuntary absence and used it as a home,

(b) on the petition date, the debtor or a dependent of the debtor intended to resume living in and using the property as a home if and when the compelled absence ends, and

(c) on the petition date, the debtor or dependent of the debtor had a meaningful ability to resume occupancy of the property as a home within a reasonable time. What constitutes a reasonable time depends on the circumstances.

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[7] *See In re DeMasi*, 227 B.R. at 588 (stating that "the determining factor should not be so mechanical as to require a debtor to occupy the home on the filing date or use the address on the bankruptcy filing").

[8] *E.g., In re Tankersley*, 575 B.R. at 863; *In re Yanovich*, 544 B.R. 306, 312 (Bankr. W.D. Pa. 2016); *In re Keener*, No. BR 14-01169, 2015 WL 998881, at *4 (Bankr. N.D. Iowa Mar. 3, 2015); *In re Feliciano*, 487 B.R. 47, 52 (Bankr. D. Mass. 2013); *In re Lozada Rivera*, 470 B.R. 109, 117 (Bankr. D.P.R. 2012).

[9] There are exceptions to this general rule. For example, the exemption is not allowed if the debtor has no equity in the property and the exemption might not be allowed if the debtor acquired the property on the eve of bankruptcy for the purpose of exempting it.

Cf. In re Bennett, 192 B.R. 584, 587–88 (Bankr. D. Me. 1996) (In addition to intending to resume occupying the property as a residence, the "debtor must also demonstrate a meaningful ability to occupy the property imminently or within a reasonable time.").[10] For example, under these criteria, a debtor does not lose the right to claim an exemption if the debtor's military service compelled the debtor's absence from home on the petition date and the debtor intends on the petition date to return home and occupy the property as the debtor's residence when the military service ends. *See In re Anderson*, 240 B.R. at 258 (concluding that the debtor had constructively occupied the property where the debtor had occupied the property before the petition date and was absent from the property involuntarily on the petition date due to military service).[11]

The Court will examine separately each of the three requirements for Ms. Morris to establish constructive occupancy and use of Buildings as a residence on the Petition Date. In doing so, the Court will address each of Jade Rentals' arguments.

A. Ms. Morris actually occupied the Buildings and considered them to be her residence before her involuntary absence

Jade Rentals argues that Ms. Morris did not in fact live in the Buildings at the time that Jade Rentals took possession of the Buildings when it levied on its judgment. Further, Jade Rentals argues that the Buildings cannot constitute a "residence," as that term is used in § 522(d)(1), because the Buildings lacked ordinary necessities such as running water and were not intended to be used as dwellings and it was unlawful for Ms. Morris to reside in the Buildings.

1. Lack of running water and the sale of the Building for non-residential use only do not show, by themselves, that a debtor is not occupying a property as a residence.

[10] *See also In re Tankersley*, 575 B.R. at 863 (same, citing *Bennett*).

[11] *See In re Broderick*, No. 14-42104-CJP, 2017 WL 432679, at *4 (Bankr. D. Mass. 2017) (citing *Anderson* with approval).

Jade Rentals relies on *In re Bace*[12] to argue that a property lacking ordinary necessities of a home, such as running water, cannot constitute a residence. In *Bace*, however, the lack of running water at the debtor's property was only one fact on which the court rested its finding that the property in question was not the debtor's homestead. The debtor had also stated that the property was "vacant," had listed a different address on his bankruptcy petition, and admitted that he could not live in the house until further construction was completed. Those facts are not present here. This Court has found that from some time in 2017 until Jade Rentals took possession of the Buildings on or about July 30, 2019 Ms. Morris lived in the Loft Building and considered the Buildings to be her home. The Court will not scrutinize a debtor's living conditions to assess whether the property in which the debtor lives and considers her home is in fact a residence. *See In re Golding,* 622 B.R. 8, 18 (Bankr. D. Conn. 2020) (stating that the court declined "to scrutinize an individual's home or their living conditions").

Jade Rentals contends further that Buildings cannot constitute a residence because Ms. Morris acknowledged in the purchase agreements for the Buildings that each building was "for storage purposes only and is not to be used for a residence of any kind" and there was a label affixed to each building conspicuously stating that they were "not intended for residential use." However, despite the manufacturer's intention and her original agreement, after purchasing the Buildings Ms. Morris converted them to residential use. She installed a stove and a refrigerator, built a pantry and countertops, installed solar panels and batteries that provide power to the refrigerator, lights, and a pump, and installed a water system in the Loft Building. She also hired a contractor who installed French doors, windows, and a stairway to one of the lofts in the Loft

[12] *In re Bace*, 364 B.R. 166, 183 (Bankr. S.D.N.Y. 2007), *rev'd sub nom. Bace v. Babitt*, No. 07 CIV. 2421(WHP), 2008 WL 800672 (S.D.N.Y. Mar. 25, 2008).

Building. Ms. Morris used a portion of the space in the Loft Building for her bedroom, which included a bed and dresser.

The Buildings are not disqualified from constituting a residence because the Buildings lacked running water and were sold only for non-residential use. Ms. Morris considered the Buildings to be her home and actually occupied the property as her home for an extended period before her involuntary absence.

2. The Buildings can qualify as a residence even if Ms. Morris is occupying the Buildings in violation of use restrictions imposed by local law.

In addition, Jade Rentals argues that, as a matter of law, Ms. Morris cannot have been using the Buildings as a residence within the meaning of § 522(d)(1) because use of the Buildings as a residence violates the New Mexico Administrative Code (sometimes, the "NMAC"), promulgated pursuant to the Construction Industries Licensing Act (the "Act"). NMSA 1978, §§ 60-13-1 to -59. The NMAC requires, among other things, that a modular building that has been "converted [f]or use as a dwelling . . . be issued a certificate of occupancy prior to human habitation and occupancy . . . ." and "have a permanent foundation . . . ." § 14.6.7.15 NMAC. There is no dispute that Ms. Morris has never had a certificate of occupancy for the Buildings or that the Buildings lack permanent foundations.

Section 522(d)(1) permits a debtor to exempt real or personal property that the debtor "uses as a residence." Considering the directive that § 522(d)(1) is to be construed liberally in favor of the debtor claiming the exemption, that section does not require a showing that the debtor's use of the property as a home is compliant with state or local ordinances. In construing state homestead statutes that are similarly silent on the effect of state or local ordinances or regulations, numerous courts have held that the homestead statutes do not require that a debtor's occupancy of property

as a residence complies with state or local laws or regulations where the debtor has not been ordered to cease such occupancy.[13]

Further, there has been no adjudication barring Ms. Morris from residing in the Buildings. The authority to enforce the Act and related regulations is vested in the Construction Industries and Manufactured Housing Division (the "Division"). *New Mexico Constr. Indus. Div. & Manufactured Hous. Div. v. Cohen*, 2019-NMCA-071, ¶ 3, 453 P.3d 456; *see* NMSA 1978, § 60-13-53. A debtor's claim of exemption does not charge the Court with the duty "to step into the shoes of a [state] agency to enforce [state] regulations . . . ." *Golding*, 2020 WL 6813359, at *6 (declining to enforce state regulations "in deference to local governmental powers and authority").[14] Moreover, even if successful enforcement action were taken it very well could result in a remediation period to put the property into compliance rather than eviction. Indeed, the NMAC contemplates that structures like the Buildings may be "safely converted [f]or use as a dwelling for human habitation and occupancy." § 14.6.7.15 NMAC. The mere possibility that enforcement

[13] *See, e.g.*, *In re Gamboa*, 578 B.R. 661, 667 (Bankr. S.D. Fla. 2017) (noting that the debtor's residence was not lawful but stating that the facts that the debtor "made the [p]roperty his permanent residence . . . [and] intends to stay on the [p]roperty as his permanent residence . . . are the only facts that ultimately matter" under a state homestead statute) *aff'd,* No. 18-20031-CIV-KMW, 2018 WL 9340067 (S.D. Fla. Sept. 27, 2018), *aff'd,* 778 F. App'x 829 (11th Cir. 2019); *Golding v. Adamcewicz* (*In re Golding*), No. 19-20465 (JJT), 2020 WL 6813359, at *6 (Bankr. D. Conn. Aug. 7, 2020); *In re Kain*, No. 12-31492-KKS, 2014 WL 10250731, at *2 (Bankr. N.D. Fla. Feb. 14, 2014) (holding that a zoning violation did not defeat the debtor's claim of state exemption in her residence); *In re Turner*, No. 04-40267DRD, 2005 WL 1397150, at *2–3 (Bankr. W.D. Mo. June 1, 2005) (overruling objection to state exemption based on fact that the debtor's residence allegedly violated local zoning laws); *In re Pich*, 253 B.R. 562, 567 (Bankr. D. Idaho 2000) (holding that state law exemption would be valid despite fact that the debtor's residence violated local laws but disallowing the exemption on other grounds). *See also In re Voliva*, No. 10-10031-8-RDD, 2011 WL 6301232, at *4 (E.D.N.C. 2011) (overruling an objection to the debtor's state law exemption in real property despite a notice from the county authorities that the debtors' use of the property violated the county building code). *But cf. In re Keener*, 2015 WL 998881, at *4 (holding that the debtor was not using the property as his residence based in part on the court's finding that the debtor "had no certificate of occupancy at the time [and t]hus had no right to live there.").

[14] *See In re Pich*, 253 B.R. at 567 (holding that a homestead exemption was properly claimed where "no . . . enforcement action, civil or criminal, had been commenced [and the d]ebtor ha[d] not been enjoined or prohibited from occupying the [p]roperty as a residence").

action could be taken that may or may not result in Ms. Morris being enjoined from living in the Buildings sometime in the indefinite future does not defeat her exemption. *See In re Gamboa*, 578 B.R. at 669 (stating that "the possibility of enforcement that could result in a forced eviction does not defeat the exemption, because the [d]ebtor was living in the [t]railer on the filing date of the case and intended to remain on the [p]roperty as his permanent residence").[15]

Jade Rentals' reliance on *In re Haworth* is unavailing. 604 B.R. 394, 397 (Bankr. D. Idaho 2019). In that case, the bankruptcy court denied the debtor's claim of an exemption in a vintage truck under Idaho law because the truck could not legally be operated on Idaho's roads on the petition date. Motor vehicle was defined under Idaho law as a vehicle that "is or may be used upon the highway." *Id*. at 398. The *Haworth* court construed the "is or may be used upon the highway" as a reference to the lawful use of the vehicle on the highway. *Id*. This Court does not find *Haworth* persuasive authority that the language "uses as a residence" in § 522(d)(1) means "uses as a residence in compliance with applicable law."

In sum, the lack of a certificate of occupancy and permanent foundations, even if violative of applicable regulations governing use of the Buildings as a residence, does not alter the Court's conclusion that Ms. Morris used the Loft Building as her residence from some time in 2017 to the date that Jade Rentals took possession of it.

3. The Other Building is part of the residence.

Jade Rentals objected to Ms. Morris's claim of exemption in both Buildings but did not assert any argument specific to the Other Building. Ms. Morris purchased the Other Building on the same date as the Loft Building, and, while in Ms. Morris's possession, the Other Building has

[15] *See In re Pich*, 253 B.R. at 567 ("In light of the required liberality of construction of exemption statutes in favor of a debtor, the Court finds no persuasive reason to interpret such a potential disqualifying factor [as a zoning violation] as having a present disqualifying effect.").

been continuously located on the same lot as, and within feet of, the Loft Building. Both before and after the Petition Date, Ms. Morris's use of the Other Building for storage of tools and art supplies and as an art studio supported and enhanced her use of the Loft Building as a residence. *Cf. In re Kincade*, No. 10-02462-8-RDD, 2010 WL 3745901, at *2 (Bankr. E.D.N.C. Sept. 20, 2010) (holding that a hog barn on a tract next to the debtor's residence, in which the debtor stored tools and firewood used in the debtor's home, "was used for support, existence, and enhancement of [the residence] and is residential property of the debtor subject to exemption" under state law exempting, like § 522(d)(1), real or personal property that is "use[d] as a residence"). The Court concludes that, to the extent the Loft Building was used as a residence under § 522(d)(1), the Other Building was also being used as part of Ms. Morris's residence.

B. On the Petition Date, Ms. Morris intended to resume occupying the property as a residence when her compelled absence ended.

To determine whether Ms. Morris intended on the Petition Date to resume occupying the Buildings as her residence if and when her compelled absence ended "requires more than a snapshot taken at the date of filing;" a court may examine a party's acts and conduct prior to and after the petition date. *In re Robinson,* 295 B.R. 147, 154 (10th Cir. BAP 2003) (applying Oklahoma law). Here, Ms. Morris occupied the Buildings as her home for about two years prior to the Petition Date. She made substantial improvements to the Loft Building to make it more habitable. Before Jade Rentals took the Buildings from her property, Ms. Morris intended to reside in the Buildings indefinitely. Six days after Jade Rentals took the Buildings, Ms. Morris filed her chapter 7 bankruptcy case to recover the Buildings. Two weeks after commencing her bankruptcy case, Ms. Morris commenced an adversary proceeding seeking turnover of the Buildings from Jade Rentals. The Buildings were returned to her land about a month and a half later and she resumed her occupancy of the Buildings. Based on these circumstances, the Court has found that on the

Petition Date Ms. Morris intended to resume occupying the Buildings as her home when her compelled absence from the Buildings ended.

C. On the Petition Date, Ms. Morris had a meaningful ability to occupy the Buildings as her residence within a reasonable time.

Ms. Morris was dispossessed of the Buildings for less than two months before she commenced her bankruptcy case. She filed her bankruptcy case six days after the State Court denied her motion for injunctive relief to recover possession of the Buildings. She filed an adversary proceeding seeking turnover of the Buildings two weeks after she filed her bankruptcy case and recovered possession of and resumed occupying the Buildings as her home about a month and a half later. These facts establish that on the Petition Date Ms. Morris had a meaningful ability to resume occupancy of the Buildings as her residence within a reasonable time after her involuntary absence ended.

Moreover, the lack of permanent foundations or a certificate of occupancy do not bar that conclusion. There is no evidence that the Construction Industries and Manufactured Housing Division has initiated or threatened an enforcement action against Ms. Morris and there has been no adjudication that the Buildings are not in compliance with the Act or the NMAC. Ms. Morris has not been ordered to cease living in the Buildings. Further, as discussed above, even if successful enforcement action were taken it very well could result in a remediation period to put the property into compliance rather than eviction. The mere possibility that Ms. Morris may or may not be enjoined from living in the Buildings at some indefinite time in the future does not establish that Ms. Morris did not have a meaningful ability on the Petition Date to continue occupying the Buildings as her residence.

The Court concludes that on the Petition Date, Ms. Morris had a meaningful ability to occupy the Buildings as her residence within a reasonable time.

CONCLUSION

Ms. Morris has satisfied her burden of showing constructive occupancy of the Buildings as her residence on the Petition Date. Jade Rentals has not satisfied its burden of showing that Ms. Morris's claim of exemption in the Buildings should be disallowed.

WHEREFORE, for the foregoing reasons, Jade Rentals' objection to Ms. Morris's claim of exemption in the Buildings should be, and hereby is, overruled.

IT IS ORDERED that Ms. Morris's claim of exemption in the Buildings under § 522(d)(1) is hereby allowed.

Robert H. Jacobvitz
United States Bankruptcy Judge

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