UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
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In re: RONNY GAMBOA, Debtor. / Case No. 16-22495-RAM
Chapter 7

RESPONSE TO CREDITORS', GAIL PEREZ'S AND ADVANCE CREDIT, INC.,'S OBJECTION TO DEBTOR'S HOMESTEAD EXEMPTION [ECF#46]

COMES NOW Debtor, RONNY GAMBOA, by undersigned counsel, and files this, his *Response to Creditors', Gail Perez's and Advance Credit, Inc.,'s Objection to Debtor's Homestead Exemption* [ECF#46] ("*Objection to Claimed Homestead Exemption*"), and states:

UNDISPUTED FACTS

1. Debtor is 72 years old. The highest level of formal education he completed was ninth or tenth grade. He owned and operated a bar ("Ronny's Tavern") in Chicago, Illinois, for approximately 34 years (from about 1980 to 2013). The bar was comprised of mixed-use real property and personal property, and the Debtor lived in an apartment above the bar;

2. In 1995, the Debtor purchased property ("the Property") located in unincorporated Miami-Dade County, Florida, to wit: the 15 acres (more or less) located at 22600 SW 207 Avenue 33170. The son of an adjacent property owner lived in a 40'-50' trailer on the neighboring property, and died approximately ten years ago. The Debtor then bought the trailer and had it pulled onto the Property through the use of a very large tractor where it has remained ever since. The trailer is immobile as a result of being supported by leveling jacks/blocks, and over time the tires have completely dry rotted;

3. On September 16, 2011, Creditor, GAIL PEREZ, obtained a

default in personam deficiency judgment against the Debtor in the Circuit Court of Cook County, Illinois, for $141,562.30, however said default judgment does not contain the address of GAIL PEREZ;

4. F.S. 55.10, provides in pertinent part:

> **55.10 Judgments, orders, and decrees; lien of all, generally; extension of liens; transfer of liens to other security.—**
>
> (1) A judgment . . . becomes a lien on real property in any county when a certified copy of it is recorded in the official records . . . provided that the judgment . . . contains the address of the person who has a lien as a result of such judgment . . . or a separate affidavit is recorded simultaneously with the judgment . . . stating the address of the person who has a lien as a result of such judgment . . . A judgment . . . does not become a lien on real property unless the address of the person who has a lien as a result of such judgment . . . is contained in the judgment . . . or an affidavit with such address is simultaneously recorded with the judgment . . .

5. On February 6, 2012, Creditor, ADVANCE CREDIT, INC., obtained a default judgment against the Debtor in the Circuit Court of Cook County, Illinois, for $73,092.27, however said default judgment does not contain the address of ADVANCE CREDIT, INC.;

6. On July 25, 2012, GAIL PEREZ and ADVANCE CREDIT, INC., (collectively, "Creditors") recorded certified copies of their respective default judgments in the Official Records of Miami-Dade County, Florida, but did not simultaneously record separate affidavits stating the addresses of the persons that claimed to have liens as a result of the recording of such judgments;

7. In November of 2013, no longer an owner or operator of the bar or of the real or personal property that comprised the bar, the Debtor got into his car to drive to South Florida with the intent of moving to, and permanently residing in, the trailer on the Property;

8. In November of 2013, the Debtor arrived in South Florida, drove directly to the Property, and moved himself and all his personal belongings into the trailer with the intent to live there permanently as it was the only property that he had left to his name. The Debtor began receiving mail at the Property at that time, and his driver's license, voter's registration, and all other important documents reflect the Property address. Since that time, the Debtor has lived at the Property continuously and uninterruptedly with the same intent to live there permanently;

9. On January 13, 2015, Creditors recorded certified copies of their respective default judgments in the Official Records of Miami-Dade County, Florida, and simultaneously recorded separate affidavits stating their addresses (the addresses of the persons that claimed to have liens as a result of the recording of such judgments);

10. The Debtor was not aware of any prohibition against living in his trailer on the Property until April 8, 2015, when he was served with a "Courtesy Warning" from Miami-Dade County that advised that living in the trailer was not permitted. The Debtor decided at that moment to do whatever was necessary for him to continue to live permanently on the Property. Later, a citation was issued to the Debtor, and Debtor's state court counsel has filed an appeal of same which remains pending;

11. The Debtor has investigated what is necessary for him to continue to live at the Property without violating any Miami-Dade County regulation, and has taken the following steps toward that goal:

a. Debtor's architect produced and submitted to Miami-Dade County Building and Zoning ("MDCB&Z") plans for a 1,131.55 square foot residence to be constructed on the Property;

b. MDCB&Z advised that the plans needed to be amended to increase the size of the residence to 1,750 square feet to satisfy alleged MDCB&Z minimum size requirements for a residence on the Property;

c. Debtor's architect produced and submitted to MDCB&Z revised plans for a 1,900 square foot residence to be constructed on the Property;

d. The Debtor brought fill to the Property and used it to into place the "pad" to accommodate the 1,131.55 square foot residence. Thereafter, the Debtor and his architect staked out the area where additional fill was required to be brought in to enlarge the pad to accommodate the larger 1,900 square foot residence. The Debtor subsequently brought in additional fill and enlarged the pad as required;

e. The Debtor has drilled an additional well and installed a pump thereon as a new, dedicated water supply for his residence, and samples of the water have been submitted to DERM for water quality lab tests (results are pending);

f. MDCB&Z advised the Debtor that a prerequisite to the issuance of his new home building permit is that he needs to sign off on a Miami-Dade County Dedication of Right-of-Way related to 207th Avenue, and provide a title insurance policy or opinion of title in support of his execution of same;

g. MDCB&Z advised the Debtor that once his new home building permit is issued, he can permissibly live in t the trailer as a watchman's quarters during the construction of his new home; and

h. MDCB&Z has NOT advised the Debtor that the Property is ineligible to have the proposed 1,900 square foot residence built upon it.

SUMMARY OF ARGUMENT

11. Creditors devoted much of their *Objection to Claimed Homestead Exemption* discussing the irrelevant homestead tax exemption provided by Article VII, Section 6, of Florida's Constitution. The proper issue before the court, however, is the Debtor's protection from forced sale of his homestead by Creditors that he enjoys pursuant to Article X, Section 4, of Florida's Constitution;

12. Creditors likewise devoted much of their *Objection to Claimed Homestead Exemption* discussing cases where the lien of a creditor attached before the debtor established homestead on the given property. In this case, the Debtor established his homestead upon the Property in November of 2013, but the Creditors did not do what would be required of them to establish a lien on real property located in Miami-Dade County, Florida, until January 13, 2015, some 14 months later;

13. The protection of the Florida homestead from forced sale by creditors first appeared as Article IX, Section 1, of the Florida Constitution of 1868; it was revised slightly and appeared as Article X, § 1 of the Florida Constitution of 1885; and it was revised again and appeared as Article X, § 4(a)(1) of the Florida Constitution of 1968 where it resides today. It was amended in 1984 to substitute "natural person" for "the head of a family", and again in 1998 to eliminate gender-specific references;

14. The *structure* of the Florida constitutional homestead exemption from forced sale by creditors that exists today, the "*bones*" if you will, are plain, unambiguous, and have remained unchanged since the inception of the exemption. They are as follows:

(a) Up to 160 acres and the improvements on same are exempted from forced sale;

(b) If located within an incorporated city or town –
(i) Only up to 1/2 acre is exempted from forced sale; and
(ii) Only improvements that are the residence of the owner or the owner's family are exempted from forced sale.

The 1868, 1885, and the 1968 versions of the homestead exemption are attached hereto as Exhibit A.

15. The less generous size limitation (1/2 acre vs. 160 acres) and the only usage limitation (formerly "residence and business house", and now since the 1968 revision, just

"residence") appear in and apply only to homesteads located within municipalities, and the line of cases that hold otherwise are in conflict with at least five Florida Supreme Court opinions (as far back as 1885 and as recent as 1955) that remain good law today;

16. The line of cases that hold that the usage limitation applies to homesteads located outside municipalities are wrongly decided, and suffer from various maladies including attribution of intent on the part of the drafters of the 1968 revision that does not logically follow from the changes made to the exemption language, recitation of a truncated and misleading version of the 1968 version of the exemption, failure to even identify whether the homestead was located within a municipality, and applying "within a municipality" case precedent to cases that involved homesteads located outside a municipality ("opinion creep"); and

17. Lastly, the Creditors' 522(p) argument that the Debtor acquired the Property within 1,215 days of the petition date is wrong on its face, and is almost not worthy of response. The Debtor acquired the Property more than 7,880 days before the petition date herein. The case cited by Creditors in that section of their *Objection to Debtor's Claimed Homestead Exemption*, Judge Killian's opinion in *In re Reinhard*, dispatches the Creditors' position as eloquently as is possible.

CREDITORS' CONFUSION OF ARTICLE VII and ARTICLE X ISSUES

18. Section I of Creditors' *Objection to Claimed Homestead Exemption* goes on for more than three pages (bottom of Page 8 through top of Page 12), citing to at least as many cases and nearly as many statutes that deal with the irrelevant homestead

tax exemption provided by Section 6 of Article VII (the Finance and Taxation Article) of Florida's Constitution;

19. The proper issue before the court, however, is the Debtor's protection from forced sale of his homestead by Creditors that he enjoys pursuant to Section 4 of Article X (the Miscellaneous Article) of Florida's Constitution;

20. In 2008, Judge Isicoff, in discussing whether claiming a homestead tax exemption is relevant to whether or not a debtor enjoyed protection from forced of his homestead stated,:

> Moreover, the fact that the Debtor has claimed the building as his homestead previously but does not do so now is not dispositive of this issue.

In re Wilson, 393 B.R. 778, 782 (Bkrtcy.S.D.Fla.2008). In *Wilson*, Judge Isicoff found that the debtor was entitled to a homestead exemption in a portion of the claimed building. *Id* at 784.

21. Judge Specie followed Judge Isicoff in the case of *In re Kain*, 2014 WL 10250731 (Bkrtcy.N.D.Fla.2014). *Kain* involved an Osteopathic physician debtor who, although she was continuing to use the clinic she owned for treating patients, was nonetheless residing on the property because she had lost her prior home to foreclosure. She requested and was denied a zoning variance to legally live in the property, and zoning violation fines were being assessed and accruing at the rate of $10.00 per day. The debtor continued to reside on the property because she, like the Debtor in the case *sub judice*, had nowhere else to go. Although the *Kain* debtor could not legally live in the property, Judge Specie found she was entitled to an Article

X homestead exemption. *Id* at 2. See also *In re Turner*, 2005 WL 1397150, 3 (Bankr.W.D.Mo.2005) (overruling objection grounded on the theory that that because the property was zoned commercial and debtor's occupancy of was inconsistent with that designation the property could not qualify for the homestead exemption from forced sale); and *In re Pich*, 253 B.R. 562, 566-67 (Bankr.D.Idaho 2000) (while a zoning violation might have consequences for the debtor, it did not preclude the assertion of a homestead exemption);

22. In addition to the foregoing cases, it is just common sense that since the Debtor is not claiming an exemption under Article VII, cases analyzing and deciding whether a person is entitled to such an exemption are inapposite;

ARTICLE X HOMESTEAD EXEMPTION

23. The burden is on the Creditors (the objecting parties) to show that the Debtor is not entitled to the claimed homestead exemption. *In re Brown*, 165 B.R. 512, 514 (Bankr.M.D.Fla.1994);

24. The Creditors are required to carry this burden by a preponderance of the evidence. *See Wilson, supra*, at 782.

25. "The homestead exemption is to be liberally construed in the interest of protecting the family home. *See, e.g., Milton v. Milton,* 63 Fla. 533, 58 So. 718, 719 (1912) ("Organic and statutory provisions relating to homestead exemptions should be liberally construed in the interest of the family home.")." *See Havoco of America, Ltd. v. Hill*, 790 So.2d 1018, 1020 (Fla.2001). *See also In re Dudeney*, 159 B.R. 1003, 1005 (Bankr.S.D.Fla.1993) citing to *Quigley v. Kennedy & Ely Ins.,*

Inc., 207 So.2d 431, (Fla.1968) ("The Supreme Court of Florida held that the homestead provision of the Florida Constitution was to be interpreted broadly . . .");

26. "However, in the same breath we have similarly cautioned that the exemption is not to be so liberally construed as to make it an instrument of fraud or imposition upon creditors: "[T]he [homestead exemption] should not be so applied as to make it an instrument of fraud or imposition upon creditors." *Havoco v. Hill, supra,* at 1020, citing *Milton v. Milton, supra*.

27. Examples of cases where the Florida Supreme Court declined to extend the homestead exemption, finding it would be a fraud upon creditors, include *Drucker v. Rosenstein*, 19 Fla. 191, 191, 1882 WL 3066, at *1 (Fla. 1882) (finding that where debtor bought property, recorded a declaration of homestead in the county records, and delivered some building materials to the site, but never occupied it as a dwelling place or home, such was not a homestead within the meaning of the Constitution and laws of Florida), and *Pasco v. Harley*, 73 Fla. 819 (Fla. 1917) (finding no homestead exemption where debtor quickly married after entry of a judgment against him to satisfy the then requirement that the exempting party be head of a family). No such situation exists in the case before this court.

28. In *Havoco v. Hill*, the Florida Supreme Court went on to state, "A concomitant in harmony with this rule of liberal construction is the rule of strict construction as applied to the exceptions. *See, e.g., Quigley v. Kennedy & Ely Ins., Inc.,* 207 So.2d 431, 432 (Fla.1968)." *Id.* at 1021.

29. The same suspicion and caution the Florida Supreme Court instructs us to use against actions in derogation of the homestead exemption through strict construction is also properly applied and employed against the improper expansion of the "within a municipality" usage limitation to rural homesteads that some court have given into. See discussion of the *Nofsinger* line of cases, *infra*.

30. Only two things are required to impress the homestead character upon property not within a municipality: the intention to live permanently there coupled with the actual use and occupancy of the property. See *Brown, supra*, citing *Hillsborough Inv. Co. v. Wilcox*, 13 So.2d 448, 452 (Fla.1943) in turn citing *Lanier v. Lanier*, 95 Fla. 552, 116 So. 867, 867 (Fla.1928) ("The character of property as a homestead depends upon an actual intention to reside thereon as a permanent place of residence, coupled with the fact of residence."). *See also Drucker v. Rosenstein, supra*, at 198, (". . . he might . . . reside in a tent set upon poles or a cabin erected upon it while building his house, and such occupation would give to it the character of a homestead and protect it under the statute from forced sale."), and *Semple v. Semple*, 82 Fla. 138, 89 So. 638, (Fla.1921) (Homestead character attaches where purchaser openly avows intention and proceeds to prepare land for family home, and there is nothing done by the claimant showing a different intention, or that is inconsistent with the asserted intention to make the place his homestead.);

31. In this case it is undisputed that the Debtor has resided on the Property continuously and uninterruptedly since mid-November 2013, and that he had no other property and nowhere else to live. It is also undisputed and uncontroverted that

that he has professed his intent to live out his final years on the Property. See Deposition Transcript of Ronny Gamboa, attached as *Exhibit F* to Creditors' *Objection to Claimed Homestead Exemption* , Page 26, Line 15-16, ". . . I've always wanted to retire in that property . . ."

32. The fact that the Property was subject to a non-exclusive Agricultural/Nursery Lease from October 21, 2009, to November 30, 2014, did not prevent Debtor from establishing his homestead thereon upon his arrival in November of 2013. Said Lease did not give the tenant the right to live on the Property or to exclude Debtor from the property, indeed, the Lease specifically stated in pertinent parts:

> Tenant accepts use and occupancy of the Land upon the following terms:
>
> . . .
>
> 1. USE – The land is to be used by Tenant solely for agricultural purposes and not other.
>
> . . .
>
> 5. LESSOR'S RIGHTS - . . . Tenant's use of the Land shall always be subordinate to the Landlord's rights in the Land. Landlord reserves the right to enter upon the Land at any time for its [sic] purposes and Tenant shall notify its employees, agents, contractors, invitees, and licensees accordingly.

Even if this court were to conclude that the existence of this non-exclusive lease prevented the Debtor from impressing the Property with homestead character during its term, said lease expired after Debtor had already moved onto the Property with the intent to remain their permanently, and before the Creditors properly recorded certified copies of their judgments and the

requisite accompanying affidavits necessary to establish a lien on real property located in Miami-Dade County, Florida. Accordingly, the Property still would have been impressed with homestead character on December 1, 2014, some 44 days before the earliest moment that the Creditors' liens could have attached on January 13, 2015. A copy of the Debtor's *Defendant's Response to Amended Motion to Allow Sheriff's Levy and Sale of Property and for Fees and Costs Incurred in Satisfying Judgment* filed in the Miami-Dade County Circuit Court domestication of foreign judgments case is attached hereto as Exhibit B, and the arguments therein are incorporated by reference. *See also, In re Lee*, 223 B.R. 594, 598 (Bankr.M.D.Fla.1998) (Creditor that failed to provide an address in the judgment or in a simultaneously filed affidavit failed to comply with this procedural safeguard mandated by Florida statute, which rendered its putative judgment lien fatally defective);

33. In a case nearly factually identical to the case before this court, *In re Israel*, 94 B.R. 729 (Bankr.N.D.Fla.1988), Judge Killian found that a debtor who owned a 40-acre homestead outside a municipality and rented 33 of said acres to a farmer, was nonetheless was entitled to her homestead exemption for all 40 acres. Judge Killian stated:

> It is well established under Florida law that exceptions to the constitutional homestead exemption should be strictly construed and that the exemption itself should be liberally construed in the interest of protecting the family home. *Quigley v. Kennedy and Ely Insurance, Inc.,* 207 So.2d 431 (Fla.1968). The sole issue presented in this instance is whether the debtor by leasing a portion of her rural property has waived her homestead exemption as to that portion under lease. The parties have not cited nor has the Court found any

> cases which hold such a waiver. The Florida Supreme Court in *Fort v. Rigdon,* 100 Fla. 398, 129 So. 847 (1930) held that where land is rural property, the homestead exemption applies to the total acreage allowed without regard to the use that may be made of that portion of the tract not covered by the residence when the land is actually occupied and lived on by the owner. While the foregoing rule may be somewhat extreme and subject to abuses in certain situations, *Fort v. Rigdon* has never been overruled and is, therefore, the controlling law.
>
> The parties have cited a number of cases dealing with structures placed on property used for purposes other than the debtor's residence. More recently, two Florida bankruptcy courts have addressed the issue of rental property located on the same parcel of property constituting the homestead of the debtor. In *In re Rodriguez,* 55 B.R. 519 (Bankr.S.D.Fla.1985) and *In the Matter of Aliotta,* 68 B.R. 281 (Bankr.M.D.Fla.1986) , the courts excluded from the exempt property those portions of the debtor's property which was rented and occupied by third parties. However, both of those cases involved property located within municipalities. Under the Florida Constitution, the homestead within a municipality is limited to the residence of the owner or his family, however, no such limitation exists with respect to rural property. We find that the lease of a portion of the rural property by the debtor to a third party does not defeat the claim of homestead with respect to that portion such to the lease.

Id. at 730. *See also, In re Dudeney, supra*, where this court properly observed the Florida Supreme Court's ruling in *Quigley v. Kennedy & Ely Ins., Inc., supra*, that dealt with a homestead not with in a municipality:

> The Supreme Court of Florida held that the homestead provision of the Florida Constitution was to be interpreted broadly with the only application

> limitation in the Constitution being the one hundred sixty contiguous acre limitation for homes located outside of a municipality. [Emphasis added]

Dudeney at 1005.

34. In addition to the *Fort v. Rigdon* that Judge Killian stated in *In re Israel* "has never been overruled and is, therefore, the controlling law.", there are four other Florida Supreme Court cases that stand for the same concepts with respect to homesteads located outside municipalities, that have never been overruled, that are therefore, controlling law, but have nonetheless been overlooked or ignored by the *Nofsinger* line of cases discussed, *infra*. Each of these additional Florida Supreme Court Cases will be noted in the following four numbered paragraphs.

35. In *Buckels v. Tomer*, 78 So.2d 861, 865 (Fla. 1955), the Florida Supreme Court stated:

> For as was stated in *Fort v. Rigdon*, 100 Fla. 398, 129 So. 847, 848, in respect to rural homesteads: "We have no authority, if the person who claims the land for a homestead resides thereon, is a resident of the State, the head of a family, and there is no more than 160 acres in the tract, to add any other conditions than those expressed in the Constitution. To say how the homesteader should use his land, whether as a 'farm,' or for a 'saw-mill,' or a 'grist-mill,' or a 'carding and fulling mill,' would be to impose a judicial condition not found in the Constitution of the State. The Constitution does not prescribe the manner in which the tract shall be used beyond residing thereon." And in another instance: "The Constitution of this State, Section 1, Article 9, exempts a homestead to the extent of one hundred and sixty acres of land outside an

> incorporated city or town to the head of a family residing in this State, with the improvements on the real estate, without regard to the use that may be made of that portion of the tract not covered by the residence and enclosures." *McDougall v. Meginniss*, 21 Fla. 362.
>
> In a later case it is held that a portion of a homestead tract upon which a boys' school was located was nevertheless exempt, the court saying: 'This language is clear, and it is significant that the framers of the Constitution of 1885, when they came to write the homestead and exemption clause for that Constitution, used the language of the Constitution of 1868 on the subject of the homestead's extent, which had been construed by * * * the Supreme Court of Florida, which had held that nothing more was required than for the homesteader to live on the tract to render the whole 160 acres exempt, and the Constitution did not prescribe the manner in which the land should be used beyond residing on it.' *Armour & Co. v. Hulvey*, 73 Fla. 294, 74 So. 212, 214. See also Vol. II, No. I, p. 47, Univ. of Fla. Law Review.
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> The appellant has failed to make revrsible [sic] error appear and consequently the decree appealed from should be affirmed.
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> It is so ordered.

36. In *Shone v. Bellmore*, 78 So. 605, 607 (Fla.1918), the Florida Supreme Court stated:

> In *McDougall v. Meginniss*, 21 Fla. 362, this court said:
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> > 'In our view the owner is only required by the Constitution to live on the land, and the whole 160 acres is exempt.'
>
> It is true that *McDougall v. Meginniss, supra*, was decided under the Constitution of 1868, but the language of the Constitution of 1885 relating to

> homestead and exemptions is practically the same, and had been several times construed when the Constitution of 1885 was adopted. The homestead is the 'place of the home' of the owner and his family, and the Constitution fixes the extent of it at 160 acres of land when it does not lie within the limits of any incorporated city or town.

37. In *Armour & Co. v. Hulvey,* 74 So. 212, 213-215 (Fla.1917), the Florida Supreme Court pushed back on early efforts to chip away sweeping breadth of the exemption provided for homesteads not within a city or town. [Warning: the following quote is long. Indeed, practically the entire opinion is reproduced herein. But it covers so many important concepts that it should be read in its entirety and in the context in which it originally appears]:

> Appellants' counsel contend that the word 'homestead' is the dominating word in the section of the Constitution quoted above, and that the facts in any case where the benefits of the homestead and exemptions clause of the Constitution are claimed should be studied in the light of the generally accepted definition of the word. They quote from Funk & Wagnall's New Standard Dictionary which defines the word 'homestead' as 'the place of a home; the house, subsidiary buildings and adjacent land occupied as a home,' and conclude that the words 'subsidiary buildings' implies 'that the house, the shelter, is the primary feature of the homestead, and the phrase 'occupied as a home' means that a *commercial* enterprise of such an extent that it overshadows the home is not contemplated in the word. Building upon the Standard Dictionary definition of the word 'homestead,' counsel suggest a rule by which doubtful cases of this kind may be measured. 'The property,' they say, 'must be used primarily as a home, and any other uses must be incidental and auxiliary to this chief and primary

purpose. Should its chief use be for a purpose other than as a home, immediately it loses its character as such, and the exemption does not attach.'

In the definition of the word 'homestead,' as given in the dictionary mentioned, the words 'subsidiary buildings' are used, and the rule resting upon this definition is narrowed to and confined within the limits of counsel's interpretation of those words. Whereas the Constitution seemingly does not limit the improvements upon the land to a 'house and subsidiary buildings'; on the other hand, it definitely prescribes the number of acres which may be held as a homestead, and in words simple, yet comprehensive and seemingly definite in meaning, provides that 'the improvements on the real estate' shall be included in the exempt property. As if the framers of the Constitution themselves had interpreted the words 'and the improvements on the real estate' to mean any valuable addition or betterment, of whatever character, they in the same section provided that the exemption, when claimed in a city or town, should not extend to more improvements or buildings than the residence and business house of the owner.

We think that the words 'and the improvements on the real estate' have a broader meaning than the idea conveyed by the words 'buildings subsidiary to a residence or dwelling.' The exemption of a half acre within the limits of any incorporated city or town would doubtless include such outhouses, barns, wagon houses, garages, wood or coal sheds, chicken houses, and fences, etc., as were appurtenant and subsidiary to and used in connection with the residence as conveniences and auxiliaries, although they are not expressly mentioned as being included in such exemption. If such subsidiary buildings and improvements are included in an exemption of city property, the framers of the Constitution must have thought that the words 'and the improvements on the real estate,' as applied to the exemption not within a

city, meant more than a residence, subsidiary buildings, and business house.

The Constitution of 1868, providing for a homestead and exemptions in so far as its extent is concerned, is almost identical with the provision of the Constitution of 1885. In the case of Greeley v. Scott, 2 Wood, 657, Fed. Cas. No. 5,746, Mr. Justice Bradley, of the Supreme Court of the United States, in commenting upon the homestead exemption provision of the Constitution of Florida of 1868, said:

> ‘That the preservation of a householder's means of carrying on his business, as well as a house for shelter, is within the constitutional purpose, is evident from the clause relating to city property, namely, that in a city or town the exemption shall not extend to more improvements or buildings than the residence and business house of the owner, showing that the business house as well as residence is included.’

Again:

> ‘Whether the provision is politic or impolitic is a question with which the courts are not concerned. In the eye of the philosophic economist, taking a broad view of the interests and objects of human society, it has many reasons in its favor; and the creditor cannot complain of injustice, for he understands the conditions when he gives the credit. It is a pure question of policy, namely, whether the advantages obtained by the exemption are equivalent to the disadvantages arising from the unwillingness of capital to remain in a community where such an exemption exists; or whether, from the latter cause, the law will not operate too depressingly upon enterprise. Speculation, however, is

> unnecessary. The people of * * * Florida have, in their Constitution, declared what their will is on the subject, and that declaration is binding on both the people and the courts.'

In that case the person seeking to exempt his homestead was engaged in the business and trade of sawing lumber, and asked to have his mill, which adjoined his dwelling, reserved as a part of his homestead. Judge Bradley held that the mill, in the sense of the Constitution, is appurtenant to and a part of the debtor's homestead. In other words, the property considered as the homestead of a lumberman running a sawmill was exempt under the provisions of the Constitution. In the case of McDougall v. Meginniss, 21 Fla. 362, this court said:

> 'In our view the owner is only required by the Constitution to live on the land, and the whole 160 acres is exempt.'

In the Greeley-Scott Case, Mr. Justice Bradley undertook to draw a distinction between the buildings and improvements erected by the owner of a homestead in the course of his business by which he earned a living, and those improvements representing an investment of his surplus earnings or capital, and held that the latter would not be included in the exemption. Mr. Chief Justice McWhorter, in the case of McDougall v. Meginniss, supra, did not approve of this view, however, and, after referring to the language expressing such idea, said:

> 'We have no authority, if the person who claims the land for a homestead resides thereon, is a resident of the state, the head of a family, and there is no more than 160 acres in the tract, to add any other conditions than those expressed in the Constitution. To say how the homesteader should use his land, whether as a 'farm,' or

> for a 'sawmill,' or a 'gristmill,' or a 'carding and fulling mill,' would be to impose a judicial condition not found in the Constitution of the state. The Constitution does not prescribe the manner in which the tract shall be used beyond residing thereon.'

This language is clear, and it is significant that the framers of the Constitution of 1885, when they came to write the homestead and exemption clause for that Constitution, used the language of the Constitution of 1868 on the subject of the homestead's extent, which had been construed by a judge of the Supreme Court of the United States to mean that all improvements made by the homesteader in the course of his business or occupation were exempt, and by the Supreme Court of Florida, which had held that nothing more was required than for the homesteader to live on the tract to render the whole 160 acres exempt, and the Constitution did not prescribe the manner in which the land should be used beyond residing on it.

As to the policy of a constitutional clause securing such a liberal exemption, the courts are not concerned. It is evident, however, from the language used in the Constitution of 1868, and its repetition in the Constitution of 1885, after the decision of this court in the McDougall and Meginniss Case, supra, that the framers of the Constitution concluded that the advantages to the state to be derived from a liberal policy of homestead exemptions was greater than the benefits which might accrue from laws permitting a creditor to pursue his debtor to the very threshold of his home.

In this case the person claiming the homestead carries on the business of conducting a military school. The nature of the business requires the construction of buildings to accommodate the students in the matter of lodging and board; there must be bedrooms and halls, classrooms and libraries, clubrooms and offices,

> quarters for the officers or teachers, and apartments for the principal and his family. If the owner had erected for himself and family a residence apart from the main building, under Judge Bradley's view of the Constitution as expressed in the Greeley-Scott Case, supra, all these improvements would have been exempt as preserving the householder's means of carrying on his business, as well as a house for shelter. There can be no doubt that they would be exempt under the view expressed by this court in the McDougall-Meginniss Case.
>
> The homesteader is not required to live in a house of any particular design nor style, nor is he required, in cases of exempt property outside the limits of an incorporated city or town, to have his residence separate and apart from his business house. He may, if he desires, erect a dormitory for boys and dwell with them in the 'midst of alarms,' or may retreat to some quiet corner and dwell with his family in peace; the improvements on his 160-acre tract are exempt from forced sale under process of any court, certainly to the extent that such improvements are useful or necessary to his business or occupation by which he earns a living for himself and family.
>
> We think that the deed under which Mr. Hulvey holds the land conveys such an estate in the land as to support the privilege of a homestead exemption.
>
> The order of the chancellor, dismissing the bill, is affirmed.

38. In *McDougall v. Meginniss, 21 Fla. 362, 371–72, 1885 WL 1776, at *4 (Fla. 1885),* the Florida Supreme Court succinctly stated:

> Our Constitution says: "A homestead to the extent of 160 acres of land * * * owned by the head of a family residing in this State * * and the improvements on the

> real estate," shall be exempt from levy and sale. This language in our view is too plain for elaboration or argument. We have no authority, if the person who claims the land for a homestead resides thereon, is a resident of the State, the head of a family, and there is no more than 160 acres in the tract, to add any other conditions than those expressed in the Constitution. . . . The Constitution does not prescribe the manner in which the tract shall be *used* beyond residing thereon.

IT IS THE HOMESTEADS "WITHIN A MUNCIPALITY" CASES WHERE THE FLORIDA SUPREME COURT STRUGGLED WITH THE USE OF IMPROVEMENTS ON THE PROPERTY

39. In the foregoing cases that all dealt with homesteads not within a municipality, the Florida Supreme Court consistently ignored the "use" limitation, because the use limitation applies only to homesteads within a municipality. The Florida Supreme Court cases where it struggled with the use of the property all dealt with homesteads within a municipality. These include, *Smith v. Guckenheimer*, 42 Fla. 1 (1900), *Boshier v. Moeller*, 83 Fla. 10 (1922), *Anderson Mill & Lumber Co. v. Clements*, 101 Fla. 523 (1931), *Cowdery v. Herring*, 106 Fla. 567 (1932), *McEwan v. Larson*, 136 Fla. 1 (1939), *Hillsborough v. Wilcox, supra,* (1943), *Lockhart v. Sasser*, 156 Fla. 339 (1945), *Brogdon v. McBride*, 75 So.2d 770 (Fla.1954), *Olesky v. Nicholas*, 85 So.2d 510 (Fla.1955), *Union Trust v. Glunt*, 856 So.2d 877 (Fla.1956). [1] Undersigned counsel researched and was unable to find a single Florida Supreme Court case that analyzed the use of the improvements upon a homestead located outside a municipality. Conversely, every Florida Supreme Court case that

[1] All of these cases specifically identify the homesteads as lying within a municipality, except *Brogdon v. McBride*, which although it does not specifically so state, it does say, "The Lockhart decision, supra, is also determinative as to the nature of improvements encompassed within the homestead in cases like the present." *Brogdon* at 771.

analyzed the use of the improvements upon a homestead was a homestead located within a municipality

THE *NOFSINGER* LINE

40. Notwithstanding the consistent and distinct treatments the Florida Supreme Court applied to the foregoing "within a municipality" and "not within a municipality" lines of cases, and further notwithstanding the identical structure maintained between the 1868/1885 homestead exemptions and the 1968 version as described in paragraph 14, above, mischief and opinion creep soon followed after the 1968 revision to Constitution;

40. The *Nofsinger* line of cases begin with "rental unit" cases that, with the exceptions of the first case (In re *Rodriguez*, 55 B.R. 519 (Bankr.S.D.Fla.1985) and the fourth case (*First Leasing & Funding of Florida, Inc., v. Fiedler*., 591 So.2d 1152 (2d.D.C.A.1992)), all deal with homesteads located outside a municipality. This line of cases improperly extends the "residence limitation" found in the homestead exemption for properties located within a municipality to homesteads located outside a municipality. The line culminates with the *Nofsinger* case, which further extends the "residence limitation" to not only improved property located outside a municipality, but to basically unimproved property located outside a municipality;

41. The *Nofsinger* line begins with Judge Britton's In re *Rodriguez*, 55 B.R. 519 (Bankr.S.D.Fla.1985). In *Rodriguez*, the court faced a property lying within a municipality (Hialeah) that had an internal dividing wall, and separate entrances, with the owner/debtor renting out one side the property to a tenant. This being a within a municipality case, Judge Britton properly

limited the homestead exemption to the portion of the property the debtor used as his residence;

42. The following year, Judge Paskay cites *Rodriguez* as "directly on point" authority in the *Matter of Aliotta*, 68 B.R. 281 (Bankr.M.D.Fla.1986). However, Rodriguez was not directly on point as it dealt property located within a municipality and *Aliotta* dealt with a 4-unit apartment property lying outside a municipality in Springhill, Fla., an unincorporated area of Hernando County.[2] Indeed, the court in *Aliotta* did not even identify the property as being inside or outside a municipality, much less address how that critical distinction would affect its analysis of how the homestead exemption should be applied to the facts of the case. These oversights were compounded by the court's blind application and construction of the portion of the 1968 homestead exemption that relates only to homesteads located within a municipality.

43. Without clarifying that the quoted provision of the 1868/1885 homestead exemption applied only to homesteads located within a city or town, the *Aliotta* court incorrectly stated:

> Prior to the 1968 Amendment of Article X, § 4 of the Florida Constitution, a homestead exemption was allowed for the "residence and business house of the owner." This "business property test" allowed an owner to claim as exempt not only his dwelling house but also other structures which were used for business or were income-producing rental properties. *See, i.e., Cowdery v. Herring,* 144 So. 348 (Fla.1932).

[2] To determine that the property was located outside a municipality, undersigned counsel checked the PACER record for this case, and identified the debtor's address as a Spring Hill address. Spring Hill is identified as an unincorporated area of Hernando County on Wikipedia.com.

Aliotta at 282.

The court then goes on to confuse the matter more by again failing to identify that the discussed section applied only to homesteads located within a municipality, and by using an edited thereby misleading version of the homestead exemption, painted a broader application of the residence limitation that caused it to be slopped over onto homesteads not located within a municipality. It stated:

> Article X, § 4 of the Florida Constitution was amended in 1968 to eliminate the reference to business property and now states that homesteads shall consist of the following property owned by a natural person:
>
> > [A] homestead if located outside a municipality, to the extent of 160 acres of contiguous land and improvements thereon ... or if located within a municipality, to the extent of one half acre of contiguous land, upon which the exemption shall be limited to the residence of the owner or his family.
>
> The clear reading of this Section leads to the conclusion that the Debtors are entitled to an exemption only for their residence and not for the three units which are rented out. The elimination of the business property reference from Article X, § 4 shows unequivocal intent to limit homestead exemptions to the residence of the owner and to disallow any claim for an exemption that exceeds the residence of the owner. The fact that the Debtors' residence is attached to other improvements on the property does not render the whole property homestead.

Id.

44. The *Nofsinger* line of cases continued off track with

the *Shillinglaw* cases: *In re Shillinglaw*, 81 B.R. 13 (Bankr.S.D.Fla.1987), and *Shillinglaw v. Lawson*, 88 B.R. 406 (1988). *Shillinglaw* was another outside a municipality case that dealt with a homeowner that rented a portion of his homestead, including a barn, to a tenant for use as his residence and for the tenant to further sublease portions of the barn to other persons. The bankruptcy court improperly cited to inside municipality case precedents of *McEwan v. Larson, supra,* and *Anderson Mill & Lumber v. Clements, supra*. The District Court, in affirming the bankruptcy court's finding that the homestead exemption should be limited, cited to no case law at all other than to say that the bankruptcy court cited to *Read v. Leitner*, 80 Fla. 574 (1920). The citation to *Read v. Leitner* was not at all central to the bankruptcy court's decision which makes the District Court's mention of it all the more befuddling. *Read v. Leitner* dealt with whether or not an owner of a homestead not within a municipality had abandoned his homestead by periodically moving to the city to school his children and engage in business. The court there found that he had not.

The *Shillinglaw* District Court then summarily ended its opinion as follows:

> The court does take note of appellant's not insubstantial argument that the language of the homestead exemption would appear to make the residency limitation apply only to urban property. The location of the semicolon between the provisions describing rural and municipal property does lead to the conclusion that the residency limitation applies to the municipal property only. However, the bankruptcy court was correct in stating that the rules of statutory construction are merely tools in understanding the

> meaning of legislation. The statute need not be given a literal interpretation where to do so would lead to an unreasonable or ridiculous conclusion. *Holly v. Auld,* 450 So.2d 217, 219 (Fla.1984). This court believes that appellant's reading of the homestead exemption would destroy the policy of protecting the debtor's residence which is the basis for the homestead exemption.

Shillinglaw at 408.

Frustratingly, however, the court never explained how or why the debtor's "not insubstantial argument" should be discarded other than to say that giving the homestead exemption its literal interpretation would lead to "an unreasonable or ridiculous conclusion". It never explained how or why that would be an unreasonable or ridiculous result, or how it "would destroy the policy of protecting the debtor's residence which is the basis for the homestead exemption."

45. The next case in the *Nofsinger* line is the *First Leasing & Funding of Florida, Inc., v. Fiedler.*, 591 So.2d 1152 (2d.D.C.A.1992) which appears to be an inside a municipality case, but it is never expressly so stated within the opinion. If it is an inside a municipality case, it appears to be correctly decided. If not, it was not.

46. In *In re Wierschem*, 152 B.R. 345 (Bankr.M.D.Fla.1993), Judge Corcoran confronted a homestead located outside a municipality with two separate buildings containing five separate rental units only one of which the debtor occupied. The court, in emphasizing the basis for its following the inside municipality case precedents of *Aliotta*, *supra*, *Shillinglaw*, *supra*, and in *In re Englander*, 156 B.R. 862 (Bankr.M.D.Fla.1992) reproduced, albeit slightly inaccurately, the Article X, Section

4(a)(1) homestead exemption and italicized the phrase "*the residence of the owner or his family*". *Wierschem* at 347. The correct wording of the exemption is "*the residence of the owner or the owner's family*", but that distinction is not important. What is important is that the court emphasized the portion of the exemption that relates only to homesteads located within a municipality while analyzing a case that involved a homestead located outside a municipality.

47. The next case in the line is *In re Pietrunti*, 207 B.R. 18 (Bankr.M.D.Fla.1997). In *Pietrunti*, Judge Paskay again faced a homestead located outside a municipality, this time composed of two contiguous parcels totaling five acres, and containing three mobile homes and brick and mortar house. The debtor lived in one and rented out the other three. The court cited to *Shillinglaw, supra*, which as you will recall dealt with a homestead located outside a municipality, but which based its conclusions of law on case precedents (*McEwan v. Larson, supra,* and *Anderson Mill & Lumber v. Clements, supra*) that involved homesteads located within municipalities. The opinion creep circle was now complete, the courts having successfully migrated inside municipality case law to outside municipality cases to such an extent that when they now analyze outside municipality cases, they can cite to "outside municipality case law."

48. Finally we arrive at *In re Nofsinger*, 221 B.R. 1018 (Bankr.S.D.Fla.1998) where Judge Hyman was faced with an outside municipality homestead that, unlike the others cases in the *Nofsinger* line, was not a "rental unit case"; instead, dealt with a debtor who rented an irrigated portion of their homestead to a third party upon which the third party operated its own nursery business. The court in *Nofsinger* cited to foregoing

cases described herein as the *Nofsinger* line of cases. As already stated, this line of cases impermissibly applies the limited homestead exemption that Article X, Section 4(a)(1) provides to homesteads located within municipalities to homesteads located outside municipalities. In attempting to justify this result, the *Nofsinger* court states:

> Nonetheless, in support of his position, the Debtor cites two Florida Supreme Court cases: *Fort v. Rigdon,* 100 Fla. 398, 129 So. 847 (1930) and *Cowdery v. Herring,* 106 Fla. 567, 143 So. 433 (1932). These cases, however, were both predicated upon the pre-amendment constitutional language. It is uncontested that court decisions under the language of the 1885 Florida Constitution had allowed an unlimited homestead exemption, even though a portion of the property was leased to and occupied by a third party. The Debtor also cited *In re Israel,* 94 B.R. 729 (Bankr.N.D.Fla.1988) in support of his position. The *Israel* Court however based its ruling on *Fort v. Rigdon,* and thus upon the former version of the Florida Constitution.

Id. at 1020–21.

The court infers that the cases cited by the debtor were rightly decided under the previous version of the homestead exemption, but does not explain how the change in the wording of the exemption affects the analysis and the outcome of the case. The court rejects the offered authority of Judge Killian's *In re Israel*, as being based on case law that construed a prior version of the exemption, but again fails to explain how the change in the wording of the exemption dictates a change in the outcome of the case.

49. Judge Killian's *In re Israel, supra*, and this court's *In re Dudeney, supra*, are properly grounded decisions that are faithful to plain language of the homestead exemption as reflected in the 1868, 1885 and 1968 versions. These cases must be followed, and the *Nofsinger* line of cases should be rejected. In discussing construction of statutes, as recently as 1988, the Florida Supreme Court reminds us:

> As the creditors themselves point out, legislative intent controls construction of statutes in Florida.[4] Moreover, "that intent is determined primarily from the language of the statute [and] ... [t]he plain meaning of the statutory language is the first consideration." *St. Petersburg Bank and Trust Co. v. Hamm,* 414 So.2d 1071, 1073 (Fla.1982) (citation omitted). This Court consistently has adhered to the plain meaning rule in applying statutory and constitutional provisions. *See Holly v. Auld,* 450 So.2d 217, 219 (Fla.1984); *Department of Legal Affairs v. Sanford-Orlando Kennel Club, Inc.,* 434 So.2d 879, 882 (Fla.1983); *Carson v. Miller,* 370 So.2d 10, 11 (Fla.1979); *State ex rel. West v. Gray,* 74 So.2d 114, 116 (Fla.1954); *Wilson v. Crews,* 160 Fla. 169, 175, 34 So.2d 114, 118 (1948); *City of Jacksonville v. Continental Can Co.,* 113 Fla. 168, 171-73, 151 So. 488, 489-90 (1933); *Van Pelt v. Hilliard,* 75 Fla. 792, 798, 78 So. 693, 694 (1918). As we recently explained:
>
> Florida case law contains a plethora of rules and extrinsic aids to guide courts in their efforts to discern legislative intent from ambiguously worded statutes. However, "[w]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." It has also been accurately stated that courts of this state are "without power to construe an unambiguous statute in a way which would extend,

> modify, or *limit,* its express terms or its *reasonable and obvious implications.* To do so would be an abrogation of legislative power."
> *Holly,* 450 So.2d at 219 (citations omitted, emphasis added).

Public Health Trust of Dade County v. Lopez, 531 So.2d 946, 948–49 (Fla.1988)

50. The structure and the language of the exemption are clear. The "residence" limitation (formerly the "improvements or buildings of the residence and the business house of the owner" limitation) contained in the homestead exemption apply, and have always applied, only to a homestead located within a municipality, or as it was previously described, within the limits of any incorporated city or town. Given such clear and unambiguous wording, the magnitude of Florida's homestead exemption provided to homesteaders located outside municipalities of the state appears great, indeed. But because of its clarity, the courts must not construe it in such a way as to limit its effect.

CREDITORS' 522(p) ARGUMENT

51. The Debtor hereby incorporates the arguments and reasoning of Judge Killian's *Reinhard* opinion by reference. See In re Reinhard, 377 B.R. 315 (bankr.N.D.Fla.2007).

WHEREFORE, Debtor, RONNY GAMBOA, respectfully prays that this Honorable Court enter an order overruling GAIL PEREZ's and ADVANCE CREDIT, INC.,'s *Objection to Debtor's Homestead Exemption* on the ground set forth above.

Respectfully Submitted:

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