UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

IN RE: CASE NO. 08-4408-3F7

CHARLES CLEVELAND EARNEST, JR.
and NANCY ANNE EARNEST,

Debtors.
_____/

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case came before the Court upon the Trustee's Objection to Debtors' Claim of Exemption. The Court conducted a hearing on the matter on November 12, 2008. In lieu of oral argument, the Court directed the parties to submit memoranda in support of their respective positions. Upon the evidence and the arguments of the parties, the Court makes the following Findings of Fact and Conclusions of Law.

Findings of Fact

Debtors filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code on July 28, 2008. On their Schedule C Debtors claimed as exempt pursuant to Fla. Const., Art X § 4(a)(1) real property located at 8879 East Highway 25, Belleview, Florida (the "Real Property"). (Tr.'s Ex. 2.) The Real Property, which is located in Marion County, is outside a municipality and is approximately 4.82 acres.

County Road 25 (the "Highway") runs along the front of the Real Property. Debtors' residence is located at the back of the Real Property, furthest from the Highway. The front portion of the Real Property, closest to the Highway, houses a building (the "Building"). Located behind the Building is a warehouse (the "Warehouse").

The Building is rented to an unrelated third party for $1,605 a month. The third party has a month to month lease on the Building but plans to rent the Building indefinitely. The Warehouse is used by Debtors' business, All American Aluminum Inc. ("All American"). A fence separates the Debtors' home from the front portion of the Real Property where the Warehouse and Building are located. (Tr.'s Ex. 3.) The purpose of the fence is to keep All American's property separate from Debtors' home. Marion County's comprehensive plan prohibits the Real Property from being subdivided.

Conclusions of Law

Debtors' Chapter 7 Trustee (the "Trustee") filed an objection to Debtors' claim of exemption. The Trustee asserts that Debtors are not entitled to claim as exempt, pursuant to Fla. Const., Art. X § 4(a)(1), the portion of the Real Property that the Building and Warehouse are located on because that property is utilized in a commercial capacity and thus exceeds Debtors' residence. Alternatively, the Trustee argues that even if Debtors are entitled to claim as exempt a portion of the Real Property that is utilized commercially, they are not entitled to claim as exempt the portion of the Real Property that is rented to a third party.

The Florida Constitution grants debtors a liberal exemption for homestead property. See Englander v. Mills (In re Englander), 95 F.3d 1028, 1031 (11th Cir. 1996). Exceptions to the homestead exemption should be strictly construed in favor of claimants and against challengers. In re McClain, 281 B.R. 769, 773 (citation omitted). The burden is on the objecting party to establish by a preponderance of the evidence that a debtor is not entitled to an exemption claimed. Id. (citation omitted); Fed.R. Bankr.P. 4003(c).

Prior to 1968 Article X, § 4, Fla. Const. stated:

> A homestead to the extent of one hundred and sixty acres of land, or the half of one acre within the limits of any incorporated city or town, owned by the head of a family residing in this state, together with one thousand dollars' worth of personal property, and the improvements on the real estate, shall be exempt from forced sale under process of any court, and the real estate shall not be alienable without the joint consent of husband and wife, when that relation exists... The exemption herein provided for in a city or town shall not extend to more improvements or buildings than the residence and business house of the owner; and no judgment or decree or execution shall be a lien upon exempted property except as provided in this article.

The pre-1968 language regarding a homestead located outside of a municipality and the language regarding a homestead located within a municipality were provided for separately, in two distinct sentences. At that time, the homestead exemption for property located within a municipality was allowed for the "residence and business house of the owner." This language permitted an owner to claim as exempt not only his dwelling house but other structures which were used for business or were income producing. The language limiting a homestead to a "residence and business house" was only found in the sentence dealing with property located within a municipality. Because of this, courts held that the residence and business house restriction did not apply to a homestead located outside of a municipality. Armour v. Hulvey, 73 Fla. 294 (Fla. 1917).

In 1968 Article X, § 4 of the Florida Constitution was amended to its current form and provides as follows:

> (a) There shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, except for the payment of taxes

> and assessments thereon, obligations contracted for the purchase, improvement or repair thereof, or obligations contracted for house, field or other labor performed on the realty, the following property owned by a natural person:
>
> (1) a homestead, if located outside a municipality, to the extent of one hundred sixty acres of contiguous land and improvements thereon, which shall not be reduced without the owner's consent by reason of subsequent inclusion in a municipality; 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 the owner's family;

The sentence providing for the exemption of homesteads located outside a municipality and the sentence providing for the exemption of homesteads located within a municipality were combined into a single sentence and the language allowing an exemption for the "business house of the owner" was eliminated entirely. The Trustee asserts that by deleting the business house restriction and placing the residence requirement in the same sentence as the rural homestead provision, the legislature intended to increase the restrictions on homesteads located both within and outside a municipality.

Since the 1968 amendment at least two courts have held that the amendment shows the legislature's intent to limit the homestead exemption to the residence of the owner. In re Nofsinger, 221 B.R. 1018, 1020 (Bankr. S.D. Fla. 1998) (finding that under plain language of constitution, homestead exemption only extends to the portion of property used as a residence and cannot include any portion rented to and occupied by a third party or used by a third party as his own business); In re Aliotta, 68 B.R. 281, 282 (Bankr. M.D. Fla. 1986). Courts have also held that the combination of the provision

regarding rural homesteads with the provision regarding city homesteads in the same sentence as the residence requirement indicates the legislature's intent to apply the residence restriction to homesteads located both within and outside a municipality. In re Pietrunti, 207 B.R. 18, 20 (Bankr. M.D. Fla. 1997); Shillinglaw v. Lawson, 88 B.R. 406, 408 (affirming In re Shillinglaw, 81 B.R. 138, 140 (Bankr. S.D. Fla. 1987)).

This Court previously held that debtors whose less than 160-acre homestead was located outside of a municipality could use a portion of their property for a commercial purpose without losing the homestead exemption. In re Lowery, 262 B.R. 875, 880 (Bankr. M.D. Fla. 2001). Another bankruptcy court came to the opposite conclusion. In re Radtke, 344 B.R. 690, 693 (Bankr. S.D. Fla. 2006). Importantly, the only binding and relevant case decided subsequent to Lowery held that the language limiting homesteads within municipalities to the residence of the owner or the owner's family does not apply to homesteads located outside municipalities. In re Davis v. Davis, 864 So. 2d 458, 460 (Fla. 1st Dist. Ct. App. 2003).[1] In that case the property, which was claimed as an exempt homestead was less than 160 acres and located outside a municipality. The owner used a portion of the property to operate a mobile home park. The issue before the court was whether a Florida homestead of less than 160 acres and improvements could include the portion of such land and improvements separate from the owner's residence.

[1] The Trustee devotes a portion of his brief to the argument that Davis is not binding precedent on this Court. The Trustee's argument is misguided. When interpreting state law, a federal court is bound by the rulings of the state's highest court. Veale v. Citibank, F.S.B., 85 F.3d 577, 580 (11th Cir. 1996)(citation omitted). If the state's highest court has not ruled on the issue, a federal court must look to the intermediate state appellate courts. Id. (citation omitted). The court in Radtke declined to follow Davis, noting that there was no binding authority from the Supreme Court of Florida on the issue and that although Davis was persuasive, the language in the Florida Constitution was not intended to extend homestead protection to the portion of property utilized for a commercial enterprise. The Court disagrees with Radtke on both counts.

The court noted that when the Florida Supreme Court interpreted the 1868 and 1885 homestead provisions it consistently held that the language which limited the homestead to the "residence and business house of the owner" did not apply to homesteads located outside municipalities. Id. at 460. The court stated:

> Like the language of the 1885 constitution, the language defining the extent of homesteads under the current constitution contains no substantive change pertinent to the issue presented in the present case. Although a homestead within a municipality is now limited to "the residence of the owner or the owner's family," rather than to "the residence and business house of the owner," this change does not affect our analysis. And even though all of the language defining the extent of homesteads now appears in a single sentence, a semicolon serves to grammatically separate the language expressing the extent of a homestead outside a municipality from the language limiting a homestead within a municipality to the residence of the owner or the owner's family.

Id. Based upon "a plain reading" of article X, § 4 and a "reading consistent with decisional law under prior constitutions", the court held that the language limiting homesteads within municipalities to the residence of the owner or the owner's family does not apply to homesteads located outside municipalities. Id. The Court finds that based upon the precedent set forth in Davis, Debtors' commercial use of the Building and Warehouse does not preclude them from claiming the entirety of the Real Property as exempt.

Alternatively, the Trustee argues that even if Debtors are able to claim the portion of the Real Property that is used commercially, they are not able to claim as exempt the portion of the Real Property which is rented to a third party. The Trustee argues that Lowery is distinguishable from the instant case because, in addition to using the Real

Property commercially, Debtors rent out the Building to a third party and allow their son's company to utilize a portion of the Warehouse.[2] While the Court agrees that Lowery does not address whether the portion of real property outside of a municipality which is rented to a third party is exempt, the Court finds that Davis does. The Court finds the holding in Davis to be broad enough to encompass both the commercial usage of property and rental to a third party. The Court finds that Debtors are entitled to claim all of the Real Property, including that portion which is rented to a third party, as exempt pursuant to the homestead provision of the Florida Constitution.

Conclusion

Debtor's 4.82 acre homestead property which is located outside a municipality and upon which is located a building which is rented to a third party and a warehouse which Debtors use in their business is exempt pursuant to Fla. Const., Art X § 4(a)(1). The Court will enter a separate order consistent with these Findings of Fact and Conclusions of Law.

DATED this 26 day of March, 2009 in Jacksonville, Florida.

Jerry A. Funk
United States Bankruptcy Judge

Copies to:

Meghan R. Applegate, Attorney for Trustee
Richard A. Perry, Attorney for Debtors

[2] The Trustee appears to argue that the Building and Warehouse are both commercial and rental property.