UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

IN RE: CASE NO. [redacted]

[redacted]
and [redacted],

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 [redacted], 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, [redacted] ("[redacted]"). 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.

KeyCite Yellow Flag - Negative Treatment
Declined to Follow by Deutsche Bank Nat. Trust Co. v. Gardner, Pa.Super., October 14, 2015

85 F.3d 577
United States Court of Appeals, Eleventh Circuit.

Carl S. VEALE, Mary A. Veale,
Plaintiffs–Appellants,
v.
CITIBANK, F.S.B., a Federal Savings and Loan fka Citicorp Savings of Florida, Inc.,
Defendant–Appellee.

No. 94–4463.
|
June 19, 1996.

Synopsis
Home mortgage borrowers brought suit against bank for bank's alleged violations of federal Truth in Lending Act (TILA). The United States District Court for the Southern District of Florida, No. 92–8444–CIV-JAG, Jose A. Gonzalez, Jr., J., entered judgment in favor of bank, and borrowers appealed. The Court of Appeals, Fay, Senior Circuit Judge, held that: (1) express mail charge that was not imposed as incident to extension of credit, and which borrowers could avoid by having documents sent via regular mail, was not "finance charge" which had to be revealed in TILA disclosure statement; (2) intangible tax that Florida required by law to be paid to public official for perfecting bank's security interest was likewise not "finance charge" and did not have to be disclosed; and (3) bank's use of standardized rescission notice form in connection with loan refinancing did not render notice less than reasonably clear contrary to requirements of TILA.

Affirmed.

West Headnotes (9)

[1] **Federal Courts**
⚖Questions of Law in General

Court of Appeals reviews district court's conclusions of law de novo; its findings of fact, for clear error.

4 Cases that cite this headnote

[2] **Consumer Credit**
⚖Price, balance, rate, and charges in general

Express mail charge that was not imposed as incident to extension of credit, and that consumer borrowers could avoid by having document sent via regular mail, was not "finance charge" which had to be revealed on TILA disclosure statement. Truth in Lending Act, § 128, 15 U.S.C.A. § 1638.

9 Cases that cite this headnote

[3] **Consumer Credit**
⚖Price, balance, rate, and charges in general

Intangible tax which Florida required by law to be paid to public official for perfecting security interest was not properly regarded as "finance charge" which had to be revealed on TILA disclosure statement; abrogating - *Rodash v. AIB Mortgage Company*, 16 F.3d 1142. Truth in Lending Act, § 128, 15 U.S.C.A. § 1638.

12 Cases that cite this headnote

[4] **Federal Courts**
⚖Highest court

In matters of state law, federal courts are bound by rulings of state's highest court.

18 Cases that cite this headnote

[5] **Federal Courts**

⇐Inferior courts

In matters of state law, where state's highest court has not yet ruled on issue, federal court must look to intermediate state appellate courts.

14 Cases that cite this headnote

[6] **Mortgages and Deeds of Trust**
⇐Construction against drafter

Contradictory language in home mortgage note as to number of payments required under note had to be construed against bank, as mortgagee, to require lesser number of payments.

1 Cases that cite this headnote

[7] **Consumer Credit**
⇐Form and sufficiency of disclosure in general

Typographical error in home mortgage note as to number of payments required did not rise to level of violation of TILA, where TILA disclosure statement listed correct number of payments and accurately reflected mortgage borrowers' obligations. Truth in Lending Act, § 102 et seq., 15 U.S.C.A. § 1601 et seq.

5 Cases that cite this headnote

[8] **Consumer Credit**
⇐Form and sufficiency of disclosure in general

Standard TILA notice form used by bank in refinancing situation to advise consumer borrowers of their rescission rights adequately advised borrowers of their right to rescind only the new value portion of transaction, by specifying that borrowers had legal right under federal law to cancel "this transaction," notwithstanding that form was not specifically designed for use in refinancing situation; while better practice would have been for bank to use nonstandard notice form, TILA required only notice which was reasonably clear when applied to particular facts of case. Truth in Lending Act, § 102 et seq., 15 U.S.C.A. § 1601 et seq.

37 Cases that cite this headnote

[9] **Consumer Credit**
⇐Form and sufficiency of disclosure in general

TILA does not require perfect notice, but only clear and conspicuous notice of borrower's rescission rights. Truth in Lending Act, § 102 et seq., 15 U.S.C.A. § 1601 et seq.

35 Cases that cite this headnote

Attorneys and Law Firms

***578** James A. Bonfiglio, Boynton Beach, FL, for appellants.

Nancy Gregoire, Lawrence A. Gordich, Ruden, McClosky, Smith, Schuster & Russell, P.A., Ft. Lauderdale, FL, Kenneth Hoffman, Miami, FL, for appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before EDMONDSON, Circuit Judge, and FAY and GIBSON*, Senior Circuit Judges.

Opinion

FAY, Senior Circuit Judge:

This appeal arises from the District Court's judgment as a matter of law in favor of the defendants. The plaintiffs, Carl and Mary Veale, brought suit under the Truth in Lending Act (TILA), alleging that Citibank did not provide the required material disclosures in connection with a home mortgage loan. Because Citibank did not violate TILA as a matter of law, we affirm.

I. BACKGROUND

In July of 1989, the Veales borrowed $361,800 from Citibank. The loan was secured by a first security interest in the Veale's primary residence. The Veale's used the money to pay off $24,825.98 previously owed to Citibank and to pay off two other mortgages retained by two other lenders. The rest of the loan was used to pay $269.05 to Epic Mortgage, a $723.60 intangible tax, a $53.40 recording fee, a $6.60 release fee, $582.70 in ***579** documentary stamps, $2,571.00 in title insurance, a $21.00 Airborne fee, and $835.00 in prepaid finance charges. The Veales did not retain any of the loan proceeds.

According to the note, the loan was "payable in 84 installments, the first one of $3,582.87, 83 of $3,582.87, and 1 of $350,565.12." Thus the note obviously contained a typographical error, as it could not require both 84 and 85 payments. The Truth in Lending disclosure statement listed 84 payments: 83 plus the final balloon payment.

The Truth in Lending recision notice provided by Citibank gave the Veales until midnight of July 29, 1989 to rescind the transaction. On July 31, 1989, the Veales executed a Verification of Election not to Cancel.

In September of 1991, the Veales defaulted. Citibank sued for foreclosure in state court. In June of 1992, the Veales attempted to rescind the transaction under TILA, but Citibank rejected the demand for recision. Citibank purchased the property at the state court foreclosure sale.

The Veales brought suit in United States District Court, alleging that Citibank violated the TILA disclosure requirements and demanding recision. The Veales moved for summary judgment but the District Court denied the motion. At the close of the Veale's case during a non-jury trial, Citibank moved for judgment as a matter of law under Rule 52(c) of the Federal Rules of Civil Procedure.[1] The District Court granted the motion and entered judgment for Citibank.

II. STANDARD OF REVIEW

[1] We review conclusions of law *de novo* but do not disturb findings of fact unless they are clearly erroneous. *See U.S. v. Thomas,* 62 F.3d 1332, 1336 (11th Cir.1995), *cert. denied,* 516 U.S. 1166, 116 S.Ct. 1058, 134 L.Ed.2d 202 (1996).

III. ANALYSIS

A. The $21 Federal Express Charge

[2] The Truth in Lending Act requires a lender to disclose the amount financed and the finance charge in a loan transaction. 15 U.S.C. § 1638. In the TILA Disclosure Statement, Citibank included a $21 Federal Express charge in the Amount Financed but did not include that amount under the Finance Charge. The Veales contend that this was a material misstatement.

In *Rodash v. AIB Mortgage Company,* 16 F.3d 1142 (11th Cir.1994) this Court held that the Federal Express fee at issue was a transaction charge, imposed by the lender as an incident to the extension of credit. As such, it had to be included in the Finance Charge.

In this case, however, we are not convinced that the Federal Express fee was required by Citibank. If the borrower can choose to avoid the Federal Express fee by having the documents sent via regular mail, then the fee is not imposed as an incident to the extension of credit. *See Berryhill v. Rich Plan of Pensacola,* 578 F.2d 1092, 1099 (5th Cir.1978). The Veales did not produce any evidence that Citibank required the fee before it would extend credit to the Veales. To the contrary, although not covered as a specific finding of fact, it appears in this case that the delivery charge was the result of expediting the pay outs to the other financial institutions in an effort to save the Veales additional interest expense. Since the Veales could have chosen not to pay the Federal Express fee and the bank did not require it, then the fee was not imposed as an incident to the extension of credit and need not be included in the Finance Charge. Unlike *Rodash,* the charge here was not incidental to the extension of credit.

***580** B. The Florida Intangible Tax

[3] [4] [5] On the TILA Disclosure Statement, Citibank did not include the Florida intangible tax in the Finance Charge. This Court has held that the Florida intangible tax is a finance charge payable by the consumer as an incident to the extension of credit. *Rodash,* 16 F.3d at 1148. Of course, we are bound by *Rodash;* however this Court in *Rodash* was attempting to apply Florida law as Florida courts would. In matters of state law, federal courts are bound by the rulings of the state's highest court. *Huddleston v. Dwyer,* 322 U.S. 232, 236, 64 S.Ct. 1015, 1017–18, 88 L.Ed. 1246 (1944). If the state's

highest court has not ruled on the issue, a federal court must look to the intermediate state appellate courts. *Fidelity Union Trust Co. v. Field,* 311 U.S. 169, 177–78, 61 S.Ct. 176, 177–79, 85 L.Ed. 109 (1940).

When this Court decided *Rodash,* no intermediate appellate court in Florida had ruled on the issue. Since then, a Florida court has ruled on the issue, and decided it differently than this Court anticipated. In such a situation, we must look to the Florida court's ruling. *See Roboserve, Ltd. v. Tom's Foods, Inc.,* 940 F.2d 1441, 1451 (11th Cir.1991).

Under TILA, a tax is not a finance charge if it is prescribed by law and paid to a public official for perfecting a security interest. 12 C.F.R. § 226.4(e)(1). Thus the issue in this case is whether Florida law requires the intangible tax for perfecting a security interest. In *Pignato v. Great Western Bank,* 664 So.2d 1011 (Fla. 4th DCA 1995), the court held that the Florida intangible tax is prescribed by law and paid to a public official for perfecting a security interest. For that reason, we must conclude that the Florida intangible tax is not a finance charge.

C. The Required Number of Payments on the Disclosure Statement

[6] [7] According to the note signed by Citibank and the Veales, the loan was "payable in 84 installments, the first one of $3,582.87, 83 of $3,582.87, and 1 of $350,565.12." Thus the note obviously contained a typographical error, as it could not require both 84 and 85 payments. Such an error must be construed against Citibank, *Landale Enterprises Inc. v. Berry,* 676 F.2d 506, 508 (11th Cir.1982), and so the note must be read to require only 84 total payments. The Truth in Lending disclosure statement listed 84 payments (83 plus the final balloon payment) and accurately reflected the Veales' obligations. This typographical error in the note does not rise to the level of a TILA violation particularly when the disclosure statement is correct.

D. The Recision Notice Form

[8] The Truth in Lending recision notice provided by Citibank gave the Veales until midnight of July 29, 1989 to rescind the transaction. This notice was based on the form in Appendix H–8 of Regulation Z of the Federal Reserve Board Rules and Regulations Relating to Truth in Lending. 12 C.F.R. § 226.1 et seq.

[9] The H–8 form does not apply perfectly to the Veales' situation, because they already owed Citibank money and Citibank already had a mortgage on their home. Thus Citibank would still hold a mortgage on the home even if the Veales elected to rescind the current transaction; the Veales did not have the right to rescind the entire security interest. Ideally, because no model form applied perfectly to this transaction, Citibank should have provided a nonstandard notice form. *See In re Porter,* 961 F.2d 1066, 1076 (3rd Cir.1992). However, TILA does not require perfect notice; rather it requires a clear and conspicuous notice of recision rights. *See Rodash,* 16 F.3d at 1146.

The H–8 form stated: "You have a legal right under federal law to cancel *this* transaction.... If you cancel the transaction, the (mortgage/lien/security interest) is also canceled." 12 C.F.R. Pt. 226, Appendix H (emphasis added). We hold that under these particular facts the H–8 form provides sufficient notice that the current transaction may be canceled but that previous transactions, including previous mortgages, may not be rescinded.

In the *Porter* case, the Third Circuit held that the H–8 form did not provide sufficient notice of recision rights in a refinancing and consolidation transaction such as this one. *See Porter,* 961 F.2d at 1077. The court ***581** acknowledged that the H–8 form could be read as saying that the recision right only applied to the current transaction, and thus did not apply to previous security interests in the property. *Id.* However, the court in *Porter* also believed the form could be read to say that the recision right applied to the old loan money as well as the new loan money and to the old mortgages as well as the new mortgage. *Id.* Thus the court concluded that the H–8 form did not clearly and accurately notify the borrower of her right to recision.

We respectfully disagree. As we noted earlier, although the H–8 form does not apply perfectly to the Veales' situation, TILA does not require perfect notice; rather it requires a clear and conspicuous notice of recision rights. *See Rodash,* 16 F.3d at 1146. We find the H–8 form to be reasonably clear when applied to the particular facts involved in this case; it provides sufficient notice that the current transaction may be canceled but that previous transactions, including previous mortgages, may not be rescinded. Such meets the requirements of the law.

E. Monthly Mortgage Payment

The Veales presented evidence at trial that Citibank miscalculated the mortgage monthly payments. The Veales' expert testified that his analysis, utilizing a special software program, resulted in a different monthly payment. However, the expert also testified that when he used other calculation tools widely used in the financial industry, the resulting monthly payment was the same as Citibank's calculated payment. Using those other calculation tools also resulted in the same finance charge, amount financed, and total of payments reported by Citibank. Certainly the trial court's findings are not clearly erroneous; the record supports the conclusion that the computations are correct.

IV. CONCLUSION

Because Citibank did not violate the Truth in Lending Act, the judgment of the District Court is hereby AFFIRMED.

All Citations

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Footnotes

* Honorable Floyd R. Gibson, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

1 Citibank argues that the Veales waived certain issues raised in their summary judgment motion by not raising those issues at trial. This is simply not a fair characterization of what occurred. The issues were squarely before the court at trial through the pre-trial stipulation, through certain exhibits presented by the Veales, and through the argument of both counsel. Counsel for the Veales stated, "Your Honor, in light of your ruling on the summary judgment motion, we will rest." Citibank's counsel moved for a directed verdict and stated, "Judge, there were two issues before Your Honor this morning that you had not disposed of before ..." Moreover, the District Court addressed all the issues in his final order. Thus the pre-trial rulings were incorporated into the trial judgment.

End of Document

ORDERED in the Southern District of Florida on December 21, 2017.

Robert A. Mark, Judge
United States Bankruptcy Court

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

In re:	)	CASE NO. [redacted]-RAM
	)	CHAPTER 13
[redacted],	)	
	)	
Debtor.	)	

MEMORANDUM OPINION AND ORDER
OVERRULING OBJECTION TO HOMESTEAD EXEMPTION

When he filed his chapter 13 petition, the Debtor was living in a trailer on a 14 acre parcel of land located outside of a municipality. The entire parcel was classified as agricultural for property tax purposes, the Debtor did not claim the homestead exemption for property tax purposes, and he was living in the trailer in violation of a county ordinance. For the reasons

discussed in this opinion, none of these facts defeat the Debtor's homestead exemption because the evidence overwhelmingly established that when he filed this case, the Debtor was living on the property and had the intent to permanently reside there. Therefore, the Court is overruling the objection to exemptions filed by Creditors, [redacted] and [redacted], Inc. (the "Objecting Creditors").

Factual Background

The parties stipulated to the following material facts in their Joint Pretrial Stipulation [DE# 131]:

1. The debtor, [redacted] (the "Debtor"), is 73 years old, unmarried, and lives alone in a trailer (the "Trailer") located on approximately 14 acres situated at [redacted] Miami-Dade County, Florida (the "Property"). The Property is comprised of a single lot, and is not located within a municipality. The Trailer contains a bathroom with a shower, two bedrooms, a kitchen, and a living room, and has FPL electrical service and satellite television service. The Trailer has water service from an on-site well and electric pump system, and is attached to a septic tank.

2. Debtor purchased the Property in 1995, and has owned it continuously since that time.

3. Debtor owns the Property individually.

4. The Property is the only real estate the Debtor has owned since [the Objecting Creditors] foreclosed on property Debtor previously owned that was located at [redacted], Chicago, Illinois.

5. Debtor bought the Trailer from the owner of the adjacent property located immediately to the north of the Property in 2008.

6. Debtor hired someone to hitch the Trailer, which is approximately 40' long, to a very large tractor and pull it onto the Property in 2008.

7. In 2008, after Debtor caused the Trailer to be brought onto the Property, he poured a 1500 square foot concrete patio immediately in front of it.

8. In mid-November 2013, Debtor left Chicago, Illinois, drove to the Property, moved himself and his personal belongings into the Trailer, and began living there full-time. He has lived there continuously ever since.

9. Debtor began receiving mail at the Property as early as January 2014.

10. At the time he moved into the Trailer, Debtor believed he could legally reside in the Trailer, and therefore had no intention of building another residence on the Property.

11. Debtor's Property remains 100% agricultural classification and no part of the Property has been separately assessed for tax purposes for residential use.

12. Debtor's schedules and amended schedules submitted in this case have not changed in any material respect through [the date of this Stipulation].

13. Debtor's total and exclusive current regular monthly income is $717 per month.

14. Debtor does not anticipate an increase to his regular monthly income for the next 5 years.

15. Debtor first applied for a building permit on August 12, 2016.

16. As of [the date of this Stipulation], no building permit has been issued to build a home on the Property.

17. Debtor has derived no income from the Property since 2014.

18. Debtor does not anticipate deriving any income from the Property for the next 5 years.

Although not included in the Joint Pretrial Stipulation, the facts relating to the Objecting Creditors' judgment lien were determined in the Court's Order Overruling In Part Creditors' Objection to Exemptions [DE# 60], an Order discussed in greater detail later in this opinion. The Objecting Creditors hold two

Illinois state court judgments against the Debtor, one for $141,562.30 entered on September 16, 2011 and one for $71,632.77, entered on February 6, 2012. The judgments were recorded in the Miami-Dade County Official Records on July 25, 2012, but that recording did not create a lien on the Debtor's Property because the recorded judgments did not include the Objecting Creditors' address in violation of Fla. Stat. § 55.10. The Objecting Creditors' judgment lien on the Debtor's Property was not perfected until the Objecting Creditors recorded the Illinois judgments a second time on January 8, 2015, after the Debtor began living full-time in the Trailer on the Property.

The Court will provide additional material facts later in this opinion in its discussion of the evidence presented at trial.

Procedural Background

The Debtor filed a voluntary chapter 13 petition on September 9, 2016. In his Schedule C [DE# 1, p. 19], the Debtor listed the Property as exempt under Article X, Section 4 of the Florida Constitution. On December 14, 2016, Creditors, Gail Perez and Advance Credit, Inc. (the "Objecting Creditors"), filed their Objection to Debtor's Homestead Exemption [DE# 46] (the "Homestead Objection").

The Objecting Creditors seek to disallow the homestead exemption in its entirety based upon the following facts:

A. The entire Property was classified agricultural for ad valorem tax purposes and a portion would have to be reclassified as residential to legally have a residence on the Property;

B. Although the Debtor was living in the Trailer on the Property on the petition date, the Trailer was not an approved dwelling under an applicable Miami-Dade County ordinance; and

C. The Debtor had not applied for a homestead tax exemption.

The Objecting Creditors argue alternatively that the entire Property cannot be claimed as homestead because the Debtor was allegedly utilizing most of the Property for business purposes. Finally, the Objecting Creditors argue that the exemption, if allowed, should be capped at $160,375 under 11 U.S.C. § 522(p) because the Debtor did not live on the Property until mid-November 2013, a date less than 1215 days before he filed his chapter 7 petition.

Pretrial Rulings

The Court conducted a prehearing conference on the Homestead Objection on January 26, 2017. Prior to the hearing, the Court reviewed the lengthy legal arguments contained in the Homestead Objection, the Debtor's Response to the [Homestead Objection] [DE# 48] and the Objecting Creditors' Reply to Debtor's Response [DE# 54].

On March 16, 2017, the Court entered its Order Overruling in Part Creditors' Objection to Exemptions and Setting Further Prehearing Conference (the "Partial Ruling") [DE# 60]. The Partial Ruling overruled the Objection to the extent it argued the following:

A. That the exemption should be disallowed because the Debtor's home on the filing date was a trailer on the Property that was prohibited from being a permanent dwelling under an applicable Miami-Dade County ordinance;

B. That the exemption should be disallowed because the Debtor did not file for a homestead tax exemption for the Property;

C. That the exemption should be disallowed because the Property was classified agricultural for property tax purposes; and

D. That the exemption, if allowed at all, should be limited to $160,375 under § 522(p) of the Bankruptcy Code. The Court found that Property owned prior to the 1,215 day period that becomes homestead within 1,215 days of the bankruptcy filing is not subject to the § 522(p) cap, citing and agreeing with *In re Reinhard*, 377 B.R. 315 (Bankr. N.D. Fla. 2007).

Based upon these rulings, the Partial Ruling identified the following remaining issues:

(1) Did the Debtor establish his intent to permanently reside in the Property prior to January 8, 2015, the date on which the Objecting Creditor's judgment lien was perfected?

(2) What was the Debtor's intended use for the Property as of the Filing Date?

(3) Do the use limitations in the Florida Constitution for properties within a municipality apply to properties outside a municipality?

Prior to trial, the Objecting Creditors abandoned their argument that the Debtor was using or intended to use the Property for business purposes. This rendered moot one legal issue identified in the Partial Ruling, namely whether the use limitations for properties within a municipality apply to properties outside a municipality when property is claimed exempt under the homestead provisions in the Florida Constitution.

Although it is now dicta, the Court reiterates here its ruling on this issue announced at a hearing prior to trial. This Court agrees with and adopts the analysis of *In re Earnest*, No. 08-4408-3F7, 2009 Bankr. LEXIS 1821 (Bankr. M.D. Fla. March 26, 2009). In *Earnest*, the court held that the language of Article X, § 4 limiting a homestead to the residence of the owner, or the owner's family, applies only within a municipality. Therefore, even if the Debtor had been renting part of the Property for business

purposes on the filing date of his bankruptcy petition, the rented portion of the Property would have remained eligible for homestead protection.[1]

Evidence and Arguments at Trial

The Homestead Objection was tried on October 19th and 20th, 2017. The only issue at trial was whether the Debtor intended to permanently reside on the Property prior to January 8, 2015, the date on which the Objecting Creditors' judgment lien was perfected, and whether he maintained the intent to permanently reside on the Property when he filed his chapter 13 petition on September 9, 2016 (the "Filing Date").

At trial, the Objecting Creditors presented testimony and witnesses confirming the agricultural classification of the Property, and also proved that Miami-Dade County had issued citations to the Debtor for living in the Trailer in violation of a county ordinance. As described earlier, the Court's Partial Ruling overruled the Objection to Exemptions to the extent it relied on the agricultural classification or the county ordinance violation. However, the Partial Ruling also stated that the Objecting Creditors could use these facts to argue that the Debtor

[1] Bankruptcy Judge Kimball of this district also adopted and followed *Earnest* in his July 21, 2017 Order Overruling Trustee's Objection to Homestead Exemption and Denying Application for Turnover, Case No. 17-11513-EPK [DE# 39]. Bankruptcy Judge Funk has also cited to and adopted his *Earnest* decision in *In re Tinseth*, No. 3:16-bk-1694-JAF, 2017 WL 875776 (Bankr. M.D. Fla. March 3, 2017).

lacked the intent to permanently reside on the Property when he filed this bankruptcy case.

The Objecting Creditors also presented evidence regarding the Debtor's efforts to obtain a building permit to build a house on the Property. Prior to trial, the Debtor objected to the relevance of postpetition efforts to obtain a building permit. The Court ruled that this evidence would be allowed because of its possible relevance to the Debtor's intent on the Filing Date.

A. The Debtor's Efforts to Obtain a Building Permit

The Objecting Creditors presented the testimony of Michelle Augustine, a Clerk Supervisor for Miami-Dade County. Ms. Augustine's testimony and the exhibits relating to her testimony confirmed that the Debtor submitted a building permit application on August 12, 2016, a little less than a month before he filed his chapter 13 petition. The exhibits show that the Debtor obtained approvals from several of the necessary county departments, but still needs approvals from other departments, including DERM, to begin construction.

The Debtor's original plan was for a 1,132 square foot house. That plan was rejected as too small based on the zoning for the Property, and a revised plan was submitted for a 1,900 square foot house. *See* Debtor's Ex. 7 and the testimony of the Debtor's architect, Alfonso Rico, who prepared both sets of plans. As of

the date of trial, the Debtor had not received all of the necessary county approvals and the county had not issued a building permit.

At trial, the Objecting Creditors questioned the Debtor's financial ability to build a house on the Property. Among other things, and by the Debtor's own admission, building a house will cost more than one hundred thousand dollars, and the Debtor has no income. The Debtor testified that he hoped to receive money as gifts from friends and relatives and would try to get a job to help pay the expenses of the house when it was built.

B. The Property's Agricultural Classification

The Objecting Creditors presented the testimony of Raul Nillo, the Supervisor of the agricultural section of the Miami-Dade County Property Appraiser's Office. Mr. Nillo confirmed that the Property has been classified agricultural since 2001. At that time, the Debtor was leasing the Property for farming. The agricultural classification has remained on the Property since 2001. There was no requirement for the Debtor to reapply each year.

Mr. Nillo explained that property classified as agricultural is eligible for a substantial property tax exemption that significantly reduces the property taxes from the amount that would be due without this classification. He testified further that property should be reclassified when it is no longer being used

for agricultural purposes. Finally, Mr. Nillo testified that the county requires a landowner to reclassify a portion of his or her property as residential if the landowner is living on the property. As noted earlier, it is a stipulated fact that no portion of the Debtor's Property has been separately assessed for residential use.

C. Living in the Trailer Violates a Miami-Dade County Ordinance

In 2016, the Objecting Creditors attempted to execute their perfected judgment liens against the Debtor's Property. The Debtor asserted the homestead exemption. In May 2016, Michel Weisz, counsel for the Objecting Creditors, contacted Miami-Dade County and advised the County that the Debtor was living in a Trailer on the Property. This "tip" resulted in the issuance of a citation against the Debtor by the County.

Details regarding the County citation were presented in exhibits introduced by the Objecting Creditors and through the testimony of Israel Maldonado, an agricultural compliance officer for Miami-Dade County. Mr. Maldonado testified that the County issued violation notices to the Debtor in 2016 for living in the Trailer in violation of a County ordinance. Objecting Creditors' Ex. 8 is a violation notice (the "Violation Notice") issued by Mr. Maldonado on May 16, 2016. The Violation Notice cites the Debtor

for living in a trailer on property zoned agricultural in violation of Miami-Dade County Code Section 33-279.

Discussion

Florida's homestead protection is found in Article X, Section 4, of the Florida Constitution, which, in pertinent part, provides:

> (a) There shall be exempt from forced sale ... 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, ... 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 Debtor's Property is located outside a municipality in unincorporated Miami-Dade County. Therefore, if the Debtor is eligible for the constitutional exemption, it will protect all 14 acres of his Property.

To be eligible for the homestead exemption, a debtor must have the actual intention to make the property his permanent residence and must actually be living on the property. *Hillsborough Inv. Co. v. Wilcox*, 152 Fla. 889, 13 So. 2d 448, 452 (Fla. 1943). In this case, the Objecting Creditors concede that the Debtor both lived on the Property full-time beginning in late 2013 and intended to make the Property his permanent residence. So, what is the basis for the challenge?

The Objecting Creditors rely, in part, on the agricultural classification of the Property and the need for an owner to reclassify a portion as residential for property tax purposes if the landowner has a residence on the Property. As previously determined in the Court's Partial Ruling, the Property's agricultural classification does not defeat the homestead claim. The Debtor may need to request reclassification of that portion of the Property containing his residence, and the entire Property may be subject to reclassification as residential for tax purposes, because there is no present farming activity. These classification changes will certainly increase the Debtor's property taxes, but the present classification does not affect the Debtor's constitutional right to the homestead exemption.

The Objecting Creditors primarily rely on the fact that the Debtor was living in the Trailer in violation of a County ordinance when they perfected their judgment lien in January 2015, and he remained in violation when he filed his bankruptcy petition in September 2016 (the "Filing Date"). Because his dwelling, the Trailer, cannot be a permanent legal dwelling, the Objecting Creditors argue that he could not have had the requisite intent to permanently reside on the Property. According to the Objecting Creditors, he could not have established his homestead on the

Filing Date unless he was living in a permitted and completed house.

The Court finds no support for this narrow interpretation of the constitutional homestead protection. It is well-settled that Florida's homestead exemption should be liberally construed for the benefit of the homestead claimant. *Edward Leasing Corp. v. Uhlig*, 652 F. Supp. 1409 (S.D. Fla. 1987); *In re Wilson*, 393 B.R. 778 (Bankr. S.D. Fla. 2008). Certainly, a debtor's residence does not have to be a house. *In re McClain*, 281 B.R. 769, 773 (Bankr. M.D. Fla. 2002) ("[S]o long as a debtor actually lived on real property being claimed as exempt, a non-exempt tree house or tent would establish the requisite degree of permanency"). So, the issue comes back to an issue the Court already addressed in its Partial Ruling: Does the Debtor lose homestead protection because the Trailer was on the Property in violation of a County ordinance? For the reasons discussed in the Partial Ruling, reinforced by additional authority reviewed by the Court, the answer is no.

Debtor's only real property is and was the 14 acre Property. He intended to make the Trailer his permanent residence when the Objecting Creditors perfected their judgment lien and maintained that intent on the Filing Date. The fact that the Trailer was not a lawful abode under a County ordinance does not defeat the constitutional homestead exemption.

No Published Decisions Sustain
an Objection to a Homestead Exemption
Based Upon Local Zoning or Ordinance Violations

Several courts have allowed the homestead exemption where the debtor occupied the property in violation of city, county or state law or in violation of local zoning laws. For example, in *In re Kain*, No. 12-31492-KKS, 2014 WL 10250731 (Bankr. N.D. Fla. Feb. 14, 2014), the debtor was living in a portion of the property that was zoned commercial and housed the debtor's medical practice. A creditor objected to the debtor exempting any portion of the property as homestead. Prepetition, the debtor's request for a zoning variance to allow her to live on the property was denied and the debtor was subject to fines of $10.00 per day for the zoning violation of living in commercially-zoned property. The court did not find the zoning violation determinative and overruled the creditor's objection as to the portion of the property that functioned as the debtor's residence. [redacted]20731 at *1.

The Court also finds persuasive an Idaho bankruptcy court decision, *In re Pich*, 253 B.R. 562 (Bankr. D. Idaho 2000). In *Pich*, the debtor was living in a building with a zoning classification of "light industrial," a classification that does not permit residential use. *Id.* at 565. Despite the absence of zoning authorization to reside in the building, the building was

the debtor's residence for nine years up through and including the filing date of his bankruptcy petition.

A creditor objected to the debtor's homestead claim arguing that the debtor was living on the property in violation of local zoning ordinances, and that this violation precluded the debtor from claiming a valid homestead exemption. The court found that the debtor's occupation of the property was in violation of local law and exposed the debtor to possible civil or criminal penalties. *Id.* at 567. Nevertheless, the court held that the debtor's violation of a zoning ordinance did not defeat his homestead exemption. *Id.* The *Pich* court noted that the objecting creditor cited no authority to support its argument that a violation of a local ordinance precluded the debtor from claiming a valid homestead exemption. *Id.* The *Pich* decision was cited and followed in *In re Carpenter*, 559 B.R. 551 (Bankr. D. R.I. 2016) (zoning violation was not a basis to deny homestead exemption).

A Missouri bankruptcy court also issued an opinion consistent with the result reached here. *In re Turner*, No. 04-40267DRD, 2005 WL 1397150 (Bankr. W.D. Mo. June 1, 2005). In *Turner*, the debtor and his wife separated eight months before he filed bankruptcy. The debtor then moved into a structure that he had previously rented out as a commercial storage facility. The property was zoned commercial. The trustee objected to the debtor's homestead

exemption arguing that a commercial structure could not qualify as a dwelling house under Missouri Law. The trustee also argued that the debtor's occupancy was in violation of the commercial zoning designation. Like all courts before and since, the *Turner* court found no authority for invalidating a homestead claim based upon a zoning restriction, and the trustee's objection was overruled. *Id.* at *3, *4.

An earlier bankruptcy decision from Connecticut rejected a similar argument that debtor's violation of state law defeated his homestead exemption. *In re Herd*, 176 B.R. 312 (Bankr. D. Conn. 1994). In *Herd*, the debtor began living on his boat when he separated from his wife. About four months before he filed his bankruptcy petition, a judgment creditor obtained a court order requiring the boat to be dry-docked. The debtor continued to live on the boat with no certificate of occupancy and in violation of state statutes, the public health code and local zoning regulations. *Id.* at 313. Despite the undisputed evidence that the debtor was living on the boat illegally, the court overruled the judgment creditor's objection to the debtor's homestead exemption claim. *Id.* at 314.

The facts in *Herd* have a striking similarity to the facts here relating to the actions of the objecting creditor. In *Herd*, the debtor's use of the boat as his residence became illegal only

after the objecting creditor obtained a state court order dry-docking the boat. In this case, if the Objecting Creditors had not "informed" the County that Mr. Gamboa was living in the Trailer in violation of a County ordinance, he may have lived "happily ever after" in the Trailer, without the County ever citing him for the ordinance violation.

The cases cited by the Objecting Creditors in their Notice of Filing Supplemental Authority [DE# 129] are readily distinguishable and do not support the Homestead Objection. First, the Objecting Creditors cite to an old Florida Supreme Court case, *Drucker v. Rosenstein*, 19 Fla. 191 (Fla. 1882). In that case, a judgment creditor sought to execute his judgment against a vacant lot owned by the defendant. The defendant purchased the lot while insolvent, shortly before the judgment was entered. He filed a statement in the county declaring the lot his homestead, but at the time he filed his statement, the lot was vacant, and as of the judgment date, it was still vacant and not occupied by the defendant. The defendant argued that he had entered into a contract to build a house and intended to live there. The court rejected the homestead claim, finding that actual occupancy is necessary, not the mere intent to live on the property in the future. 19 Fla. at 198.

The only common fact between *Drucker* and this case is that both the Debtor here and the defendant in *Drucker* testified that they intended to build houses on the properties at issue. Otherwise, the *Drucker* decision is readily distinguishable. Unlike the defendant in *Drucker*, [redacted] was living on the Property in his Trailer. The actual occupancy requirement was unquestionably satisfied.

The Objecting Creditors also rely on *In re Geiger*, 569 B.R. 846 (Bankr. M.D. Fla. 2016). In that case, the debtor inherited a property owned by his grandmother. In 2012, he moved out of his marital home because of marital problems and moved into a trailer on the property. He stayed only ten days and then moved out because there was mold and holes in the roof that made the property unlivable. Two years later, in 2014, the debtor filed his chapter 7 petition. Notably, he was living in the marital home when he filed and had not lived on the property claimed as homestead except for the 10 day period two years earlier.

Not surprisingly, the court rejected the debtor's homestead claim, noting that the homestead character of a property "depends upon an actual intention to reside thereon as a permanent place of residence coupled with the fact of residence." 569 B.R. at 848 (emphasis added) (quoting *Hillsborough Inv. Co. v. Wilcox*, 13 So.2d 448, 452 (Fla. 1943)). First, the court found that the debtor's

actions were inconsistent with his stated intent to make the property his permanent residence. Second, and most critically, the undisputed evidence was that the debtor was not living on the property on the petition date and had never lived there except for ten days two years before his bankruptcy.

Like *Drucker*, the *Geiger* decision does not support the Objecting Creditor's argument. Here, whether or not the Debtor will be able to build the house he is planning, the Debtor has lived on the Property since 2013 and his actions have been wholly consistent with his intent to make the Property his permanent residence.

During closing argument after trial, the Objecting Creditors attempted to distinguish the ordinance violation here from the zoning or ordinance violations that did not preclude homestead claims in some of the above-cited cases. They argued that living in a "legal" structure where the use for residential purposes is illegal is different from living in a structure, in this case, the Trailer, that is not a structure "legally" on the property. This is not a meaningful distinction and certainly not a distinction supported by any case law. Like the debtor in *Pich* who ultimately could be removed from his property because of the zoning violation, the Debtor here may ultimately be removed from the Trailer if he does not get a building permit and construct a house. However,

the possibility of enforcement that could result in a forced eviction does not defeat the exemption, because the Debtor was living in the Trailer on the filing date of the case and intended to remain on the Property as his permanent residence.

Under an applicable County ordinance, the Debtor could legally use the Trailer as his residence while building a home, but such use is lawful only if a building permit has been issued. The Debtor did not have a building permit on the Filing Date and still did not have a permit when the Court conducted the trial on the Homestead Objection. The Objecting Creditors also presented evidence casting doubt on the Debtor's financial ability to build a house even if he gets his building permit. These facts do not support the Homestead Objection. The relevance, at all, of the Debtor's postpetition efforts to obtain a building permit corroborate the Debtor's unrebutted testimony that he intended to make the Property his permanent residence.

If the County had not been tipped off by the Objecting Creditors, the Debtor would have been content to continue living in the Trailer. When he was cited by the County, he hired an architect to draw up plans to build a small house and has pursued all of the necessary County department approvals. Perhaps he will not be able to afford to build a house and perhaps the County will ultimately force him to move out of the Trailer. But one thing is

certain: This Debtor has made the Property his permanent residence since he moved into the Trailer in 2013, and he intends to stay on the Property as his permanent residence. Those are the only facts that ultimately matter. For these reasons, it is -

ORDERED that the Homestead Objection [DE# 46] is denied.

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864 So.2d 458
District Court of Appeal of Florida,
First District.

Carolyn DAVIS, Appellant,
v.
Horace Edwin DAVIS, Appellee.

No. 1D02-3366.
|
Dec. 24, 2003.
|
Rehearing Denied Feb. 4, 2004.

Synopsis

Background: During administration of testator's estate, testator's widow filed petition to have entire tract of land and improvements thereon, including mobile home park, declared homestead. The Circuit Court, Nassau County, Robert M. Foster, J., found that property upon which mobile home park was located was not homestead property. Widow appealed.

Holding: The District Court of Appeal, Allen, J., held that mobile home park portion of homestead not located within a municipality and consisting of no more than 160 acres of contiguous land and improvements thereon that was separate from residence of owner or his family could be part of homestead.

Reversed and remanded.

West Headnotes (1)

[1] **Homestead**
Separate Tracts or Lots

Language in state constitution limiting homesteads within municipalities to residence of the owner or the owner's family did not apply to homesteads located outside municipalities and, thus, portion of homestead not located within a municipality and consisting of no more than 160 acres of contiguous land and improvements thereon that was separate from residence of owner or his family and was used as mobile home park could be part of the homestead. West's F.S.A. Const. Art. 10, § 4.

3 Cases that cite this headnote

Attorneys and Law Firms

***458** Janet A. Carver, Fernandina Beach, for Appellant.

Daniel S. Brim, Fernandina Beach, for Appellee.

Opinion

ALLEN, J.

This case requires us to decide whether a Florida homestead not located within a municipality and consisting of no more than 160 acres of contiguous land and improvements thereon may include a portion of such land and improvements which is separate from the residence of the owner or the owner's family. Concluding that the separate portion may be part of the homestead as defined in article X, section 4 of the Florida Constitution, we reverse the trial court's ruling to the contrary.

The appellant's husband, Horace Davis, died testate on August 17, 2000. At the time of his death, Mr. Davis and the appellant resided on real property consisting of less than 160 acres of contiguous land owned by Mr. Davis and located in an unincorporated portion of Nassau County. On a portion of the property separate from his residence, Mr. Davis operated a mobile home park.

***459** When administration of Mr. Davis's estate was subsequently commenced, the appellant petitioned to have the entire tract of land and improvements thereon declared homestead under article X, section 4, thereby precluding devise of the land and improvements under Mr. Davis's will[1] and requiring that the land and improvements descend in accordance with section 732.401(1), Florida Statutes (2000).[2] The appellee, as personal representative of Mr. Davis's estate, did not raise any objection to the designation of a portion of the land and improvements as homestead, but he contended that the portion of the land

and improvements being utilized to produce rental income as a mobile home park was not homestead property. Relying upon the language of article X, section 4, he contended that only the portion of the property upon which the appellant and Mr. Davis had actually resided could be properly considered homestead property. Apparently agreeing with the appellee's argument, the trial court entered an order by which the court ruled that the property upon which the mobile home park was located was not homestead property. This appeal is from that order.

Article X, section 4 specifies, in relevant part, that the maximum physical extent of Florida homesteads shall be

> 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 appellant argues that the trial court erred by relying upon the concluding clause of the above-quoted passage to limit the homestead in the present case to that portion of the property upon which she and Mr. Davis actually resided, because the clause applies only to a homestead located within a municipality. The appellee responds that the language by which a homestead is limited to the actual residence of the owner or the owner's family applies equally to all homesteads.

Language similar to that found in article X, section 4 of the current constitution has appeared in Florida constitutions for well over a century. Article IX, section 1 of the 1868 constitution provided that the maximum physical extent of exempt homesteads would be

> 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, ... 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.

The provision was renumbered as article X, section 1 in the 1885 constitution, but remained materially unchanged.

***460** When interpreting the 1868 and 1885 homestead provisions, the supreme court consistently concluded that the language limiting the homestead to the "residence and business house of the owner" was inapplicable to homesteads located outside municipalities. *Buckels v. Tomer,* 78 So.2d 861 (Fla.1955); *Armour & Co. v. Hulvey,* 73 Fla. 294, 74 So. 212 (1917); *McDougall v. Meginniss,* 21 Fla. 362 (1885); *accord Fort v. Rigdon,* 100 Fla. 398, 129 So. 847 (1930). In construing the 1885 constitution, the supreme court found it significant that the framers maintained the same language as contained in the 1868 provision despite the liberal interpretation afforded the prior version by the courts. *Armour,* 74 So. at 214.

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.

Giving article X, section 4 a plain reading, and also a reading consistent with decisional law under prior constitutions, we hold 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. Because the trial court's ruling in this case was apparently based upon an erroneous reading of the relevant constitutional language, the order under review is reversed and this case is remanded.

DAVIS and BENTON, JJ., concur.

All Citations

864 So.2d 458, 29 Fla. L. Weekly D49

Footnotes

1 Article X, section 4(c) provides, in relevant part, that "[t]he homestead shall not be subject to devise if the owner is survived by spouse or minor child ..."

2 Section 732.401(1) (2000) provided:

732.401 Descent of homestead.---

(1) If not devised as permitted by law and the Florida Constitution, the homestead shall descend in the same manner as other intestate property; but if the decedent is survived by a spouse and lineal descendants, the surviving spouse shall take a life estate in the homestead, with a vested remainder to the lineal descendants in being at the time of the decedent's death.

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