

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
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In re: ROBIN [REDACTED],
Debtor. /

Case No. [REDACTED]-RAM
Chapter 7

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

COMES NOW Debtor, [REDACTED], by undersigned counsel, and files this, his *Response to Creditors', Gail Perez's and [REDACTED] 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 ("~~REDACTED~~ 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 ~~REDACTED~~ Avenue ~~REDACTED~~. 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.~~, 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.~~, 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 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 there 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.

The appellant has failed to make reversible [sic] error appear and consequently the decree appealed from should be affirmed.

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:

'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 MUNICIPALITY"
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, ██████████, respectfully prays that this Honorable Court enter an order overruling ██████████'s and ~~ADVANCE CREDIT~~, INC.,'s *Objection to Debtor's Homestead Exemption* on the ground set forth above.

Respectfully Submitted:

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year such school or schools as may be provided by law for such district shall forfeit its portion of the common school fund during such neglect.

Sec. 9. The Superintendent of Public Instruction, Secretary of State, and Attorney-General shall constitute a body corporate, to be known as the Board of Education of Florida. The Superintendent of Public Instruction shall be president thereof. The duties of the Board of Education shall be prescribed by the Legislature.

ARTICLE IX

HOMESTEAD

Section 1. 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 exempted from forced sale under any process of law, and the real estate shall not be alienable without the joint consent of husband and wife, when that relation exists. But no property shall be exempt from sale for taxes, or for the payment of obligations contracted for the purchase of said premises, or for the erection of improvements thereon, or for house, field, or other labor performed on the same. 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.

Sec. 2. In addition to the exemption provided for in the first section of this article, there shall be and remain exempt from sale by any legal process in this State, to the head of a family residing in this State, such property as he or she may select, to the amount of one thousand dollars; said exemption in this section shall only prevent the sale of property in cases where the debt was contracted, liability incurred, or judgment obtained before the 10th day of May, A. D. 1865. Nothing herein contained shall be so construed as to exempt any property from sale for the payment of the purchase money of the same, or for the payment of taxes or labor.

Sec. 3. The exemptions provided for in sections 1 and 2 of this article, shall accrue to the heirs of the party having enjoyed or taken the benefit of such exemption, and the exemption provided for in section 1 of this article shall apply to all debts, except as specified in said section, no matter when or where the debt was contracted, or liability incurred.

ARTICLE X

HOMESTEAD AND EXEMPTIONS

Sec.

1. Exemption of homestead; extent.
2. Exemption to inure to widow and heirs.
3. Exemptions in former constitution; applicability.
4. Homestead may be alienated by husband and wife.
5. Homestead area not reduced by subsequent inclusion in municipality.
6. Legislature to enact laws to enforce article.
7. Exemption of homestead from taxation.

§ 1. Exemption of homestead; extent

Section 1. 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. But no property shall be exempt from sale for taxes or assessments, or for the payment of obligations contracted for the purchase of said property, or for the erection or repair of improvements on the real estate exempted, or for house, field or other labor performed on the same. 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.

Historical Note

The Constitution of 1885 further limited the right of exemption by excepting sales for assessments or for repair of improvements. The provision that no judgment, decree or exe-

cution should be a lien on exempted property was also added.

Prior Constitutions:

Const. 1868, art. 9, § 1.

§ 2. Exemption to inure to widow and heirs

Section 2. The exemptions provided for in section one shall inure to the widow and heirs of the party entitled to such exemption, and shall apply to all debts, except as specified in said section.

West's F.S.A. Const. Art. 10 § 4

§ 4. Homestead; exemptions

(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;

§ 4. Homestead; exemptions, FL CONST Art. 10 § 4

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IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY, FLORIDA

CIVIL CIRCUIT DIVISION

CASE NO. [REDACTED] CA 09

[REDACTED]
Plaintiffs,

v.

[REDACTED]
Defendant.

DEFENDANT'S RESPONSE TO PLAINTIFF'S AMENDED MOTION TO ALLOW
SHERIFF'S LEVY AND SALE OF PROPERTY AND FOR FEES AND COSTS
INCURRED IN SATISFYING JUDGMENT

COME NOW, Defendant, [REDACTED] A ("Gamboa") by and through his undersigned counsel, and submits the following Response to Plaintiff's Amended Motion to Allow Sheriff's Levy and Sale of Property and for Fees and Costs Incurred in Satisfying Judgment:

I. PLAINTIFF'S RECORDED JUDGMENT WAS DEFECTIVE AND INVALID AT THE TIME OF RECORDING IN 2012.

The Plaintiff, [REDACTED] ("Perez") argues that she had a valid recorded judgment on July 25, 2012, prior to Gamboa allegedly establishing the property as his homestead. Perez did not have a valid judgment because she did not comply with the requirements of Florida Statute 55.10 and Florida Statute 55.505. Both statutes require that both the last known address of the judgment debtor and the address of the creditor be contained in the judgment or in a separate affidavit. The address that appears on the judgment and affidavit for the creditor is "c/o [REDACTED]'s attorney." That is not sufficient to meet the requirements of the statute in order to perfect her judgment or lien.

In *Hott Interiors, Inc. v. Fostock*, 721 So. 2d 1236 (Fla. 4th DCA 1996), the issue before the court was whether a final judgment becomes a lien on real estate when it contains the address of plaintiff's attorney but not the address of the plaintiff. The Court held that section 55.10(1), Florida Statutes (1997), requires that a final judgment contain the judgment holder's address to become a lien on real estate. An alternative method of creating such a lien is to record an affidavit in compliance with section 55.101. A judgment containing only the address of the judgment holder's attorney does not comply with the statute, so that its recording does not impose a lien on real estate. "We cannot expand this clear statutory directive to say that the address of the judgment holder's attorneys may be substituted for that of the judgment holder." *Id.*

The facts in this case are identical to those of *Hott Interiors*. Perez conveniently fails to mention in her motion that on January 8, 2015, she had filed another certified copy of the same judgment and another affidavit. The subsequent affidavit filed in 2015 is different than the prior affidavit filed in 2012, in that it listed the creditor's address as her home address and not her attorney's address. Therefore, it was not until January 2015 that the judgment was perfected and thus became a valid lien. Gamboa moved to and occupied the subject property in November of 2013 and made it his homestead at said time. The fact that Perez recorded a second affidavit in January 2015, is further evidence that the first affidavit filed in 2012, with the judgment, was defective and invalid. As a result, Perez's argument that her judgment is enforceable because it was recorded before the subject property became Gamboa's homestead fails. In addition, should Perez argue that her recording of the 2015 affidavit relates back to the original recording of the judgment, said argument fails under *Clinton v. Doehla*, 933 So. 2d 1215 (Fla. 2d DCA 2006). *Clinton* holds that nothing prevents the holder of a recorded judgment which does not properly contain the address of the creditor from curing the defect by re-recording the judgment and simultaneously

filing an affidavit with the address as provided for in *Fla. Stat. §55.10(1)*. However, such re-recording does not relate back to the original recording of the judgment, but would create a lien on property from the date of the re-recording forward. Applying said holding to our case, [REDACTED]'s judgment did not become a lien until January 2015.

II. DEFENDANT'S PROPERTY QUALIFIES FOR HOMESTEAD PROTECTION FROM FORCED SALE BY CREDITORS.

A. Perez argues that the property cannot be [REDACTED]'s homestead because it is a mobile home in violation of a county ordinance. She cites case law that does not apply to the facts of this case and does not support her argument. Her case law deals with homestead exemption for tax purposes, and not homestead exemption for purposes of protection from forced sale by creditors. The homestead exemption from forced sale is different from the homestead exemption for tax purposes. *S. Walls, Inc. v. Stilwell Corp.*, 810 So. 2d 566,569 (Fla. 5th DCA 2002). Failure to claim the homestead tax exemption is not evidence that property is not in fact homestead. *Pierrepoint v. Humphreys*, 413 So 2d. 140,143 (Fla. 5th DCA 1982).

The homestead exemption found in *Article X, section 4 of the Florida Constitution* specifies, in pertinent part, that:

- (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 payment of taxes and assessments thereon, obligations contracted for the purchase, improvement or repair thereof, or obligations contracted for house, field or other labor on the realty, the following property owned by a natural person:
 - (1) A homestead, if located outside a municipality, to the extent of 160 acres of contiguous land and improvement thereon, which shall not be reduced without the owner's consent by reason of subsequent inclusion in 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.

There are thus three significant requirements that the courts must consider in order to

determine whether a debtor's homestead qualifies for Florida's constitutional exemption from forced sale: 1) acreage limitations, 2) residency requirements and 3) ownership requirements.

Gamboa meets all three requirements. First, the subject property is 15 acres located outside a municipality with improvements, i.e. the mobile home ~~C~~ occupies. In *Gold v. Schwartz*, 774 So. 2d 879 (Fla. Dist. Ct. App. 4th Dist. 2001) the court held that "the fact that the decedent's residence was a permanently affixed mobile home rather than a traditional house constructed thereon does not render the property ineligible for homestead status, as it is undisputed that the decedent owned and resided on the subject property in the mobile home." Furthermore, the term "homestead" as used in the constitution includes no definition for the term "improvements on the real property." See, *Article X, §4(a)(1), Fla. Const.* In Florida, a general policy exists in favor of liberally construing homestead laws in favor of those whom the laws were designed to protect. *Snyder v. Davis*, 699 So. 2d 999 (Fla. 1997). In *White v. Posick*, 150 So. 2d 263 (Fla. 2d DCA 1963), the court held that a pool and a patio were considered part of the homestead improvements and not subject to severance for creditor's sale. The mobile home was no less an improvement than a swimming pool and patio considered part of the homestead improvements in *White*; furthermore, its addition to the property was patently intended to adapt the property for the owner's residence thereon. Therefore, the court held that the mobile home permanently affixed to the real estate resided in by the head of household qualifies as homestead under the Florida Constitution. *Gold at 880*. Thus, ~~C~~ meets the acreage limitation requirement.

Perez cites *Kogan v. Robbins*, 594 So. 2d 355, 355 (Fla. 3d DCA 1992), to support her argument that the mobile home cannot be exempt, however, that case deals solely with a claim for homestead tax exemption and not homestead creditor exemption. This argument carries no weight and does not apply to the facts in this case.

Secondly, [REDACTED] meets the residency requirement necessary under the constitution. Gamboa is a natural person and a resident of the state of Florida since 2013. He provided a sworn affidavit in compliance with Florida Statute §222.17 as well as having occupied the premises since November 2013. In Florida, a homestead is established by actual occupancy of the subject property accompanied by the intent to reside in the property as one's homestead. *In re del Callejo*, 2015 Bank. LEXIS 538 (Bankr. S.D. Fla. Feb. 20, 2015).

[REDACTED] has owned the subject property since 1995 and moved there permanently in November 2013 after losing his only other property located in Illinois to [REDACTED] via a foreclosure sale. The mobile home qualifies as a homestead property as discussed above. In *S. Walls, Inc. v. Stilwell Corp.* supra, the court found that "underlying the policy considerations of Article X, section 4(a)(1), is the adage that "a man's home is his castle." "Although a castle to one person may be a shanty to another, the law does not discriminate. Thus, regardless of whether one's castle is a traditional family home or a modest cottage, whether it is a rural farmhouse or a villa by the sea, whether it floats or sits on wheels, whether it is a condominium or a co-op, it should receive the same protection under Florida law." *Id.* at 579.

Thus, [REDACTED] meets the ownership requirement under the Florida Constitution. He is the sole record title owner of the property since 1995.

B. [REDACTED] argues that the property cannot be homestead because it is not zoned residential. She cites *Fla. Stat. §196.011* and argues that because [REDACTED] does not have a homestead tax exemption and the property is zoned agricultural, he cannot claim it as homestead for protection from creditors. This argument fails because as stated previously in *S. Walls, Inc. v. Stilwell Corp.* supra, the homestead exemption from forced sale is different from the homestead exemption for tax purposes. Throughout her entire argument, [REDACTED] cites the tax exemption

statute which does not apply to this case. This case is about the homestead exemption protection as it relates to creditor forced sale. [REDACTED] is protected under *Article X, section 4 of the Florida Constitution*. There are only three specific exceptions to allowing a forced sale of one's homestead property and Perez does not meet or qualify for any of the three exceptions.

The fact that the property is zoned agricultural does not mean that it cannot be [REDACTED]'s homestead. The Florida Constitution does not require a specific type of zoning for a property to be protected. In fact, the Florida legislature and courts have extended the protection of homestead from forced sale to include many locations beyond the typical home. In *Gold v. Schwartz supra*, the court held that when the debtor owns the land upon which a mobile home is located, both land and mobile home qualify as homestead.

[REDACTED] cites cases that are all distinguishable from this case, because in those cases, the properties were used for both residential and commercial purposes simultaneously. The cases cited by Perez deal with separate structures and structures used for business purposes such as a nightclub. [REDACTED] has not used the property for business purposes since he made it his homestead. In fact, there are cases that contradict [REDACTED]'s cases. As recent as last year, *In re del Callejo*, 2015 Bank. LEXIS 538 (Bankr. S.D. Fla. Feb. 20, 2015), the Bankruptcy Court ruled (citing *Edward Leasing Corp. v. Uhlig*, 652 F. Supp. 1409 (S.D. Fla. 1987), "With respect to business activities conducted within the Uhlig family residence, the Court finds no factual or legal basis to support Plaintiff's claim that any or all of this structure should be denied homestead exemption under *Art. X, § 4.*" "In the century which has passed since the enactment of Florida's first homestead exemption clause, in 1885, not a single reported case has declared a residential unit occupied by the owner as his family home to be non-exempt simply because the owner conducted business activities within those premises." (Emphasis original)

Each case and statute, cited by ██████, dealt with properties that were not outside a municipality. *In re Davis v. Davis*, 864 So. 2d 458,460 (Fla. 1st Dist. Ct. App. 2003), 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. Following the ruling in *Davis*, the Bankruptcy Court in the matter of *In re Earnest*, 2009 Bankr. LEXIS 1821, 21 Fla. L. Weekly Fed. B 770 (Bankr. M.D. Fla. March 26, 2009), held that a Debtor's 4.82 acre homestead property which was located outside a municipality and upon which was located a building which is rented to a third party and a warehouse which Debtors used in their business, was exempt pursuant to *Fla. Const., Art X §4 (a)(1)*.

While the Florida Constitution does not define the term "homestead," it does provide various limitations and requirements. As addressed previously in this response, Gamboa has met all three requirements.

III. Conclusion

The evidence is clear that the Plaintiff failed to comply with the judgment statutes and as a result, the judgment and affidavit were defective and invalid. Plaintiff did not have a valid lien on the property upon the entry of the Order Granting Plaintiff's Ex Parte Motion for Issuance of Writ of Execution on May 3, 2014. Even if, *arguendo*, Plaintiff's judgment was a valid lien against the property after correcting the missing creditor's address, the judgment is not one of the three exceptions under the Article X Section 4 of the Florida Constitution which would allow the forced sale against the Defendants homestead property to occur.

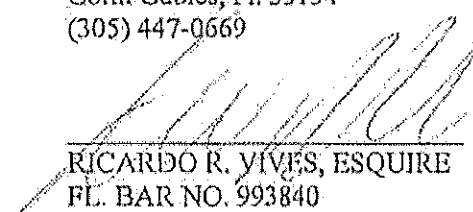
The evidence is clear that the property is Defendants homestead property and not subject to

creditor forced sale or levy and Plaintiff has not cited a single case where a mobile home and/or a property zoned agricultural were deemed homestead not protected from creditor's forced sale.

Accordingly, Plaintiff's motion fails for the all of the reasons stated in this response and the Plaintiff's motion must be denied.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response was emailed on March 24, 2016 to Michel O. Weisz at RTT@bergersingerman.com, MWeisz@bergersingerman.com and mvega@bergersingerman.com

By: 

RICARDO R. VIVES, ESQUIRE