Recent Developments In Florida Homestead Law

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Article X, section 4(a) of the Florida Constitution affords homeowners an exemption from the forced sale of, or imposition of a lien on, Florida homestead property by creditors, except in three specifically enumerated instances: (1) unpaid property taxes and assessments for the homestead; (2) mortgages for the purchase, improvement or repair of the homestead, and (3) liens for work performed on the homestead. In 2001, the Florida Supreme Court confirmed the broad interpretation of Florida's homestead exemption in *Havoco of America v. Hill*,[2] when it held as a matter of first impression that "the homestead exemption protects a homestead acquired by a debtor using nonexempt assets with the intent to hinder, delay or defraud creditors," because such a transfer of nonexempt assets into an exempt homestead with the intent to hinder, delay or defraud creditors is not one of the three specified exceptions to the homestead exemption. In the five years since the *Havoco* decision, Florida courts have attempted to clarify the application of the Court's holding in *Havoco*, as evidenced in four recent cases.

In March 2005, the *Havoco* decision was followed by Florida's Third District Court of Appeal in *Conseco Servs., LLC v. Cuneo*.[3] In *Cuneo*, a creditor sued to recover money loaned to Cuneo and other former officers of Conseco, who used the borrowed funds to invest in stock of the company, which later became worthless when the company went into bankruptcy. There was no fraud involved in the acquisition of the loan, but rather than repay the loan, the Cuneos instead sold nearly $8 million in securities (other than securities purchased with funds they borrowed) and took a $2.45 million mortgage on their Connecticut residence. The Cuneos then used the sale and mortgage proceeds to purchase a $10.2 million home in Florida. The creditor sued the Cuneos in Florida seeking a declaratory judgment that the Cuneos' transfer of funds to purchase the Florida homestead was fraudulent because the Cuneos were attempting to take advantage of the Florida homestead exemption to hinder, delay and defraud present or future creditors by transferring their assets into the Florida property. The *Cuneo* court followed *Havoco* and held that it was "not enough that the Cuneos transferred their nonexempt funds to an exempt asset in order to keep those funds from creditors. If a debtor acquires homestead property with the 'specific intent to hinder, delay, or defraud [a] creditor,' the property still enjoys Florida's homestead protection."

The issue of what happens when a debtor sells their existing Florida homestead with the intent of reinvesting the proceeds in a new homestead was examined in *Rossano v. Britesmile, Inc.*[4] After learning of the debtor's intention to sell her homestead and purchase a less expensive residence, the creditor served a writ of garnishment on a closing agent who held an escrow account containing the proceeds from the sale. While the trial court ordered a garnishment judgment for the full amount of the funds, the Third District Court of Appeal reversed the garnishment judgment based on the debtor's clear intention to use all or part of the proceeds from the sale of her previous homestead to purchase a new homestead, but ruling however, that any surplus from the sale of the previous homestead that was not re-invested in the new homestead would be subject to a creditor's reach. The *Rossano* decision confirmed that the

proceeds of a voluntary sale of a homestead are exempt from creditor claims to the same extent as the homestead is, if the seller can show a good faith intention prior to and at the time of the sale to reinvest the proceeds in another homestead within a reasonable time.

Whether proceeds invested in a homestead resulted from "fraud" or a "fraudulent conveyance" was central to the case of *Willis, Willis and Giacomino v. Red Reef, Inc.*[5] and appears to be an important distinction in this line of cases. Put simply, a "fraudulent conveyance" is a transfer that puts assets of a debtor beyond the reach of current or future creditors in a manner that violates applicable statutes or the common law. In the *Willis* case, the Willises, along with Giacomino, formed a company called Ocean One North, Inc. ("Ocean One") for the sole purpose of owning and managing a commercial building in Boca Raton, Florida. Red Reef, Inc. ("Red Reef") entered into a lease agreement with Ocean One for the intended purpose of operating a restaurant. Ocean One then breached the lease agreement by failing to allow Red Reef to occupy the leased premises. While being sued by Red Reef for breach of the lease agreement, Ocean One sold the property and the Willises took a portion of the proceeds and paid off the mortgage on their homestead residence. After entering final judgment against the Willises, the trial court imposed an "equitable lien" on the homestead property. On appeal, the Fourth District Court of Appeal held that despite the fact that the funds used to payoff the mortgage were clearly traceable as being funds the Willises directly deposited in their personal joint account from the sale of the building by Ocean One, the funds themselves were not obtained by fraud, and therefore were outside of the reach of the creditor, Red Reef. The *Willis* court observed that the Willises did not obtain the funds that went into the homestead by fraud or egregious conduct, and that merely transferring the funds into the homestead via a fraudulent conveyance is not sufficient to give rise to an enforceable equitable lien. The Court also noted that the imposition of equitable liens on Florida homesteads has been limited to cases in which the homesteads were purchased with the fruits of fraudulent activity, such as where the funds used to extinguish the mortgage on the homestead was obtained by fraud and forgery,[6] or when embezzled funds are used to improve homestead.[7]

While the foregoing cases have demonstrated Florida's broad constitutional protection of the homestead against creditors, it is not without its limits. In *Zureikat v. Al Shaibani*,[8] Jacob Zureikat fraudulently obtained $200,000 from Shaibani and used the funds for his personal benefit, including transferring a portion of the funds to his wife and investing a portion of it into his homestead. The Fifth District Court of Appeal held that the trial court properly awarded an equitable lien against the homestead because Shaibani established that proceeds from Zureikat's fraudulent or reprehensible conduct were used to invest in, purchase or improve the homestead. The court further reiterated that where funds obtained through one spouse's fraud are used to invest in, purchase or improve the homestead, an equitable lien may be established despite the other spouse's innocence or ignorance of wrongdoing.

As the foregoing decisions demonstrate, the homestead exemption afforded by the Florida Constitution is strong and generally beyond the attack of creditors, except in cases where the funds were obtained by a debtor through fraudulent, egregious or reprehensible conduct. Unresolved questions remain, however, as to the application of Florida's homestead exemption by the bankruptcy courts in light of The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005[9] ("2005 Bankruptcy Act"). This new bankruptcy legislation includes provisions to

reduce eve-of-bankruptcy homestead maneuvering. While Florida bankruptcy courts have yet to definitively determine how the 2005 Bankruptcy Act may limit the homestead exemption, homeowners contemplating bankruptcy should understand the potential for further limitation of the homestead exemption under federal bankruptcy law.

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[1] This article is for general information purposes. The article does not constitute or contain legal advice. This article should not be considered as a legal opinion by the author or by the firm of Angelo & Banta, P.A., or as a substitute for legal counsel. The author would like to thank law student Anila S. Rasul for her assistance with this article.

[2] 790 So. 29 1018 (Fla. 2001).

[3] 904 So. 2d 438 (Fla. 3d DCA 2005).

[4] 31 Fla. L. Weekly D 87 (Fla. 3d DCA 2005).

[5] 2006 WL 167829 (Fla. App 4 Dist 2006).

[6] *See Palm Beach Sav. & Loan Ass'n, F.S.A. v. Fishbein*, 619 So. 2d 267 (Fla. 1993).

[7] *See Jones v. Carpenter*, 90 Fla. 407, 106 So. 127 (1925).

[8] 2006 WL 565907 (Fla. App. 5 Dist. 2006).

[9] Pub. L. No. 109-8, 119 Stat 23 (codified as amended in scattered sections of 11 U.S.C.).