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INTRODUCTION

There is only one volume of pleadings for this appeal. Accordingly, all references to the record will begin "R1".

Document number 3 of the record in this case is the Bankruptcy Record on Appeal which consists of copies of a number of items contained in the bankruptcy court file. Specific items contained in the Bankruptcy Record on Appeal (document number 3) will be further identified by reference to the bankruptcy court docket number and to the page number of the particular document. The bankruptcy court docket number is the handwritten number which appears at the bottom of the first page of each item. For example, R1-3-B138-2 refers to page 2 of the Findings of Fact and Conclusions of Law entered on February 3, 1994 (bankruptcy court docket number 138) which is part of the Bankruptcy Record on Appeal designated as document number 3 in the record on appeal in this case.

STATEMENT OF THE CASE

On July 22, 1992, Appellant filed a voluntary Chapter 7 bankruptcy petition. (R1-3-B1). In Schedule C of the schedules of assets, liabilities, etc. filed by appellee in the bankruptcy proceeding, appellee claimed an exemption under Article X, Section 4, Florida Constitution for the real property located at 209 and 211 Calhoun Avenue, Destin, Florida. (R1-3-B7-7). Appellant objected to this claim of exemption. (R1-3-B20-1, 2). After an evidentiary hearing, the bankruptcy court denied appellant's objections. (R1-3-B138, 139). Upon appellant's appeal to the United States District Court for the Northern District of Florida, the district court remanded the case to the bankruptcy court for a determination of whether and under what circumstances Florida law prevented debtors in 1990 and 1991 from converting non-exempt property to exempt property. (R1-3-B220-17).

On remand from the district court, the bankruptcy court held that Florida law would not have prevented the debtor from converting non-exempt assets into homestead, even if done with intent to place those assets beyond the reach of his creditors. (R1-3-B243-9). On appeal, the district court affirmed the bankruptcy court's order (R1-3-13 and 14). The case was then appealed to the Eleventh Circuit Court of Appeals from which the following question was certified to this Court:

DOES ARTICLE X, SECTION 4 OF THE FLORIDA CONSTITUTION
EXEMPT A FLORIDA HOMESTEAD, WHERE THE DEBTOR
ACQUIRED THE HOMESTEAD USING NON-EXEMPT FUNDS
WITH THE SPECIFIC INTENT OF HINDERING, DELAYING, OR
DEFRAUDING CREDITORS IN VIOLATION OF FLA. STAT. §
726.105 OR FLA. STAT. §§ 222.29 AND 222.30?

STATEMENT OF THE FACTS

The pertinent facts are summarized in the Findings of Fact and Conclusions of Law entered by the bankruptcy court on February 3, 1994 (R1-3-B138-1 through 5, and 7 through 12) and in the district court's Order Affirming In Part, Reversing In Part and Remanding Bankruptcy Court's Order of February 3, 1994 entered on April 27, 1995 (R1-3-B220-2 through 5, 14). The appellee, Elmer Hill, has engaged in the marketing and managing of coal production contracts throughout his professional life. (R1-3-B220-2). In 1975, appellant, Havoco of America, Ltd., entered into a contract to provide coal to the Tennessee Valley Authority ("TVA") over a 10 year period. Id. Following the execution of this contract, appellee became an officer and director of appellant and was responsible for administering the TVA and related contracts. Id. Six months after entering into their contract, appellant and TVA reopened negotiations on the contract price for coal. Id. From the start of the reopened negotiations, Hill conspired with others to eliminate appellant as a principal under the TVA contract. Id. As a direct result, Havoco was unable to successfully renegotiate the terms of the TVA contract and had to assign its contract to R & F Coal Company. Id.

In 1981, Havoco filed suit against Hill in Illinois asserting claims for fraud, conspiracy to defraud, tortious interference with contractual relations and breach of fiduciary duty. (R1-3-B220-2, 3). The case came to trial in late 1990, and the Illinois jury found for appellant on all counts against appellee and awarded appellant \$14,250,000.00 in compensatory damages and \$750,000.00 in punitive damages. (R1-3-B220-3). The federal district court entered judgment on these amounts on December 19, 1990, and a judgment subsequently became enforceable on January 2, 1991. Id.

On December 30, 1990, appellee, a long-time resident of Tennessee, closed on the purchase of a house in Destin, Florida, paying approximately \$650,000.00 for the house. Id. Appellee also purchased furnishings for the Destin house, valued at \$75,000.00, primarily from monies from a Florida bank account which he held jointly with his wife. Id. Funds from personal accounts in Florida and Tennessee were also used. Id. Appellee and his wife then moved into the Destin house and have since made it their residence. Id.

On July 22, 1992, Hill filed a voluntary petition for bankruptcy under Chapter 7 (R1-3-B7-1). Id. Appellee claimed the Destin house as exempt under Article X, Section 4 of the Florida Constitution. (R1-3-B7-7). Havoco objected to this claim of exemption. (R1-3-B20-1, 2).

During the evidentiary hearing on appellant's objections to the claimed exemption, appellant attempted to introduce evidence of appellee's transfer of other non-exempt assets on January 3, 1991. (R1-3-B220-4). Appellant contended that the January 3, 1991 transfers demonstrated that appellee purchased the Destin home as part of a larger scheme to defraud appellant via bankruptcy. Id. While appellant introduced some documentary and testimonial evidence on the transfers, the bankruptcy court deemed this evidence irrelevant and therefore refused to permit

testimony regarding these events. (R1-3-B220-4,5).

At the evidentiary hearing before the bankruptcy court, the appellee presented evidence as follows: Appellee had planned on a Florida retirement for many years before doing so and was, in fact, at retirement age at the time he purchased the Destin home. (R1-3-B138-9). Beginning in 1989, appellee and his wife had hired a real estate broker to assist in locating a suitable retirement home in the Destin area. *Id.* Appellee and his wife had placed their Tennessee home on the market with the anticipation that they would purchase a home in Destin when it sold. *Id.* Appellee and his wife were looking for homes in the \$250,000.00 to \$1,000,000.00 price range, and the parties' broker testified that it was difficult to find homes in this price level in the Destin area. (R1-3-B138-9,10). Appellee and his wife purchased the Destin home only after the broker became aware of its availability through indirect sources in December 1990 and after tough negotiations with the seller. (R1-3-B138-10). It

was not unusual for appellee to purchase homes with cash, and appellee made no attempt to conceal the purchase of the Destin property. Id.

ISSUE ON APPEAL

DOES ARTICLE X, SECTION 4 OF THE FLORIDA CONSTITUTION EXEMPT A FLORIDA HOMESTEAD, WHERE THE DEBTOR ACQUIRED THE HOMESTEAD USING NON-EXEMPT FUNDS WITH THE SPECIFIC INTENT OF HINDERING, DELAYING, OR DEFRAUDING CREDITORS IN VIOLATION OF FLA. STAT. § 726.105 OR FLA. STAT. §§ 222.29 AND 222.30?

SUMMARY OF ARGUMENT

Article X, Section 4 of the Florida Constitution exempts one's homestead from claims of creditors. Within less than two weeks after the entry against him of a \$15,000,000.00 judgment, the appellee (then a resident of Tennessee) purchased a home in Destin, Florida for approximately \$650,000.00 in cash and thereafter established residency in Destin. In his voluntary Chapter 7 bankruptcy proceeding, the appellee claims an exemption for the Destin home under this constitutional provision. The appellant objected to the claimed exemption and sought to show that the acquisition of the Destin home for cash was part of a larger scheme by the appellee to hinder, delay and defraud the appellant in the collection of its judgment. Relying upon *Bank Leumi Trust Co. of New York v. Lang*, 898 F. Supp. 883(S.D. Fla. 1995), the bankruptcy court below held that the appellee is entitled to claim the homestead exemption, even if the appellant were able to prove the scheme to defraud. (R1-3-B243).

The appellant contends that the Bank Leumi case erroneously interprets Florida law too restrictively and narrowly and ignores the long line of Florida cases which recognize the well-established principle that the homestead exemption may not be used as an instrument of fraud. Bank Leumi purports to limit the exceptions to the Florida constitutional homestead provision to the three exceptions specifically enumerated in the constitutional provision, but in so doing the Bank Leumi court fails to recognize that the Florida Supreme Court has, in fact, recognized other exceptions in order to prevent the homestead exemption from being used as an instrument of fraud. The end result of the Bank Leumi case and of the lower courts' decisions in the case at bar is that the Florida homestead provision can be used as an instrument of fraud so long as the particular kind of fraud in question is not identical to the kind of fraud which was already the subject of a reported Florida decision. Appellant respectfully submits that the established law of Florida does not allow the appellee to claim the homestead exemption if it can be shown that the homestead exemption is being used as an instrument of fraud.

ARGUMENT

DOES ARTICLE X, SECTION 4 OF THE FLORIDA CONSTITUTION EXEMPT A FLORIDA HOMESTEAD, WHERE THE DEBTOR ACQUIRED THE HOMESTEAD USING NON-EXEMPT FUNDS WITH THE SPECIFIC INTENT OF HINDERING, DELAYING, OR DEFRAUDING CREDITORS IN VIOLATION OF FLA. STAT. § 726.105 OR FLA. STAT. §§ 222.29 AND 222.30?

In its Order Regarding Status of Destin Home and Furnishings (R1-3-B243), the bankruptcy court relied exclusively on *Bank Leumi Trust Co. of New York v. Lang*, 898 F. Supp. 883 (S.D. Fla. 1995), a federal district court decision, in determining what the state law of Florida is with respect to the use of the homestead exemption as a instrument of fraud. The Bank Leumi court chose to severely restrict the long line of Florida Supreme Court cases which recognize the well-established principle that the homestead exemption may not be used as an instrument of fraud, thereby opening a wide door for creative debtors to manipulate the Florida homestead exemption for fraudulent purposes.

The Bank Leumi facts are, indeed, very similar to the facts of the case at bar. In *Bank Leumi*, the plaintiff had loaned \$1,800,000.00 to the defendants in order to finance an educational training business. *Id.* at 884. The bank received corporate promissory notes and personal guaranties executed by the defendants. After the defendants' business filed for bankruptcy, the bank sued the defendants in New Jersey on their personal guaranties and obtained a judgment for \$1,800,000.00. Meanwhile, the defendants sold a New Jersey home for \$940,000.00 and moved to Florida, purchasing a home in Palm Beach Gardens for \$522,000.00 in cash. The bank sought to execute its judgment against the newly required homestead. The Bank Leumi court specifically found that the defendants acted with intent to defeat their creditors' claims by converting non-exempt assets to exempt assets, stating that this determination "presented a relatively facile task." *Id.* at 887. Nevertheless, the Bank Leumi court concluded that the newly acquired homestead was exempt from creditors' claims. *Id.*

The Bank Leumi court conceded that its result "appears to negate basic concepts of fairness", but claimed that its hands were tied by the "long line of Florida case dealing with the subject." *Id.* at 889. It is difficult to conceive how this long line of Florida cases, which uniformly stand for the principle that the homestead cannot be used as an instrument of fraud, required the Bank Leumi court to reach what it concedes was an unfair result. The appellant contends that the established Florida cases on this subject do not emasculate this court and prevent it from reaching a fair

result, but rather clearly empower the court to remedy injustice by preventing the homestead exemption from being used to further a fraud on creditors.

In *Milton v. Milton*, 58 So. 718, 719 (Fla. 1912), this Court held that "the [homestead exemption] law should not be so applied as to make it an instrument of fraud or imposition upon creditors." This cautioning language has been repeatedly cited in and approved by subsequent cases of the Florida Supreme Court. See *Slatcoff v. Dezen*, 76 So. 2d 792 (Fla. 1954); *La Mar v. Lechluder*, 135 Fla. 703, 185 So. 833 (Fla. 1939); *Jones v. Carpenter*, 90 Fla. 407, 106 So. 127 (Fla. 1925); *Pasco v. Harley*, 75 So. 30, 32 (Fla. 1917); and *Jetton Lumber Co. v. Hall*, 64 So. 440, 442 (Fla. 1914).

In *Milton* the debtor moved into and claimed homestead rights in lands he had inherited earlier when faced with the possible execution of a judgment against him. *Milton*, 58 So. at 719. This Court upheld a claim of homestead stating that there was "no sufficient showing of bad faith on the part of William Milton in moving on and claiming homestead in the land." *Id.* The implication, however, is that if there had been such a showing, a denial of the exemption would have resulted.

In *Pasco*, this Court referenced and quoted the language of *Milton* relating to fraud in the homestead exemption and further stated that "the provisions of the homestead laws should be carried out in the liberal and beneficial spirit in which they were enacted, but at the same time great care should be taken to prevent them from becoming the instruments of fraud". *Pasco*, 75 So. at 32. In *Jones*, this Court refused to allow the debtor to use the homestead exemption to avoid his creditors where the debtor had tortiously converted corporate funds in order to make improvements on his homestead. *Jones*, 106 So. at 129-130. In so holding, this Court again cited the rule that the homestead exemption law cannot be applied so as to make it an instrument of fraud. *Id.* at 130.

In *Slatcoff*, this Court faced an exemption issue relating to the cash surrender value of life insurance policies. *Slatcoff*, 76 So. 2d at 793. Although *Slatcoff* is not a homestead case, the Court's language is significant and *Pasco* is cited with approval. This Court stated:

[i]t is universally held that the exemption laws were "designed for the honest debtor", 22 Am. Jur., Exemptions Section 140, and we stated long ago that the provisions of our exemption statutes, while they must be liberally construed, should not be so applied as to become an instrument of fraud upon creditors. *Pasco v. Harley*, 73 Fla. 819, 75 So. 30.

Id.

The Bank Leumi court chose to read the *Jones/Pasco* line of cases narrowly and

to limit their effect to their particular facts. In so doing so, the Bank Leumi court ignored this Court's broad admonishment against allowing the homestead exemption to be used as an instrument of fraud, regardless of its form. Indeed, conduct comprehended within the term "fraud" assumes many shapes, disguises and subterfuges. *Volusia County Bank v. Bigelow*, 45 Fla. 638, 33 So. 704 (Fla. 1903). Black's Law Dictionary (6th Ed. 1990) includes as a definition of "fraud" the following:

A generic term, embracing all multifarious means which human ingenuity can devise, and which are resorted to by one individual to get advantage over another by false, suggestions or by suppression of truth, and includes all surprise, trick, cunning, dissembling, and any unfair way by which another is cheated.

That the particular form of fraud present in the case at bar has not been the subject of a reported Florida decision should not be dispositive of the question whether Florida Law would allow the homestead exemption to be used to facilitate such fraud. In reality the Bank Leumi case stands for the illogical proposition that although the homestead exemption cannot be used as an instrument of the type of fraud involved in the Jones/Pasco line of cases, Florida law would permit the exemption to be used as an instrument of any other kind of fraud.

Further, although the Bank Leumi court construes Florida case law as strictly limiting the exceptions to the homestead exemption to the three exceptions contained in Article X, Section 4 of the Florida Constitution, it apparently does not recognize that the Jones/Pasco line of cases denounced the homestead exemption on equitable grounds that, in fact, are not included in these three enumerated exceptions. Thus, although isolated authority can be found for the Bank Leumi court's position (e.g. *Butterworth v. Caggiano*, 605 So. 2d 56, 58 (Fla. 1992), holding that "forfeitures are not excluded from the homestead exemption because they are not mentioned, either expressly or by reasonable implication, in the three exceptions that are expressly stated"), a fair reading of the Jones/Pasco line of cases in context demonstrates that this Court long ago established the common sense, equitable doctrine that the homestead exemption cannot be used as an instrument of fraud and has consistently applied that doctrine whenever confronted with a situation involving the fraudulent use of the homestead exemption to perpetuate a fraud on creditors. This clearly established doctrine should not be emasculated by an unduly narrow and restrictive interpretation of prior decisions of this Court.

Indeed, in *Palm Beach & Savings Association v. Fishbein*, 619 So. 2d 267 (Fla. 1993), this Court held that a lien might be enforced against homestead property on equitable grounds even if it does not expressly fall within a constitutional exception. In *Fishbein*, the bank sought to enforce a lien against the homestead through equitable subrogation. *Id.* at 269. Mrs. Fishbein argued that the bank's claim did not fall within an express exception to the homestead protection provisions, and, therefore, the Florida constitution protected her homestead from the bank's claim. *Id.* This Court rejected her argument and instead found that an equitable remedy could be fashioned in the "spirit of the exceptions" to the constitutional homestead provision. *Id.* at 270.

Fishbein is consistent with generally accepted rules of constitutional analysis and interpretation. For example, constitutions are generally considered "living documents," not easily amended, which demand greater flexibility in interpretation than that required by legislatively enacted statutes. *Fla. Soc. of Ophthalmology v. Fla. Optometric*, 489 So. 2d. 1118, 1119 (Fla. 1986). When adjudicating constitutional issues, the principles, rather than the direct operation or literal meanings of the words used, measure the purpose and scope of a provision. *U. S. v. Lefkowitz*, 285 U.S. 452, 467, 52 S. Ct. 420, 424, 76 L. Ed. 877 (1932). "The spirit of the constitution is as obligatory as the written word." *Plante v. Smathers*, 372 So. 2d 933, 936 (Fla. 1979).

In *Fishbein*, this Court essentially determined that one interpretation would sanction fraudulent activity, while the other would serve equity and fairness. The *Fishbein* court made it manifest that principles of equity and fairness were the appropriate approach in accordance with established Florida law. The Bank Leumi court, however, dismissed *Fishbein* as factually dissimilar. *Bank Leumi*, 898 F. Supp. at 888.

The Bank Leumi court also dismissed as factually dissimilar another line of

cases in Florida wherein a husband/father had sought to invoke the homestead exemption in order to thwart his wife's ability to collect alimony or child support. Bank Leumi, 898 F. Supp. at 889. In those cases, the Florida courts have not permitted the husband/father "to hide behind the homestead exemption laws." *Id.* The Bank Leumi court, however, dismisses the alimony/child support cases out of hand, stating that these cases are inapposite because involving the equities of domestic relations. *Id.* The Bank Leumi court also attempts to distinguish this line of cases on the ground that they present the situation where "monies directly due others were put into the property to prevent its recovery." *Id.* Truly, these are distinctions without a difference. In all of the cases under discussion, including the Jones/Pasco line of cases, the alimony/child support line of cases, the Bank Leumi case and the case at bar, the debtor used monies "directly due others" to acquire a homestead and thereby prevent the creditor from recovering these monies. In the alimony/child support cases, these monies were due under a judgment for alimony or child support; in Bank Leumi these monies were due on a judgment under a guarantee; and in the case at bar, these monies are due under a judgment for fraud and breach of fiduciary duty. Clearly, "the delicate but seemingly clear distinction" (*Id.* at 889) drawn by the Bank Leumi court is no distinction at all. Rather, the alimony/child support line of cases is simply another application of the well-established doctrine that the Florida homestead exemption cannot be used as an instrument of fraud.

Thus, although the Bank Leumi court strains to find distinctions which result in allowing a debtor to abuse the homestead exemption (which the court admitted was contrary to basic concepts of fairness), the "long line of Florida cases dealing with the subject" cited by the Bank Leumi court uniformly reach a contrary result - to deny the homestead exemption whenever used as an instrument of fraud. Havoco respectfully suggests that the Bank Leumi decision is a distortion of Florida law and is an unwarranted restriction on the well-established decisions of this Court which abhors the abuse of the homestead exemption to further a debtor's fraud, regardless of the particular form the fraud takes. Accordingly, Havoco urges this Court to reject the reasoning of Bank Leumi and to hold instead that under Florida law the homestead exemption will be denied when the homestead is acquired with the intent to delay, hinder or defraud creditors. The case at bar should be remanded to the Bankruptcy court for further proceedings to establish the debtor's intent. In such proceedings, evidence of other substantially contemporaneously transfers by the debtor would be relevant to establish such intent, as set forth in the April 27, 1995, Order of the district court. (R1-3-B220).

CONCLUSION

For the reasons set forth herein, the Appellant respectfully urges that this Court recognize and affirm the long line of Florida cases which clearly hold that the homestead exemption may not be used as an instrument of fraud. The Appellant respectfully urges that the question certified to this Court be answered in the negative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief of Appellant was furnished by U. S. Mail to Louis K. Rosenbloum, Esquire, P.O. Box 12443, Pensacola, Florida 32538-2443 and John E. Venn, Jr., Esquire, 220 West Garden Street, Suite 603, Pensacola, Florida 32501 this day of January, 2000.

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