

IN THE SUPREME COURT OF THE STATE OF FLORIDA
CASE NO. SC06-1671

Lower Tribunal Case No.: 3D04-117

DEBORAH CHAMES and HELLER & CHAMES, P.A.,

Petitioner,

v.

HENRY DE MAYO,

Respondent.

**AMICUS CURIAE BRIEF OF THE
BUSINESS LAW SECTION OF THE FLORIDA BAR
(Supporting Respondent Henry De Mayo)**

**On Discretionary Review From a Decision of the
Third District Court of Appeal**

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STATEMENT OF INTEREST

Amicus Curiae, the Business Law Section of The Florida Bar (the “BLSFB”), submits this brief supporting Respondent Henry De Mayo (“DeMayo” or the “Respondent”). BLSFB respectfully submits this brief in its capacity as a recognized Section of The Florida Bar which includes many attorneys who have a direct interest in this litigation with respect to commercial matters including but not limited to the circumstances under which Florida’s Constitutional homestead exemption is subject to waiver. This brief is not filed on behalf of The Florida Bar itself.

This case raises important issues concerning the interpretation and application of Florida’s Constitutional homestead exemption and the circumstances under which that important exemption is subject to waiver.

SUMMARY OF THE ARGUMENT

Notwithstanding Petitioners’ argument to the contrary, the Court should not overrule long-standing precedent that served as the basis for the Third District’s decision, *Carter’s Adm’rs v. Carter*, 20 Fla. 558 (1884) (holding that homestead protection could not be waived in a written instrument, a promissory note, which did not involve one of the recognized exceptions set forth in the Florida Constitution) and *Sherbill v. Miller Mfg. Co.*, 89 So. 2d 28 (Fla. 1956) (same; citing to and relying upon *Carter*). As acknowledged by the Petitioners, Judge

Wells’ opinion below relied upon *Carter* “as accurately defining the policy considerations behind the homestead provision of the Florida Constitution, Article X, §4 and *Sherbill*, for the proposition that homestead provisions could not be waived because a waiver of homestead would be contrary to the public policy of this state.” Petitioners’ Initial Brief, at 4.

The fact that Florida’s Constitutional homestead provision was modified in 1984 to provide for a forced sale to apply to a “natural person,” as opposed to a “head of a family,” does not obviate the long-standing and well-recognized policy reasons for the homestead protections afforded by Florida’s Constitution. Conspicuously absent from Petitioners’ Initial Brief is any mention, let alone discussion, of the Court’s seminal decision in *Havoco of America, Ltd. v. Hill*, 790 So. 2d 1018 (Fla. 2001), which recounts the three exceptions to Florida’s Constitutional homestead provision, *none of which is present here*. This fact, in itself, compels affirmance of the Third District’s decision.

Lastly, there are substantial policy implications that would arise from reversal of the Third District’s decision and those implications compel affirmance of that decision.

STATEMENT OF THE CASE AND FACTS

The BLSFB adopts the Statement of the Case and Facts portion of Respondent’s Answer Brief.

ARGUMENT

I. The Court must affirm the Third District's decision.

Petitioners acknowledge that Judge Wells' opinion below relied upon *Carter, supra*, "as accurately defining the policy considerations behind the homestead provision of the Florida Constitution, Article X, §4 and *Sherbill*, for the proposition that homestead provisions could not be waived because a waiver of homestead would be contrary to the public policy of this state." Petitioners' Initial Brief, at 4. Relying upon the concurring opinion by Judges Sheppard and Green, however, Petitioners argue that the Court should overrule *Carter* and *Sherbill, supra. Id.* at 5. Of note, Petitioners do not acknowledge the first sentence in the concurring opinion in which Judges Sheppard and Green acknowledge that they were "compelled" to rule for Respondent because the facts before the court were "indistinguishable" from those in *Sherbill, supra. De Mayo v. Chames*, 934 So. 2d 548, 551 (Fla. 3d DCA 2006).

Regardless, the fact that other states adopt what has been characterized as the "modern" view that one's right to homestead protection is "personal" and therefore subject to waiver does not and cannot obviate that protection or the reasons therefor. The Court has long ago and consistently recognized the importance of affording a liberal construction to the homestead protection provided by the Florida Constitution. *See, e.g., Graham v. Azar*, 204 So. 2d 193, 195 (Fla.

1957); *Milton v Milton*, 63 Fla. 533, 536, 58 So. 718, 719 (1912) (“Organic and statutory provisions relating to homestead exemptions should be liberally construed in the interest of the family home.”). Decisional law from the federal courts recognizes this proposition. *See, e.g., In re Alexander*, 346 B.R. 546, 550 (Bankr. M.D. Fla. 2006) (“[T]he Florida courts have consistently held that the exemption should be liberally construed in favor of protecting the family home and those whom it was designed to protect.”) (quoting *Southern Walls, Inc. v. Stillwell Corp.*, 810 So. 2d 566, 569-70 (Fla. 2d DCA 2002); citing *Havoco, supra*).

The fact that the relevant constitutional provision has been changed to provide protection to a “natural person,” instead of a “head of family,” as urged on the Court by Petitioners, does not obviate or otherwise minimize the reasons for maintaining the homestead protections afforded by Florida’s Constitution. *See Alexander, supra*, 346 B.R. at 550-51 (recognizing that various types of ownership interests can qualify for homestead protection and rejecting the argument that that protection didn’t apply to a settlor and principal beneficiary of a trust in which the residence was held since trust was not a “natural person”). This is evidenced by the following language from *Havoco* that pursuant to the

plain and unambiguous wording of article X, section 4, a homestead is *only* subject to forced sale for (1) the payment of taxes and assessments thereon; (2) obligations contracted for the purchase, improvement or repair thereof; or (3) obligations contracted for house, field or other labor performed on the realty. Under the

rule “*expressio unius est exclusio alterius*”-the expression of one thing is the exclusion of another-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.

Havoco, 790 So. 2d at 1022 (quoting *Butterworth v. Cagiano*, 605 So. 2d 56, 60 (Fla. 1992) (“These exceptions are unqualified.”)) (Emphasis added by *Havoco* Court). *Accord Chauncey v. Dzikowski (In re Chauncey)*, 454 F.3d 1292, 1294 (11th Cir. 2006) (citing *Havoco* for the above-stated exceptions and holding, in part, that the debtor’s conduct of paying down her mortgage with the proceeds of a personal injury settlement and delaying the filing of her bankruptcy did not rise to the level of fraud or wrongdoing to warrant the imposition of an equitable lien on her homestead¹).

If fact, the change from “head of a family” to a “natural person” *expanded* the scope of the protections afforded by Florida’s Constitution. *Public Health Trust of Dade County v. Lopez*, 531 So. 2d 946, 948 (Fla. 1988) (reiterating public policy behind Florida’s homestead protections and stating that the change in Florida’s Constitution from “head of a family” to a “natural person . . . *expanded* the class of persons who can take advantage of the homestead provision and its protections.”)

¹ Here, Petitioners do *not* seek imposition of an equitable lien. Even if such relief had been requested, it would not be warranted here if such relief was not appropriate under the egregious facts in *Chauncey*, *supra*.

(Italics added); *Cain v. Cain*, 549 So. 2d 1161, 1163 (Fla. 4th DCA 1989) (same).

Thus, the proposition urged by Petitioners, that the homestead exemption is subject to waiver, citing *In re Amendment to the Rules Regulating the Florida Bar/Rule 4-1.5(f)(4)(b) of the Rules of Professional Conduct*, 2006 WL 2771252 (Fla. Sept. 28, 2006), is lacking in merit because the Florida Constitution so provides via the three recognized, albeit “unqualified” exceptions.² However, contracting with an attorney for legal services is simply *not* one of these recognized exceptions provided for by the Florida Constitution. As noted by the Court in *Havoco*,

“[a] concomitant in harmony with th[e] 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)).^[3] Indeed, this strict construction of the exceptions proved paramount in our most recent inquiries into the homestead exemption in the context of civil and criminal forfeitures.” *Havoco*, 790 So. 2d at 1021.

In short, because none of the three recognized exceptions to the homestead

² In support of this proposition the Court cited to *Hartwell v. Blasingame*, 564 So. 2d 543, 545 (Fla. 2d DCA 1990). *Hartwell*, however, is distinguishable as that case involved waiver by a surviving spouse through a prenuptial agreement as contemplated by Florida probate law.

³ In a footnote, the Court cited to its decision in *Olesky v. Nicholas*, 82 So. 2d 510, 513 (Fla. 1955) wherein it stated as follows: “We find no difficulty in holding that the Florida constitutional exemption of homesteads protects the homestead against every type of claim and judgment except those specifically mentioned in the constitutional provision itself...” *Id.*, note 5. *Accord Havoco*, 790 So. 2d at 1021 (same).

protection provided for the by the Florida Constitution is present here the Court must affirm the Third District's decision.

II. Public policy compels affirmance of the Third District's decision.

Beyond the straight-forward application of *Havoco*, there are sound public policy reasons that also compel affirmance. As cogently explained by Judge Wells prior to the Third District's retreat from its initial decision, the

waiver of the homestead exemption will become an everyday part of contract language for everything from the hiring of counsel to purchasing cellular telephone services. *The average citizen, who is of course charged with reading the contracts he or she signs, as this court knows all too well, often fails to read or understand boilerplate language detailed in consumer purchase contracts, language which the contracts themselves often permit to be modified upon no more than notification in a monthly statement or bill.* Nonetheless, under the majority's application of article X, section 4, such consumers may lose their homes because of a 'voluntary divestiture' of their homestead rights for nothing more than failure to pay a telephone bill. *This inevitably will result in whittling away this century old constitutional exemption until it becomes little more than a distant memory.*

De Mayo v. Deborah Chames and Heller & Chames, P.A., Case No. 3D04-117 (Fla. 3d DCA Nov. 30, 2005), at 24-25 (Italics and underlining added). In short, if the Third District's decision is reversed, every Floridian who is otherwise entitled to the State's Constitutional homestead protection will be at risk in the form of

*every day, run-of-the-mill transactions that could, by the failure to make even one timely payment, result in the loss of a family home.*⁴

⁴ In light of the great significance of home ownership to the average consumer, both the federal and state regulators in the mortgage industry have set forth volumes of regulations in an effort to ensure that the borrower is fully apprised of the details and consequences of a mortgage transaction. A review of certain of these regulations is appropriate in the context of this case in which Petitioners claim waiver of the State's Constitutional-based homestead protections.

Within the federal regulatory scheme, the Truth in Lending Act (15 U.S.C. § 1601 *et seq.*) with associated Regulation Z (12 C.F.R. § 226 *et seq.*) and the Real Estate Settlement Procedures Act (12 U.S.C. § 2601 *et seq.*) with associated Regulation X (24 C.F.R. § 3500 *et seq.*) require a long list of disclosures that must be provided to a consumer before a mortgage loan is closed (e.g., Good Faith Estimate, HUD-1 Settlement Statement, Servicing Disclosure Statement, Affiliated Business Arrangement Disclosure Statement, Notice of Right to Receive a Copy of an Appraisal, Rescission Notice, etc.). Generally, the Truth in Lending Act was implemented to “promote the informed use of consumer credit by requiring disclosures about its terms and cost” by requiring lenders to disclose information about the creditor, amount financed, annual percentage rate, finance charge, and the total amount of all payments combined. 12 C.F.R. § 226.18. Similarly, the Real Estate Settlement Procedures Act was implemented to insure consumers receive the necessary advanced disclosures explaining in detail the costs and nature of the real estate settlement services. 12 U.S.C. § 2604. Several other federal laws have been promulgated providing additional disclosure and protections to the consumers in connection with their mortgage loans, including, but not limited to, the Equal Credit Opportunity Act (15 U.S.C. § 1691 *et seq.*); the Fair Housing Act (42 U.S.C. § 3601 *et seq.*); the Fair Credit Reporting Act (15 U.S.C. § 1681 *et seq.*); the Fair Debt Collection Practices Act (15 U.S.C. § 1692 *et seq.*); the Home Owners Equity Protection Act (15 U.S.C. § 1639 *et seq.*); and the Home Owners Protection Act (12 U.S.C. § 4901 *et seq.*).

Furthermore, the states provide an additional layer of consumer protection within their own laws. In Florida for instance, before handing over any funds for fees associated with a mortgage loan, a consumer must receive contact information of someone at the lender who is available to promptly answer any questions or concerns of the consumer. Fla. Stat. § 494.0068(1)(d). Additional disclosures

Looking at the waiver issue from a bankruptcy standpoint is fair and otherwise justified because many of the cases involving the issue of the application of the homestead arise in that context. For example, would a ruling recognizing a contractual-based waiver of homestead protection create a new class of creditors somewhere between secured creditors and general unsecured creditors? If so, would this new breed of super-creditor nevertheless have its claim discharged leaving the creditor enjoined from partaking of the fruits of its boilerplate language? Or would a trustee in bankruptcy somehow step into the shoes of this super-creditor and liquidate a debtor's homestead (and for that matter all otherwise exempt assets) for similarly situated super-creditors?

Regardless, the issue before the Court does *not* implicate the sort of form over substance analysis that applies to, for example, "true" leases versus "disguised" security agreements. The instant issue goes to the level of formality needed to make certain types of transactions valid. For example, oral contracts

required under the Florida laws include, but are not limited to, Florida Anti-Coercion Insurance Notice, Florida Lender Application Disclosure, Florida Conflict of Interest Disclosure, Florida Broker Disclosure, Prepayment Penalty Disclosure, Documentary Stamp Tax Notice and various disclosures for High Cost Loans.

As evidenced by this complex and ever-evolving framework of consumer protection regulation in the realm of mortgage laws, it is clear that regulators have taken a strong position in favor of ensuring full disclosure to the consumer through prescribed forms that convey a clear understanding of the obligations and implications of the mortgage transaction.

which as a general proposition are just as binding as written ones are nevertheless not binding where a sale of land is involved or an agreement to pay the debt of another or the execution of a will. All of these require a higher level of formality. And this higher level of formality applies *especially* in the home ownership context (in which homestead waiver issues necessarily arise).

The foregoing are but a few issues that would be occasioned by a holding that persons can waive homestead protections by any form of contract, which is precisely what De Mayo entered into with the Heller & Chames law firm.

CONCLUSION

Based on the foregoing, the Court should affirm the Third District's opinion in its entirety and, in so doing, uphold the sanctity of Florida's important homestead exemption and the strict application of the unambiguous and "unqualified" exceptions required for the waiver thereof.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served via Regular U.S. Mail, postage prepaid, upon Deborah Chames, Esq., Heller & Chames, P.A., 261 N.E. First Street, Sixth Floor, Miami, FL 33132; Jay M. Levy, Esq., Jay M. Levy, P.A., Counsel for Petitioners, Two Datan Center, #1510, 9130 S. Dadeland Blvd., Miami, FL 33156; Sophie De Mayo, Esq., Counsel for Respondent, 10042 S.W. 77th Court, Miami, FL 33156; Robert W.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

Respectfully submitted,

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