OA 11-5-92

IN THE *SUPREME* COURT OF FLORIDA

FILED
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PALM BEACH SAVINGS & LOAN ASSOCIATION, F.S.A.,

Petitioner,

vs.

DEBORAH FISHBEIN,

Respondent.

CASE NO. 78,922

ANSWER BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

Petitioner was the plaintiff in the trial court and the appellee in the district court of appeal. The petitioner will be referred to herein as the bank. Respondent was the defendant in the trial court, the appellant in the district court of appeal. Respondent will be referred to by name herein.

The record from the trial court will be referred to by the symbol "R" and the appropriate page number in parenthesis. The decision below will be referred to as "Opinion" and the appropriate page number in parenthesis.

STATEMENT OF THE CASE AND FACTS

The respondent, Mrs. Deborah Fishbein, accepts the statement of the facts and of the case in petitioner's brief, and as contained in the Opinion below. The following additions are pertinent to the issues before the Court.

Mrs. Deborah Fishbein and her former husband are the parents of two minor children who resided with them at the homestead and who remain in the custody of Mrs. Fishbein where, after the dissolution of the marriage, they maintained their residence on the homestead property at issue in this case.

Mr. and Mrs. Fishbein were in divorce proceedings at the time the bank accepted the loan papers purporting to contain Mrs. Fishbein's signature. The bank had, shortly prior to permitting the papers to be executed out of the bank's presence, responded negatively to a written request from Mr. Fishbein seeking to close the loan without his wife's signature (R-613-614). The attorney/vice president acting for the bank expressed concern about closing the loan in the manner it was closed due to his knowledge of the dissolution proceedings that had previously been instituted between Mrs. and Mr. Fishbein (R-57-59). Despite this knowledge, the bank officer admitted that the bank made no effort to contact Mrs. Fishbein regarding the proposed lien on this homestead property (R-59). The loan officer testified that the bank had never before permitted a loan of this amount to be closed in the this manner (R-47-49). All the expert witnesses, including the bank's expert, testified that the procedure used by the bank under the circumstances here would not have been used by a prudent bank

in closing the loan (R-83-85,100). The actual closing papers were executed by Mr. Fishbein, at a place known as the El Cid Bar, owned by Mr. Fishbein, without the knowledge or consent of Mrs. Fishbein after the bank gave to papers to Mr. Fishbein to have executed and returned to the bank (R-124). Mr. Fishbein forged the signature of Mrs. Fishbein (R-125). A part of funds were used to pay prior loans to others that had been secured by the homestead property (R-125).

The trial court found the manner in which the bank allowed this loan to be closed was neglect but not "active misfeasance" (R-713-719). The trial court found no knowledge, contrivance or fault on the part of Mrs. Fishbein in this matter (R-717).

Mr. Fishbein had earlier misrepresented in the dissolution proceeding that he would purchase a residence for Mrs. Fishbein in Boca Raton, then after he failed to do so, Mr. Fishbein accepted a settlement awarding the homestead property to Mrs. Fishbein in which he represented to the dissolution court that their homestead at 160 Kings Road, Palm Beach, was free and clear of all encumbrances (R-11-14, 241-242).

The facts shown at the hearing held in the circuit court showed without contradiction or dispute that Mr. Fishbein had assets far in excess of the amount of the loan at the time he unilaterally executed the mortgage with the bank (R-629-634). Further, there was uncontradicted testimony at the hearing in the trial court that assets were available at the time he forged Mrs. Fishbein's signature to pay off the prior encumbrances (R-120). These assets were dissipated by the time Mrs. Fishbein was given

knowledge of *Mr.* Fishbein's attempted unilateral alienation of their homestead (R-120).

The district court of appeal held that if it were "required to do so, [it] would not hesitate to conclude that as between the Bank and Mrs. Fishbein, the Bank, the party who was best able to avert the loss and who was least innocent, should bear the loss caused by Mr. Fishbein." (Opinion, p.7, fn. 7).

The signature forged by Mr. Fishbein of Deborah Fishbein's signature is noticeably different from other signatures of hers on other previously executed documents that were in possession of the bank at the time the bank accepted the loan papers in this case that were executed out of the presence of any bank official or other representative known to the bank (R-624,626,690-698,699-703,704-710).

SUMMARY OF *ARGUMENT*

The bank has argued that equitable liens may be imposed in contravention of the constitutional protection. Several cases have been cited far that proposition. However, examination of them reveals that each has involved improvements to the property that have placed the obligation within the homestead exemptions. They do not hold, either expressly or impliedly, that equity may ignore the plain limitation of Florida's unique and beneficent homestead property right.

Equity principles should not be permitted to override the constitutional protection of homestead. Moreover, in this case the failure of the bank to exercise reasonable care and caution, after being put on notice to do so specifically, should prevent application of equity. Homestead must be viewed in terms of the fact that homestead protection is based on possession, not record title. The duty of the bank to insure that it was dealing with a valid alienation rests on its shoulders. The fraud here was not skillful or derived from any artifice that the bank would have found even difficult to avoid. This is not the case of a skillful imposter. No one presented a fake Mrs. Fishbein to a loan officer. The bank wholly failed to inquire of her by making even the most perfunctory inquiry as to her intent to alienate her interest as the wife in this property the bank knew to be a homestead.

If this Court were dealing with two innocent parties, both of whom who had exercised diligence and care, the equity would be in Mrs. Fishbein's favor because of the unique nature of homestead property. The failure of the bank to exercise this degree of care

in this transaction, after the notice it received to make certain of the status of the parties' alienation, should dispose of the equity claim. Sound exercise of equity discretion precludes the judgement entered in the trial court where the bank was neglectful in permitting the loan papers to be taken from the bank by Mr. Fishbein. The district court of appeal should be affirmed in reversing the judgment that had dispossed Mrs Fishbein from the homestead. The case can be decided on this ground alone.

Assuming, arguendo, the existence of a rule that the homestead provision can yield to ordinary principles of equity so as to be overruled by a court exercising equity jurisdiction, the unique nature of the homestead protection would prevent its use against homestead property. This case is not one of ordinary property or monies being subject to an equity judgment. This case involves a greater interest, which by constitutional determination serves both the protection of the family as well as the staste's interest in protecting the integrity of a family security despite the profligate or dishonest actions of one spouse. The cases hold that to enter a judgment in equity against homestead requires reprehensible or fraudulent conduct on the part of the beneficiary of the homestead. Mrs. Fishbein was found by the trial court to have not been guilty of any such conduct. The cases of Isaacson v. Isaacson, 504 So.2d 1309 (Fla. 1st DCA 1987), and Clutter Construction Corp. v. Clutter, 173 So.2d 761 (Fla. 3rd DCA 1965), hold that such reprehensible conduct or fraud is required on the part of the beneficiary claiming its protection for an equity judgment to be entered to remove the protection of the homestead

protection. Since there was no such conduct on the part of Mrs. Fishbein, the decision below should be affirmed.

Also involved is the constitutional issue whether the homestead property right granted in Art. X, Section 4, Fla. Const., can be avoided by the use of equity when the mortgage is invalid for its failure to comply with the requirement of that section that both spouses join in the alienation. An important fact is that the proceeds were not used to make improvements on the property nor to purchase the property.

We have organized the issues in response to the petitioner's brief by stating the issues as the district court decided them. We have organized our answer to the petitioner's brief into one point of argument with appropriate sub-headings. This answer brief is also intended to constitute a reply to the amicus brief.

The petitioner's brief has a Point II which argues that the district court engaged in de novo review. No specific factual finding is asserted to have been substituted at the appellate level. Therefore, it is respondent's position that there is no need for a further response to that point.

ARGUMENT

WHETHER ARTICLE X, SECTION 4, OF THE FLORIDA CONSTITUTION, AND RULES OF EQUITY, PROTECT *AN* INNOCENT SPOUSE AND CHILDREN FROM HAVING *AN* EQUITABLE LIEN IMPOSED ON THEIR HOMESTEAD PROPERTY BASED UPON *AN* OBLIGATION INCURRED BY THE HUSBAND ALONE?

A. EQUITY HAS NOT **BEEN USED FOR THE IMPOSITION OF EQUITABLE SUBORDINATION LIENS ON HOMESTEAD PROPERTY.**

The bank would have the Court believe that the Court has approved judgments entered by use of a court's inherent equity jurisdiction against homestead property to satisfy obligations of a general nature. Such is not the law as it has previously been interpreted.

The primary **case** relied upon by the bank, Jones **v.** Carpenter, **90** Fla. **407,** 106 So. **127** (1925), made this **clear** in stating its holding, 106 **So.** at **130:**

> Section 1 of article 10 of our Constitution, after defining a "homestead," attaches to it the following qualification:
>
> "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 funds involved in this litigation were all spent for labor and improvements on the house which appellee seeks to exempt and are clearly within the qualifications to his homestead as above enumerated.

Jones v. Carpenter, did not hold that an obligation which does not come within the exceptions to the homestead can be levied upon in equity. The Court ruled that equity in Jones was consistent with the constitutional homestead right. The case did not hold

that equity could be imposed inconsistent with the constitution. In fact, the Court said just the opposite in that opinion, 106 So. at 130:

> A homestead in this country is for the benefit of the family, where it can be sheltered and live beyond the reach of financial reverses. It is one of the issues of our republican government designed to encourage freeholders, those citizens who are the prop and mainstay of all free government. It is designed to keep sacred and inviolate the home for the family regardless of the amount of the indebtedness or the number of creditors of the head of the family. It cannot be alienated except as the law directs, and when the parties are sui juris and dealing at arm's length it is notice to the world of all these facts and more; but it cannot be employed as a shield and defense after fraudulently imposing on others.

The fraud and imposition on others in Jones was the use of stolen money to improve the property. It was the actual improvement to the property with the money in Jones that resulted in the Court's approval of entry the of a judgment against the property in that case.

The case of Butterworth v. Caggiano, Case No. 78-377 (pending), concerned forced sale under Art. X, Sec. 4(a), Fla. Const. The present case involves not only the forced sale phrase, but also the portian that states that no judgment or decree or execution shall be a lien on homestead property except as set forth in Section 4. In relevant part, Article X, Section 4(a) states:

> Homestead; exemptions. -
> (a) These 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:** [the provision ***goes*** on to define homesteadproperty]

This no lien phrase is of equal importance. Both are neces- **sary** to protect a spouse from being dispossessed **as** a result of the actions or debt of the other spouse. Further, since no lien may be imposed by any judgment, decree or order, the non-joining spouse cannot be forced by a lien encumbrance on the property to pay debts incurred separately by the other spouse at a time of future sale of the homestead. Mrs. Fishbein should not have the burden, nor any spouse, of being required to follow the other spouse around to make sure no **debts** are incurred that could be liens, either in law or in equity, against the homestead.

The other cases relied upon by the bank for use of equity have all also involved some specific exception contained in the homestead provision. In LaMarr v. Lechlider, 135 Fla. 703, 185 So. **833 (1939),** equity was **imposed** where there was improvement by construction of buildinga, along with an expressed intent by both spouses for the other party to have an interest in the property. The Court held the lien in LaMarr to be consistent with a specific exception contained in the homestead provision, **185 So.** at **835** that, "It was undoubtedly the intention of both the LaMarrs and the Lechliders that, by the construction of the improvements thereon, the Lechliders should acquire an interest in the land herein involved.. .." Thus an equitable lien **was** imposed where a legal obligation had failed because the homestead exemption did not apply to that circumstance.

The same holding is embodied in Sonneman v. Tuszynski, 139 Fla. 24, 191 So. 18 (1939), where the claimant provided labor on the property itself. This was given in return for a promise to provide a home for the rest of her life. This claim was within one of the exceptions to the constitutional homestead protection.

The bank's use of these cases in their argument to contend that general equity judgments may be entered in the face of the constitutional homestead provision is incorrect. The Court's precise holdings in the cases involving the homestead provision reflects a close application and adherence to the homestead right contained in the constitution, not the allowance of equity judgments to avoid it or to do violence to it.

B. THE DISTRICT COURT OF APPEAL WAS CORRECT IN HOLDING THAT EQUITY WAS IN MRS. FISHBEIN'S FAVOR AND DID NOT LIE WITH THE BANK.

The bank's failure to determine the status of the wife regarding the proposed lien, which Mr. Fishbein had asked the bank to grant unilaterally, should be dispositive of its claim of imposition on creditors. The bank neither used the telephone to discuss the proposed lien with Mrs. Fishbein, who had not come into the bank, nor had the bank sent any representative to the property to check with this known spouse. Not even after the papers were returned by Mr. Fishbein did the bank make a single telephone call to the residence to determine if Mrs. Fishbein acknowledged the note. The financial statement of Mr. Fishbein shows that at the time the loan was made he had funds available from other sources to satisfy the prior encumbrances (R-629-634). At the time the loan was made Mrs. Fishbein could have required,

through the dissolution court, that Mr. Fishbein use his substantial assets to satisfy the prior liens. By the time Mrs. Fishbein was apprised of the bank's claim, by service of foreclosure papers, Mr. Fishbein had dissipated these substantial assets and her situation was no longer the same.

Homestead is dependent upon the status of possession, not record title. The failure of the bank to check and determine that it had the signatures it knew were required should be fatal to its contention of being victim of an unfair law. See In re: Noble's Estate, 73 So.2d 873 (Fla. 1954), where the Court stated:

> The homestead character of a given piece of property depends entirely on the use to which at the time it is being put. We recognized this in Bigelow V. Dunphe, 143 Fla. 603, 197 So. 328,330, where we said that "Homestead character is a matter of use which could be determinable only from the physical appearance as distinguished from the title as ... shown on the records." In that case a mortgagee had attempted to foreclose a mortgage executed by a wife who was a free-dealer. It developed that the encumbered property was a homestead and that the mortgagor was the head of a family so we held that foreclosure could not be decreed. We stated that the condition of title could be learned from the record, but that the use could not, and that it was the use which governed its immunity as homestead.

Therefore, there is support for the position of Mrs. Fishbein that a creditor is on notice to determine not solely from public records but from an inspection of the property itself the status of potential homestead claims. Here, with knowledge of the dissolution proceedings between Mr. and Mrs. Fishbein, and the request by Mr. Fishbein to close the mortgage without her signature, the bank allowed the papers to leave the bank for signature,

yet all the while making not one single inquiry on the property itself or by telephone to the wife. This is a failure to exercise reasonable care under circumstances which makes the bank's claim to equity, and the argument that the homestead right is an imposition on creditors, something less than persuasive.

The bank argues that the trial court failed to find the bank negligent. However, the Fourth District's holding is contrary to that argument. The district court found, Opinion, p.5, that "[T]he trial court agreed with Mrs. Fishbein that the Bank was negligent in the manner in which it chose to close the loan...." After discussing the law of homestead that precludes an obligation entered into by one spouse from encumbering homestead property, the district court found that the basis of the judgment was a loan to Mr. Fishbein that "did not fall within any of the exceptions enumerated in our state constitution" and consequently the bank was not entitled to execute on the property. (Opinion, pp. 5-6).

The district court found that courts may impose equitable liens against homestead property only where the beneficiary claiming the homestead protection has been guilty of some fraudulent or egregious conduct. Citing to Isaacson v. Isaacson, 504 So.2d 1309 (Fla. 1st DCA 1987), the district court determined that the required liberal construction of the homestead protection mandated its result which it stated was "consistent with the well-established principle that exceptions from the constitutional exemption from forced sale are to be strictly construed." Isaacson v. Isaacson, supra at 1311. The trial court, after finding fraud had been employed by Mr. Fishbein, imposed a lien upon, and ordered

sale, of what was then Mrs. Fishbein's homestead to satisfy a portion of the debt.

The bank would have this Court overturn the salutary rule that equity can be imposed against homestead property based on the actions of one spouse while the innocent spouse, not guilty of fraud, suffers the consequence of loss of the homestead which Article X, Section 4, is designed to protect against liens for such debts. Such a result would conflict with the uninterrupted line of cases holding inviolate the homestead property from the actions of one spouse when the obligation fails to come within the exceptions of the constitutional provision.

It is our position that Isaacson correctly erects a barrier against this use of equity. However, the constitutional protection as previously interpreted would seem to cause doubt that even Isaacson's exception could be applied to permit a lien on homestead property against one spouse for another spouse's misdeeds. The Court in Clutter Construction Corp. v. Clutter, 173 So.2d 761 (Fla. 3rd DCA 1965), followed the Isaacson ruling to again prevent an equitable lien without the claimant establishing fraud or reprehensible conduct. Where was Mrs. Fishbein's reprehensible conduct? There was none.

Clutter's citation to Isaacson illuminates its holding to some extent. The bank seems to find fault with the limited description of the facts in Clutter. Yet it is clear that the precedent it is applying is as stated in Isaacson. See also, Kitzinger v. Gulf Power Co., 432 So.2d 188 (Fla. 1st DCA 1983).

Regardless, the equities sub judice are not in the bank's

favor because of the bank's negligence in failing to protect its own interests in a commercially reasonable manner. The bank knew sufficient information to require it to take appropriate steps to ascertain the true identity of the person who signed the loan papers. She did not win the lottery, she simply retained what she had, her homestead, already awarded by the dissolution court. As the district court ruled, the bank was in the superior position to prevent the fraud, failed to do so, so cannot now successfully claim equity to rectify its own failure by obtaining an equity judgment against the homestead property Mrs. Fishbein is entitled to enjoy free of such claims. By making such claims free from levy at law, but not in equity, the homestead protection is truncated beyond its historical scope. The creditor gave credit under such law, knowing full well of its requirements as well as knowing of the difficulties between these spouses, thus acted recklessly at best in permitting this loan to be closed in the manner it did.

Equity should not vitiate or limit the homestead protection. Public Health Trust of Dade County v. Lopez, 531 So.2d 946 (Fla. 1988). But the issues in this case can be disposed of by application of established principles of equity. The bank, as the pasty exercising a position of superior ability and knowledge, failed to exercise reasonable care for its own protection. As such, its acceptance of the dubious nature of this transaction, without ascertaining facts essential to its own status as mortgagee, cannot claim equity over the rights of Mrs. Fishbein. This is especially so where homestead property is concerned. The bank would not be entitled to equity under these circumstances even if non-homestead

property were involved. The fact that homestead property is involved is simply an additional circumstance that must be taken into consideration. The organic right of homestead is of long standing and has been directed to be liberally construed "in the interest of the family home." Milton v. Milton, 63 Fla. 533, **58 So. 718 (1912), 58 So.** at 719. while stating that such should not be an instrument of fraud so as to be an imposition on creditors, the Court in Milton enforced the homestead protection from valid claims of creditors, that were not within the exceptions to homestead immunity, since homestead took precedence over them. See also, Jetton Lumber Co. v. Hall, **67 Fla. 61, 64 So. 440 (1914). In** Sunrise S & L Assn. v. Giannetti, 524 **So.2d 697** (Fla. 4th **DCA 1988),** a bank had by its negligence made possible the forgery of a satisfaction of mortgage. A subsequent innocent party as mortgagee was given priority. In Jones v. Lally, 511 So.2d 1014 (Fla. 2nd **DCA 1987),** a title company check was dishonored. **As** between buyer and seller the loss was placed on the seller whose negligent failure to endorse the check properly caused a stop payment. The operative rule, which should govern the case at bar, was stated, **511** So.2d at **1016:**

> Where one of two innocent parties must suffer a **loss** as a result of the default of another, the loss shall fall on the party who is best able to avert the loss and is the least innocent.

The cases are quite consistent on this principle, as well as on the principle of the special status of homestead property when it has not been alienated by joinder of both spouses. Continental Casualty Co. v. Associated Plastics, Inc., 347 **So.2d 822 (Fla. 3rd**

DCA 1977), concerned a claim by a paint supplier who, knowing of a sub-contractor's credit problems, filed a false partial release indicating it had been paid which mislead an innocent party. The supplier was denied a lien against the innocent owner. The cases simply do not permit equity to undo the separate rights of an innocent person to reward carelessness or outright negligence. See, e.g. Bryan v. Owsley Lumber Co., 201 So.2d 246 (Fla. 1st DCA 1967); Baader v. Walker, 153 So.2d 51 (Fla. 2nd DCA 1963); and Poser v. Hunt Furniture Co., 43 So.2d 343 (Fla. 1949). The Baader v. Walker, case is particularly useful as it involved a mortgagor who paid an agent who in turn absconded with the money. The court pointed out that the mortgagor, who had a third grade education, was not versed in the law of negotiable instruments or mortgages in contrast to the mortgagee who was in the business of making loans. The mortgage was adjudged to have been satisfied.

In conclusion, the ruling of the Fourth District Court of Appeal that the bank was not entitled to receive a judgment in equity against the homestead rights of Mrs. Fishbein should be approved.

In order to obtain equity from a court a party must have both clean hands and have taken appropriate steps to avoid the loss. The holding below followed established law in overturning the trial court's judgment. The bank failed to take reasonable steps to protect itself, and if taken would have avoided the risk of its own loss, while all along having had full information about the nature of the parties situation to put it on notice to protect itself. The bank further knew of the parties dissolution proceedings and that

a reconciliation hearing had been scheduled for the very afternoon of the day in which the loan was made **(R-57-58).**

There is no need for the Court below to reach any other issue.

C. THE NATURE OF THE CONSTITUTIONAL HOMESTEAD PROTECTION.

The Court has stated from Baker v. State, **17** Fla. **406 (1879)** to Public Health Trust of Dade Countv v. Lopez, 531 **So.2d 946** (Fla. **1988),** that a family's homestead is constitutionally entitled to remain inviolate from forced sale or encumbrance for debts incurred by one spouse without the concurrence of the other. Baker, perhaps the earliest decision, established the automatic protective nature of our constitution's homestead provision. The Court held, **17** Fla. **at 408-409:**

> Any one who has **owned** and occupied with his family the limited amount of land and improvements mentioned has "enjoyed" it as exempt from forced sale, whether he has or has not been threatened with executions or other process, because the enjoyment of a homestead consists in the use and occupation of it with his family, according to the clear intent and purpose of the provision.

More recently in Public Health Trust, supra, 531 So.2d at **948,** the Court reiterated the long-standing nature and policy reasons which underlie this constitutional provision:

> For the reasons advanced by the personal representatives, we reject the creditor's position. For over a century, Florida has by constitutional provision made the homeplace exempt from the claims of creditors. **See** Baker v. State, 17 Fla. 406 (1879) (construing homestead provision of the Florida Constitution of 1868). As a matter of public policy, the purpose of the homestead exemption is to promote the stability and welfare of the state by securing to the householder a home, so that

> the homeowner and his or her heirs may live beyond the reach of financial misfortune and the demands of creditors who have given credit under such law. See Bigelow v. Dunphe, 143 Fla. 603, 197 **So. 328 (1940).**

Also, significantly, the Court in the same decision rejected the notion that the homestead protection awards any unjust windfall and rejected an argument that equity can undo this protection, **id,** 531 **So.2d at 950-951):**

> Lastly, we reject the creditor's argument that a literal interpretation of section 4(b) will provide a windfall for financially independent heirs at the expense of the just demands of creditors. Even if we were free to ignore the plain language of the constitution, we would not be persuaded by this argument. The homestead protection has never been based upon principles of equity, see Bigelow, but always has been extended to the homesteader and, after his or her death, to the heirs whether the homestead was a twenty-two room mansion or a two-room hut and whether the heirs were rich or poor.

While Mrs. Fishbein's homestead falls somewhere in between those examples, her homestead right would be inviolate even if she were financially independent, which she is not.

The bank **cites** to Rvskind **v.** Robinson, 302 So.2d **427** (Fla. 4th **DCA** 1974), which contains no facts upon which to assess its actual holding except that it reversed a summary judgment for trial. To the extent that it implies that lending monies which were used to pay prior mortgage indebtedness gives right to an equitable judgment against homestead **property,** it should be disappraved.

The homestead protection applies equally upon award of homestead property in dissolution proceedings. The Court made this

clear in Sharp v. Hamilton, **520** So.2d 9 (Fla. 1988), at 10, in disallowing relief an a mortgage the former husband had entered into alone:

> We agree with the Second District that the judgment of dissolution is controlling and "...the transfer of the husband's interest to the wife pursuant to the judgment of dissolution was equivalent to the defeasance of the husband's interest in the property which would have occurred had he predeceased his wife while the parties were still married." 354 So.2d at 139. We can see no reason for a rule of law that prohibits the award of the marital property in settlement of divorce free and clear of any obligations incurred by one spouse alone when Mrs. Hamilton could have received title to the property free and clear had she survived her husband while they were still married, or if he had by quit-claim deed transferred title to her prior to dissolution, State Dept. of Commerce, Division of Employment Security v. Lowery, **333** So.2d 495 (Fla. **1st** DCA 1976), cert. denied, **344** So.2d 327 (Fla. 1977), and Jonas **v.** Logan, **478** So.2d 410 (Fla. 3rd DCA 1985); or if she and Mr. Hamilton, in anticipation of divorce, had reached a property settlement agreement later incorporated into the final decree of divorce providing she would have sole title to the property upon dissolution, Liberman, **354** So.2d at 137; or if a special equity in the property had been awarded to her by a final decree of dissolution, Holt v. Boozel, 394 So.2d 226 (Fla. 5th DCA 1981).

The bank had claimed that when Mrs. Fishbein relied for less than three months upon her husband's initial dissolution settlement to purchase a home for her that she relinquished the homestead. However, the trial court found no abandonment or lapse in the homestead. A brief lapse in possession occurred as a result of the deceit of Mr. Fishbein which tricked her into leaving the homestead in reliance on his promise **(R-610-612).** When this deceit became known, the dissolution judge then ordered the husband to carry out

his subsequent agreement to turn over the marital homestead to her (R-610-612). The court found as fact that she had not relinquished her homestead because she immediately returned to the homestead (R-610-612,639-651). Continuous and uninterrupted physical presence in not required to create and maintain homestead. Burdick v. Burdick, 399 So.2d 410 (Fla. 3rd DCA 1981). Abandonment is an issue to be determined by a trial judge based upon all of the pertinent facts and circumstances. Beensen v. Burgess, 218 So.2d 517 (Fla. 4th DCA 1969). An involuntary temporary absence does not forfeit or terminate homestead status. McGann v. Halker, 530 So.2d 440 (Fla. 3rd DCA 1988); Vandiver v. Vincent, 139 So.2d 704 (Fla. 2nd DCA 1962). Once established, homestead status remains until establishment of domicile at some other place, or alienation of the property as provided by law. M.O. Logue Sod Service v. Logue, 422 So.2d 71 (Fla. 2nd DCA 1982), rev. denied 430 So.2d 451. While an ownership interest is required, record title is not a prerequisite to establishing property as homestead. Heiman v. Capital Bank, 438 So.2d 932 (Fla. 3rd DCA 1983); Bowers v. Mozingo, 399 So.2d 492 (Fla. 3rd DCA 1981). This Court rejected any "twinkling of a legal eye" as a basis for termination of homestead. Sharp v. Hamilton, supra. The trial court was correct in finding that Mrs. Fishbein remained entitled to claim this special homestead status.

Since the bank paid the prior liens so that it would have a first mortgage claim, the action on the part of the bank was for its own benefit and was subsequent to the loaning of money to Mr. Fishbein. Subsequent acts cannot breathe life into an instrument executed in defiance of the protection provided by Art. X, Section

4. Gotshall v. Taylor, 196 So.2d 479 (Fla. 4th DCA 1967), at 481:

> If the requirements of the Constitution and the statutes are not complied with in alienating homestead real estate, the attempt is a nullity as to the heirs of the homestead, and also as to a husband and wife and between them and between the parties and is void ab initio, and subsequent events will not breathe life into it.

In Florida, homesteads are "sacred cows" and as such "they may not be alienated contrary to the interests of those to be protected by the homestead character of the property involved." Daniels v. Katz, 237 So.2d 58 (Fla. 3rd DCA 1970). Such property is not subject to execution or judgment liens for debts of one spouse once the property acquires the status of homestead. Id. This Court in Norman v. Kannon, 133 Fla. 710, 182 So. 903 (1938), at 905, held that a unilateral conveyance by one spouse of a homestead is ineffectual under the constitutional homestead provision:

> Such a conveyance cannot be effectual because it would violate the organic command that the homestead exemptions 'shall inure to the widow and heirs of the party entitled to such exemption,' [citations omitted].

(emphasis supplied by Court in quoting from original).

The homestead right against forced sale for debts or subrogated liens arising from separate debts of a spouse differs from the homestead that exists for tax purposes. Point East One Condominium, Corp. v. Point East Developers, Inc., 348 So.2d 32 (Fla. 3rd DCA 1977). Florida's commitment to this protection has been extended by an amendment to Article X, Section 4, eliminating the "head of family" requirement. Cain v. Cain, 549 So.2d 1161 (Fla.

4th DCA 1989).

Homestead protection survives many irregularities. In Re: Schorr's Estate, 409 So.2d 487 (Fla. 4th DCA 1981), it was held that homestead continued despite alienation by a husband after obtaining an invalid divorce in the Dominican Republic.

The bank has argued that the protection should not be an imposition on creditors. Yet, it is the nature of the protection that it serves to insulate. It is the true nature of its intended purpose to shield the spouse and family's home from the profligate actions, or worse, or one spouse.

The bank complains of the result below that it argues works an imposition on creditors. The Court has consistently held that:

> The purpose of the homestead exemption provision in our state constitution is to protect the family home from forced sale for the debts of the owner and head of the family.

Tullis v. Tullis, 360 So.2d 375,377 (Fla. 1978). The Court approved of forced sale by one common owner to enforce the "beneficial enjoyment" of the wife's homestead interest in the property." Id. There the result was to effectuate the homestead protection, not to vitiate it.

The failure of the bank to determine the identity of the persons it was dealing with should be reprehensible conduct on it's part since its negligence would, if the petitioner prevails, fall upon the innocent spouse and children, who are the exact and primary beneficiaries of the homestead protection contained in our constitution for over 100 years.

If a homestead could be reached for debts paid by ill gotten

gains the exception would swallow the rule and eviscerate the homestead protection. If a person's act in robbing a store and using the proceeds to pay several mortgage payments would cause the innocent spouse and children to lose the homestead for the debt owned to the store, in tort or in equity, the homestead protection would fail to serve its purpose. That would be no different from a person who took funds for roofing work, and diverted a portion of them to pay part of a mortgage payment. Likewise, if a person who wrote a dishonored check to a Publix market, the grocer should not have a right to a subrogated equitable judgment against the homestead. If the homestead was intended to permit tracing the funds obtained by a single spouse to their use in payment of general obligations secured by the homestead, the constitution would have provided for such exception to the homestead protection, but it does not. The exceptions are limited to specific obligations. The lien sought by the bank in equitable subrogation is not one of them.

CONCLUSION

WHEREFORE, the respondent, Mrs. Fishbein, submits that the decision of the district court of appeal should be approved, the stay of the district court's mandate should be lifted, and the cause should be remanded for issuance of the mandate to restore her and her children to their homestead residence.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by mail, to ROLLNICK, ROSEN & LINDEN, P.A., 133 Sevilla, Coral Gables, Florida 33134, this 4th day of ~~JUNE~~ July, 1992.

Of Counsel