IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC15-977
FOURTH DCA CASE NO.: 4D14-3049
L.T. No.: 502010CA009707XXXXMB

JBK ASSOCIATES, INC., f/k/a
COASTAL INSULATION, INC.

Appellant,

v.

SILL BROS., INC., PATRICK T. SILL, STEPHEN D. SILL, LISA D. SILL, and BARBARA H. SILL,

Appellees.

APPELLANT'S REPLY BRIEF

UPON PETITION FOR DISCRETIONARY REVIEW OF A DECISION RENDERED BY THE FOURTH DISTRICT COURT OF APPEAL

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KEY TO ABBREVIATIONS USED IN THIS BRIEF

"App. ___" refers to the specified page in the Appendix on Appeal.

"App.___; T.__:__" refers to the specified page and line number in the Transcript for the June 25, 2014, hearing before the Honorable Donald W. Hafele, on Appellee/Defendant, Patrick T. Sill's Motion to Dissolve Writ of Garnishment.

"App.___; Sill Depo.__:__" refers to the specified page and line number in the Transcript for the April 25, 2014 deposition of Appellee/Defendant Patrick T. Sill.

"JBK" refers to Appellant/Plaintiff, JBK Associates, Inc., f/k/a Coastal Insulation, Inc.

"Sill" refers to Appellee/Defendant, Patrick T. Sill.

STATEMENT OF FACTS

Sill has mischaracterized "[t]he undisputed testimony" that was before the trial court below. JBK now corrects those mischaracterizations. *Answer Br.*, p. 2.

Without citing to the record, the Answer Brief incorrectly argues that "[t]he undisputed testimony was also that Mr. Still [sic: Sill] instructed the broker to invest only in conservative investments and that the money needed to be readily available so that he could take it when he found a home to purchase." *Answer Br.*, p. 2. However, Sill's account statements show that the investment objective/risk tolerance was for ***moderate*** growth over ***three to five years*** with ***moderate*** liquidity. App. 121; App. 131; T. 37:12-16. Sill deposed that he personally chose the time-table and investment objectives contained within the account profile:

> Q. Was that profile created with information provided by you to your financial advisor?
>
> A. Yes.
>
> Q. So you gave him all that information?
>
> A. Yes.

App. 26; Sill Depo. 53:16-20.

Additionally, Sill gives the false impression that he intended to purchase a new home at the conclusion of his current lease. *Answer Br.*, pp. 2-3. In reality, Sill was unsure about what he wanted to do at the conclusion of his lease.

Although JBK does not dispute that Sill met with realtors and *considered* buying a new home, when Sill was asked to clarify his intentions, he was equivocal:

> Q. What do you plan to do after the [ ] [lease is] up?
>
> A. I don't know yet.
>
> Q. So you might renew your lease or you may go someplace else?
>
> A. I've been looking to buy a house, so I might buy a place. It's TBD right now.

App. 26; Sill Depo. 12:2-7.

In his own words, Sill's intentions were to be determined.

ARGUMENT

I. SILL LOST HIS CONSTITUTIONAL HOMESTEAD PROTECTION

a. The sale proceeds were not held solely for the purchase of another homestead, but were used to purchase various securities.

In *Orange Brevard Plumbing & Heating Co. v. La Croix*, 137 So.2d 201 (Fla. 1962), this Court prescribed the following conditions upon which proceeds from the sale of a homestead retain their constitutional homestead protection:

> the proceeds of a voluntary sale of a homestead to be exempt from the claims of creditors just as the homestead itself is exempt if, and only if, the vendor shows, by a preponderance of the evidence an abiding good faith intention prior to and at the time of the sale of the homestead to reinvest the proceeds thereof in another homestead within a reasonable time. Moreover, only so much of the proceeds of the sale as are intended to be reinvested in another homestead may be exempt under this holding. Any surplus over and above that amount should be treated as general assets of the debtor. ***We further hold that in order to satisfy the requirements of the exemption the funds must***

> ***not be commingled with other monies of the vendor but must be kept separate and apart and held for the sole purpose of acquiring another home. The proceeds of the sale are not exempt if they are not reinvested in another homestead in a reasonable time or if they are held for the general purposes of the vendor.***

Id. at 208 (emphasis added).

Sill violated *Orange Brevard* in two ways: (i) instead of holding the sale proceeds "for the sole purpose of acquiring a new home," Sill purchased various non-exempt securities – pieces of corporations and other commercial investments; and (ii) he improperly commingled dividends[1] and interest from such investments with the sale proceeds. *Id.* at 206, 210; *Answer Br.*, p. 2. Although it is JBK's position that Sill forfeited his entire homestead exemption by reinvesting the sale proceeds into non-exempt securities, at a minimum, any gain Sill realized from such investments over and above the net proceeds from the sale of his former marital residence constitutes a "surplus over and above that amount [and] should be treated as general assets of [ ] [Sill]." *Orange Brevard,* 137 So.2d at 210.

No Florida authority squarely addresses this case's predominant issue: whether the proceeds from the sale of Sill's former residence maintained their constitutional homestead protection after being reinvested into non-exempt securities. Despite this void, an analogy exists between the use of sale proceeds to make money and the use of the actual homestead to make money. With regard to

[1] A "dividend" is "a distribution from the net profits of a company to its shareholders." http://dictionary.reference.com/browse/dividend?s=t.

the latter, courts have held that renting out a portion of a residence voids the homestead protection to the extent of such rental. See *In re Bornstein*, 335 B.R. 462 (Bankr. M.D. Fla. 2005) (holding that under Florida law, the homestead exemption was limited to the part of the duplex in which debtor and her family actually resided); and *In re Nofsinger*, 221 B.R. 1018, 1021 (S.D. Fla.1998) (holding that "the homestead exemption only extends to that portion of the property which a debtor uses as his residence and cannot include any portion which is rented to and occupied by a third party or used by the third party as his own business."). In the same respect, Sill is not entitled to homestead protection for monies he invested into non-exempt securities.

In re White, 389 B.R. 693 (B.A.P. 9th Cir. 2008), the Court considered "[w]hether Arizona law restricts the use of homestead sale proceeds during their period of temporary exemption." *Id.* at 698. The debtor utilized a portion of the proceeds from the sale of his homestead to engage in numerous pre- and post-petition investments. *Id.* at 697. The court held "the debtor was not privileged to use homestead sale proceeds for a purpose inconsistent with the exemption purposes of Arizona law …" *Id.* at 706. The White court explained that "the debtor's lack of intent to reinvest the proceeds for an exempt purpose (***as evidenced, inter alia, by trading activities in risky investments 'so contrary to' the claim of exemption as to constitute abandonment of the exemption***) exposed the

debtor to liability for dissipation of proceeds…." *Id.* at 702 (emphasis added). The court also noted that California, Oregon, Texas, Illinois, and Idaho "have temporary homestead sale proceeds exemptions similar to that of Arizona and that they appear to be interpreted consistently to restrict the use of proceeds to exempt purposes." *Id.* at 704 (citations omitted).

Florida's homestead exemption is more stringent than Arizona's homestead exemption. In Florida, to maintain exempt status, the proceeds from the sale of a debtor's homestead must be "held for the ***sole*** purpose of acquiring another home." *Orange Brevard*, 137 So.2d at 206 (emphasis added). Conversely, the bankruptcy court in *In re White* "rejected the … argument that the *only* permissible use is reinvestment in a new homestead … ." *Id.* at 702 (emphasis in original). In other words, Arizona has a lower standard than Florida in this regard. For this reason, the court's holding in *In re White* carries greater weight in this case.

Sill mistakenly relies upon *In re Bertola*, Case No. 11-29140, 2012 WL 1945426 (Bankr. Colo. 2012). The Florida and Colorado homestead exemptions are drastically different. Colorado "protects a limited dollar amount against execution and attachment to the extent the homeowner has equity in the home." *In re Bertola*, at *2; C.R.S. § 38-41-201. Furthermore, Colorado provides that "proceeds from the sale of a homestead are exempt from execution or attachment for two years if the proceeds are kept separate and apart from other monies so the

proceeds may be always identified." *Id.*; C.R.S. § 34-41-207. This standard falls short of the requirements prescribed in *Orange Brevard*, *supra*. In fact, contrary to the Florida homestead exemption, the Colorado Bankruptcy Court expressly noted that "[t]he Proceeds Statute contains no requirement as to a debtor's intent to acquire a new homestead, and the Court will infer none here." *In re Bertola, at* *3.

The Colorado Bankruptcy Court improperly distinguished the case of *In re White* because the debtor had engaged in "'day trading" in risky investments. Courts are not financial advisors and should not be evaluating whether a homestead exemption applies based on the perceived level of risk presented by certain investments. In practice, evaluating whether an investment was suitably "safe" on a case-by-case basis would only spawn more litigation, and would unsettle the bright line rule that *Orange Brevard* provides, engendering uncertainty in every case. Existing Florida law does not permit such distinctions, as sale proceeds must be "held for the ***sole*** purpose of acquiring another home." *Orange Brevard*, 137 So.2d at 210 (emphasis added). This Court should not depart from that well established standard.

Sill's reliance on the case of *In re Binko*, 258 B.R. 515 (Bankr. S.D. Fla. 2001) is also misplaced. In *Binko*, the court held that withdrawing funds from the debtors' segregated homestead account to pay living expenses after falling upon hard times did not void the exemption. *Id.* at 517. Despite Sill's insinuation, there

was absolutely no indication that the debtors had reinvested their sale proceeds into non-exempt securities, as Sill did in the instant case. *Answer Br.*, pp. 9-10. In fact, just the opposite can be deduced from the opinion because the court noted that "[t]he [d]ebtors never commingled the sale proceeds in this account with any other income ... ." *Id.* at 516. In other words, unlike Sill in this case, the debtors did not make income from investments made with the sale proceeds. The court also expressly noted that "[a] 'commingling' of the proceeds would be to place funds from a different source into the same account as the proceeds from the sale of the homestead." *Id.* at 518 (citing Black's Law Dictionary 264 (7th ed.1999). In the context of this case, the moment Sill's investments began generating income – in the form of corporate profits paid as dividends based on Mr. Sill's ownership interest in the various corporations he invested in -- that was placed into the same account, "commingling" occurred and voided Sill's homestead exemption.

Finally, Sill's reliance on *Sun First Nat. Bank of Orlando v. Gieger*, 402 So.2d 428, 431 (Fla. 5th DCA 1981) is also misplaced as the central issue before the *Gieger* court was whether non-cash proceeds from the sale of a homestead retain the homestead exemption. *Sun First Nat. Bank*, 402 So.2d at 431 ("The issue is whether those proceeds must be cash proceeds in order to come under the protection of Orange Brevard.") The issue before this Court is **not** whether the

form of the proceeds from the sale of the homestead are exempt, but rather whether the proceeds, in any form, lost their exempt status upon Sill's investment.

Neither this Court, nor any other court interpreting *Orange Brevard*, has ever held that funds from the sale of a homestead retain their exempt status if they are used to purchase non-exempt securities. Simply labeling his investment account as "FL Homestead Account" did not automatically extend the homestead exemption; rather, it is Sill's intent that makes this determination. *Orange Brevard*, *supra*. If it wasn't already abundantly clear, Sill's counsel confirmed that Sill's intent was dual purpose: (1) to generate income; and (2) to purchase a new home. *Answer Br.*, p. 7 ("The money was left solely in the account and conservative investments were made in an effort ***to have the amount grow and provide more money*** for use in purchasing a new home.") (emphasis added).

Sill's ***dual*** purpose – underscored by his holding of the securities for moderate growth, instead of having a conservative investment goal (more akin to a bank account) -- violates the requirement that funds be "held for the ***sole*** purpose of acquiring another home." *Orange Brevard, supra* (emphasis added). Additionally, Sill deposed that he had not decided whether to continue leasing or to purchase a new homestead. App. 26; Sill Depo. 12:2-7.

By attempting to "grow" the funds through the purchase of shares of various commercial enterprises, Sill violated *Orange Brevard*'s requirement that the

proceeds not be held for the "general purposes of the vendor." *Id.* at 206. Sill's investments also violated *Orange Brevard* because he improperly commingled dividends and interest from such investments with the sale proceeds.

In an effort to support his argument, Sill improperly extends the general rule that the "homestead exemption is to be liberally construed" to mean that this Court's interpretation and application of *Orange Brevard* is likewise required to be liberally construed. *Answer Br.*, pp. 4-5. *Orange Brevard* makes it clear that Sill was not free to invest the proceeds from the sale of his homestead into non-exempt securities that constituted shares of various corporations in which he sought ownership, while simultaneously maintaining the exemption. Sill lost his homestead exemption because he violated *Orange Brevard*.

II. THIS APPEAL IS NOT MOOT

Sill argues that JBK has no recourse because he purchased a new homestead while the appeal was pending. The crux of Sill's argument is that JBK was required to obtain a stay under Fla. R. App. P. 9.310 in order to be entitled to appellate relief for an erroneously dissolved lien. Such an argument is both improper and incorrect.

There is no record evidence on this appeal, or in any other proceeding below, regarding Sill's purchase of a new homestead. Likewise, Sill never made such an argument below, nor did he supplement the record on appeal under the

Florida Rules of Appellate Procedure. *See generally*, *Aills v. Boemi*, 29 So.3d 1105, 1108–09 (Fla. 2010) (explaining that preservation of error for appellate review requires aggrieved party to make timely, contemporaneous objection, and the specific legal argument raised on appeal must be presented below).

Sill essentially argues that Fla. R. App. P. 9.310 acted as a mandatory prerequisite to JBK achieving appellate relief he now seeks. Such an argument is contrary to Florida law. As this Court explained in *Horn v. Horn*, 73 So.2d 905, 906 (Fla. 1954):

> [i]f appellant determines to appeal without posting a supersedeas bond, it is his privilege to do so; but, at the same time, the lower Court has the power to enforce such decree as has then been entered. There is no provision in the law which would authorize the lower Court to compel the appellant to furnish a supersedeas bond as a condition to perfecting his appeal from a final decree which is a matter of right under the Constitution and laws of this State.

Furthermore, this Court has recognized that if an appellate court overturns an erroneous judgment by a lower court without there being a stay pending appeal, the "***party against whom an erroneous judgment has been made is entitled upon reversal to have his property restored to him by his adversary***." *Sundie v. Haren*, 253 So.2d 857, 858 (Fla. 1971) (emphasis added). In other words,

> [e]ven after a judgment at law has been rendered and execution levied and the judgment fully collected, it has been held that if the judgment be later reversed or set aside by an appellate court, the nisi prius court has the right to order restitution to defendant so as ***to obviate the advantage obtained by plaintiff through the court's error***.

Hazen v. Smith, 135 Fla. 813, 816 (Fla. 1931) (emphasis added).

In this case, JBK had perfected a lien over the subject proceeds. Fla. Stat. § 77.06(1) ("Service of the writ creates a lien in or upon any such debts or property at the time of service or at the time such debts or property come into the garnishee's possession or control."). Accordingly, if this Court agrees that both the trial court and the Fourth District Court of Appeal erred, JBK is entitled to have the lien it obtained through the subject writ of garnishment restored under the auspices of *Sundie*, *supra* and *Hazen*, *supra*. The resulting (non)issue is that the subject funds have now been converted into a new homestead.

Despite Sill's citation to *Havoco of Am., Ltd. v. Hill,* 790 So.2d 1018, 1019 (Fla. 2001), JBK would be entitled to an equitable lien/constructive trust over Sill's new homestead in order to prevent unjust enrichment. Sill was unjustly enriched because he obtained his new homestead with proceeds from the erroneously dissolved writ of garnishment/lien. In *Palm Beach Sav. & Loan Ass'n, F.S.A. v. Fishbein,* this Court held that a bank was entitled to an equitable lien based on the use of its funds to satisfy preexisting mortgages; otherwise, the defendant would be unjustly enriched. 619 So.2d 267, 271 (Fla. 1993). In reaching its decision, this Court noted its prior decisions in *La Mar v. Lechlider*, 135 Fla. 703, 185 So. 833 (1939), and *Sonneman v. Tuszynski*, 191 So. 18 (1939), in which equitable liens were imposed against homestead properties to prevent unjust enrichment: "it is

apparent that where equity demands it this Court has not hesitated to permit equitable liens to be imposed on homesteads beyond the literal language of article X, section 4. [T]here was no fraud involved in either *La Mar* or *Sonneman*. In those cases, the equitable liens were imposed to prevent unjust enrichment." *Fishbein*, 619 So.2d at 270.

Imposing an equitable lien on Sill's new homestead would leave him no worse off than he would have been had the trial court not erroneously dissolved the writ of garnishment. On the other hand, to deny an equitable lien would leave him vastly and unjustly enriched. *Spridgeon v. Spridgeon*, 779 So.2d 501, 502 (Fla. 2d DCA 2000) ("The equitable lien leaves Ms. Spridgeon no worse off than she would have been if she had honored her agreement. On the other hand, to have denied the lien would have left her vastly and unjustly enriched."). To further hold that a judgment creditor is required to seek a stay and post a bond would not only go beyond existing law, but it would also expose judgment creditors to claims for damages if a judgment debtor foregoes the purchase of a property or is prevented from the purchase due to the stay, and the case is decided in the judgment debtor's favor. A judgment creditor should not be exposed to a claim for damages merely for vindicating its judgment lien. Conversely, the judgment debtor who purchased a new home with funds that the judgment creditor properly

levied upon is in no worse shape than the judgment debtor would have been had the lien been upheld by the lower courts.

Sill's reliance on *Havoco* is misplaced. In *Havoco*, this Court held that even when a judgment debtor transfers non-exempt assets into an exempt homestead with the intent to hinder, delay, or defraud creditors, he is nevertheless entitled to the homestead exemption provided in article X, section 4 of the Florida Constitution. *Havoco*, 790 So.2d at 1027. Unlike this case, the judgment creditor in *Havoco* had not perfected a lien through a writ of garnishment over the non-exempt proceeds that were eventually used to purchase a homestead. *Id.* at 1019-1020. Here, once the post-judgment writ of garnishment was served upon Wells Fargo, JBK held a perfected lien over the funds at issue, **prior** to Sill's purchase of the new property. Fla. Stat. § 77.06(1) ("Service of the writ creates a lien in or upon any such debts or property at the time of service or at the time such debts or property come into the garnishee's possession or control."); *see also*, *In re Specialty Prop. Dev., Inc.*, 399 B.R. 857, 860 (Bankr. M.D. Fla. 2008) (holding "that the service of a writ, in fact, became a lien on the garnished funds when it was served."). Rather than allowing JBK to execute on the lien it had perfected, the trial court erroneously dissolved the writ of garnishment/lien.

Under these circumstances, JBK is entitled to have its judgment lien restored through an equitable lien or constructive trust to prevent Sill from being unjustly

enriched through the trial court's error of improperly dissolving the writ of garnishment. *Fishbein, supra*; *Sundie*, *supra*; and *Hazen*, *supra*.

CONCLUSION

Even if the homestead exemption attached to the sale proceeds, the exemption was forfeited when Sill impermissibly used the monies to purchase securities in various companies, and then commingled the remaining cash funds with the securities (and the dividends and interest generated thereon). Should this Court agree that the proceeds lost their exempt status, this Court can provide adequate relief in the form of an equitable lien on the real property Sill purchased with JBK's money. Accordingly, this Court should reverse the lower courts' orders to the extent that it held that Sill's Wells Fargo Advisors, LLC account was protected by the homestead exemption, and impose an equitable lien on Sill's current homestead.

CERTIFICATE OF COMPLIANCE WITH RULE 9.210

I hereby certify that the font type and size of this brief complies with the requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy hereof was provided this 14th day of December, 2015 via **E-mail** to: **Les Osborne, Esquire,** Rappaport Osborne & Rappaport PL, counsel for Patrick Sill, 1300 N. Federal Highway, Suite 203, Boca Raton, Florida 33432 (office@rorlawfirm.com).

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