UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

IN RE:

CASE NO. 08-3203-3F7

ROBERT OULLETTE and
YASUKO OULLETTE,

Debtors.
_____/

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case came before the Court upon the Trustee's Objection to Debtors' Claim of Exemption and Motion for Turnover. The Court conducted a hearing on the matter on November 12, 2008. In lieu of oral argument, the Court directed the parties to submit memoranda in support of their respective positions. Upon the evidence and the arguments of the parties, the Court makes the following Findings of Fact and Conclusions of Law.

Findings of Fact

Debtors filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code on June 4, 2008. (Tr.'s Ex. 1.) On their Schedule C Debtors claimed as exempt pursuant to Fla. Const., Art X § 4(a)(1) real property located at 4162 Saunders Drive, Middleburg, Florida (the "Real Property"). (Tr.'s Ex. 2.) The Real Property is located outside a municipality. Two mobile homes are located on the Real Property. Debtors live in one of the mobile homes and rent the other mobile home (the "Rental") to a third party for $450.00 per month. During 2006 and 2007 Debtors received total rent of $10,800.00 ($5,400.00 per year) from the Rental. Debtors received $450.00 per month in rent through November 2008.

Conclusions of Law

Debtors' Chapter 7 Trustee (the "Trustee") filed an objection to Debtors' claim of exemption and a motion for turnover. The Trustee argues that the Rental is personal property and that it and the rent received from it are therefore property of the estate. Alternatively, the trustee argues that even if the Rental is real property, it and the rents from it are not exempt.

The Florida Constitution grants debtors a liberal exemption for homestead property. See Englander v. Mills (In re Englander), 95 F.3d 1028, 1031 (11th Cir. 1996). Exceptions to the homestead exemption should be strictly construed in favor of claimants and against challengers. In re McClain, 281 B.R. 769, 773 (citation omitted). The burden is on the objecting party to establish by a preponderance of the evidence that a debtor is not entitled to an exemption claimed. Id. (citation omitted); Fed.R. Bankr.P. 4003(c).

As the Trustee's initial basis for objecting to the exemption is that the Rental is personal rather than real property, the Trustee bears the burden of establishing that the Rental is personal property. Section 320.015(1) of the Florida Statutes sets forth the circumstances under which a mobile home is considered to be real property for property taxation purposes. It provides that a mobile home is subject only to a license tax unless it is classified and taxed as real property. The statute further provides that "[a] mobile home is to be considered real property only when the owner of the mobile home is also the owner of the land on which the mobile home is situated and said mobile home is permanently affixed thereto." Section 193.075(1) of the Florida Statutes, which deals with mobile homes and recreational vehicles, provides that "a mobile home shall be taxed as real property if the owner of the mobile home is also the owner of the land on which the mobile home is permanently affixed. A mobile home shall be considered permanently affixed if it is tied down and connected to the normal and usual utilities."

It is undisputed that Debtors own both the Rental and the land upon which it is situated. The Trustee asserts that the Rental is not attached to the real estate upon which it sits as evidenced by several pictures the Trustee entered into evidence. Upon a review of the pictures, the Court finds that the pictures do not establish that the Rental is not affixed to the land. The pictures evidence skirting around the Rental and a sewer or septic pipe running from a hole in the skirting into the ground. The Trustee offered no evidence that the Rental is not tied down. The Court finds that upon the record before it, the Trustee failed to establish that the Rental is personal property.

Alternatively, the trustee argues that even if the Rental is real property, it and the rents from it are not exempt. Prior to 1968 Article X, § 4, Fla. Const. stated:

> A homestead to the extent of one hundred and sixty acres of land, or the half of one acre within the limits of any incorporated city or town, owned by the head of a family residing in this state, together with one thousand dollars' worth of personal property, and the improvements on the real estate, shall be exempt from forced sale under process of any court, and the real estate shall not be alienable without the joint consent of husband and wife, when that relation exists… The exemption herein provided for in a city or town shall not extend to more improvements or buildings than the residence and business house of the owner; and no judgment or decree or execution shall be a lien upon exempted property except as provided in this article.

The pre-1968 language regarding a homestead located outside of a municipality and the language regarding a homestead located within a municipality were provided for separately, in two distinct sentences. At that time, the homestead exemption for property located within a municipality was allowed for "residence and business house of the owner." This language permitted an owner to claim as exempt not only his dwelling house but other structures which were used for business or were income producing. The language limiting a homestead to a "residence and business house" was only found in the sentence dealing with property located within a municipality. Because of this, courts held that the residence and business house restriction did not apply to a homestead located outside of a municipality. Armour v. Hulvey, 73 Fla. 294 (Fla. 1917).

In 1968 Article X, § 4 of the Florida Constitution was amended to its current form and provides as follows:

> (a) There 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:
>
> (1) a homestead, if located outside a municipality, to the extent of one hundred sixty acres of contiguous land and improvements thereon, which shall not be reduced without the owner's consent by reason of subsequent inclusion in a municipality; or if located within a municipality, to the extent of one-half acre of contiguous land, upon which the exemption shall be limited to the residence of the owner or the owner's family;

The sentence providing for the exemption of homesteads located outside a municipality and the sentence providing for the exemption of homesteads located within a municipality were combined into a single sentence and the language allowing an exemption for the "business house of the owner" was eliminated entirely. The Trustee asserts that by deleting the business house restriction and placing the residence requirement in the same sentence as the rural homestead provision, the legislature intended to increase the restrictions on homesteads located both within and outside a municipality.

Since the 1968 amendment at least two courts have held that the amendment shows the legislature's intent to limit the homestead exemption to the residence of the owner. In re Nofsinger, 221 B.R. 1018, 1020 (Bankr. S.D. Fla. 1998) (finding that under plain language of constitution, homestead exemption only extends to the portion of property used as a residence and cannot include any portion rented to and occupied by a third party or used by a third party as his own business); In re Aliotta, 68 B.R. 281, 282 (Bankr. M.D. Fla. 1986). Courts have also held that the combination of the provision regarding rural homesteads with the provision regarding city homesteads in the same sentence as the residence requirement indicates the legislature's intent to apply the residence restriction to homesteads located both within and outside a municipality. In re Pietrunti, 207 B.R. 18, 20 (Bankr. M.D. Fla. 1997); Shillinglaw v. Lawson, 88 B.R. 406, 408 (affirming In re Shillinglaw, 81 B.R. 138, 140 (Bankr. S.D. Fla. 1987)).

While the Court previously held in In re Lowery, 262 B.R. 875 (Bankr. M.D. Fla. 2001) that debtors whose less than 160-acre homestead was located outside of a municipality could use a portion of their property for a commercial purpose without losing the homestead exemption, that case did not address a debtor's rental of a portion of his property to a third party. Importantly, the only binding and relevant case decided subsequent to Lowery held that the language limiting homesteads within municipalities to the residence of the owner or the owner's family does not apply to homesteads located outside municipalities. In re Davis v. Davis, 864 So.2d 458, 460 (Fla. 1st Dist. Ct. App. 2003).[1] In that case the property, which was claimed as an exempt homestead was less than 160 acres and located outside a municipality. The owner used a portion of the property to operate a mobile home park. The issue before the court was whether a Florida homestead of less than 160 acres and improvements could include the portion of such land and improvements separate from the owner's residence. The court noted that when the Florida Supreme Court interpreted the 1868 and 1885 homestead provisions it consistently held that the language which limited the homestead to the "residence and business house of the owner" did not apply to homesteads located outside municipalities. Id. at 460. The court stated:

> Like the language of the 1885 constitution, the language defining the extent of homesteads under the current constitution contains no substantive change pertinent to the issue presented in the present case. Although a homestead within a municipality is now limited to "the residence of the owner or the owner's family," rather than to "the residence and business house of the owner," this change does not affect our analysis. And even though all of the language defining the extent of homesteads now appears in a single sentence, a semicolon serves to grammatically separate the language expressing the extent of a homestead outside a municipality from the language limiting a homestead within a municipality to the residence of the owner or the owner's family.

[1] The Trustee devotes a portion of his brief to the argument that Davis is not binding precedent on this Court. The Trustee's argument is misguided. When interpreting state law, a federal court is bound by the rulings of the state's highest court. Veale v. Citibank, F.S.B., 85 F.3d 577, 580 (11th Cir. 1996)(citation omitted). If the state's highest court has not ruled on the issue, a federal court must look to the intermediate state appellate courts. Id. (citation omitted). In holding that debtors, whose less than 160-acre homestead was located outside of a municipality, could not use a portion of their property for a commercial purpose without losing the homestead exemption, a Southern District bankruptcy court declined to follow Davis. In re Radtke, 344 B.R. 690, 693 (Bankr. S.D. Fla. 2006). The court in Radtke noted that there was no binding authority from the Supreme Court of Florida on the issue and that although Davis was persuasive, the language in the Florida Constitution was not intended to extend homestead protection to the portion of property utilized for a commercial enterprise. The Court disagrees with Radtke on both counts.

Id. Based upon "a plain reading" of article X, § 4 and a "reading consistent with decisional law under prior constitutions", the court held that the language limiting homesteads within municipalities to the residence of the owner or the owner's family does not apply to homesteads located outside municipalities. Id. The Court finds that based upon the precedent set forth in Davis, Debtors' lease of the Rental to a third party does not preclude Debtors from claiming it and any rent which came due post-petition as exempt.[2]

Conclusion

The mobile home located on Debtors' homestead property, which they rent to a third party, is exempt pursuant to Fla. Const. Art. X § 4(a)(1). Any rent which came due post-petition is also exempt. The Court will enter separate orders consistent with these Findings of Fact and Conclusions of Law.

DATED this 26 day of March, 2009 in Jacksonville, Florida.

/s/Jerry A. Funk
Jerry A. Funk
United States Bankruptcy Judge

Copies to:

Raymond R. Magley, Attorney for Trustee
Robert H. Wood, Attorney for Debtors

[2] "There is widespread agreement that the effect of an exemption is to remove property from the bankruptcy estate and to vest it in the debtor." In re Brown, 178 B.R. 722 (Bankr. E.D. Tenn. 1995). While § 541(a)(6) of the Bankruptcy Code provides that rents from property of the estate are property of the estate, the Rental is exempt property and thus not property of the estate.