

Florida's Homestead Exemption - Now Even Stronger?

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In January, 1981 Havoco of America, Ltd., a Delaware Corporation, filed suit in the United States District Court for the Northern District of Illinois against Sumitomo Corporation of America and Elmer C. Hill, alleging *inter alia*, that through fraud, conspiracy to defraud, tortious interference with contractual relations and breach of fiduciary duty Hill coerced Havoco into assigning a coal sales contract with the Tennessee Valley Authority to a third company. Havoco of America Ltd. v. Sumitomo Corporation of America and Elmer C Hill, 971 F.2d 1332, at 1335 (7th Cir. 1992). This case was appealed to the 7th Circuit Court of Appeals three times¹ on various issues before final judgment was entered against Mr. Hill on December 19, 1990. Havoco of America, Ltd., v. Hill, 197 F.3d 1135 (11th Cir. 1999). The case would probably be of little interest to Florida Bar members but for Mr. Hill's decision - like that of many out of state² business owners - to retire in Florida.

¹ See, Havoco of America v. Hilco, Inc., 731 F.2d 1282 (7th Cir. 1984); Havoco of America v. Hilco, Inc., 799 F.2d 349 (7th Cir. 1986); and Havoco of America Ltd. v. Sumitomo Corporation of America and Elmer C Hill, 971 F.2d 1332 (7th Cir. 1992).

² Hill was a long-time resident of Tennessee. Havoco v. Hill, 197 F.3d 1135, 1137 (11th Cir. 1999).

It seems that Mr. Hill, presumably with full knowledge of imminent collection efforts and advice of counsel, paid \$ 650,000. cash for a retirement home in Destin, Florida. Id. at 1137. Hill made his home purchase on December 30, 1990 - just 3 days before collection efforts could commence - then filed for bankruptcy protection 23 days later. Id. In the course of the bankruptcy proceedings Hill claimed the Destin home was exempt³ as his homestead pursuant to the Florida Constitution. Id. The matter was appealed to the District Court, which found that state law governed questions related to homestead exemption, and remanded to the bankruptcy court to determine whether and under what circumstances Florida law prevented debtors in 1990 and 1991 from converting non-exempt property to exempt property. @ Havoco, 197 F.3d at 1138 (*citing* the record on appeal). On remand, the bankruptcy court held Florida's homestead exemption could not be overcome if Aclean funds@ were used - even if the debtor had the intent to hinder creditors. Id. This decision was affirmed by the District Court, and Havoco appealed to the 11th Circuit. Havoco, 197 F.3d at 1139.

The 11th Circuit Court of Appeals conducted a survey of state and federal decisions which interpret Florida's constitutional homestead exemption, and affirmed its position that there is a significant question of Florida law with respect to which the Florida precedent is not clear. @ Havoco, 197 F.3d at 1141 (quoting In re Jost, 136 F.3d 1455, 1458-59 (11th Cir. 1998)). The 11th Circuit then certified the following question to the Florida Supreme Court:

³ Hill also claimed home furnishings valued at approximately \$75,000. were exempt assets because he purchased them with monies from a bank account jointly held with his wife. The 11th Circuit held that under such circumstances an adversary proceeding must be had, and the wife included as a party. 197 F.3d 1135 at 1137.

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

Havoco, 197 F.3d at 1144.

The Florida Supreme Court rendered its opinion on June 21, 2001. Havoco of America, Ltd. v. Hill, 790 So. 2d 1018 (Fla. 2001). The Florida Supreme Court was cognizant of the subtle nuances between Florida's constitutional homestead protection and statutory enactments which were written to protect creditors from fraud. Like the 11th Circuit, the Florida Supreme Court cited cases which at first glance seem to support a negative response to the certified question. By both applying the rule *Aexpressio unius est exclusio alterius*[@] (the expression of one thing is the exclusion of another), and clarifying that its often relied upon Fishbein (Palm Beach Savings & Loan Ass'n v. Fishbein, 619 So. 2d 267 (Fla. 1993) case and its progeny are really *Aequitable subrogation*[@] cases, the Court was able to conclude that a fraudulent intent is not a constitutionally recognized exemption to Florida's homestead exception, and answered the certified question in the affirmative⁴. Havoco of America, Ltd. v. Hill, 790 So. 2d 1018, 1030 (Fla. 2001).

In conclusion, the Havoco case is certainly worth a careful read. The case is certain to generate heated debate. Some will undoubtedly argue that the decision makes Florida the ultimate *Adebtor's paradise*[@] while others will argue that it merely clarifies the

⁴ Interestingly, the Florida Supreme Court recognized without opinion the fact that Florida district courts have allowed equitable liens beyond the exceptions specifically enumerated by Article X, Section 4 where the homestead exemption was asserted to thwart alimony and child support obligations. Havoco, 790 So. 2d 1018, 1028 at fn. 12.

exceptions to the homestead exemption that we have known all along. One thing is for certain - no matter what type of practice you enjoy, you're sure to either come across a citation to Havoco or need to advise a client about its potential implications in the future.

Editor's note. Don't forget to register for the November 9 PBCBA Commercial Litigation Seminar. Mr. Zappolo will be discussing the Havoco case and other fraudulent transfer issues.