IN THE COURT OF APPEAL FOR THE STATE OF FLORIDA
FOURTH DISTRICT COURT OF APPEAL

JD RESTORATION INC
a/a/o Bischoff et al.,

Appellant,

NO: 4D17-2415
L.T. No.: 50-2016-CA-11733

v.

UNIVERSAL PROPERTY & CASUALTY
INSURANCE COMPANY,

Appellee.
_____/

INITIAL BRIEF OF APPELLANT

ON APPEAL FROM THE FIFTEENTH JUDICIAL CIRCUIT,
PALM BEACH COUNTY, FLORIDA

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INTRODUCTION AND QUESTIONS PRESENTED

This suit was brought by JD Restoration, Inc., ("JD"), who holds a post-loss assignment of benefits ("AOB") from the insureds ("the Bischoffs"). JD appeals a final order granting Universal Property & Casualty Insurance Company's ("UPCIC") motion to dismiss.

This case presents the following questions:

1) Whether the trial court erred by concluding that JD's AOB was a legal nullity because it purported to transfer homestead-protected property through an unwitnessed, unsecured agreement?

2) Whether JD has standing to assert the homestead protection enjoyed by its insureds, the Bischoffs, who have not contested the AOB?

STATEMENT OF THE CASE AND FACTS

On May 4, 2016, the Bischoffs suffered a loss at their residence. (R. 6). In return for remediation services, the Bischoffs executed an "Assignment of Insurance Benefits" in favor of Appellant JD Restoration. (R. 16). The AOB provided that the Bischoffs "assign any and all insurance rights, benefits, proceeds and any causes of action . . . to JD Restoration, for services rendered or to be rendered . . . ." (R. 16). It also contained a direct payment authorization that gave JD "irrevocable power-of-attorney and my express permission to endorse my name on any and all checks received from an insurance company on my behalf for services provided by JD Restoration." (R. 16).

JD's invoice totaled $15,803.85. (R. 15). Appellee UPCIC did not issue any payment. (R. 8).

UPCIC moved to dismiss the ensuing breach of contract suit arguing, *inter alia*, that the AOB was a legal nullity because the AOB sought to transfer homestead-protected benefits. (R. 41). According to UPCIC, such an AOB was only operative if it was both secured and "an owner executed deed or through a power of attorneys with two witnesses for both options." (R. 41). In response, JD argued that Florida's homestead exemption did not apply on three grounds: because there was no "forced sale;" because the homestead exemption did not apply to insurance proceeds for the repair of the homestead; and, because UPCIC had no standing to invoke the

homestead exemption. (R. 53-54). JD also argued in a supplemental filing that the homestead provisions did not alter the common-law right to execute an AOB. (R. 67-69).

After a hearing on March 29, 2017,[1] the court granted UPCIC's motion to dismiss. The court concluded that "the Florida constitution as interpreted and applied by the appellate courts of this State requires granting Defendant's motion." (R. 76). Notwithstanding his "reluctance," the felt constrained based on precedent from the Third District Court of Appeal to "find that the proceeds from Defendant's casualty policy in favor of its insureds are imbued with the same insulation as the property itself enjoys . . . ." (R. 77). Accordingly, any AOB would have to comply with "proper procedure to create a secured interest in the insurance proceeds in favor of Plaintiff." (R. 77). Because the Bischoffs' AOB was not "fully executed by the Bischoffs in the manner prescribed by §§ 689.01 and 689.111, Fla. Stat.," the court dismissed the case for lack of standing.

JD appeals.

[1] The hearing is not part of the record.

SUMMARY OF ARGUMENT

Florida's homestead protection against creditors is not absolute. It does not apply to "obligations contracted for the purchase, improvement, or repair" of the homestead, or to "house, field, or other labor performed on the realty." Fla. Const. Art. X, § 4. Because JD Restoration's services are within these exceptions, the homestead provisions are irrelevant to the AOB here. Moreover, the homestead exemption exists to protect homeowners only. It cannot be used as a defense by a party outside the scope of its protection. Because the Bischoffs have not asserted that the AOB is invalid, UPCIC cannot do so.

ARGUMENT

I. The standard of review in this case is *de novo*.

A trial court's order granting a motion to dismiss is reviewed *de novo*. *One Call Prop. Servs. v. Sec. First Ins. Co.*, 165 So. 3d 749, 752 (Fla. 4th DCA 2015). Courts also review the application of homestead protections de novo. *Partridge v. Partridge*, 912 So. 2d 649, 649 (Fla. 4th DCA 2005).

II. Florida's homestead provisions do not extend to the insurance benefits that the Bischoffs assigned to JD Restoration.

Homestead protection resides in both the Florida Constitution and in its statutes. The relevant section in our Constitution provides:

> (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 . . . .
> (b) These exemptions shall inure to the surviving spouse or heirs of the owner.

Fla. Const. Art. X, § 4. Conveyances of any interest in homestead property must take the same form as a deed, which requires a writing signed in the presence of two subscribing witnesses. Fla. Stat. §§ 689.111, 689.01.

Where the homestead exemption applies, insurance proceeds from the homestead retain similar protection against a general creditor. Insurance benefits sufficiently related to the homestead may be protected as well, so that "the family shall have shelter and shall not be reduced to absolute destitution." *Orange Brevard Plumbing & Heating Co. v. La Croix*, 137 So. 2d 201, 204 (Fla. 1962). Insurance proceeds from a loss to homestead property are protected in the same manner as homestead property with respect to unsecured creditors. *Quiroga v. Citizens Prop. Ins. Corp.*, 34 So. 3d 101 (Fla. 3d DCA 2010).

Florida law contains many examples of insureds invoking their homestead rights against general creditors not within the exception for taxes, repairs, or labor. The *Quiroga* court held that Mr. Quiroga's attorneys, even though their services led directly to recovery of the insurance proceeds in question, were not subject to a lien by them after he repudiated the contingent fee arrangement. *Id*. at 103.

Similarly, in *Kohn v. Coats*, 138 So. 760 (Fla. 1931), the Florida Supreme Court would not permit a garnishment of homestead insurance funds by general creditors J.E. Kohn, or by Atlantic and Gulf Fertilizer Company.

In the present case, appellant JD Restoration is a creditor on an obligation "which originated from work or repair performed on the property." *Spector v. Spector*, 42 Fla. L. Weekly D1164 (Fla. 4th DCA May 24, 2017). *Butterworth v. Caggiano*, 605 So. 2d 56, 60 (Fla. 1992). The AOB directly pays for materials and labor used to repair the property, placing it within the homestead exception for repairs. *Perry v. Beckerman*, 97 So. 2d 860, 863 (Fla. 1957). The Bischoffs could not raise the homestead defense against JD Restoration, and neither can UPCIC.

In reaching its decision in this case, the trial court relied upon *Quiroga* for the proposition that homestead protections extend to AOBs executed in return for labor and repair to the homestead. (R. 75-76). The court read the case too broadly. *Quiroga* kept general creditors from seizing insurance funds arising from homestead property. 34 So. 3d at 102. It does not, and could not, re-write the constitutional homestead provision.

Thus, as a matter of textual interpretation, the homestead exemption does not apply to the AOB executed here. Should the Court find any ambiguity, it should apply the maxim that the homestead exemption "should be liberally construed in the interest of the family home." *Milton v. Milton*, 58 So. 718, 719 (1912). To

affirm would run afoul of the public policy that makes AOBs necessary: to permit immediate repairs on a primary residence in situations where the homeowner cannot afford to pay the contractor up front. *See generally Sec. First Ins. Co. v. State*, 177 So. 3d 627, 628-29 (Fla. 1st DCA 2015). Indeed, blocking the AOB here would run contrary to the purpose of the homestead exemption itself: to protect the homestead. In fact, the inability to make quick repairs might cause the homeowner to lose coverage if the policy contains the standard exclusions for loss that could have been avoided by prompt remediation.[2]

To require a notary and two witnesses to make an AOB into a secured agreement would impede emergency repairs and circumvent longstanding Florida law making such benefits freely assignable. Fortunately, because Florida's homestead exemption does not apply to AOBs executed in return for services to the homestead, the Court need not impose any such burden on the homeowners of this state.

III. United Property and Casualty Insurance Company does not have standing to assert the homestead protections enjoyed by the Bischoffs.

As the party who repaired the homestead, Restoration 1 is stepping into the shoes of the homestead owner to seek payment from First Protective for repairs. *Schuster v. Blue Cross & Blue Shield of Fla., Inc.*, 843 So. 2d 909, 911-12 (Fla. 4th

[2] The Bischoff's policy is not in the record on appeal.

DCA 2003). UPCIC can only raise defenses it would have against the Bischoffs. *Shaw v. State Farm Fire & Cas. Co.*, 37 So. 3d 329, 330 (Fla. 5th DCA 2010) ("If the assignor is entitled to be paid, the assignee is entitled to be paid."). Assuming *arguendo* there were some formal defect in the AOB, UPCIC as a nonparty could not complain on behalf of the Bischoffs. *Lugassy v. Ind. Fire Ins. Co.*, 636 So. 2d 1332, 1335 (Fla. 1994) (no standing to challenge adequacy of consideration where "the insurance company was neither a party to the contract nor a third party beneficiary"). "As long as no creditor of the assignor questions the validity of the assignment, a debtor of the assignor cannot do so." *Blackford v. Westchester Fire Ins. Co.*, 101 F. 90, 91 (8th Cir. 1900). This especially true for the homestead exemption, which particularly resides only in those protected by it. *Lyons v. Lyons*, 155 So. 3d 1179, 1182 (Fla. 4th DCA 2014) (holding that protections against devise of homestead did not apply to person "not within the class of persons the constitutional provision is designed to protect"); *In re Estate of Morrow*, 611 So. 2d 80, 81 (Fla. 2d DCA 1992).

Here, the Bischoffs have not sought to repudiate the AOB. The only interests UPCIC seeks to protect are its own. *Travelers Cas. & Sur. Co. v. United States Filter Corp.*, 870 N.E.2d 529, 545 (Ind. Ct. App. 2007) (observing that insurance company "would be foolish to consent to the transfer of insurance if, by

withholding such consent, it could shed itself of past liability."). Homestead is for homeowners, not for insurance companies.

CONCLUSION

Florida's homestead provisions do not apply when a homeowner uses insurance funds to obtain repair of the homestead. Although the homestead argument is ultimately without merit, UPCIC should not be permitted to advance it. Appellant JD Restoration asks the Court to reverse the order granting UPCIC's motion to dismiss, and remand for further proceedings.

s/Gray Proctor

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Initial Brief has been furnished via email to: John P. Joy, Esq., and Sara M. Sandler, Esq., of Walton Lantaff Schroeder & Carson LLP, 110 E. Broward Blvd., Suite 2000, Fort Lauderdale, Florida 33301-3503, at:

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this 22d day of October, 2017.

/s/ Gray Proctor

CERTIFICATE OF TYPEFACE COMPLIANCE

I certify that this Initial Brief complies with the font requirements of Florida Rule of Appellate Procedure 9.100(l). The brief has been prepared using Times New Roman, 14-point font.

/s/ Gray Proctor