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Insurance -- Homeowners -- Insureds' assignment of benefits to repair service for repairs to insureds' homestead property did not violate homestead protection provisions of Florida Constitution -- Insurer's motion to dismiss assignee's action against it and alternative motion for summary judgment are denied

ALL REPAIR & RESTORATION LLC, a/a/o Stanley R. McCalla, et. al., Plaintiffs, v. CASTLE KEY INSURANCE COMPANY, Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County, Circuit Civil Division. Case No. 19-13820 CA (22). July 10, 2019. Michael A. Hanzman, Judge. Counsel: Oren Reich, for Plaintiff. Darryl Gavin and Cristina Cambo, for Defendant.

ORDER

I. INTRODUCTION

Plaintiff, All Repair & Restoration LLC ("Plaintiff" or "All Repair"), repaired damage to Stanley R. McCalla's ("McCalla") home allegedly caused by Hurricane Irma and covered by a homeowner's policy issued by Defendant Castle Key Insurance Company ("Defendant" or "Castle Key"). Rather than paying for those services directly McCalla, like many insureds, transferred to All Repair, via a garden variety assignment of benefits (AOB), his entitlement to insurance proceeds. The AOB executed by McCalla provided that:

> ASSIGNMENT: Customer represents that he or she is the Insured or the Insured's Agent. Customer hereby assigns and transfers after Loss insurance rights, benefits and causes of action to the fullest extent allowed under Customer's property insurance policy to All Dry USA. Customer agrees and understands that the Assignment of Insurance Rights is a binding contract for goods and services and involves the present irrevocable transfer of an interest from Customer to All Dry USA.
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> DIRECTION OF PAYMENT: Customer demands, authorizes and requests all insurance companies and/or representing firms or any party in receipt of insurance proceeds to make timely and direct payment to ALL DRY USA at the below listed address. Payment should be made by the any/all parties in the name of All Dry USA. If payment is incorrectly made in the Customer's name by the insurance company, Customer shall endorse the check to All Dry USA within 48 hours of Customer's receipt of the check.

Pursuant to the AOB All Repair submitted its invoice to Castle Key and demanded payment. When Castle Key refused that demand All Repair filed this suit. Castle Key now seeks dismissal (or alternatively summary judgment), insisting that the AOB is void because McCalla could not legally divest himself of constitutionally protected homestead property (i.e., the insurance proceeds) without violating Article X § 4(c) of the Florida Constitution. Put simply, Castle Key says that: (a) insurance proceeds on homestead property are "constitutionally protected to the same extent as the property itself;" and (b) a "homeowner cannot be divested" of such insurance proceeds -- or *voluntarily* assign them "through an unsecured agreement," without running afoul of Article X §4(c). Motion, p. 2. So, according to Castle Key, the AOB "is invalid as a matter of law and should be deemed null and void as against public policy." *Id*.

Plaintiff disagrees and insists that "[n]othing in Article X section 4(c) prevents a homeowner from voluntarily transferring homestead-protected property." Response, p. 4. In Plaintiff's view, this constitutional provision protects against forced sales/liens, not voluntary transactions for consideration. Plaintiff then goes further, arguing that "even if [it] were attempting to . . . obtain insurance benefits through a forced sale or judicial lien . . . this would be permissible under article X, section 4, because it would be 'for the payment of . . . obligations contracted for the purchase, improvement or repair [of the homestead property], or obligations contracted for house, field or other labor performed on the realty'." Response, p. 4. So, as far as Plaintiff is concerned, this case does not remotely implicate the policy underlying Article X.

II. ANALYSIS

As an initial matter, the parties do not dispute that the subject property is McCalla's constitutionally protected homestead, or that the insurance proceeds at issue here are "imbued with" the same constitutional protection as the property itself. *Quiroga v. Citizens Prop. Ins. Corp.*, 34 So. 3d 101, 102 (Fla. 3d DCA 2010) [35 Fla. L. Weekly D767a]; *Orange Brevard Plumbing & Heating Co. v. La Croix*, 137 So. 2d 201 (Fla. 1962). The only question therefore is whether this garden variety and ubiquitous AOB is void as violative of our constitution. The Court concludes that it is not.

"The homestead exemption has been enshrined in our state constitution for over a hundred years." *Chames v. DeMayo*, 972 So. 2d 850 (Fla. 2007) [32 Fla. L. Weekly S820a]. It provides that:

> (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:
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> (1) a homestead. . . .

Art. X, § 4(a), Fla. Const. The public policy underlying this 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." *McKean v. Warburton*, 919 So. 2d 341, 344 (Fla. 2005) [30 Fla. L. Weekly S613a] (quoting *Public Health Trust v. Lopez,*531 So.2d 946, 948 (Fla.1988).

Because our homestead exemption protects "both the individual and the public," as well as a "debtor's family," *Chames* at 860, agreements that purport to waive its protections are generally unenforceable absent "formally mortgaging the property." *Chames* at 854. *See also Carter's Adm'rs v. Carter*, 20 Fla. 558 (1884); *Sherbill v. Miller Mfg. Co.*, 89 So. 2d 28 (Fla. 1956). Our courts have reasoned that while a formal mortgage transaction "implies the exercise of discretion and the contemplation of inevitable consequences" *Carter's* at 570, enforcing waivers in such things as "promissory notes, retainer agreements, or other purportedly unsecured instruments," *Chames* at 854, is "contrary to the policy of the exemption laws of this State." *Sherbill,* 89 So.2d at 31. As a result -- and as the precedent relied upon by Castle Key makes clear -- an unsecured creditor may not, in reliance upon a waiver of the homestead exemption, seek to impose a lien upon, or force the sale of, homestead property. *See, e.g., Chames*, *supra* (attorney who secured a homestead waiver in retainer agreement could not apply a charging lien against client's home); *Quiroga, supra* (homeowners could not be *forced* to pay attorney insurance proceeds received from hurricane damaged property); *Orange Brevard Plumbing & Heating Co. v. La Croix*, 137 So. 2d 201, 203 (Fla. 1962) (judgment creditor could not -- over homeowner's objection -- attach "the proceeds of a voluntary sale of a homestead when it is intended in good faith that such proceeds are to be reinstated in a new homestead"). Rather, our courts "have repeatedly refused to find an exception to the protection from forced sale outside those expressly stated" in our constitution, *Chames* at 855, and have steadfastly held that a homeowner may not -- through an unsecured agreement -- "divest himself from the exemptions afforded him though Article X, section 4(c)." *Quiroga* at 102.

Here the homeowner -- McCalla -- did not expressly waive or "divest himself from the exemptions afforded him through Article X, section 4(a)" at all. *Quiroga*, at 102. He merely assigned, and divested himself of, potential homestead property (*i.e.,* insurance proceeds) in exchange for repairs performed on the homestead itself, and nothing in Article X, § 4(c) of our constitution prevents a homeowner from exercising his constitutional right to enter into and *voluntarily* perform contracts involving the disposition of homestead property. *See, e.g., Hoffman v. Boyd*, 698 So. 2d 346 (Fla. 4th DCA 1997) [22 Fla. L. Weekly D1991a] (the right to contract is generally constitutionally protected). Rather Article X, § 4(c) -- as plainly written -- does no more than exempt homestead property from "forced sale under process of any court. . .," and Article X, § 4(c)'s "explicit language" does not say -- or suggest -- that a homeowner may not voluntarily assign homestead property (*i.e.,* insurance proceeds) in exchange for work performed on the home itself. *See, e.g., Zingale v. Powell*, 885 So. 2d 277, 282 (Fla. 2004) [29 Fla. L. Weekly S484a] ("[a]ny inquiry into the proper interpretation of a constitutional provision must begin with an examination of that provision's explicit language") (quoting *Florida Society of Ophthalmology v. Florida*

Optometric Assn., 489 So.2d 1118, 1119 (Fla.1986)). To the contrary, Article X, § 4(c) expressly allows a homeowner to "alienate the homestead by mortgage, sale or gift . . . ." So as conceded by Castle Key's counsel during oral argument, McCalla -- in exchange for services rendered -- could have gifted the insurance proceeds to All Repair but -- in Castle Key's view -- he was powerless to assign those same proceeds. This obviously makes no sense, and this Court will not apply the *expressio unius est exclusio alterius* rule of construction to restrict and limit the manner in which a homeowner may *voluntarily* divest himself of homestead property. *See, e.g.,* 16 AM. Jur. 2d Constitutional Law § 69 (2005) ("the *maxim expressio unius est exclusio alterius* does not apply with the same force to a constitution as to a statute . . . and it should be used sparingly").

Moreover, even assuming the assignment here is viewed as an implied waiver of McCalla's homestead protection, and that this waiver could not be enforced against *him*, no one is attempting to place a lien upon -- or *force* a sale of -- his home to collect this debt. McCalla is not even a party to this case and has no interest in its outcome. Thus, the policy underlying this constitutional provision -- which is to benefit the debtor/homeowner "by securing to him his homestead beyond all liability from forced sale under process of any court," *Orange Brevard Plumbing,* at 204, is not at all implicated here.

Finally, and unlike the scenarios presented in *all* the appellate decisions relied upon by Castle Key, in *this* circumstance All Risk could have insisted that McCalla pay for the services rendered and placed a lien on the home if he failed to do so, as Article X, § 4(c) permits a lien (and forced sale if necessary) to enforce an obligation incurred for the "improvement or repair" of homestead property. Instead of obligating himself to directly pay for All Risk's services, and risk having a lien placed on his home if he did not (or could not) pay, McCalla decided to simply assign his insurance proceeds -- a transaction that actually *protected* the property from a potential lien and forced sale, and thus furthered the public policy underlying our homestead exemption.[1]

The bottom line is that there is nothing about this AOB transaction that contravenes the plain and ordinary meaning of Article X, § 4(c), or implicates the policies underlying the homestead exemption. So even assuming this transaction is viewed as a waiver/divestiture of McCalla's homestead protection (and it was not) "Florida's highly valued constitutional homestead protection is subject to waiver," *Chames* at 855, and *this* Plaintiff had a right to lien the property -- and if necessary force a sale -- if McCalla refused, or was unable, to pay for the labor and materials needed to repair his homestead property. As a result, these parties (*i.e.,* McCalla and All Risk) were surely at liberty to enter into an AOB and thereby eliminate any possibility of that highly undesirable -- but constitutionally permissible -- scenario.

III. CONCLUSION

As our Supreme Court recently observed, courts should be "guided by the rule of extreme caution when called upon to declare transactions void as contrary to public policy and should refuse to strike down contracts involving private relationships on this ground, unless it be made clearly to appear that there has been some great prejudice to the dominant public interest sufficient to overthrow the fundamental public policy of the right to freedom of contract between parties sui juris." *City of Largo v. AHF-Bay Fund, LLC*, 215 So. 3d 10, 16 (Fla. 2017) [42 Fla. L. Weekly S254a] (quoting *Banfield v. Louis*, 589 So. 2d 441, 446-447 (Fla. 4th DCA 1991)). *See also Florida Windstorm Underwriting v. Gajwani*, 934 So. 2d 501 (Fla. 3d DCA 2005) [30 Fla. L. Weekly D1213a]. Having said that, the Court obviously recognizes that an agreement "which cannot be performed without violating . . . a constitutional or statutory provision is illegal and void." *Local No. 234 of United Ass'n of Journeymen & Apprentices of Plumbing & Pipefitting Indus. of U.S. & Canada v. Henley & Beckwith, Inc.*, 66 So. 2d 818, 821 (Fla. 1953). But as pointed out earlier, nothing in the plain and unambiguous language of Article X, § 4(c) expressly (or by implication) forbids this type of private contract, and its enforcement will hardly cause "some great prejudice to the dominant public interest" or to any concerned party, let alone prejudice "sufficient to overthrow" a homeowner's right to freedom of contract -- particularly in a circumstance such as this where Plaintiff could have liened the property for the amount due (and forced a sale if necessary) as permitted by our constitution. The contract right owned by McCalla was therefore assignable. *See, e.g., L.V. McClendon Kennels, Inc. v. Inv. Corp. of S. Florida*, 490 So. 2d 1374 (Fla. 3d DCA 1986) ("[g]enerally, all contractual rights are assignable unless the contract prohibits assignment, the contract involves obligations of a personal nature, or public policy dictates against assignment").

Defendant's "Motion to Dismiss and Alternative Motion for Summary Judgment" are **DENIED**. Defendant shall file its answer and affirmative defenses, if any, within twenty (20) days of this Order.

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[1]In addition to inapposite cases involving attempts to force a sale or lien property absent the homeowner's consent, Castle Key cites two *per curiam* decisions in support of its position: *One Call Prop. Services, Inc. v. St. Johns Ins. Co., Inc.*, 183 So. 3d 364 (Fla. 4th DCA 2016) (unpublished); and *JD Restoration Inc. v. Universal Prop. & Cas. Ins. Co.*, 245 So. 3d 809 (Fla. 4th DCA 2018) [43 Fla. L. Weekly D1123a]. Neither has any precedential value. *See Hicks v. Am. Integrity Ins. Co. of Florida*, 241 So. 3d 925, 929 (Fla. 5th DCA 2018) [43 Fla. L. Weekly D1138a] ("*per curiam* affirmed decisions without a written opinion have no precedential value"). The Court also notes that the trial court in *JD Restoration* granted the defendant's motion to dismiss because the AOB did not "clearly and unambiguously transfer the Insured's rights under the policy to plaintiff" and -- while "expressing . . . reluctance" -- accepted the homestead argument raised as an *alternate* basis for its ruling. Similarly, the trial court in *One Call Property* also relied on the homestead argument in the *alternative*, as it found the AOB void because the plaintiff was not a licensed adjuster and thus the assignment violated Fla. Stat. § 626.854(16). In any event, to the extent these courts concluded that these routinely employed AOB's violate our constitutional homestead exemption, this Court respectfully disagrees.

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