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**FILED**

SID J. WHITE

NOV 12 1991

IN THE SUPREME COURT OF FLORIDA  
CASE NO.: 78,922  
CLERK, SUPREME COURT  
By \_\_\_\_\_  
Chief Deputy Clerk  
FLORIDA BAR NO. 174589

PALM BEACH SAVINGS & LOAN,  
F.S.A., a federal savings  
association,

Petitioner,

v.

DEBORAH FISHBEIN,

Respondent.

\_\_\_\_\_ /

**JURISDICTIONAL BRIEF OF PETITIONER  
PALM BEACH SAVINGS & LOAN ASSOCIATION, F.S.A.**

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STATEMENT OF THE FACTS AND OF THE CASE

On October 15, 1984, Lawrence Fishbein ("Mr. Fishbein") acquired a mansion on Palm Beach Island (the "Subject Property") taking title in his **sole** name. At the time, he was married to DEBORAH FISHBEIN ("Mrs. Fishbein"). In March, 1985, Mr. Fishbein executed a Quit Claim Deed to himself and Mrs. Fishbein, as tenants by the entireties. This deed was not recorded. Thereafter, Mr. & Mrs. Fishbein moved into the Palm **Beach** home. It was Mrs. Fishbein's homestead from October, 1985 to August, 1988.

In March, 1988, Mr. Fishbein borrowed \$1.2 million from PALM BEACH SAVINGS & LOAN ASSOCIATION, F.S.A. ("PALM BEACH SAVINGS"), and secured the debt with a Mortgage on the Subject Property. At that time, Mr. and Mrs. Fishbein were involved in Dissolution of Marriage proceedings. Mr. Fishbein forged her signature on the loan commitment letter and Mortgage.<sup>1</sup>

\$933,905.42 was used to pay off three existing mortgages' and the real estate **taxes** on the Subject Property. The remainder (approximately \$270,000) was utilized by Mr. Fishbein to alleviate an immediate cash problem.

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<sup>1</sup>While her signature was forged, it was witnessed and notarized (see Appendix 1).

<sup>2</sup>The three mortgages on the Subject Property were as follows: a first mortgage which was assumed by Mr. Fishbein when he acquired the house; a second mortgage which was a purchase money mortgage given by Mr. Fishbein at the time of acquisition of the house; and a third mortgage which was executed by both Mr. Fishbein and Mrs. Fishbein. In fact, the third mortgage to Florida National Bank (which paid for improvements to the house) specifically acknowledged the Liens of the prior mortgages as being valid first and second mortgage liens, respectively, on the house.

In August, 1988, the Fishbeins' marriage was dissolved after they entered into a Property Settlement Agreement (the "Agreement"), which provided that Mr. Fishbein, within one year, would buy his wife a \$275,000 home in **Boca** Raton and would pay her **\$225,000**. As security for his obligations under the Agreement, Mr. Fishbein gave his wife a Quit Claim Deed to the Subject Property.<sup>3</sup> In return, Mrs. Fishbein gave up her interest in the house and moved to Boca Raton where she was renting a house with an option to purchase. Thereafter, Mr. Fishbein neither purchased the Boca Raton house nor paid her **\$225,000**. Mrs. Fishbein then moved back to the Subject Property in approximately December, 1988.

Mr. Fishbein defaulted on the loan with **PALM BEACH SAVINGS** and, consequently, **PALM BEACH SAVINGS** filed its mortgage foreclosure action. In defense, Mrs. Fishbein asserted that her signature was forged to the **PALM BEACH SAVINGS'** mortgage without her knowledge or consent. **PALM BEACH SAVINGS** then filed an Amended Complaint asserting an additional claim for the imposition of an equitable lien on the Subject Property in the event the trial court deemed the Mortgage to be void. Mrs. Fishbein and **PALM BEACH SAVINGS** entered into a Pre-trial Stipulation acknowledging that: (1) at the time of the execution of the **PALM BEACH SAVINGS'** Mortgage, Mrs. Fishbein had no record ownership interest in the Subject Property; and (2) her only interest in the house at the time **PALM BEACH SAVINGS** made the loan was a homestead interest.

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<sup>3</sup>This deed to himself and his wife, was to be held by her Dissolution attorney and was to be recorded only in the event Mr. Fishbein failed to meet his obligations under the Agreement.

The trial court entered a Final Judgment (Appendix No. 1). It found (1) during the Dissolution settlement negotiations, *Mr. Fishbein* misrepresented to *Mrs. Fishbein* that the house "...was free and clear of any liens except one being asserted by his mother and sister;" and (2) that *Mr. Fishbein* forged his wife's signature on the Mortgage to **PALM BEACH SAVINGS**. The trial court determined that the fraud of *Mr. Fishbein* vitiated any intent on *Mrs. Fishbein's* part to abandon the homestead; and it **also** prevented title, unencumbered by the homestead, from vesting in *Mr. Fishbein* as of the date of the Dissolution decree. Accordingly, the trial court held that the **PALM BEACH SAVINGS'** Mortgage did not attach to the Subject Property upon entry of the Dissolution decree and *Mrs. Fishbein's* leaving the marital residence.

The trial court then went on to address **PALM BEACH SAVINGS'** claim for an equitable lien to the extent that its loan proceeds were used to satisfy pre-existing mortgages and tax liens on the Subject Property:

[PALM BEACH SAVINGS] has clearly shown fraud on the part of *Mr. Fishbein* in obtaining a loan although no fraud by *Mrs. Fishbein* has been shown. . . .I find that the Plaintiff should have an equitable lien on the property to the extent that its loan proceeds were used to pay the pre-existing mortgages which had attached [to] the homestead and the unpaid taxes. . . .Additionally, the signature which they relied upon was supported by the attestation of two witnesses and the seal of a notary. Lastly, the homestead would have been liable for these pre-existing mortgages and taxes if the PALM BEACH SAVINGS' loan had not been procured. Thus, if an equitable lien attaches, Mrs. Fishbein stands in no worse position than she stood in prior to the fraudulent mortgage.

[Emphasis added]

The **trial** court enforced an equitable lien in favor of **PALM BEACH SAVINGS** in the amount of \$1,182,298.09.<sup>4</sup>

Mrs. Fishbein appealed to the Fourth District Court of Appeal asserting that the equitable lien could not be imposed against her homestead. **PALM BEACH SAVINGS** cross-appealed the failure to impose the legal mortgage. The Fourth District reversed the Final Judgment, holding that **PALM BEACH SAVINGS** had not established (**as** it perceived was mandatory) fraud or other egregious conduct on Mrs. Fishbein's part. The Fourth District also concluded that the unjust result and/or windfall to Mrs. Fishbein was of no consequence since the homestead protection of the Florida Constitution is not based on principles of equity. See the Fourth District's Opinion (Appendix No. 2).

#### SUMMARY OF ARGUMENT

The Fourth District's decision conflicts with prior Florida Supreme Court precedent cited in the dissenting opinion of Judge Stone as well as with the Third District's opinion in Clutter Construction Corp. v. Clutter, 173 So.2d 761 (Fla. 3d DCA 1965). It also used that constitutional homestead protection as a sword to achieve an unconscionable result on creditors rather than as a shield for family preservation. The cases cited in the dissent expressly reflect that equitable liens may be enforced against homestead to prevent the homestead from being used as an instrument

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<sup>4</sup>This amount consists of the payments to satisfy the three mortgages and the 1986-1988 real estate taxes, plus interest, all of which were valid, pre-existing encumbrances upon Mrs. Fishbein's homestead.

of fraud upon, or detriment to creditors. Those cases also hold that homestead may be used solely as a shield, but not to create a windfall and/or unjust enrichment to the party asserting the homestead protection. The unjust result and express windfall of approximately one million dollars to Mrs. Fishbein by virtue of the Fourth District's opinion is unwarranted, is in conflict with previous Florida Supreme Court precedent and is erroneously based upon the decisions of Isaacson v. Isaacson, 504 So.2d 1309 (Fla. 1st DCA 1987) and Public Health Trust of Dade County v. Lopez, 531 So.2d 946 (Fla. 1968). This Court has discretionary jurisdiction pursuant to Fla.R.App.P. 9.030(a)(2)(A)(ii) and/or (iv).

#### ARGUMENT

The Fourth District's opinion concludes that "the only basis upon which a court may impose an equitable lien [on homestead property] is where there is fraud or egregious conduct by the party claiming the homestead exemption." This holding expressly conflicts with prior decisions of this Court which allow the imposition of an equitable lien where there is fraud which, while not committed by the party claiming the homestead exemption, would otherwise create an unjust result or windfall to that party. Sonneman v. Tuszvnski, 139 Fla. 824, 191 So. 18 (Fla. 1939); LaMar v. Lechluder, 135 Fla. 703, 185 So. 833 (Fla. 1939); and Jones v. Carpenter, 90 Fla. 407, 106 So. 127 (Fla. 1925).

The Fourth District relies upon Isaacson for the proposition that the fraud must be on the part of the beneficiary of the homestead protection.<sup>5</sup> Isaacson is distinguishable on its facts.<sup>6</sup>

The Fourth District's strict constructionist view of Article X, Section 4 of the Florida Constitution and of the issue of when equitable liens are enforced against homestead property conflicts with the cases cited by the dissent, all of which are equitable lien cases fashioned by this Court. That precedent was not overruled by Lopez and remains the law of Florida on the application of equitable liens to homestead property. Only a departure by the Fourth District from that long-standing precedent allows this unjust result. Accordingly, this Court has discretionary jurisdiction pursuant to Fla.R.App.P. 9.030(a)(2)(A)(iv).

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<sup>5</sup>The cases cited by Isaacson, specifically Clutter Construction Corp. v. Clutter, 173 So.2d 761, 762 (Fla. 3d DCA 1965); Bessemer v. Gersten, 381 So.2d 1344, 1347 n.1 (Fla. 1980) and Kitzinger v. Gulf Power Co., 432 So.2d 188, 195 (Fla. 1st DCA 1983), do not stand for this proposition. None of these cases require that the fraud be on the part of the beneficiary of the constitutional protection; rather, these cases stand for the proposition that the plaintiff is required to prove fraud or other "reprehensible conduct."

Furthermore, the Fourth District's opinion states that Clutter provides no facts and does not discuss the law in detail. Interestingly, while Clutter is admittedly a short opinion without any express facts, the Clutter court relied upon Jones v. Carpenter and LaMar v. Lechliden, two of the three cases cited in Judge Stone's dissent.

<sup>6</sup>Isaacson involved a former wife seeking recovery of child support and/or alimony arrearages. The Isaacson court declined to hold that because a husband possesses qualified homestead real property which he refused to alienate to meet support obligations that he has acted "reprehensibly" as a matter of law so as to overcome the constitutional protection against the forced sale of such property. In contrast, the instant case involves homestead property which was expressly alienated prior to it becoming homestead property (to the extent of the first and second mortgages) and which was expressly subject to the consensual third mortgage and statutory tax liens.

Furthermore, the fraud of Lawrence Fishbein, a co-beneficiary of the homestead protection, should not and cannot inure to the benefit of or confer a windfall upon Mrs. Fishbein. While she should not be penalized for Mr. Fishbein's fraud, nor should she be entitled to cash in on a one million dollar windfall.

Jones v. Carpenter supports the proposition that an equitable lien exists against one's homestead for money of another used in the improvement of that property. Jones also holds that a lien may be enforced against a homestead, even though it is not, in specific terms, included in the constitutional provision. 106 So. at 130. Jones reflects this Court's historical intention that the homestead protection be utilized as a shield, but not as a **sword**. The Jones court balanced the organic and statutory provisions relating to homestead exemptions (and their liberal application in the interest of the family) with the fact that these exemptions should not be applied so as to **make** them an instrument of fraud or imposition upon creditors.

The Fourth District also misperceived this Court's decision in Public Health Trust of Dade County v. Lopez, 531 So.2d 946 (Fla. 1988). The **Fourth** District cites Lopez for the proposition that the constitutional homestead protection is **immune** from and cannot take into account equitable principles. This is a rigid misapplication of the law in Florida and an inappropriate extension of the dicta in Lopez. Lopez dealt with a statutory hospital lien<sup>7</sup> and not with an equitable lien granted to the extent of prior, proper alienations of homestead; i.e., --to the extent that the prior valid mortgages and tax **liens** were paid off. Furthermore, the

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<sup>7</sup>Lopez does not deal with prior consensual liens and/or liens which would, in effect, be equitably subrogated to the prior consensual liens. Rather, Lopez deals solely with statutory hospital liens which were attempted to be enforced against a decedent's homestead. The sole issue in Lopez was the interpretation of **Article X, section 4(b)** of the Florida Constitution and whether, in extending the homestead exemption to the surviving spouse or heirs of the owner, it was to be strictly construed to apply only to minor or dependent heirs. Lopez is inapplicable to the facts of the instant case.

Fourth District's reliance on the dicta in Lopez relating to "equity" is a misperception of the law. Therefore, this Court also has discretionary jurisdiction under Fla. R. App. P. 9.030(a)(2)(A)(ii) in that the Fourth District's opinion construes the homestead exemption under Article X, Section 4(b), Fla. Const., and the application and enforcement of an equitable lien to homestead property.

The Fourth District has clearly gone beyond the search for substantial competent record evidence to support the trial court's findings and conclusions; it has instead entertained a tacit de novo review of that evidence placed before the trial court.\* The result of the Fourth District's reversal of the trial court is to award the lottery jackpot to Mrs. Fishbein by wiping out almost \$1 million of valid debt. Because her husband committed fraud, Mrs. Fishbein gets the lottery's first prize--and **she** didn't **even** buy **a ticket**.

Finally, the Fourth District's opinion creates a greater exemption for Mrs. Fishbein than is provided for under the constitutionally-created homestead exemption. The Fourth District held:

To interpret Clutter as only requiring proof of fraud on someone's part rather than on the part of the person claiming homestead protection is to defeat the purpose of homestead protection. To allow one party's fraud to affect another party's homestead

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<sup>8</sup>The trial court expressly found that Mrs. Fishbein stood **in no worse position** than she stood in prior to the fraudulent mortgage, as the homestead would have been **liable for** the pre-existing mortgages and taxes even if the PALM BEACH SAVINGS' loan had not been procured.

interest is exactly the same as allowing one party's debts to encumber homestead property. In this case, applying the rule in the manner that the trial court did resulted in depriving Mrs. Fishbein of the homestead exemption provided to her by the Florida Constitution.

Since Mrs. Fishbein's homestead was previously alienated and encumbered exactly to the extent of the equitable lien, the trial court's Final Judgment resulted in Mrs. Fishbein having the same homestead exemption granted by the Constitution as she had prior to the forged mortgage. However, the Fourth District creates an absolute windfall of \$1 million and elevates her exemption to a greater level than that allowed by the Constitution.<sup>9</sup> It is **incongruous that this unconscionable result is being done in the name of family preservation and homestead protection.**

#### CONCLUSION

The Fourth District's opinion wiped out the equitable lien in the name of homestead--a homestead previously burdened with valid liens in that exact amount; thus, Mrs. Fishbein will live in a Palm Beach mansion free and **clear** of all pre-existing mortgages and tax liens because equity has **nothing to do with homestead!**

Furthermore, the Fourth District's opinion, holding that the "only basis" upon which an equitable lien can be imposed against homestead is when there is fraud or egregious conduct by the party claiming the homestead protection, has broad and long-ranging

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<sup>9</sup>Had the forgery been discovered during the process and before the loan was funded, then the prior mortgagee and tax liens would have remained valid encumbrances to Mrs. Fishbein's homestead. It takes arbitrary extensions of *dicta* to fashion a result that allows the liens to be satisfied with no equitable considerations to the party which provided the funds and was not a part of the fraud.

implications. Courts of equity can no longer be such when equitable liens and homestead collide. Equitable liens have become, by the Fourth District's broad pen strokes, a misnomer. Equitable liens will neither do equity nor be liens; instead, they will be relegated to that area of the law given less consideration than the mythical peppercorn. Finally, the Fourth District's opinion conflicts with the prior decisions of this Court as well as the Third District allowing equitable liens on homestead so as to prevent the homestead exemption from being used as a sword to create injustice. Based upon the foregoing reasons and citations of authority, Petitioner respectfully requests that this Court grant its Petition and exercise its discretionary review under Fla.R.App.P. 9.030(a)(2)(A)(ii) and/or (iv).

WE HEREBY CERTIFY that a true <sup>and</sup> correct copy of the foregoing was served by U.S. Mail this ~~27th~~ day of November, 1991 upon Allan L. Hoffman, Esq., Attorney for DEBORAH FISHBEIN, 1610 Southern Boulevard, West Palm Beach, Florida 33406.

Respectfully submitted,

ROLLNICK, ROSEN & LINDEN, P.A.  
Attorneys for Petitioner  
133 Sevilla  
Coral Gables, Fl. 33134  
Phone No (305) 444-7800

By: \_\_\_\_\_

NEIL B. LINDEN  
DAVID B. HABER

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IN THE SUPREME COURT OF FLORIDA

CASE NO:

FLORIDA BAR NO. 174589

PALM BEACH SAVINGS & LOAN,  
F.S.A., a federal savings  
association,

Petitioner,

v.

DEBORAH FISHBEIN,

Respondent.

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Trial Court Final Judgment

Appendix 1

Fourth District Court of Appeal Opinion

Appendix 2

JUN-18-1990 11:23am 90-174397  
IN THE CIRCUIT COURT OF THE FIFTEENTH  
JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR  
PALM BEACH COUNTY.

CASE NO. CL-88-1146B "AI"

PALM BEACH SAVINGS & LOAN  
ASSOCIATION, etc.,

ORB 6488 Pg 418

Plaintiff:

vs.

LAWRENCE J. FISHBEN, et al.,

Defendants.

FINAL JUDGMENT /

The Plaintiff, Palm Beach Savings and Loan Association, seeks to foreclose a mortgage on property owned by the Defendant, Deborah Fishbein. I have previously granted a summary judgment finding that Palm Beach savings and Loan Association had priority over all other claims to the property other than Deborah Fishbein's. The questions presented are whether Palm Beach Savings can foreclose on a mortgage given by Lawrence Fishbein and not joined in by his wife Deborah and, if not, whether Palm Beach Savings should have an equitable lien to the extent that the proceeds of its loan were used to pay preexisting mortgages, taxes and other liens on the property.

In October of 1984, the Defendant, Lawrence Fishbein, acquired a house at 160 Kings Road in Palm Beach. At that time, Mr. Fishbein was married to Deborah Fishbein and in March of 1985 he executed a quit claim deed to himself and Deborah, as tenants by the entirety. This deed was never recorded. Mr. and Mrs. Fishbein resided in the house and it had homestead status from October of 1985 to August of 1988. In March of 1988 Lawrence Fishbein borrowed \$9,000.00 from Palm Beach Savings and secured the debt with a

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**APPENDIX 1**

mortgage on the house. A portion of the loan proceeds was used to pay off three existing mortgages, back taxes and creditor liens on the property. The remainder of the loan was used by Lawrence Fishbein to alleviate an immediate cash problem. The Fishbeins were involved in divorce proceedings at the time and Lawrence Fishbein forged Deborah Fishbein's signature on the loan commitment letter and mortgage.

In August of 1988, Mr. and Mrs. Fishbein entered into a property settlement which provided that Mr. Fishbein would buy a \$275,000.00 home for Deborah Fishbein in Boca Raton and pay her \$225,000.00 in cash, all to be accomplished in one year. As collateral for these provisions in the property settlement agreement, Lawrence Fishbein gave Deborah another quit claim deed conveying the house to himself and her. This deed was to be held by Deborah's attorney and if Lawrence did not buy the Boca house and pay the \$225,000.00, it was agreed Deborah could record the deed. During the settlement negotiations, Lawrence represented to Deborah that the house was free and clear of any liens except one being asserted by his mother and sister. This statement was obviously false. In August of 1988 the divorce was granted and with property settlement agreement in hand, Deborah moved to what she thought would be her new home in Boca. Lawrence didn't buy the Boca house for Deborah, didn't pay her \$225,000.00 and defaulted on the loan with Palm Beach Savings. Palm Beach Savings foreclosed, Mrs. Fishbein moved back to the Palm Beach house and Mr. Fishbein went to jail. As the last piece of the puzzle, the judge in the divorce

proceeding found fraud in the procurement of the property settlement agreement, set the agreement aside and awarded Deborah the Palm Beach house.

In defense of this foreclosure action, Deborah asserts that since the property was a homestead her signature was necessary for a valid mortgage under Article X, Section 4, of the Florida Constitution (1968). Palm Beach Savings counters that while the lack of Deborah's signature may have made the mortgage voidable, it was not void and that when the divorce was final and Deborah moved to Boca the homestead ended and its mortgage attached.

I find that the property remains the homestead of Mrs. Fishbein and that Palm Beach Savings cannot foreclose on its mortgage. The case most apropos for analysis is Pitts v. Pastorie, 15 Fla.L.Wkly. 154 (2d Dist. Jan. 12, 1990), wherein Mr. Pitts had borrowed \$21,500.00 from Mr. Pastorie and secured the debt by a mortgage on his house, not signed by his wife. Mr. Pitts did not repay the money and eventually after his children were grown divorced his wife. Pitts later remarried, after which Pastorie foreclosed on the mortgage. Pitts defended on the theory that the mortgage was void since it was not signed by his former wife. The Second District held that the mortgage was merely voidable and, noting that one can encumber after acquired property, also held that when Pitts divorced his wife he acquired sole ownership of the property and the mortgage attached. The court specifically observed that at the time of the divorce, the house was not used to secure any divorce obligations and that its decision did not disadvantage

the wife or family members entitled to a homestead exemption.

There are several factual distinctions between Pitts and this case which I think compel an opposite result. First, and most obvious, the mortgagor in Pitts was the person against whom enforcement of the mortgage was sought. The opposite is true in this case. Second, the property impressed with the mortgage in Pitts had not been used as security for an obligation under a divorce decree. Here the property settlement agreement, adopted by the court, specifically looked to the Palm Beach home as security for the Boca house as well as the lump sum payment of \$225,000.00. Third, the decision in Pitts did not disadvantage minor children and a wife who did not enter into the mortgage. Enforcing this mortgage would dispossess the wife and minor children.

Palm Beach Savings nevertheless argues that Mrs. Fishbein lost her homestead when the divorce took place and that she also abandoned any homestead when she moved to Boca Raton. These arguments would be convincing but for Mr. Fishbein's fraudulent conduct resulting in Mrs. Fishbein's move and the divorce. Mrs. Fishbein testified that had she known of the Palm Beach Savings mortgage, she would have not entered into the property settlement agreement. I find that the fraud of Mr. Fishbein vitiated any intent on Mrs. Fishbein's part to abandon the homestead and also prevented title, unencumbered by the homestead, from vesting in Mr. Fishbein. Thus, since Mr. Fishbein did not procure either the divorce or title to the property unencumbered by Mrs. Fishbein's homestead rights, the mortgage did not attach as it did in Pitts.

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Palm Beach Savings' second position is that it should have an equitable lien on the property to the extent its funds were used to satisfy preexisting mortgages, taxes and liens on the property.

Mr. Fishbein defends the equitable lien count on the basis that Palm Beach Savings was negligent in the manner it closed the loan and thus should not be entitled to equitable relief.

The only case law in Florida dealing with the impression of an equitable lien on homestead property is Clutter Construction Corp. v. Clutter, 173 So.2d 761 (Fla. 3d DCA 1965). The opinion affirms the denial of an equitable lien without any factual recitation and states that "to recover an equitable lien against real property used as a homestead it is necessary for the plaintiff to establish fraud or 'reprehensible conduct'." This holding in Clutter is cited by the Florida Supreme Court with approval in Bessemer v. Gersten, 381 So.2d 1344 (Fla. 1980).

The Plaintiff has clearly shown fraud on the part of Mr. Fishbein in obtaining the loan although no fraud by Mrs. Fishbein has been shown. Under these circumstances, I find that the Plaintiff should have an equitable lien on the property to the extent that its loan proceeds were used to pay the preexisting mortgages which had attached the homestead and the unpaid taxes. While Palm Beach Savings could have been more prudent in handling the closing and such prudence may have avoiled the fraud, I do not believe that any such negligence should be a bar to an equitable lien. Palm Beach Savings' mistake, if any, was one of neglect not one of active misfeasance. Additionally, the signature which they

ORB 6488 Pg 423

relied upon was supported by the attestation of two witnesses and . . . the seal of a notary. Lastly, the homestead would have been liable for these preexisting mortgages and taxes if the Palm Beach Savings' loan had not been procured. Thus, if an equitable lien attaches, Mrs. Fishbein stands in no worse position than she stood in prior to the fraudulent mortgage.

I find that the Plaintiff's equitable lien should be in the amount of \$1,182,298.09 and that interest should accrue from June 13, 1990, at the rate of \$307.03 per day, which is twelve percent per annum. The equitable lien consists of the MacClean mortgage in the amount of \$205,722.07; the Ridgeway mortgage in the amount of \$158,828.28; the Florida National Bank mortgage in the amount of \$524,178.00; 1986 real estate taxes in the amount of \$16,051.53; 1987 real estate taxes in the amount of \$14,464.80; and 1988 real estate taxes in the amount of \$14,459.88. The total mentioned previously contains interest on these amounts at the rate of twelve percent per annum from March 25, 1988.

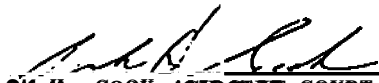
Both the Plaintiff and Mrs. Fishbein have sought attorney's fees and those claims are denied.

The house is presently being offered for sale and it would be more advantageous for the parties for the house to be sold at a private sale as opposed to a public sale. Accordingly, I am staying any foreclosure sale on the equitable lien for a period of six months during which time Mrs. Fishbein may continue with her efforts to obtain a buyer for the property.

I reserve jurisdiction to enter further orders in this cause

as may be required to enforce the equitable lien and to tax costs.

DONE AND ORDERED at West Palm Beach, Palm Beach County,  
Florida, on this 13th day of June, 1990.

  
JACK H. COOK, CIRCUIT COURT JUDGE

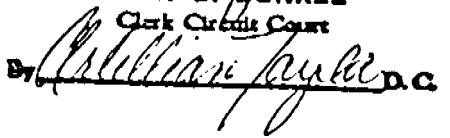
Copy furnished:

Anne' Desormier-Cartwright, Esq., P. O. BOX 4388, West Palm Beach,  
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Allan Hoffman, Esq., 1610 Southern Blvd., West Palm Beach, Florida  
33406

James A. Bonfiglio, Esq., 189 Bradley Place, Palm Beach, Florida  
33480



PALM BEACH COUNTY - STATE OF FLORIDA  
I hereby certify that the  
foregoing is a true copy  
of the record in my office.  
This 14th Day of August 1990  
JOHN B. DUNKLE  
Clerk Circuit Court  
By  D.C.

-7-

RECORD VERIFIED  
PALM BEACH COUNTY, FLA  
JOHN B. DUNKLE  
CLERK CIRCUIT COURT

RECORD VERIFIED  
PALM BEACH COUNTY, FLA  
JOHN B. DUNKLE  
CLERK CIRCUIT COURT

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA  
FOURTH DISTRICT  
JULY TERM 1991

DEBORAH FISHBEIN, )  
 )  
 Appellant/ )  
 Cross-Appellee, )  
 )  
 v. )  
 )  
 PALM BEACH SAVINGS & LOAN )  
 ASSOCIATION, F.S.A., et al., )  
 )  
 Appellees/ )  
 Cross-Appellants. )  
 )

CASE NO. 90-1937.

582/1052

Opinion filed September 4, 1991

Appeal and cross appeal from  
the Circuit Court for Palm  
Beach County; Jack H. Cook,  
Judge.

NOT FINAL UNTIL TIME EXPIRES  
TO FILE REHEARING MOTION  
AND, IF FILED, DISPOSED OF.

Allan H. Hoffman, West Palm  
Beach, for Appellant/Cross-  
Appellee.

Neil P. Linden and David B.  
Haber of Rollnick, Rosen and  
Linden, P.A., Coral Gables,  
for Appellee/Cross-Appellant-  
Palm Beach Savings & Loan  
Association, F.S.A.

GARRETT, J.

Deborah Fishbein [Mrs. Fishbein] appeals the trial court's final judgment that awarded appellee Palm Beach Savings & Loan Association, F.S.A. [Bank] an equitable lien on her Palm Beach property and the Bank cross appeals the trial court's ruling that the Bank could not foreclose its mortgage because the mortgage did not attach to the Palm Beach property on the date of

her divorce. The Bank also appeals the trial court's ruling that Mrs. Fishbein did not abandon the Palm Beach property when she moved to Boca Raton. We reverse the award of the equitable lien, but affirm the issues on cross appeal.

Mrs. Fishbein was married to Mr. Fishbein when he purchased a house located in Palm Beach in October of 1984, Mr. Fishbein took title to the property in his name alone, however, the house became their marital home. In March of 1985 Mr. Fishbein executed a quit claim deed from himself to himself and Mrs. Fishbein, as tenants by the entirety. The quit claim deed was never recorded.

Mr. Fishbein assumed an existing first mortgage on the Palm Beach house, he gave a second mortgage at the time of purchase and on November 26, 1985 Mr. and Mrs. Fishbein executed a third mortgage. The third mortgage acknowledged the existence of the first and second mortgages.

In 1988 Mr. and Mrs. Fishbein were involved in divorce proceedings. The Bank knew about the divorce when it loaned Mr. Fishbein \$1,200,000. He wrote the Bank a letter shortly before the closing inquiring whether the mortgage could be made without his wife's signature. The Bank required Mrs. Fishbein's signature but contrary to its closing procedures, permitted Mr. Fishbein to take the loan documents out of the bank and return them signed and notarized. Mr. Fishbein forged Mrs. Fishbein's signature. He secured this loan with a mortgage on the Palm Beach property and used a portion of the proceeds to pay off its three existing mortgages, back property taxes and creditor liens.

Mr. and Mrs. Fishbein's dissolution settlement agreement called for Mr. Fishbein to purchase a home for Mrs. Fishbein in Boca Raton and to make several large payments to her in addition to child support for their two children and alimony. As security for the agreement, Mr. Fishbein signed a quit claim deed on the Palm Beach property. Mrs. Fishbein's attorney was to hold the quit claim deed as security for Mrs. Fishbein in the event Mr. Fishbein failed to fulfill his part of the settlement agreement. During the settlement negotiations Mr. Fishbein represented that the Palm Beach property was owned free and clear of any liens except those being asserted by his mother and sister.

The divorce was granted in August of 1988. At that time, Mrs. Fishbein moved to the Boca Raton house Mr. Fishbein had agreed to purchase for her. However, Mr. Fishbein did not purchase the Boca Raton house nor, with the exception of one \$1,000 payment, did he make any alimony or child support payments. As a result, in November of 1988 the trial court entered a nunc pro tunc order that awarded Mrs. Fishbein the Palm Beach property retroactively to the date of the divorce decree. Mrs. Fishbein moved back into Palm Beach house in December of 1988.

On December 5, 1988 the Bank filed the complaint in this case which sought foreclosure of its mortgage on the Palm Beach property or in the alternative an equitable lien against that property. Mrs. Fishbein defended on the grounds that the Palm Beach house was homestead property, her signature was forged

on the loan documents without her knowledge or consent and the Bank **was** negligent in the **manner** in which it closed the transaction.

Initially the trial court **granted partial** summary judgment in favor of **Mrs.** Fishbein, finding the mortgage to be void. The Bank's motion **for** rehearing **was** denied. **The Bank did** not file an appeal of **this order, but several months later, it** filed a motion **for** reconsideration of the **order granting partial summary** judgment. The trial court granted the motion and vacated the partial summary judgment.

After a **bench** trial, **the** trial judge **found** that Mr. Fishbein **had** forged **Mrs.** Fishbein's signature on the mortgage **and** misrepresented that the Palm **Beach** property **was free** and clear of any liens. It ruled that Mr. Fishbein's **fraud** vitiated any intent upon **Mrs.** Fishbein's part to abandon the homestead. It also found that Mr. Fishbein's **fraud** prevented **title,** unencumbered by **Mrs.** Fishbein's right of homestead, from vesting in Mr. Fishbein as of **the date of the divorce decree.** The trial court ruled **that** because Mr. **Fishbein did not acquire title to the Palm Beach property** unencumbered by **Mrs.** Fishbein's homestead rights, the Bank's mortgage **did** not attach to the Palm **Beach** property upon **entry of the divorce decree** or upon Mrs. Fishbein's departure from the Palm Beach house. The court held that the Palm Beach **property** remained Mrs. Fishbein's homestead **and** that the Bank could not **foreclose** on its mortgage.

**However, the trial** court did award the Bank an equitable lien on **the Palm Beach property** to the extent that the

proceeds of the loan were used to satisfy the preexisting mortgages and property taxes. Although the trial court agreed with Mrs. Fishbein that the Bank was negligent in the manner by which it chose to close the loan, the trial court ruled that the Bank's conduct did not rise to the level of "active misfeasance." Finding that the Palm Beach property would have been subject to the preexisting mortgages and taxes if Mr. Fishbein had not procured the loan from the Bank, the trial court concluded that by awarding the Bank an equitable lien, Mrs. Fishbein stood in no worse position than she would have stood in had there been no fraudulent mortgage. This appeal and cross appeal followed. The Bank proceeded to execute on its judgment, but we stayed those proceedings pending the outcome of this appeal.

#### HOMESTEAD EXEMPTION

For the reasons stated by the trial judge, we agree that the Palm Beach property remained Mrs. Fishbein's homestead.<sup>1</sup>

Article X, section 4 of the Florida Constitution provides that no judgment shall be a lien on homestead property except for the payment of taxes and assessments, obligations contracted for its purchase, improvement or repair, or for labor performed on the property. The judgment, sub judice, obviously created a lien on the Palm Beach property. But, because the basis of the judgment, the loan to Mr. Fishbein, did not fall

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<sup>1</sup> The transfer of a husband's interest in homestead property to his wife pursuant to a divorce decree is equivalent to the defeasance of the husband's interest in the property which would have occurred had he predeceased the wife while the parties were still married. *Lieberman v. Kelso*, 354 So.2d 137, 139 (Fla. 2d DCA 1978).

within any of **the** exceptions enumerated in our **state** constitution the Bank cannot execute on the Palm **Beach** property. See Caggiano v. Butterworth, 16 F.L.W. D1642 (Fla. 2d DCA June 21, 1991)(**criminal** enterprise forfeiture judgment not one of the constitutional exceptions to homestead **exemption**).<sup>2</sup> The fact that Mr. Fishbein used **the proceeds** to **pay off existing mortgages and back property taxes did not change the basis of** the Bank's judgment from the loan to Mr. Fishbein to an obligation **contracted** to purchase **or to pay taxes on the Palm Beach property.**

Therefore, we affirm **the** trial court's ruling that the Bank cannot **execute on its mortgage** foreclosure judgment so long as the Palm Beach property remains **Mrs. Fishbein's** or her children's homestead **property.**

#### EQUITABLE LIEN

Mrs. **Fishbein** contends that **in order to successfully impose an equitable lien on homestead property, the creditor** must prove fraudulent or otherwise egregious **conduct** on the **part of the** beneficiary of **the** homestead. She argues that because the mortgage in question **is invalid, the Bank is not entitled to an equitable lien on the homestead property. She also contends that the Bank negligently granted the mortgage and for this reason is**

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<sup>2</sup> We acknowledge that the Fifth **District** has held otherwise, but on different grounds. See *DeRuyter v. State*, 521 So.2d 135, 137-138 (Fla. 5th DCA 1988)(homestead exemption designed to **protect real property from forced sale for debts, not criminal enterprise**).

not entitled to an equitable remedy especially when that remedy dispossesses her of homestead property.

The Bank responds that it is entitled to a lien because the proceeds of its invalid mortgage were used to pay off valid liens and property taxes on the homestead property. It argues that when a mortgage is invalid, the party granting the mortgage is entitled to an equitable lien to the extent that the proceeds of the mortgage were used to improve the property. The Bank points out that courts in Florida have imposed equitable liens on homestead property. The Bank disagrees with Mrs. Fishbein that the fraudulent or egregious conduct must be committed by the beneficiary of the homestead in order for a creditor to be entitled to an equitable lien. According to the Bank, all a creditor has to do is prove fraudulent or reprehensible conduct to be entitled to an equitable lien.

We disagree with the Bank. "The purpose of an equitable lien is to achieve right and justice, considering the relations of the parties and the circumstances of their dealings," Public Health Trust of Dade County v. Lopez, 531 So.2d 946, 948 (Fla. 1988).<sup>3</sup> However, courts may impose equitable liens against homestead real property only where the plaintiff can establish some fraudulent or otherwise egregious conduct on the part of the beneficiary of the homestead protection. Isaacson v. Isaacson, 504 So.2d 1309, 1310-1311

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<sup>3</sup> If required to do so, we would not hesitate to conclude that as between the Bank and Mrs. Fishbein, the Bank, the party who was best able to avert the loss and who was least innocent, should bear the loss caused by Mr. Fishbein.

(Fla. 1st DCA 1987). Limiting the imposition of equitable liens against homestead property to cases where the plaintiff has established fraud or other egregious conduct on the part of the beneficiary, of the protection is "consistent with the well-established principle that exceptions from the constitutional exemption from forced sale are to be strictly construed." Id. at 1311.

Despite the fact that the trial judge concluded that the Bank had not established fraud on Mrs. Fishbein's part, he imposed an equitable lien in the Bank's favor based on his finding that the Bank had established fraud on Mr. Fishbein's part. The trial judge relied on Clutter Construction Corp. v. Clutter, 173 So.2d 761 (Fla. 3d DCA 1965), which holds that to recover an equitable lien on homestead property, the plaintiff must establish fraud or reprehensible conduct.

Mrs. Fishbein correctly relies on Isaacson for the proposition that in order to be entitled to an equitable lien against homestead property a plaintiff must prove fraud or egregious conduct on the part of the beneficiary of the homestead protection. Although the Bank suggests that Isaacson conflicts with Clutter, again we disagree. The Clutter opinion provides no facts. It does not discuss the law in detail. To interpret Clutter as only requiring proof of fraud on someone's part rather than on the part of the person claiming homestead protection is to defeat the purpose of homestead protection. To allow one party's fraud to affect another party's homestead interest is exactly the same as allowing one party's debts to encumber

homestead property. In this case, applying the rule in the manner that the trial court did resulted in depriving Mrs. Fishbein of the homestead exemption provided to her by the Florida Constitution.

Based on Isaacson, we conclude that the only basis on which a court may impose an equitable lien is where there is fraud or egregious conduct by the party claiming the homestead exemption. Therefore, we hold that the trial court erred when it imposed an equitable lien against the homestead property because the Bank failed to establish fraudulent conduct on Mrs. Fishbein's part.

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However, the trial court also based its decision to impose the equitable lien on the fact that Mrs. Fishbein would have been liable for the three existing mortgages on the property if Mr. Fishbein had not paid them off with the fraudulent mortgage. In essence, the trial court imposed a lien against homestead property for an equitable reason. We hold that the trial court erred when it imposed the equitable lien on this basis. The plain language of the constitution cannot be ignored, homestead protection is not and never was based upon principles of equity. Public Health Trust of Dade County v. Lopez, 531 So.2d 946, 968 (Fla. 1988). Homestead protection has always been extended to the homesteader or his or her heirs regardless of whether the property is a mansion or a hut and regardless whether the heirs are rich or poor and regardless whether it is equitable to do otherwise,

As a matter of public policy, the purpose of the homestead 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, See Bigelow v. Dunphe, 143 Fla. 603, 197 So. 328 (Fla. 1940). [Emphaeis added.]

Id.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.

FARMER, J., concurs.

STONE, J., dissents with opinion.

STONE, J., dissenting.

I would affirm the imposition of an equitable lien on the property. The trial court has the discretion to conclude that the appellant has received a windfall constituting unjust enrichment. Therefore, the appellant cannot in good conscience retain the property free and clear of all liens. Cf. Sonneman v. Tuszynski, 139 Fla. 824, 191 So. 18 (Fla. 1939); La Mar v. Lechluder, 135 Fla. 703, 185 So. 833 (Fla. 1939); Jones v. Carpenter, 90 Fla. 407, 106 So. 127 (Fla. 1925).