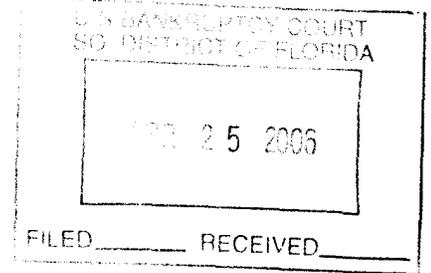


ORDERED in the Southern District of Florida on April 25, 2006



*Laurel Myerson Isicoff*  
\_\_\_\_\_  
Laurel Myerson Isicoff, Judge  
United States Bankruptcy Court



UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF FLORIDA

IN RE:

CASE NO. 05-12133-BKC-LMI

ITALO MARIO SIERVO and  
MARGARITA S. SIERVO,

Chapter 7

Debtors.

DEBORAH B. TALENFELD, TRUSTEE,

ADV. CASE NO. 05-1216-BKC-LMI

Plaintiff,

vs.

ITALO MARIO SIERVO and  
MARGARITA S. SIERVO, and  
WASHINGTON MUTUAL, INC.,

Defendants.

**ORDER DENYING DEBTOR/DEFENDANTS' MOTION  
FOR PARTIAL SUMMARY JUDGMENT (CP #33)**

This matter came before the Court on March 27, 2006 at 2:00 p.m. on Debtor/Defendants' Motion for Partial Summary Judgment. The Court having

considered the file in this adversary proceeding, including the Motion, the response of the Plaintiff thereto, the affidavits and deposition transcript filed in connection therewith, having considered argument of counsel, and otherwise having considered all matters the Court deems relevant to the consideration of this matter, the Court denies the Motion for Partial Summary Judgment for the reasons set forth below.

### **Procedural Background**

The Debtors, Italo and Margarita Siervo (the "Debtors") filed for protection under Chapter 7 of the United States Bankruptcy Code on March 24, 2005 (the "Petition Date").<sup>1</sup>

On July 25, 2005, the Trustee filed this adversary proceeding. Count I seeks a denial of the Debtors' discharge pursuant to 11 U.S.C. § 727(a). Count II, against the Debtors and Washington Mutual, Inc., seeks to recover from Washington Mutual \$115,200.00 that the Debtors paid to Washington Mutual seven months prior to the Petition Date. The \$115,200.00, admittedly proceeds from the sale of a non-exempt asset, were used to pay down the mortgage held by Washington Mutual that encumbers the Debtors' homestead.

Washington Mutual filed an Amended Answer (CP #32) raising three affirmative defenses, one of which asserts that, should the Trustee prevail in Count II, pursuant to the Note and Mortgage, Washington Mutual will be able to increase its lien on the

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<sup>1</sup>A more detailed factual background is set forth in this Court's Order Granting Motion to Strike Witness and Granting Motion of Kathe Kozlowski for Protective Order (CP #62) dated April 4, 2006.

Debtor's homestead in an amount equal to whatever amount Washington Mutual is required to pay to the Trustee.

On December 8, 2005, the Debtors filed their Motion for Partial Summary Judgment, together with supporting affidavits of the Debtors, seeking summary judgment on Count II of the Complaint. The gist of the motion is that, should the Trustee prevail in its action against the Debtors, the Debtors will have to sell their homestead to satisfy the judgment, and the Trustee will be achieving indirectly what the Florida Supreme Court held in *Havoco of America, Ltd. vs. Hill*, 790 So. 2d 1018 (Fla. 2001) the Trustee is prohibited from doing directly.

In response, the Trustee filed a Memorandum in Opposition to Plaintiff's [sic] Motion for Partial Summary Judgment (CP #56) arguing that since the Trustee is suing a third party, not the Debtor, the Trustee is not violating either the spirit or the holding of *Havoco*.

#### The Florida Homestead is Sacrosanct

All parties acknowledge the sanctity of the homestead, and the Trustee has acknowledged that even if the Debtors' motives were impure, as the Trustee alleges, the Trustee cannot, and in fact, does not attempt to, set aside the homestead exemption based on the alleged fraud perpetrated by the Debtors on their unsecured creditors. Rather, the Trustee argues, the Trustee can legitimately pursue a third party, Washington Mutual, for the return of a fraudulent transfer under applicable law.

In *Havoco*, the Florida Supreme Court held unambiguously that "the transfer of non-exempt assets into an exempt homestead with the intent to hinder, delay or defraud creditors" is not conduct for which the constitutionally protected homestead can be

compromised. **790 So. 2d at 1028.** In reviewing almost a century of its own jurisprudence, some of it admittedly confusing, the Florida Supreme Court made clear that

the use of the homestead exemption to shield assets from the claims of creditors is not conduct sufficient in and of itself to forfeit the exemption under the express terms of Article X, Section 4.

***Id.* at 1027.**

The Trustee relies on the case of ***In re Levine*, 134 F.3d 1046 (11<sup>th</sup> Cir. 1998)** as support for her argument that she may recover from a third party a fraudulent transfer of non-exempt funds. In ***In re Levine***, the Eleventh Circuit held that Fla. Stat. § 726.105, the Uniform Fraudulent Transfer Act as codified in Florida, authorized the bankruptcy trustee to recover a transfer from an otherwise exempt third party annuity fund. Since the Eleventh Circuit “allowed” the trustee in ***Levine*** to pursue a third party who had received a fraudulent transfer, the Trustee argues in this case that she is similarly authorized to proceed against Washington Mutual.

The Trustee’s reliance on ***In re Levine*** is misplaced. The Eleventh Circuit in ***Levine*** sought to reconcile two Florida statutes, Fla. Stat. § 726.105, and Fla. Stat. § 222.30 which creates the statutory exemption for annuities such as those that were the object of the trustee’s desire in ***Levine***. The Eleventh Circuit specifically noted that the annuity exemptions were creatures of statute and did not involve “the constitutionally protected homestead.” ***Levine*, 134 F.2d at 1051.**

The Florida Supreme Court in ***Havoco*** also noted this distinction, citing ***In re Levine*** as support for the proposition that Fla. Stat. § 726.105 “has no effect on the constitutionally created homestead exemption.” **790 So. 2d at 1029.**

More recently, another bankruptcy trustee relied on *In re Levine* in filing suit against a debtor to recover a fraudulent transfer. In *Chambers v. Potter (In re Potter)*, **320 B.R. 753 (Bankr. M.D. Fla. 2005)** the trustee sued the debtor under Florida's fraudulent conveyance statute seeking recovery of the amount of a non-exempt tax refund that the debtor, Mr. Potter, had used to pay down his mortgage immediately prior to filing bankruptcy. The trustee in *Potter* relied on *In re Levine* for the proposition that although the trustee could not attack the Potter's homestead, the trustee could nonetheless sue the Potters for the money transferred.

Judge Jenneman summarily dispensed with this attempt to bypass the proscriptions of *Havoco*. In distinguishing *In re Levine*, Judge Jenneman noted the Eleventh Circuit was very careful in contrasting the statutory annuity exemption that was subject to the fraudulent conveyance statute with the *constitutional* homestead protections, which could not be compromised by a statute.

Accordingly, Judge Jenneman held:

In Florida, debtors cannot be forced to sell their homestead to satisfy the claims of creditors outside of the three exceptions detailed in the State's constitution. This is particularly true where, as here, the trustee must rely on avoidance powers provided in Florida's own statutes.

. . .  
Florida homestead is protected from creditor claims whether they arise in a direct challenge to the exemption, as in *Havoco*, or by a fraudulent transfer as asserted here. Creditors may not avoid transfers into homestead property simply because the transfer was fraudulent.

**Potter, 320 B.R. at 759.**

Since the Trustee is suing a third party, not the Debtor, the Trustee argues that she may pursue the fraudulent transfer without regard to *Havoco*, whatever the

consequences to the Debtor if the Trustee prevails against Washington Mutual. The Court does not agree. If the consequence of the Trustee's action against Washington Mutual is such that the Debtors' homestead interest is impermissibly compromised, then the Trustee will not be permitted to proceed, since the Trustee cannot do indirectly what she is not allowed to do directly. **See *Havoco*, 790 So. 2d 1018; *Hill v. 1<sup>st</sup> Nat'l Bank*, 79 Fla. 391, 84 So. 190 (1920); see also *Potter*, 320 B.R. 753.**

### **Summary Judgment Standard of Review**

Federal Rule of Civil Procedure 56 governing summary judgment applies in an adversary bankruptcy proceeding. **FED. R. BANKR. P. 7056.** Accordingly, summary judgment is appropriate where the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." **FED. R. CIV. P. 56(c).** In considering whether a genuine issue of material fact remains for trial, the Court must "view all evidence and make all reasonable inferences in favor of the party opposing summary judgment." ***Loren v. Sasser*, 309 F.3d 1296, 1301-1302 (11<sup>th</sup> Cir. 2002).** However, a "mere 'scintilla' of evidence supporting the opposing party's position will not suffice, there must be enough of a showing that the jury could reasonably find for that party." ***Id.* at 1302 (quoting *Walker v. Darby*, 911 F.2d 1573, 1577 (11<sup>th</sup> Cir. 1990)).**

Thus, in order to grant the Debtors' Motion for Partial Summary Judgment, the Court must determine whether there is any genuine issue of material fact with respect to determining whether the foreseeable consequence of the Trustee's action is that the

Debtors' homestead will be impacted in a way that is prohibited by the Florida constitution.

However, on the record before the Court on this Motion for Partial Summary Judgment, it is not clear whether the consequence of the relief sought by the Trustee in Count II, in fact, would be the result of the Trustee's success, and accordingly, Debtors' Motion for Partial Summary Judgment on Count II is denied without prejudice.

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Copies to:  
Leslie Osborne, Esq.  
Kathe Kozlowski, Esq.

*Attorney Leslie Osborne shall serve a conformed copy of this Order upon all parties in interest and shall file a Certificate of Service of same with the Clerk of Court.*