IN THE SUPREME COURT OF FLORIDA

CASE NO. 63,017

CHASE FEDERAL SAVINGS
AND LOAN ASSOCIATION,

Petitioner,

vs

JERRY B. SCHREIBER,
as Personal Representative
of the Estate of THEADORES
WINLACK ROSS,

Respondent.

APPEAL FROM THE DISTRICT
COURT OF APPEAL OF FLORIDA
THIRD DISTRICT, CASE NO. 80-1213

REPLY BRIEF OF PETITIONER

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STATEMENT OF THE CASE AND OF THE FACTS

The Answer Brief of Respondent, ROSS, includes a Statement of Case and Facts which fails to clearly specify areas of disagreement with the statements contained in Petitioner, CHASE's Initial Brief. The Statement of the Case and Facts made by Respondent, ROSS, is argumentative and merely restates paragraphs 2, 3, 4, 6, 8, and 9 of the Complaint initially filed by ROSS. (R:1&2)

Petitioner suggests that the restatement of the case and facts contained in Respondent, ROSS's Answer Brief should have been omitted, and Petitioner specifically disagrees with three areas therein.

First, PETER R. COURNOYER failed and refused to answer any questions regarding any facts relating to the subject of this lawsuit including his relationship with ROSS and any consideration given for any property that may have been transferred, (T-2:34-40) and the record on appeal and transcripts of the trial, therefore, reflect no facts as to his personal knowledge, endeavors, attempts or intentions. The record does reflect, through the testimony of ROSS, that COURNOYER was not a friend (T-1:38) and that he did not handle all of her business and financial matters (T-1:68).

Second, ROSS's Exhibit Composite 3, contains a letter dated September 28, 1977 from Leonard J. Altamura, Esq., advising that his office represented PEREZ in the purchase of the property which is the subject of this litigation. ROSS's Exhibit Composite 3, also contains a statement executed by LUIS PEREZ and GLADYS PEREZ on October 6, 1977 acknowledging that legal services performed on behalf of the lender, CHASE, by their attorney, were not being performed on behalf of the borrower, PEREZ.

Finally, Petitioner herein, CHASE, and Petitioner in the Supreme Court of Florida, Case No. 63,025, PEREZ, seek review of an Order rendered on December 10, 1982.

ARGUMENT

ISSUE I

IF RESPONDENT IS CORRECT THAT THIS COURT LACKS JURISDICTION TO REVIEW THE APPEAL OF CO-DEFENDANTS, PEREZES, PETITIONERS IN CASE NO. 63,025 PRESENTLY BEFORE THIS COURT, THIS APPEAL AS TO PETITIONER, CHASE, IS NOT MOOT.

It is improper to raise an issue for the first time in a Reply Brief, but Petitioner, CHASE, is compelled to go beyond the scope of issues presented in the Initial Brief in order to respond to the issues raised for the first time herein before this honorable Court by Respondent in its Answer Brief. Denny vs Denny, 334 So. 2d 300 (Fla. 1st DCA 1976).

Petitioner, CHASE, and this Court are aware that a mortgage does not convey title to real property within this jurisdiction, but rather creates a lien on such real property.

Petitioner, CHASE, therefore, filed, on October 27, 1982, (A-20, Petitioner's Appendix) its Motion for Rehearing of an Order which cancelled deeds to COURNOYER and PEREZ and the CHASE Mortgage which had created a lien on the subject real property. CHASE suggested that the Appellate Court may have overlooked or failed to consider the existence of two separate Deeds of conveyance in the chain of title between ROSS, as Grantor and COURNOYER, as Grantee. The Motion further asserted that the first Deed referred to above, contained the usual recital of "a good and valuable consideration" and was, therefore, valid.

It is uncontroverted, that CHASE, a real party in interest, herein, timely filed a Motion for Rehearing, Fla. R. App. P. 9.330 (a), and that both CHASE and PEREZ were Appellees in the case pending before the District Court of Appeal. Fla. R. App. P. 9.020 (f)(2).

Fla. R. App. P. 9.020 (g) states:

> "Where there has been filed in the lower tribunal, an authorized and timely Motion for ... Rehearing ... the Order shall not be deemed rendered until disposition thereof."

On December 10, 1982, the District Court of Appeal entered its Order denying CHASE's Motion for Rehearing (A-6, Respondent's Appendix) and thereby rendered the decision of the Appellate Court previously entered on October 12, 1982. As no notice of intent to invoke the discretionary jurisdiction of the Supreme Court of Florida can be filed until an Order is rendered, Fla. R. App. P. 9.120 (b), neither CHASE nor PEREZ could have sought review by this Court prior to December 10, 1982.

CHASE filed its Notice to Invoke Discretionary Jurisdiction on December 22, 1982. PEREZ filed its Notice to Invoke Discretionary Jurisdiction on December 29, 1982. It is, therefore, inconceivable that Petitioner, CHASE's Appeal could be rendered moot, when both CHASE and PEREZ have separately sought to invoke this Court's jurisdiction pursuant to Fla. R. App. P. 9.120 (b) within thirty days of the rendition of the Order sought to be reviewed, said Order being rendered on December 10, 1982.

Assuming arguendo that the Deeds to COURNOYER and PEREZ were cancelled, or that this Court lacked jurisdiction to review the Appeal of PEREZ in Case No. 63,025, CHASE would still be before this Court having properly sought to invoke discretionary jurisdiction. Fla. R. App. P. 9.030 (a)(2)(A). CHASE could still seek the relief sought in Petitioner's Initial Brief or CHASE could seek relief to the extent of its entitlement to an equitable lien in the amount spent in satisfying the existing liens and encumbrances on the property, more specifically, a mortgage in favor of Sun Bank of Miami West, which was satisfied by CHASE. Houston vs Mentelos, 318 So. 2d 427 (Fla. 3d DCA 1975).

ISSUE II

THE DISTRICT COURT OF APPEAL INCORRECTLY DETERMINED THAT LUIS PEREZ AND GLADYS PEREZ ALONG WITH PETITIONERS, CHASE, ARE NOT BONA FIDE PURCHASERS WITHOUT NOTICE OF THE FAILURE OF CONSIDERATION IN SUPPORT OF THE DEED TO COURNOYER, THEIR GRANTOR, AND THE RESULTING INVALIDITY OF THE DEED.

Petitioner, once again, acknowledges that it is improper to raise an issue for the first time in a Reply Brief, but Petitioner, once again, is compelled to go beyond the scope of issues presented in the Initial Brief in order to respond to the issues raised for the first time by Respondent in its Answer Brief, which fails to respond to the points raised by Petitioner in the Initial Brief.

Respondent, ROSS, urges that there existed a duty to make an inquiry into the validity of the two separate Quit-Claim Deeds between ROSS, as Grantor and COURNOYER, as Grantee, and that such duty arose from actual, implied, or constructive notice received by CHASE and PEREZ, said notice being of such a nature as to preclude the trial Court and the Appellate Court from finding LUIS PEREZ and GLADYS PEREZ bona fide purchasers for value without notice.

To do this, ROSS must ignore the good faith negotiations between PEREZ and the realtor representing the seller, COURNOYER; PEREZ's lack of knowledge as to any potential title problems; and the payment of Fifty Thousand Dollars ($50,000.00) as full valuable consideration by PEREZ and CHASE to COURNOYER. ROSS

must also ignore the testimony of sellers' attorney, as to his standard office practice concerning the preparation of the second corrective Quit-Claim Deed and in place thereof, substitute speculation as to matters as they may have occured.

ROSS seeks to imply constructive notice, not of any matters ascertainable from the face of any Deeds which form an essential link in the chain of title, but specifically from matters not appearing therein. The Deeds forming essential links in the chain of title were introduced into evidence by ROSS and marked as ROSS's Composite 1.

The corrective Quit-Claim Deed in the chain of title was a Deed of confirmation prepared by an experienced attorney (T-2:58,60) merely to clear title to the subject property (T-2:66,68) only after the deposit receipt contract on the subject property had been executed by PEREZ and COURNOYER (ROSS's Composite 3). That Quit-Claim Deed had the same effectiveness as to a bona fide purchaser under the recording act as would a Warranty Deed. Section 695.01 (2), Florida Statutes (1979).

There were no recorded instruments in the chain of title which would have given constructive notice or implied actual notice to CHASE or PEREZ. There was no other continuing action, or exercise of rights, which would have put CHASE or PEREZ on notice. In ZAUCHA vs TOWN OF MEDLEY, 66 So. 238 (Fla. 1935), a roadway on the property was being used for public travel, which fact was known to Appellants, and the public records

referred to an amended plat recorded in the public records of the county. In Leffler vs Smith, 388 So. 2d 261 (Fla. 5 DCA 1980), continuous use of the lot in question for many years, coupled with reservations in the Deed of property from the original owner to the developer, gave notice.

Therefore, it becomes evident that the test in Florida for constructive notice or implied actual knowledge would require two elements; first, something in the record to apprise a potential purchaser of the rights of another, and second, the exercise and use of those rights by others. Neither element is present in the case at bar, and notice, constructive or implied, cannot, therefore, be charged to the bona fide purchasers, PEREZ.

As none of the Deeds in the chain of title were those of a guardian, we may dispense with the constructive notice of a guardian's Deed and readily distinguish the case at bar from Sapp vs Warner, 105 Fla. 245, 141 So. 124, 143 So. 648, 144 So. 481 (1932).

As the case at bar does not present a question of adverse possession by Appellant (T-1:72), it is readily distinguishable from MacEwen vs Peterson, 102 Ariz. 209, 427 P. 2d 527 (1967), where a cursory title examintation would have revealed that record title was held by more then one party; and Henson vs Bridges, 218 Ga. 6, 126 S.E. 2d 226 (1962), where two Deeds dated 1944 and 1950 in the muniments of title which excepted two acres used by Andrew's Chapel Church were held sufficient to put a purchaser on inquiry; and Davis vs Kleindienst, 62

Ariz. 251, 169 P. 2d 78 (1946), where evidence disclosed numerous acts of obvious ownership including the platting and filing of the plat with the city council.

As no Deed in the chain of title disclosed any encumbrances, the case at bar is readily distinguishable from University of Richmond vs Stone, 148 Va. 686, 139 S.E. 257 (1927), where the rights of holders of the promissory notes appeared upon the face of the duly recorded Deed of trust and thereby gave actual notice; and McCausland vs Davis, 204 So. 2d 334 (Fla. 2d DCA 1967), where a Bill of Sale for an airplane showed on its face that an encumbrance existed and notice of an unrecorded chattel mortgage was thereby implied.

PEREZ had no actual knowledge of ROSS's claim and the case at bar may, therefore, readily be distinguishable from Hagan vs Sabal Palms, Inc., 186 So. 2d 302 (Fla. 2d DCA 1966), where there was actual notice of a common restriction in the original Deeds from a common grantor; and from First Federal Savings and Loan Association of Miami vs Fisher, 60 So. 2d 496, Fla. 1952), where there was actual notice at the time the mortgage was executed that the husband's son has an interest in the property; and from Rinehart vs Phelps, 7 So. 2d 783 (Fla. 1942), where there was expressed actual implied notice of the Probate Court's Order.

The many substantial differentiating facts distinguishing Florida National Bank and Trust Company of Miami vs Havris,

366 So. 2d 491 (Fla. 3d DCA 1979) had been set forth in Point II of Petitioner's Initial Brief and need not be restated here.

As the validity of a Deed does not depend on the real consideration being expressed therein, there can be no duty on the part of PEREZ or CHASE to inquire into the consideration given. Mexican Crude Rubber Company vs Ackley, 101 Fla. 552, 134 So. 585 (1930). However, assuming arguendo that there existed such a duty, ROSS would have to be estopped from denying consideration, as a cash consideration was recited in both Deeds (T-1:95) Campbell vs Carruth, 32 Fla. 264, 13 So. 432 (1893); Daniell vs Sherrill, 48 So. 2nd 736 (Fla. 1950), 23 ALR 2d 1410.

By virtue of being validly executed and recorded, the corrective Quit-Claim Deed's validity is presumed Gregory vs Lloyd, 284 F. Supp. 264 (N.D. Fla. 1968). Furthermore, because it was under seal and recited consideration, a lawful consideration would additionally be presumed. Crockett vs Crockett, 145 Fla. 311, 199 So. 337 (1940); Scoville vs Scoville, 40 So. 2d 840 (Fla. 1949); Saltzman vs Ahern, 306 So. 2d 537 (Fla. 1st DCA 1975). Finally, the consideration clause in either Deed was conclusive for purposes of giving effect to the operative words transferring title from ROSS to COURNOYER. Florida Moss Products Company vs City of Leesburg, 93 Fla. 656 112 So. 572 (1927).

Assuming arguendo, that there was actual knowledge gained from a "non-relative" affidavit in the abstract of the chain of title for the property in question, and that this actual knowledge supported the lack of consideration asserted by ROSS,

as grounds for recission, PEREZ would still be a bona fide purchaser without notice. Consideration is not essential for the validity of a Deed and is neither required nor mentioned in Florida Statutes Section 689.01 Fla. Stat. (1979) dealing with the conveyances of real property. 1 Florida Real Estate Transactions, (Boyer 1980) Section 11.01. As pointed out in Williamson vs Kirby, 379 So. 2d 693 (Fla. 3d DCA 1980), a Deed without consideration is valid absent a finding of fraud or undue influence. As there was no testimony nor findings of fraud or undue influence in the case at bar, the Deeds must be found to be valid.

ROSS has failed to offer any facts or law which would place CHASE and PEREZ on actual, implied, or constructive notice of any infirmities in the chain of title. ROSS has further failed to offer any law which would impose upon CHASE and PEREZ a duty to inquire beyond or behind the face of any Deed which forms an essential link in the chain of title.

ISSUE III

THE SCOPE OF REVIEW FOR DISTRICT COURTS OF APPEAL IN GRANTING REHEARING EN BANC AS STATED HEREIN IS IMPROPER.

The majority opinion below has improperly defined the scope of review to be applied in granting Motions for Rehearing En Banc, when it abandoned the past prerequisite scope which required direct intra-district conflict, and sought to develop as the appropriate standard or scope of review that:"...decisions lack uniformity whenever it appears that they are so inconsistent and disharmonious that they would not have been rendered by the same panel of this Court." (A-2).

Fla. R. App. P. 9.331 (b) provides for Hearings En Banc to maintain uniformity while Fla. R. App. P. 9.331 (c) provides for Rehearings En Banc when an intra-district conflict of decisions exist; the former being a proceeding which may not be requested by a party and one which occurs before or prior to an Appellate Court's entry of a decision. The latter, Rehearing En Banc, is an extraordinary proceeding which may be requested by a party only after a panel decision has been entered.

The key operative words of the rule dealing with Rehearings En Banc, Fla. R. App. P. 9.331 (c)(2) are contained in the required statement for Rehearing En Banc, and are patterned after the form of suggestion, Fed. R. App. P. 26 (f)

required by the United States Court of Appeals for the Fifth and Eleventh Circuits. The attorney seeking this extraordinary Rehearing, must state that he believes based on a reasoned and studied professional judgment:

> "...that the panel decision is contrary to the following decision(s) of this Court..."

The committee notes to Fla. R. App. P. 9.331(c)(1) assert that a litigant may apply for the extraordinary Rehearing only on the grounds that an intra-district conflict of decisions exists. The committee notes to Fla. R. App. 9.331(a) further assert that "maintenance of uniformity" is the equivalent of decisional conflict as derived byt the Supreme Court.

Contrary to the assertions of Respondent, ROSS, that the broader scope of review is a practical and usable standard which can be measured by anyone concerned with a particular decision, the Petitioner, CHASE, asserts that a broader scope of review calls for speculation and is vague and ambiguous on its face. It requires a Judge who may or may not have been a member of a specific panel which entered the decision from which Rehearing En Banc is sought, to decide whether that specific panel would have rendered that decision as well as a prior decision which is inconsistent and disharmonious. It further requires a Judge, who may or may not have been a member of a particular panel which entered a prior decision, to decide whether that specific panel would not have rendered the decision from which Rehearing En Banc is sought, because the two decisions

are inconsistent and disharmonious. The broader scope requires not merely that a Judge walk in the shoes of another panel of Judges, but that he walk simultaneously in the shoes of two separate panels of Judges, and search for inconsistency and disharmony.

The speculative, vague and ambiguous nature of the broader scope of review is pointed out by Respondent ROSS who suggests that the broader scope of review espoused herein could be used by various Courts of Appeal to develop new precedents within a specific district which would comply with decisions rendered by Courts in other districts. This process would probably reduce the number of inter-district conflicts, but would do so at the expense of usurping the Constitutional power vested in the Supreme Court of Florida, creating, rather than resolving, additional intra-district conflicts, and depriving litigants of a clear statement of the law within that specific district.

Petitioner, CHASE, would be remiss if it failed to again point out the irony of the decision rendered herein, which itself contains a decisional conflict between the majority and the plurality of the Third District Court of Appeal which reaches an opinion on the merits and then decides it should not have reviewed the case, thereby creating the exact situation that it has previously sought to avoid by requiring intra-district decisional conflict as the only basis for an En Banc Rehearing.

CONCLUSION

The Petitioner, CHASE, has properly sought to invoke the discretionary jurisdiction of this Court. It has pointed out the obvious factual distinctions between the present case and previous intra-district and inter-district decisions. It has noted the inability of Respondent to offer any facts or law which would impose a duty of inquiry beyond or behind the face of any Deed forming an essential link in the chain of title, or the reason for such inquiry if the duty existed. Finally, it has shown that the proposed enlarged scope of review for Rehearings En Banc introduces ambiguity and speculation by departing from the decisional conflict rule as conceived by the drafters of the Rehearing En Banc Rule and as previously adopted by the lower Court.

For the above reasons, and each of them, the Petitioner, CHASE, respectfully prays and concludes that the trial Court's ruling, which was affirmed by a panel of the Third District Court of Appeal, whould be reaffirmed, that the panel decision should be reinstated and that the Order authorizing an En Banc Rehearing and the Opinion on Motion for Rehearing En Banc Granted, should be vacated.

Respectfully submitted,

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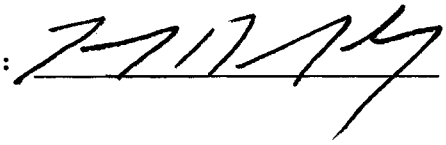
By: 

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the Reply Brief of Petitioner, Chase Federal Savings and Loan Association, was served by mail this 21st day of March, 1983 to: Joseph A. McGowan, Esquire, Suite 209, 19 West Flagler Street, Miami, Florida, 33130, Jerry B. Schreiber, Esquire, 207 Biscayne Bldg., 19 West Flagler Street, Miami, Florida, 33130, and John H. Duhig, Esquire, Suite 1133, CNB Building, 25 West Flagler Street, Miami, Florida, 33130.

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