o/a 12-6-83

IN THE SUPREME COURT OF THE
STATE OF FLORIDA

S.C. FILE NO.: 63,150

EDWARD CERRITO and JOAN R. CERRITO,

Petitioner,

vs.

JAQUELINE R. KOVITCH, et al.,

Respondent,

_____/

ANSWER BRIEF OF RESPONDENTS

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CITATION OF AUTHORITIES

STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

The Respondent, JACQUELINE R. KOVITCH, accepts the statement of the case and the statement of the facts as set forth in the Petitioners' Initial Brief.

ISSUES FOR DETERMINATION

I. THE LOWER COURT DID NOT ERR IN STRIKING THE PETITIONERS' DEMAND FOR JURY TRIAL ON THE ISSUES CONTAINED IN THE PETITIONERS' AFFIRMATIVE DEFENSES AND COUNTERCLAIM OF USURY.

II. THE LOWER COURT DID NOT ERR IN ENTERING A FINAL JUDGMENT OF FORECLOSURE IN LIGHT OF THE USURIOUS NATURE OF THE TRANSACTION AND THE CONDUCT OF JACQUELINE KOVITCH BEFORE AND DURING LITIGATION.

III. THE LOWER COURT DID NOT ERR BY DISMISSING THE PETITIONERS' COUNTERCLAIM WITH PREJUDICE.

IV. THE LOWER COURT DID NOT ERR IN SETTING THE CASE FOR TRIAL BEFORE THE ENTIRE ACTION WAS AT ISSUE.

I. THE LOWER COURT DID NOT ERR IN STRIKING THE PETITIONERS' DEMAND FOR JURY TRIAL ON THE ISSUES CONTAINED IN THE PETITIONERS' AFFIRMATIVE DEFENSES AND COUNTERCLAIM OF USURY.

For purposes of this Brief, the parties will be referred to as they appeared in the Lower Court. The CERRITOS will be referred to as the Petitioners and the KOVITCHS will be referred to as the Respondents.

The symbol "A" will be used to refer to the Appendix on the Petitioners' Brief on Jurisdiction.

The symbol "R" will refer to the record on appeal in the Lower Court.

At the outset of its decision, the Fourth District Court of Appeal pointed out that the Petitioner had raised "....usury as a counterclaim rather than pleading it as an affirmative defense" (A-1).

The Appellate Court also reaffirmed that usury is a creature of statute and as set forth in a prior holding of the Fourth District Court of Appeal, Moretto vs Sussman, 274, So 2d, 259, 260, (Fla. 4th DCA 1973); ".....usury violations are statutorily governed and give rise only to those penalties and relief statutorily contained as provided. Other damages compensatory or punitive are not recognized or permitted".

The Appellate Court further stated:

".....usury in the customary setting is solely an equitable affirmative defense whether alleged in an action at law on the debt or in an equitable action to foreclose on the security for that debt. (Despite the prohibition by modern rules of procedure merging law and equity, distinguishing between the two sometimes aids analysis)".

The Appellate Court reviewed the case law in Florida and reaffirmed the principals cited in Diversified Enterprises, Inc. v West, 141 So 2d 27, 29 (Fl. 2nd DCA 1962); Tel. Services Co. v General Capital Corp. 227 So 2d 667 (Fl. 1969); as well as other cases referred to in its opinion in Moretto vs Sussman, supra.

In Florida there appears to be only one opinion which collides with the otherwise established case law of this state and that is the case of Smith vs Barnett Bank of Murray Hill, 350 So 2d 358 (Fla. 1st DCA 1977).

The Fourth District Court of Appeals in the opinion sought to be reviewed herein held that while they agreed with the general rationale set forth in Smith, they did so, with, "One important and indeed determinative exception". They disagreed that the usury statute creates a cause (right) of action for money damages. The lower Appellate Court further agreed that pronouncements set forth in High Tower vs Bigoney, 156 So 2d 501 (Fla.1963) were correct. That opinion recognized that the filing of a compulsory counterclaim for relief cognizable at law in an action for equitable relief does not waive jury trial on

the counterclaim issues. The Court stated however, that while they had no quarrel with the correctness of that proposition, "its extention to equate the defense of usury with such a 'legal issue' is in our view unjustified". (emphasis supplied).

The Smith Court has held that usury can be pleaded as a counterclaim even though the usury statute and the Rules of Civil Procedure specifically deem it to be an affirmative defense. Therein lies the difference. and that difference was initially considered by the Appellate Court in the very first paragraph of its opinion which states:

> ".....Appellants raised usury as a counterclaim rather than pleading it as an affirmative defense".

Petitioners have not cited one case in any jurisdiction which has dealt with this problem. Petitioners have instead cited cases involving eviction, tax disputes, as well as other cases in which the governing statute specifically allowed for jury trial.

If the Petitioners position has merit then this Court must declare F.S. 687.04 as unconstitutional in that it violates the right to jury trial. This Court has hertofore determined that the usury statute is constitutional. Acknowledging its constitutionality, the lower Court, as affirmed by the Appellate Court did nothing more than track the language of the statute as well as the governing rules of Civil Procedure in determining that the defense of usury, was just that, a defense, and not a counterclaim and properly struck the counterclaim and the demand for jury trial.

The Respondents do not quarrel with the statement made in

Smith that it is, ".....insignificant to the determinations of counterclaimants' right to a jury trial, that the right of action they assert is created by statute, rather than by common law".

The error of the Smith Court was in determining that a counterclaim was the proper vehicle for determining the usury issue. There are no cases in Florida to support this proposition, nor as stated above, has the Petitioner cited any cases in support of that proposition.

II. THE LOWER COURT DID NOT ERR IN ENTERING A FINAL JUDGMENT OF FORECLOSURE IN LIGHT OF THE USURIOUS NATURE OF THE TRANSACTION AND THE CONDUCT OF JACQUELINE KOVITCH BEFORE AND DURING LITIGATION.

The Petitioners have at all stages of this litigation, that is in the Trial Court, as well as the Appellate Court, contended that the promissory note which was the obligation upon which the mortgage was foreclosed, was usurious on its face. This has never been borne out by the testimony of any witnesses called on behalf of the Petitioners nor from the testimony of the Respondent. As a matter of fact an examination of the promissory note and mortgage, clearly establishes a distinction between the interest sought to be charged against the corporate borrower, the maker of the note, and the individuals, who guaranteed the note, and who in fact mortgaged the subject property. The mortgage, a copy of which was attached to the Respondents' Complaint filed in the Trial Court below, (A-2), clearly shows that the interest contemplated against the mortgagors, was 10% both from the stand point of interest on the obligation and even deferred interest. This Court is respectfully directed to paragraph 3 and 4 of the said mortgage. The interest on the promissory note however, is a different matter. That note was executed by Ed-Jo Corp., of Florida, Inc., who was first named in the Trial Court proceedings as a Defendant. Thereafter, for purposes best known to the Petitioner, the Corporations interest in the litigation, was abandoned, as reflected by the fact that the Corporation was named as an additional Appellee in the Appellate

proceedings and has been named herein as an additional Respondent in these proceedings. It is interesting that Counsel for the Petitioner herein was in fact Counsel for the Corporate Defendant in the trial proceedings below, but from the date of entry of the Judgment against the Corporate Defendant, has no longer acted in any legal representative capacity as to that adverse party. As stated above, the promissory note executed by the Corporation, was to bear interest at 15% per annum. This was appropriate interest for corporate obligation on the date of the execution of the note in question, 1977. This note is referred to in the mortgage which was attached to the Respondents' initial Complaint and has been filed in the Petitioners' appendix (A-2).

Since Petitioners had made reference in their argument to portions of the transcript taken of the testimony in the Trial Court proceedings, Respondents will also point out the following:

1. The Petitioner, Joan Cerrito, called as an adverse witness in the Trial Court, testified that neither of the Respondent , Jacqueline R. Kovitch, or Louis Kovitch, induced them, or in any way suggested that they form the Corporation, Ed-Jo Corp. She stated that her Husband had told her that the mortgage broker Frank Scaltrito had been the one who suggested the formation of the corporation (R017), (R-284), (R-293-294). The Petitioners further acknowledged during the course of their testimony that they executed numerous documents at the time of closing which were introduced into evidence during the Plaintiffs'case, which were in

their corporate capacity and in effect confirmed and re-confirmed that the transaction in question was going to be a corporate loan secured by a mortgage on their residence. One of those documents was the affidavit signed by the Petitioners at the time that the transaction was closed (R-828).

In the case of Dixon v. Sharp, 276 So2d 817 (Fla. 1973), the matter of usury was reviewed at great lengths in this Court in a well reasoned and oft-cited opinion, Justice Roberts set forth the four requisites of a usurious transaction which are:

> "1. A loan expressed or implied;
> 2. An understanding between the parties that the money lent shall be returned;
> 3. That for such a loan a greater rate of interest than is allowed by law shall be paid or agreed to be paid as the case may be;
> 4. There must exist a Corrupt intent to take more than the legal rate for the use of the money loaned."

The Court went on to recognize that usury is largely a matter of intent, that it is not fully determined by the fact that the lender actually receives more than law permits, but is determined by existence of a Corrupt purpose in the lender's mind to get more than the legal interest for the money lent (page 820 of the opinion).

The Court went on to say that in reviewing the claim of defense of usury, the circumstances surrounding the entire agreement must be proved and then must be carefully scrutinized by the Court. Further, that the requisite intent can not be determined solely from the mathematical consequences of the agreement entered into between the parties. Corrupt intent should

be determined from all of the circumstances surrounding the transaction rather than being determined by an inflexible rule which measures the mathematical result.

The Petitioners herein in their brief, have setforth a breakdown of the so called various "disguised" interest charges to establish that the transaction between the parties was tainted with usury. They refer to such items as brokerage commission, title policy, and attorneys fees. As previously argued in the Respondents' Appellate Brief, the Courts of this State have considered each one of these factors and have determined that with the transaction, is in fact an arms length one, that these are not "disguised" interest charges. In the case of Shaffron v. J.E. Holness, 102 So2d 35 (Fla. 2d DCA 1955) the Court held that when the borker is not closely connected with the lender and rather is held to be an agent of the borrower, that fees and commissions paid to that broker are not interest because the lender did not receive the fees nor benefit by their payment. The testimony at the time of trial, clearly established that the mortgage broker was at all times the Petitioners' agent. The Petitioners went to him long before they met the Respondents, Kovitch. That the said mortgage broker was acting for them in trying to place their loan, and by their execution of their loan application agreement which preceeded the transaction, they agreed to pay him a brokerage commission. In the case of Mindlin v. Davis, 74 So2d 789 (Fla. 1954) the Supreme Court in reviewing

the transaction claim to be usurious, considered the matter of attorneys fees and other expenses in determining whether or not the same should constitute additional interest thereby creating usury. The Court in its opinion at page 792 said:

> "It is settled in this state that the borrower may legitimately agree with the lender to pay actual reasonable expenses of examining and appraising the security offerred for the loan as well as the cost of closing the transaction, even if such payments when added to the interest contracted for, exceed the maximum interest allowd by law. Pushee v. Johnson, 123 Fla. 305, 166 So. 847, 105 ALR 789. Examining title of the loan security and handling the closing of the loan are services traditionally rendered by attorneys at law and involve an actual expense to the lender which he passes on to the borrower under the rule quoted."

The Court in considering the facts in the Mindlin case concluded that the attorney's participation in the transaction involved in that case went no further than the rendering of a legitimate legal service and that the attorneys fees is legally chargable to the borrower under the general rule of Pushee v. Johnson, 123 Fla. 305, 166 So. 847, 105 ALR 789.

Petitioners herein claim that the services rendered by the Respondents' attorney in the transaction, should not have been charged to the Petitioners and were "disguised" interest. An examination of those services, established that they were no more or less than any other services contemplated in a transaction of this nature and were both actual and reasonable expenses which should be directly atributable to the loan.

Petitioners' contention as to the action the Respondent, JACQUELINE KOVITCH should have taken, that is to say suit on

the note as opposed to foreclosure, can only be described as specious. The Petitioners themselves as established by their testimony, had a prior record of financial problems, as a result of which they sought out the services of the mortgage broker in order for him to obtain a willing lender to bail them out of their financial troubles. Now Petitioners say to this Court, you should have sued us on the note rather than taken away our home which we the Petitioners gave you as collateral on a corporate obligation, and which corporation was formed not at the request or inducement, or even with knowledge of the Respondents, but rather at the sole whim and caprice of the Petitioners in order to affect a transaction which they now complain of as being usurious. This argument is akin to a child murdering his parents and then throwing himself on the mercy of the Court because he is an orphan.

The Lower Court when presented with all of the evidence and testimony, could have only found one way and that is that the transaction in question was in no way usurious and it was for that reason that the Lower Court, gave no consideration or set-off of any of the claims of the Petitioners herein, but on the contrary entered judgment in full and accordance with the foreclosure relief requested by the Respondents. This judgment, has been fully affirmed by the appellate Court below.

III. THE LOWER COURT DID NOT ERR BY DISMISSING THE PETITIONERS' COUNTERCLAIM WITH PREJUDICE.

The Petitioners still contend that they had a valid Counterclaim. As previously argued before the Appellate Court, this Court is respectfully directed to the fact that the only so called "Counterclaim" pending before the Court at the time of final hearing, was the third "Counterclaim" filed by the Petitioners at which time they first named the Respondent, Louis Kovitch as a Third Party Defendant (R-405-406). There was no pending "Counterclaim" by any of the Petitioners below or even the named Respondent herein Ed-Jo Corp., against the Respondent, Jacqueline Kovitch.

The record further establishes however, the Petitioners totally failed to produce any evidence in support of their so called Third Party "Counterclaim" against the Respondent, Louis Kovitch. The relief requested in their "Counterclaim" was a prayer that the promissory note executed by the Petitioner be declared null and void and that a judgment be entered against the Respondent, Louis Kovitch for both compensatory and punitive damages as well as cost and attorneys fees. The sum and substance of that "Counterclaim" appears to be the contention that the Respondent, Louis Kovitch was the real party and interest in the transaction and that the Respondent Jacqueline Kovitch was his alter ego. These are the issues which the Petitioners had to establish before the Court, and which the Court determined they failed to establish, hence their so called Third Party "Counterclaim" was appropriately dismissed with prejudice.

IV. THE LOWER COURT DID NOT ERR IN SETTING THE CASE FOR TRIAL BEFORE THE ENTIRE ACTION WAS AT ISSUE.

The record reflects that on February 13, 1981 the Respondent, Jacqueline Kovitch filed her notice for non-jury trial (R-390). On February 20, 1981 the Court entered an order setting a non-jury trial and scheduling the same for the week begining Monday, July 13, 1981 and attached to that order was the local form used by the Broward County Circuit Court for uniform pretrial procedure (R-392-393). The Petitioners contend that the action was prematurely noticed for trial, prematurely set for trial and prematurely tried. The record reflects otherwise. The Complaint in this matter was filed on August 2, 1979, the Answer and "Counterclaims" of the Petitioner Cerrito and the named Respondent herein Ed-Jo Corp., was filed October 30, 1979 (R-332-336;337-340). The reply to the affirmative defenses and the Answer to the so called "Counterclaim" was filed November 13, 1979. The Answer to the "Counterclaim" of Ed-Jo Corp. was filed November 21, 1979. It was only after the Appellate Court had disposed of the Petitioners' interlocutory Appeal concerning the trial Court's prior order which granted the Respondent, Kovitch's Motion to Strike the Petitioners' Demand for Jury Trial, that the Respondent, Jacqueline Kovitch then noticed the matter for non-jury trial as indicated on February 13, 1981 (R-390). The Respondent Jacqueline Kovitch further filed a Motion to Strike the Petitioners claims for both compensatory and punitive damages and that Motion was disposed of in her favor on May 1, 1981 (R-404) which was after

she had noticed the matter for non-jury trial. At no time however, did the Petitioners, Cerrito ever challenge the Order setting the non-jury trial, in the Court below either prior to the trial or after the trial. Their only challenge to this was asserted during the Appeal. It is to be further noted that the Petitioners, Cerrito filed a Motion for Re-hearing in the Trial Court. That Motion was filed solely on behalf of the Petitioners, Cerrito and did not even include at that juncture the Corporate Defendant, Ed-Jo Corp. The Petition for Re-hearing only directed itself to the failure to surrender the original of the note and mortgage. At no time did that Motion for Re-hearing address itself to any impropriety in the Trial Court having set the cause for trial while the Respondent, Kovitch's Motion to Strike Compensatory and Punitive Damages was still pending.

As argued in the Appellate Court below, the case of Davis v. Hagin, 330 So2d 42 (First DCA 1976), considered the matter of a technical violation of R.C.P. 1.440 (C). Coincidentally that case dealt with a mortgage as well. In that case it appears that the Lower Court had overruled a Mortgagors objection of insufficient notice by the Mortgagees as to a date of trial, rendered judgment on behalf of the Mortgagees foreclosing the mortgage, and the Mortgagors appealed. The First District Court of Appeal affirmed the Lower Court's ruling holding that the Trial Court had acted within its discretion of disregarding the Mortgagees technical violations of the notice rule and denying the Mortgagors untimely objection. In that case the Mortgagors were given notice of trial 21 days rather than the required 30 days. Two days before the trial the Mortgagor's counsel gave notice for the first time of an objection to the trial date. He made

known his objections to the Court on the date of trial. The Court overruled the objection, tried the case and foreclosed the mortgage. In considering the matter, the District Court of Appeal speaking through Judge Smith said:

> "The Trial Court acted within the proper limits of its discretion in disregarding a technical violation of rules which was so tardily complained of. No substantial grounds supported the Appellants objections to the trial date and for aught that appears, no prejudice resulted." (P. 42 of the opinion)

In the case below, the Order of the Lower Court setting the non-jury trial was entered on February 20, 1981 scheduling the trial for the week of July 13, 1981. Not only did the Petitioners fail to file any objection to the so called "premature" trial date, but both the Petitioners and the Respondents, Kovitch , proceeded to continue their discovery in preparation for the trial date. At the time of trial no objection was asserted by the Petitioners, nor was any objection or contention concerning the "premature" setting of the non-jury trial asserted by the Petitioners after the trial in their Motion for Re-Hearing.

Respondents respectfully submit that this issue was not properly preserved before the Appellate Court and therefore should not be given any consideration by this Court.

CONCLUSION

The Appellate Court affirmed the Lower Court's judgment of foreclosure in all respects. By this affirmance the Court found that there was no usury; that the dismissal of the Petitioners' Counterclaim was obviously whith the discretion of the Trial Court; that the Order setting the case for trial, was appropriate, particularly in view of the fact that at no time was any objection ever raised; and further that the action of striking the demand for jury trial was also appropriate under the laws of Florida based on the principle that this is an affirmative defense not the subject of a Counterclaim. In its opinion however, the Court recognizes that their decision did necessarily and expressly create a conflict with the opinion rendered in Smith vs. Barnett Bank of Murray Hill, 350 So2d 358 (Fla. 1st DCA 1977).

The oppinion in Smith, is predicated on a misapplication of the principles of law concerning usury as an affirmative defense. That opinion therefore, should be overruled by this Court. In addition, the decision of the District Court, which affirmed the Trial Court's Final Judgment of foreclosure, should be affirmed.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to HARVEY KAUFMAN, ESQ., KENNEY, BOSWELL & KAUFMAN, Attorneys for Petitioners, 213 Southern Boulevard, West Palm Beach, Florida 33405, this 28 day of September, 1983.

Richard W. Wasserman

RICHARD W. WASSERMAN