

63,150

IN THE FLORIDA SUPREME COURT
TALLAHASSEE, FLORIDA

CASE NO:

FILED

EDWARD CERRITO and JOAN R. CERRITO,

Petitioners,

vs.

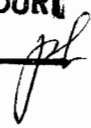
JACQUELINE R. KOVITCH and ED-JO
CORP. OF FLORIDA, INC., a Florida
corporation,

Respondents.

FEB 2 1983

SID J. WHITE
CLERK SUPREME COURT

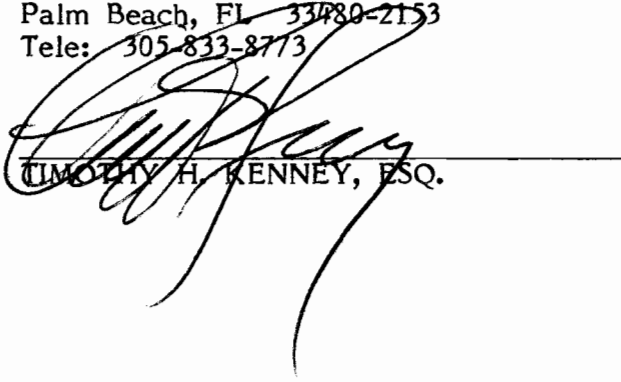
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Chief Deputy Clerk



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PETITIONERS' BRIEF ON JURISDICTION

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For purposes of identification, the Appendix to Petitioners' Brief on Jurisdiction will be referred to as (A-).

CITATION OF AUTHORITIES

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STATEMENT OF THE CASE

This appeal arises out of an action for foreclosure of a mortgage on real property. The Petitioners/Defendants, EDWARD CERRITO and JOAN R. CERRITO, were the mortgagors. The Respondent/Plaintiff, JACQUELINE KOVITCH, was the mortgagee. The Respondent/Counterdefendant, LOUIS KOVITCH, is the husband of JACQUELINE KOVITCH. The mortgaged property was a home owned by the CERRITOS. The mortgage secured a note issued by ED-JO CORP. OF FLORIDA, INC. This note was endorsed by the CERRITOS. When ED-JO CORP. OF FLORIDA, INC. and the CERRITOS defaulted on the subject note, MRS. KOVITCH filed suit to foreclose the mortgage on August 2, 1979, in the Circuit Court In and For Broward County, Florida (A-2).

On October 26, 1979, the CERRITOS filed an answer with affirmative defenses and a counterclaim for usury (A-3). On November 30, 1979, MRS. KOVITCH filed a Notice for Jury Trial (A-4) and on December 5, 1979, the trial court entered an Order Setting Trial by Jury (A-5). Following the granting of a continuance, the CERRITOS filed a Demand for Jury Trial on March 14, 1980 (A-6).

The trial court granted MRS. KOVITCH'S Motion to Strike the CERRITOS' demand for jury trial by an Order dated April 14, 1980 (A-7). On May 12, 1980 the CERRITOS filed an Interlocutory Appeal from the aforementioned Order (Case #80-847, District Court of Appeal, State of Florida, Fourth District). On October 8, 1980, the Fourth District Court of Appeals determined that the April 14, 1980 Order was not one of those non-final orders from which an interlocutory appeal is authorized, and therefore dismissed the appeal. Thereafter, the CERRITOS petitioned this Court for review of the Fourth District Court of Appeals' October 8, 1980 Order and on March 6, 1981, the Petition for Review was denied (Case #59,929, In the Supreme Court, State of Florida).

Meanwhile, the matter was litigated in the lower court. On February 13, 1981, MRS. KOVITCH, filed a Notice for Non-Jury Trial (A-8). On February 20, 1981, the lower court entered an Order Setting Non-Jury Trial (A-9). On February 24, 1981, the CERRITOS filed their Motion in Opposition to Notice for Trial (A-10). This motion was never expressly ruled upon by the lower court. On June 15, 1981, with leave of the lower court, the CERRITOS filed a Third Party Counterclaim against LOUIS KOVITCH (A-11) as well as Amended Affirmative Defenses (A-12). On June 29, 1981, the CERRITOS filed their demand for a jury trial on the issues contained in the third-party counterclaim (A-13). On July 14, 1981 the demand for jury trial was stricken (A-14).

On July 22, 1981 the action was tried (non-jury) and on August 3, 1981, the lower court entered a Final Judgment of Foreclosure in favor of MRS. KOVITCH (A-15). This judgment also dismissed the Counterclaim of the CERRITOS with prejudice.

The CERITOS filed an appeal in the Fourth District Court of Appeals directed to the April 14, 1980 Order Striking their Demand for a Jury Trial, the July 14, 1981 Order Striking their Demand for Jury Trial, and the August 3, 1981 Final Judgment of Foreclosure.

On December 29, 1982, the Fourth District Court of Appeals issued its opinion, wherein the Final Judgment was affirmed in all respects (A-1).

That opinion acknowledges "conflict" with the decision of the First District Court of Appeals in Smith v. Barnett Bank of Murray Hill, 350 So 2d 358 (Fla. 1st DCA, 1977) as to the issue of the CERRITOS' right to a jury trial. This Court has jurisdiction based upon that conflict.

- I. THIS COURT HAS DISCRETIONARY JURISDICTION UNDER ARTICLE V, SUBSECTION (3)(b)(3) OF THE CONSTITUTION OF THE STATE OF FLORIDA IN THAT THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL, DATED DECEMBER 29, 1982, EXPRESSLY CONFLICTS WITH A PRIOR DECISION OF THE FIRST DISTRICT COURT OF APPEAL ON THE SAME ISSUE OF LAW.

The Supreme Court has discretionary jurisdiction to review a decision of one District Court of Appeal which expressly and directly conflicts with a decision of another District Court of Appeal. Article V, Subsection 3(b)3, Fla., Const., Rule 9.030(a)(2)(A)(iii), Florida Rules of Appellate Procedure. The referenced constitutional provision and rule are clearly designed to remove uncertainty and promote uniformity in the application of the laws of Florida.

The case of Smith v. Barnett Bank of Murray Hill, 350 So. 2d 358 (Fla. 1st DCA 1977) arose out of a mortgage foreclosure proceeding brought by Barnett Bank of Murray Hill. Mr. Smith filed a counterclaim which set forth a claim for recovery of usurious interest based on Chapter 687.04, Florida Statutes. The lower court permitted the Counterclaim, however, the court ordered the matter set for non-jury trial. The 1st DCA, reversed and indicated that, "...the right of action afforded by Section 687.04, Florida Statutes (1975) is a right of action for money damages, for which a jury trial is appropriate...(at 359)."

In the case at bar, the CERRITOS were defendants in a mortgage foreclosure acton. They counterclaimed for usury based upon the usury statute (A-3). Their request for jury trial on the counterclaim was denied (A-7). In light of these facts, their situation is identical to that of Mr. Smith in Smith v. Barnett Bank of Murray Hill, supra. The decision of the Fourth District Court of Appeals (A-1) both figuratively and literally is contrary to the decision of the First District Court of Appeals. Thus, Judge Hersey of the Fourth District Court of Appeals plainly states:

"...we necessarily and here expressly create conflict with the first district's Smith case (A-1, P.3)."

Clearly, the subject of this appeal is within the "conflict" jurisdiction of this Court.

II. A REVIEW ON THE MERITS IS WARRANTED AS THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL DEPARTS THAT FROM THE NOTION THAT A RIGHT TO A JURY TRIAL IS A FUNDAMENTAL RIGHT GUARANTEED BY THE UNITED STATES AND FLORIDA CONSTITUTIONS.

Amendment of United States Constitution provides that "in suits at common law...the right of trial by jury shall be preserved..." Moreover, Article 1, Section 22 of the Florida Constitution provides that the "right of trial by jury shall be secure to all and remain inviolate..."

In applying these precepts, Courts have consistently held that a jury trial will not be denied simply because the substantive law at issue arises from legislation. See Smith v. Barnett Bank of Murray Hill, supra; Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959); Curtis v. Loether, 415 U.S. 189 (1974); Pernell v. Southall Realty, 416 U.S. 363 (1974).

In the decision under review, the 4th DCA has failed to address the very cases which the Court in Smith v. Barnett Bank of Murray Hill, supra, found controlling, to-wit, Beacon Theatres, Inc. v. Westover, supra; Bailey v. Central Vermont Ry., 319 U.S. 350 (1943); Fleitman v. Weisbach Street Lighting Co., 240 U.S. 27 (1916).

In Hollywood, Inc. v. City of Hollywood, 321 So 2d 65 (S.C., 1975) this Court held that a party in possession of land was entitled to a jury trial in a statutory quiet title action. It was stated as follows:

Questions as to the right to a jury trial should be resolved, if at all possible, in favor of the party seeking the jury trial, for that right is fundamentally guaranteed by the U.S. and Florida Constitutions. (at 71).

It is Petitioners' position that the right to a jury trial cannot be swept away without compelling justification and/or sound reasoning. The decision of the Fourth District Court of Appeals sets a dangerous precedence for future incursions into a fundamental right.

CONCLUSION

For the reasons cited herein, Petitioners respectfully submit that this Court should accept jurisdiction, or in the alternative, postpone the decision on jurisdiction until the review of briefs on the merits, and oral argument.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioners' Brief on Jurisdiction was furnished by U.S. Mail this 1st day of February, 1983 to Richard Wasserman, Esq., 420 Lincoln Road, #324, Miami Beach, FL 33139.

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