D/a 12-6-83

IN THE SUPREME COURT OF THE STATE OF FLORIDA

S.C. FILE NO: 63,150

FILED

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SID J. WHITE
CLERK SUPREME COURT
By _____ Chief Deputy Clerk

EDWARD CERRITO and JOAN R. CERRITO,

Petitioners,

vs.

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

Respondents.

_____/

REPLY BRIEF OF PETITIONERS

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CITATION OF AUTHORITIES

I. REPLY TO RESPONDENTS' FIRST ARGUMENT.

With respect to Respondents' first argument, the CERRITOS strenuously disagree with the proposition (Answer Brief, P5) that this Court must declare F.S. 687.04 unconstitutional if it is to uphold the CERRITOS' position. The constitutionality of F.S. 687.04 is simply not at issue. Clearly, this Court can interpret F.S. 687.04 so as to infer a right to trial by jury and such an interpretation will in no way affect the continuing viability of any portion of Chapter 687. The very fact that the First District Court of Appeal in Smith v. Barnett Bank of Murray Hill, 350 So. 2d 358 (Fla. 1st DCA, 1977) so interpreted F.S. 687.04 and did so without declaring the statute unconstitutional is sufficient demonstration of the fallecy of Respondents' argument.

With respect to the notion that usury is simply an affirmative defense, the CERRITOS would cite to this Court those cases wherein borrowers initiated actions to recover usurious interest based upon the usury statute. See e.g. Abramowitz v. Barnett Bank of Orlando, 394 So. 2d 1033 (Fla. 5th DCA, 1981); Curtiss National Bank of Miami Springs vs. Solomon, 243 So. 2d 475 (Fla. 3rd DCA, 1971). It is difficult, if not impossible, to accept the argument that usury is simply an "affirmative defense" when the usury statute in and of itself supports an independent action for recovery of a monetary award.

II. REPLY TO RESPONDENTS' SECOND ARGUMENT.

Respondent professes that the "corrupt intent" requirement set forth in Dixon vs. Sharp, 276 So. 2d 817 (1973) has not been met by the CERRITOS. The Districts, however, have recognized that notwithstanding Dixon, the requirement of "corrupt intent" is satisfied by a finding that the rate charged by the lender is higher than the maximum allowed by statute. See e.g. Abramovitz vs. Barnett Bank, 3994 So. 2d 1033 (Fla. 5th DCA, 1981), Ellis National Bank vs. Davis, 359 So. 2d 466 (Fla. 1st DCA, 1978), cert. denied 365 so. 2d 711 (1978), cert. denied 440 U.S. 976 (1979). There is no requirement that the lender have evil or malevolent motives, nor is it a requirement that the lender be intimately familiar with the usury statutes.

Furthermore, in the case of Dixon vs. Sharp, supra, there are crucial distinctions with the subject case which must be highlighted. First, in Dixon, the Supreme Court specifically noted that Sharp, (the borrower) and Dixon (the lender) had been friends for many years and it was Sharp who offered to pay an additional "bonus" to induce the loan. In effect the loan was a favor between friends, and the added "bonus" was paid out of gratutity rather than necessity. Second, the Supreme Court pointed out that:

> ...Before the loan to Sharp was consummated, the Dixons suggested that they and Sharp obtain legal advice but Sharp announced that this would be unnecessary that he would simply sign the note, pay the bonus and interest equal to the interest payable by the Dixons to College Park National Bank. (Emphasis added by the Court) (276 So. 2d 817, at 818).

All parties acknowledged that the Cerrito/Kovitch loan was a business transaction and it is undisputed that up until the subject transaction, the CERRITOS and KOVITCHES had never met. Equally important, this was not a transaction between laymen. Attorney Tempkins was involved, and he was JACQUELINE KOVITCH'S attorney. MRS. KOVITCH cannot seriously contend

that the holding of Dixon would be the same if Dixon had been represented by counsel, and counsel was aware that a "bonus" was being paid in addition to the maximum interest rate allowable.

III. REPLY TO RESPONDENTS' THIRD ARGUMENT.

With respect to Respondents' argument that the Counterclaim against JACQUELINE KOVITCH was not pending at the time of trial, such an argument ignores the difference between "striking" a claim for certain damages (e.g. compensatory and punitive) and "dismissing" a claim entirely. In the lower court JACQUELINE KOVITCH never moved to dismiss the counterclaim but rather she moved to strike the prayer for compensatory and punitive damages (R-384). Similarly, the lower court never entered an Order dismissing the CERRITOS' Counterclaim against JACQUELINE KOVITCH, but rather the lower court simply entered an order striking the prayer for damages which the court did not believe were recoverable under the Usury Statute (R-404).

In addition, paragraph 6 of the Final Judgment dated August 3, 1981 (R-762) specifically reads:

> The Defendants, ED CERRITO and JOAN R. CERRITO, his wife, have failed to prove (emphasis added) by competent evidence, their counterclaim (emphasis added), and accordingly the same are hereby denied (R-764).

Clearly, had the counterclaim been dismissed there would have been no necessity to address the question of "proof" of same.

In this regard, it is important to note that statutory causes of action and defenses may be pled by alleging ultimate facts which demonstrate the applicability of the statute. TRAWICK, Fla. Prac. and Proc., 6-17.5 (1981). An examination of the record as a whole amply demonstrates that the lower court and all parties were well aware that Chapter 687 was the basis for the defenses and Counterclaims asserted by the CERRITOS.

In summary, the lower court denied the CERRITOS' Counterclaims not because the pleading setting forth those claims failed to bring them within the purview of the penalty/forfeiture provisions of Chapter 687, but rather because

the lower court found (albeit erroneously) that no usury existed in the underlying transaction.

IV. REPLY TO RESPONDENTS' FOURTH ARGUMENT.

In Respondents' Answer Brief it is argued that the action was not prematurely set for trial and tried. That argument, however, overlooks the prejudice occasioned by the departure from the procedure set forth in Fla. Rule of Civ. Proc. 1.440(c).

Judge Boyer, in his dissenting opinion in Davis vs. Hagin, 330 So. 2d 42 (Fla. 1st DCA, 1976), the very case cited by the Appellee, stated the following:

> ...The rule clearly sets forth the procedure to be followed in setting a case for trial. It also clearly sets forth the time periods to be observed. Strict compliance with the rule may be waived by the parties. However, notwithstanding local customs to the contrary, a party is entitled to insist that the rules be complied with. There may well be instances in which for good cause shown strict compliance may be waived or dispensed with: However, no such cause appears sub judice. I do not conceive that Rule 1.010, R.C.P. was intended as a vehicle for carte blanche amendment of the other rules.
>
> Although I am of the view that the foregoing remarks are applicable to any civil case, I particularly view them as being peculiarly applicable to mortgage foreclosure proceedings wherein one party is sought to be dispossessed of his property at the behest of another...

The CERRITOS respectfully request that Judge Boyer's interpretation and application of Rule 1.440(c) be adopted in the instant case. The KOVITCHES demonstrated no "good case" for the departure from the timetable set forth in rule and the CERRITOS, like any other litigants, have the right to expect that the trial judges of this state comply with the aforsaid rule.

CONCLUSION

For the reasons set forth herein, Petitioners respectfully submit that the relief requested in Respondents' Answer Brief should be denied.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Petitioners was furnished by U.S. Mail this 21st day of October to Richard W. Wasserman, Esq., 420 Lincoln Road, #324, Miami Beach, FL 33139.

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