5-9-84

IN THE SUPREME COURT OF FLORIDA

CASE NO. 64,380

PENTHOUSE NORTH ASSOCIATION, INC.,

Petitioner,

vs.

REMO M. LOMBARDI, et al.,

Respondents.

Discretionary Review From the Fourth District Court of Appeal
Case Nos. 81-347 and 81-1011 (Consolidated)

PETITIONER'S REPLY BRIEF ON THE MERITS

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POINT I

WHETHER A DECISION OF THE SUPREME COURT OVERRULING A PRIOR DECISION OPERATES RETROSPECTIVELY SO AS TO ALLOW SUIT FOR A WRONG COMMITTED PRIOR TO THE OVERRULING DECISION.

POINT II

WHETHER THE TRIAL COURT ERRED IN DISMISSING THE SECOND AMENDED COMPLAINT FOR FAILING TO STATE A CAUSE OF ACTION BASED ON THE STATUTE OF LIMITATIONS.

Much of Respondents' argument was anticipated, and has been adequately refuted in advance in Petitioner's Initial Brief on the Merits.

Commencing on page 10, Respondents argue that a change in the case law cannot be applied retroactively when it will impair contract rights.

This argument proceeds from two faulty premises:

First, no statutory rights are asserted by either party in the instant case. Petitioner alleges the common law tort of breach of fiduciary duty and self-dealing resulting in unjust enrichment. None of the Respondents' grounds for their Motions to Dismiss argued that any rights they acquired under the subject Recreation Lease were acquired pursuant to a statute, and none of the case law supposedly "on the books" at the time of execution of the Lease construed a statute. Instead, the cases construed the common law.

Therefore, the exception announced by this Court in Florida Forest and Park Service v. Strickland, 18 So.2d 251 (Fla. 1944)

on which Respondents rely simply does not apply.

The second faulty premise in Respondents' argument is that there is no prohibition under either the United States or Florida Constitutions against a court impairing otherwise vested contract rights. Article I, §10 of both Constitutions prohibits a state from enacting laws which impair the obligation of contracts. As the United States Supreme Court has made clear:

> The short answer to this contention is that this provision, as it terms indicate, is directed against legislative action only.

Barrows v. Jackson, 346 U.S. 249, 260, 73 S.Ct. 1031, 1037, 97 L.Ed. 1586 (1953).

> It has been settled by a long line of decisions, that the provision of section 10, article 1, of the federal Constitution, protecting the obligation of contracts against state action, is directed only against impairment by legislation and not by judgments of courts.

Tidal Oil Co. v. Flanagan, 263 U.S. 441, 451, 44 S.Ct. 197, 198, 16 L.Ed. 382 (1924) (emphasis added). Thus, if a judgment impairing a contract proceeds upon reasons apart from, and without giving effect to, a statute, no constitutional issue is raised. Columbia Railway Gas & Electric Co. v. South Carolina, 261 U.S. 236, 43 S.Ct. 306, 67 L.Ed. 629 (1923); accord, State ex rel. Nuveen v. Greer, 88 Fla. 249, 102 So. 739, 747 (1924).

On pages 12 and 13 of their Brief on the Merits, Respondents address this Petitioner's argument that the cause of action had not yet truly accrued when the Complaint was filed. They argue that the Second Amended Complaint (R.142) refutes this Petitioner's position, but this Court is directed to the allegations of damages

therein. Paragraph 12 of the Second Amended Complaint describes the damages as those to be suffered in the future, by describing them as "an amount equal to the projected escalated recreation lease payments over 99 years which they will have to pay." (R.145) (emphasis added). In their Motions to Dismiss, Respondents never challenged the adequacy of these allegations of damage. Their Motions to Dismiss were directed solely to liability.

Therefore, the Second Amended Complaint does not refute the argument that no cause of action accrued until the first escalation of rent. Instead, the Complaint supports this contention.

Finally, on page 14, Respondents make the unsupported assertion that this is not an equitable cause of action. The assertion is not only unsupported, it is inaccurate. The Fourth District has specifically held it is equitable, thereby denying a jury trial. King Mountain Condominium Association, Inc. v. Gundlach, 425 So.2d 569 (Fla. 4th DCA 1983). This holding was based on the Fourth District's reading of this Court's holding in Avila South Condominium Association, Inc. v. Kappa Corp., 347 So.2d 599 (1977).

POINT III

WHETHER THE TRIAL COURT PROPERLY DENIED RESPONDENTS' MOTION FOR ATTORNEYS' FEES.

This Court, of course, has jurisdiction to consider this point, regardless of the existence of conflict. In acquiring jurisdiction of this case, this Court has authority to dispose of all contested issues. E.g., Kennedy v. Kennedy, 303 So.2d 629 (Fla. 1974).

On page 19 of their Brief on the Merits, Respondents argue that the Petitioner never raised before the lower court or the Fourth District the important point that claims for indemnification must be pled, proved, and tried before a jury. But this is because the proceedings never reached the stage where this argument could be raised.

This Court must keep in mind that at the trial court level, the Respondents made a Motion to Tax Costs and Attorneys' Fees (R.207-212) after the Second Amended Complaint was dismissed with prejudice. Petitioner responded with a Motion to Strike (R.213), which was granted. (R.214).

The issue of indemnification was raised, sua sponte, by the Fourth District in its opinion. The Respondents never made a claim for indemnification in the trial court, thus, Petitioner was never presented with the opportunity to argue that this claim must be properly pled, proved, and tried before a jury. The proceedings before this Court are the first opportunity Petitioner has had to make this argument.

CONCLUSION

Based on all of the foregoing, and on the argument contained in Petitioner's Initial Brief on the Merits, the decision of the District Court of Appeal affirming dismissal of the Second Amended Complaint for failure to state a cause of action should be quashed, and the cause remanded to the trial court with directions that Respondents be required to file their Answer and Affirmative Defenses.

The decision of the District Court reversing the striking of the prayer for attorneys' fees should similarly be quashed, regardless of the decision this Court reaches on the cause of action. Regardless of whether Petitioner is ultimately successful on the merits or not, the trial court's determination that Respondents are not entitled to attorneys' fees for successful defense should be affirmed.

Respectfully submitted,

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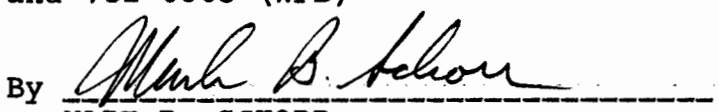
By 
MARK B. SCHORR

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petitioner's Reply on the Merits was furnished by mail, this 7th day of May, 1984, to: LEVY, SHAPIRO, KNEEN & KINGCADE, P.O. Box 2755, Palm Beach, FL 33480; COLEMAN, LEONARD & MORRISON, P.O. Box 11025, Fort Lauderdale, FL 33301; and LARRY KLEIN, ESQ., Suite 201, Flagler Center, 501 South Flagler Drive, West Palm Beach, FL 33401.

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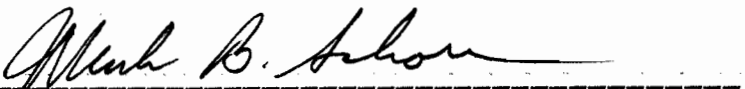
BY 
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