12
23 48
35

CASE NO. 67,777

FILED
SID J. WHITE
OCT 28 1985
CLERK, SUPREME COURT
By
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

BARNETT BANK OF WEST FLORIDA,

Petitioner,

v.

W. RICHARD HOOPER,

Respondent.

PETITION FOR DISCRETIONARY REVIEW

PETITIONER'S AMENDED BRIEF ON JURISDICTION

Robert P. Gaines
Beggs & Lane
Post Office Box 12950
Pensacola, Florida 32576
904/432-2451
Attorneys for Petitioner

TABLE OF CONTENTS

CITATION OF AUTHORITIES

STATEMENT OF THE CASE

This is a petition to invoke the discretionary jurisdiction of the Supreme Court pursuant to the provisions of Rule 9.030(a)(2)(A)(iv), Florida Rules of Appellate Procedure. The decision of the District Court of Appeal of Florida, First District, expressly and directly conflicts with a decision of the District Court of Appeal of Florida, Third District.

Dr. W. Richard Hooper filed a complaint seeking to void a promissory note to Barnett Bank of West Florida on the ground that Barnett failed to disclose to him material facts relating to the loan transaction. At the conclusion of the evidence, the trial judge directed a verdict in favor of Barnett.

Upon appeal by Dr. Hooper, the District Court of Appeal of Florida, First District, reversed the judgment with directions to submit the case to a jury.

STATEMENT OF THE FACTS

The district court of appeal summarized the evidence as follows (A 2-5):

> In reviewing the directed verdict, we are required to view the evidence in a light most favorable to Dr. Hooper. So viewed, the evidence shows the following: When Dr. Hooper moved to Pensacola in 1973 he began doing business with the bank. He appointed the bank trustee of a trust and personal

representative of his estate. Several years later, Dr. Hooper became interested in making a tax shelter investment. In June, 1981, he met with Hosner to discuss tax shelter investments. Hosner took him to see Edwin Riffel, the loan officer in charge of Hosner's accounts at the bank. Dr. Hooper testified that Riffel told him he was familiar with Hosner investments, and they were sound and had passed IRS scrutiny. Dr. Hooper decided to make a tax shelter investment with Hosner and borrowed $50,000.00 from the bank for the investment.

During the spring of 1982, Harry Stump, the assistant vice president at the bank who supervised the bookkeeping department, the proof department and the cash management department, became concerned at the rather large amount of uncollected funds in the Hosner Enterprises account. He also became suspicious that Hosner was involved in a check-kiting scheme. When the uncollected funds reached approximately $200,000.00 in the Hosner Enterprises account in early May, Stump met with Riffel on May 11 and conveyed his suspicions to Riffel. Riffel was aware of the large amount of uncollected funds in the Hosner Enterprises account and was additionally concerned because Hosner was delinquent in his loan payments. In fact, early in May, Riffel had told Hosner he had to get some money into his account. Also, by May 1982, Riffel knew that the IRS was investigating Hosner.

In his deposition prior to trial, Stump had testified that he became personally convinced that Hosner was check-kiting around May 10, 1982. However, at the trial, he explained that his deposition testimony had been too hasty and that a more accurate description of his feelings on May 11 was that he was concerned about a check-kiting scheme, but the scheme was not confirmed because "you can't confirm that it is a kite until you start to put a stop to it."

On May 11, Stump instructed bank employees to make copies of the checks which were being deposited to the Hosner account and send the copies to him, and only then could the deposits be credited to Hosner's account. After this particular reporting procedure began, the uncollected funds activity on Hosner's account increased.

On May 14, Stump admitted, the situation had deteriorated to the point that Stump felt the bank was "at risk." In other words, the uncollected funds in the Hosner account were very great, so that if the bank continued to pay the checks presented on the account, it might be paying out money which was not in the bank, and which could not be collected, and the bank would lose money. In an effort to protect the bank, Stump made the decision to return all Hosner checks presented to the bank on May 13 on the grounds that they were being drawn against uncollected funds. A computer printout of bank transactions, which is reviewed daily by bank officers, was prepared on the evening of Friday, May 14. However, this printout would not ordinarily be reviewed by other bank officials until the next business day, which was Monday, May 17. Stump testified that May 17 was the first time other bank officials would have known that Hosner's checks were being returned on the basis of uncollected funds. Stump testified that after May 11 he did not discuss the Hosner situation with Riffel again until May 19 or 20.

The transaction giving rise to this litigation occurred as follows: Late in the afternoon of May 14, during a break from surgery, Dr. Hooper received a call from Hosner. He returned the call. Hosner put Dr. Hooper on hold and then came back on the line with Riffel in a three-way conversation. Dr. Hooper asked to borrow $90,000.00 for purposes of investment. Riffel agreed to the loan. The conversation was very short and was

ended when Dr. Hooper had to return to surgery. Late that evening, after banking hours, a promissory note prepared by Riffel and a check, representing the proceeds of the loan in the sum of $89,865.00, were delivered to Dr. Hooper for his signature by a messenger from Hosner's office. He signed the note and endorsed the check and these were returned to the messenger. A copy of this check for $89,865.00, introduced into evidence at the trial, shows that the back of the check is stamped "for deposit only, Hosner Enterprises, Inc., 1170027502." Also introduced into evidence was a deposit slip dated May 17, depositing into the Hosner account a sum of money which included a check for $89,865.00.

Meanwhile, at about this same time, another bank in town, First American Bank, began refusing to pay Hosner's checks. On May 17, checks totaling $270,000.00 were returned to the appellee bank from First American Bank. On May 24, the Hosner Enterprises account had insufficient funds and the appellee bank had confirmed a check-kiting scheme. Nevertheless, by May 26, the account had been "zeroed out." At the conclusion of his testimony, Stump admitted that without deposit of Dr. Hooper's approximately $90,000.00 check, Hosner's account would have been overdrawn "$87,000.00 or something."

Dr. Hooper testified he never received any benefit from the $90,000.00 he gave to Hosner. Moreover, he testified that had he known of the IRS investigation, of the check-kiting scheme, of the fact that Barnett had refused to honor checks on the Hosner Enterprises' account to protect its position, that Hosner was at the bank because he was told he needed to get money to the bank to cover overdrafts and delinquent loans, he would not have made the loan. Riffel testified, as justification for his actions, that he did not

> disclose any information to Dr. Hooper concerning Hosner's account on May 14 because of the duty of confidentiality the bank owed to its depositor, Hosner.

SUMMARY OF THE ARGUMENT

The holding of the District Court of Appeal, First District, in this case is in express and direct conflict with the holding in Milohnic v. First National Bank of Miami Springs, 224 So.2d 759 (Fla. 3d DCA 1969). Milohnic holds that a bank can be held liable to a depositor for revealing information about the depositor's account. The First District has held in this case that a bank may forfeit the principal and interest of a loan if it does not reveal to the borrower confidential information about the status of the account of another depositor.

ARGUMENT

The holding of the district court of appeal is stated in its opinion as follows:

> Although we are compelled to acknowledge that we are required to reach a decision based upon our review of a cold record, we nevertheless are of the opinion that the evidence below was subject to conflicting inferences concerning whether a confidential relationship existed between the parties and whether the bank had knowledge of material facts which it was required to disclose, under the governing legal standards, and that reasonable minds might well have reached differing conclusions on these issues. Accordingly, we are of the view that the trial court should have submitted these issues to the jury.

Although the district court of appeal attempted to distinguish the holding in Milohnich v. First National Bank of Miami Springs, 224 So.2d 759 (Fla. 3d DCA 1969), that case (A 13-18) is not distinguishable. The holding of the court below is in conflict with the holding in Milohnich.

The plaintiffs in Milohnich alleged that the bank had negligently and intentionally divulged information about the accounts of one of the plaintiffs to third parties, which resulted in the third parties' having obtained injunctions preventing the bank from disbursing any of the money the plaintiffs had on deposit with it. The trial court had dismissed the complaint for failure to state a cause of action. After reviewing the authorities from other jurisdictions, the District Court of Appeal, Third District, reversed, holding that the complaint stated a cause of action.

The reasoning of the district court of appeal in Milohnich was that there is a recognized duty imposed upon a bank of not disclosing financial affairs of its depositors or customers. The majority of the court held that this was an implied term of the contract with the bank's depositor. The concurring judge stated that he would prefer to find the cause of action based upon the commission of a business tort rather than a breach of contract.

Several possible exceptions to the rule of non-disclosure were recognized by the court in Milohnich. None

of those exceptions is applicable to this case. For example, the Third District quoted the following from 10 Am.Jur.2d Banks §332 at page 761:

> Indeed, it is an implied term of the contract between a banker and his customer that the banker will not divulge to third persons, without the consent of the customer, express or implied, either the state of the customer's account or any of his transactions with the bank, or any information relating to the customer acquired through the keeping of his account, unless the banker is compelled to do so by order of a court * * *

The Third District on the same page of the opinion quoted from a treatise, which gave as the exceptions the following:

> * * * The duty is not absolute and its qualifications can be classified under four heads. These are (2) a disclosure under compulsion of law, (b) where there is a duty to the public to disclose, (c) where the interests of the bank require disclosure, (d) where the disclosure is made with the express or implied consent of the customer.

None of the exceptions recognized in Milohnich is said by the District Court of Appeal, First District, to be applicable to this case.

As partial justification for its conclusion, the First District stated (A 10):

> Under the circumstances, a jury could reasonably conclude, we believe, that nothing would have prevented the bank from insisting, as a condition to approval of the Hosner-arranged loan to

> Dr. Hooper, that Hosner disclose to Dr. Hooper the status of his delinquent loans and overdrawn accounts with the bank. As a last alternative, the bank could have simply declined to make the loan.

The court has apparently misconstrued the obligations imposed on a bank by the regulations under the Equal Credit Opportunity Act, Title VII of the Consumer Credit Protection Act, Title 15, United States Code, §§1601 et seq. The regulations are found as Part 202, Title 12, Code of Federal Regulations (A 19-23).

Section 202.9 of the regulations (A 22) requires a bank to notify a loan applicant of adverse action in writing. The notification must contain a statement of specific reasons for the action taken or a disclosure of the applicant's right to a statement of reasons within 30 days after receipt by the bank of a request made within 60 days of such notification. Although this notification requirement is applicable to many situations, there is an exception in the regulations for the type of business loan for which Dr. Hooper applied. However, Section 202.3(e)(2) (A 21) provides in regard to applications for business credit that Section 202.9 relating to notifications is not applicable unless an applicant within 30 days after oral or written notification that adverse action has been taken requests in writing the reasons for such action.

In short, a bank cannot merely inform an applicant

that it is unwilling to make a loan. In many situations it is required to either give the applicant the reasons for its refusal to make the loan or inform the applicant of his right to ask for such reasons. In the case of a business loan such as this, upon written request of the applicant, it must state the reasons.

In this case, Dr. Hooper did not ask Barnett for advice about his proposed investment (A 6). Dr. Hooper was given full control of the loan proceeds (A 4). Barnett had no way of knowing what Dr. Hooper and Mr. Hosner planned to do with the money. The First District holding requires Barnett to volunteer defamatory information about its depositor, Mr. Hosner, because he might intend to use the loan proceeds improperly.

There is a real and substantial conflict between the holdings of the two district courts of appeal in these two cases. If the bank notifies the loan applicant that he should not borrow the money because one of its customers is in the process of defrauding him, the bank can be sued by the allegedly defrauding customer. If the bank makes the loan, it runs the risk of losing its money because it did not give the borrower confidential information that it has about another customer. Faced with these two cases, a banker is in the proverbial position of being damned if he does and damned if he doesn't. Whichever action he takes,

he has left his bank open to the award of damages by a jury with absolutely no way to protect his bank.

CONCLUSION

There is a very real and express conflict between the decision of the District Court of Appeal, First District, in Hooper v. Barnett Bank of West Florida and the decision of the District Court of Appeal, Third District, in Milohnich v. First National Bank of Miami Springs, 224 So.2d 759 (Fla. 3d DCA 1969). This court should exercise its discretionary jurisdiction to resolve this substantial and embarrassing conflict so that bankers, depositors and borrowers will know the rules under which they are to do business.

Robert P. Gaines
Beggs & Lane
Post Office Box 12950
Pensacola, Florida 32576
904/432-2451
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing brief and appendix was mailed to Donald H. Partington, Esquire, Post Office Box 12585, Pensacola, Florida 32573, on October 22, 1985.

Robert P. Gaines
Of counsel for petitioner