IN THE SUPREME COURT OF FLORIDA

CASE NO. 68,458

LANDMARK FIRST NATIONAL BANK OF FORT LAUDERDALE,

Petitioner,

v.

GEPETTO'S TALE O' THE WHALE OF FORT LAUDERDALE, INC., ROBINEX INTERNATIONAL LIMITED, ARTHUR J. BRAUER and DONALD R. BRAUER,

Respondents.

Appeal From The Fourth District Court Of Appeal
Case No. 85-1112

PETITIONER'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE

Petitioner is filing this its jurisdiction brief pursuant to Florida Rule of Appellate Procedure 9.120(d). Petitioner has previously filed its Notice to Invoke the Discretionary Jurisdiction of the Supreme Court under Florida Rules of Appellate Procedure 9.030(a)(2)(IV) requesting the Supreme Court to review the decision of the Fourth District Court of Appeal, which decision was rendered on January 22, 1986. A certified copy of that decision is attached hereto as Appendix A. That decision of the Fourth District Court of Appeal, reversing an Order of the Trial Court, considered the issue of whether a judgment creditor was estopped from seeking a deficiency judgment when that creditor did not give to the buyer notice of the sale of the collateral pursuant to Fla.Stat. §679.504(3). The Trial Court held that LANDMARK FIRST NATIONAL BANK OF FORT LAUDERDALE had satisfied statutory notice requirements so as to entitle it to a deficiency judgment against respondents. The Fourth District Court of Appeal, following its precedent, reversed and remanded while expressly noting a conflict with the Third District Court of Appeal.

Petitioner herein, LANDMARK FIRST NATIONAL BANK OF FORT LAUDERDALE, was appellee in the Fourth District and Plaintiff in the Trial Court. The Respondents herein, GEPETTO'S TALE O' THE WHALE OF FORT LAUDERDALE, INC., ROBINEX INTERNATIONAL LIMITED, ARTHUR J. BRAUER and DONALD R. BRAUER, were the appellants in the Fourth District Court of

Appeal and the Defendants in the Trial Court. LANDMARK FIRST NATIONAL BANK OF FORT LAUDERDALE is referred to hereinafter as "LANDMARK." GEPETTO'S TALE O' THE WHALE OF FORT LAUDERDALE, INC. is referred to hereinafter as "GEPETTO'S."

This jurisdictional brief is accompanied by an Appendix pursuant to Florida Rule of Appellate Procedure 9.120(d) containing a certified copy of the decision of the Fourth District Court of Appeals sought to be reviewed herein.

References to the transcript of the hearing on Respondent's Motion for Declaratory Relief and Set-off, which hearing was conducted before the Honorable Judge J. Cail Lee on February 28, 1985, will be designated by the letter "T."

STATEMENT OF FACTS

On November 30, 1979, GEPETTO'S borrowed $100,000.00 from LANDMARK. This transaction was evidenced by a Promissory Note and Security Agreement in which GEPETTO'S pledged its restaurant equipment as collateral for the loan. A Guaranty Agreement, further securing that loan, was executed by the Respondents, DONALD R. BRAUER, ARTHUR J. BRAUER, and ROBINEX INTERNATIONAL LIMITED.

GEPETTO'S defaulted on the loan by failing to pay the payment due on March 30, 1981. LANDMARK instituted suit, in Broward County Circuit Court, Case No. 84-13446CD, seeking possession of the collateral, a judgment for damages

against GEPETTO'S in a direct action on the Note, and damages against the guarantors. The Trial Court granted prejudgment replevin of the collateral and subsequently entered, on February 17, 1982, a Final Summary Judgment against GEPETTO'S and the Guarantors. (Appendix B).

That Final Summary Judgment, entered by the Trial Court and included herein as Appendix B, stated:

> Having already obtained possession of certain personal property through Prejudgment Writ of Replevin, the Plaintiff shall dispose of same as a secured creditor in a commercially reasonable manner and credit any sums received against the above damages.

Over a year after the entry of the Final Summary Judgment, GEPETTO'S and the Respondents, ARTHUR J. BRAUER, DONALD R. BRAUER, and ROBINEX INTERNATIONAL LIMITED, filed a Petition for Accounting and Set-Off, which pleading was later amended to a Petition for Declaratory Relief and Set-off. In that Petition, Respondents asserted that LANDMARK had failed to give the requisite notice of sale of the collateral and had sold the collateral in a commercially unreasonable manner. The Respondents sought thereby to have the earlier judgment declared satisfied.

An evidentiary hearing was conducted, on Respondent's Petition for Declaratory Relief and Set-off, before the Honorable Judge J. Cail Lee, Broward County Circuit Court. At that hearing, the evidence established that LANDMARK did not notify Respondents of the sale of the

collateral, but that Respondents knew that the judgment referenced above had been entered against them. (T. 21) The evidence further established that LANDMARK advertised the availability of the restaurant equipment for purchase (T. 43), contacted several persons who might be interested in purchase of that collateral (T. 46), met with several potential buyers to view the collateral (T. 46), and, in at least one instance, refused an offer submitted for various of the items. (T. 85) Expert testimony at that hearing clearly established that the quantities of items involved were not large enough to justify public auction (T. 84), and that, in the expert's opinion, LANDMARK's method of disposing of the collateral was "a normal way to dispose of the merchandise because of the limited amount of small wares as far as the quantity and also the items that were in the warehouse were not of great value to a majority of restaurants in this area." (T. 87) The expert witness further testified that sufficient notice had been given by LANDMARK to Appellants by virtue of the entry of the Final Summary Judgment. (T. 92-3)

The Trial Court entered an Order denying Respondents Petition for Declaratory Relief and Set-off. The Trial Court specifically found that the Final Summary Judgment satisfied LANDMARK's obligation to provide reasonable notice of sale of the collateral. Appeal was taken by Respondents from that Order, in which appeal

Respondents argued that any deficiency judgment should be deemed satisfied by virtue of the lack of notice by LANDMARK to Respondents of the sale of the collateral and by virtue of the alleged conduct of this sale in a commercially unreasonable manner. The Fourth District reversed and remanded.

SUMMARY OF ARGUMENT

The Fourth District Court of Appeal, in an opinion written by Judge Hurley, (Appendix A) reversed and remanded, adhering "to the rule that a creditor who fails to abide by the statutory notice requirement is not entitled to a deficiency judgment . . . ." Gepetto's Tale O' The Whale of Fort Lauderdale, Inc. v. Landmark First National Bank of Fort Lauderdale, 11 FLW 253 (Fla. 4th DCA Jan. 22, 1986). This decision expressly and directly conflicts with a decision of the Third District Court of Appeal involving the same legal issue. Jurisdiction of the Supreme Court to grant certiorari in this matter is clearly proper.

JURISDICTION

The Fourth District Court of Appeal's opinion is expressly and directly in conflict with decisions of the Third District Court of Appeal. In its opinion, the Fourth District Court of Appeal states:

> We recognize that our decision conflicts with the Third District's most recent and cogent pronouncements on the subject. Yet, in light of our own recent affirmation of this Court's precedent and the widespread acceptance of the rule throughout the state, we believe that the resolution of any conflict is best left to the Supreme Court.

Gepetto's Tale O' The Whale, supra, at 254.

The Fourth District, in recognizing its conflict with the Third District, cited the case of Ayares-Eisenberg Perrine Datsun, Inc. v. Sun Bank of Miami, 455 So.2d 525 (Fla. 3d DCA 1984). In Ayares-Eisenberg, the Third District was faced with a situation where a bank brought an action against debtors and guarantors to recover on overdue notes after repossessing collateral secured by the note. The Third District noted that Sun Bank did not deny that it failed to give the requisite statutory notice before disposing of the collateral. Id. at 527. That Court thus decided a question identical to the issue before the Fourth District Court of Appeal in the case at bar. The Ayares-Eisenberg Court held that the lack of statutory notice to the debtor of the sale of collateral was not a complete bar to a deficiency judgment, a holding directly in conflict with the issue decided by the Fourth District in the case at bar. Recognizing the existence of a majority rule to the contrary on this issue, the Court explained that it was unable to:

> follow the majority rule in Florida that failure to give the notice required by Section 679.504(3) precludes an action to recover the balance owed on a note after disposition of the collateral . . . .

Id. at 527 citing Barnett Bank of Tallahassee v. Campbell, 402 So.2d 12 (Fla. 1st DCA 1981), review denied mem., 412 So.2d 463 (Fla. 1982); Barnett v. Barnett Bank of Jacksonville, 345 So.2d 804 (Fla. 1st DCA 1977); Washington v. First National Bank of Miami, 332 So.2d 644 (Fla. 3d DCA 1976); Hepworth v. Orlando Bank and Trust Company, 323 So.2d

41 (Fla. 5th DCA 1975); Turk v. St. Petersburg Bank and Trust Company, 281 So.2d 534 (Fla. 2d DCA 1973). The Third District held, however, "that the legislature has provided other relief which will require remand for further proceedings," referring to the remedies provided the debtor in Fla.Stat. §679.507. Id.

The Ayares-Eisenberg Court further noted that that Court had earlier, in Bank of Oklahoma, N.A. v. Little Judy Industries, Inc., 387 So.2d 1002, 1005 (Fla. 3d DCA 1980), adopted the following language from Norton v. National Bank of Commerce of Pine Bluff, 240 ARK. 143, 149, 398 S.W.2d 538, 541 (1966):

> We do not agree with [the] contention that the bank's failure to give . . . notice of the intended sale completely discharged [the debtors] obligation. For the most part the Code follows the theory formerly applicable to mortgages, by which the debtor was entitled to any surplus realized upon foreclosure and was liable for any deficiency. [See U.C.C. Section 9-504(2) (codified at Section 679.504(2), Fla.Stat. (1981)).] The Code also provides that if the secured party has disposed of the collateral in a manner not in accordance with the Code "any person entitled to notification . . . has a right to recover from the secured party any loss caused by a failure to comply" with the provisions of the Code.
>
> . . . .
>
> We think the just solution is to indulge the presumption in the first instance that the collateral was worth at least the amount of the debt, thereby shifting to the creditor the burden of proving the amount that should reasonably have been obtained through a sale conducted according to law. . . .

Id. at 527-8. The Third District, in Bank of Oklahoma, concluded that the rule stated in Norton "achieves a fair and commercially workable result without the imposition of a penalty which is not prescribed by statute." Id. at 528, citing Bank of Oklahoma, N.A., supra, at 1005.

In Ayares-Eisenberg, the Third District has clearly adopted a rule advanced by courts in a number of other states[1/] that failure of a secured creditor to give the notice as required by U.C.C. 9-504(3) does not automatically preclude the creditor from obtaining a deficiency judgment against the debtor. This rule adopted by the Third District is in direct conflict with the opinion entered by the Fourth District Court of Appeal in the instant case.

REASONS FOR ACCEPTANCE OF JURISDICTION

The jurisdiction of the Supreme Court to review decisions of any District Court of Appeal is expressly established by Article V, Section 3 of the Florida Constitution. That Article, in Section 3(b)(3) clearly states that the Supreme Court

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1/ See, e.g., Weaver v. O'Meara Motor Company, 452 P.2d 87 (Alaska 1969); Norton v. National Bank of Commerce, 240 Ark. 143, 398 S.W.2d 538 (1966); Community Management Association v. Tousley, 32 Colo. App. 33, 505 P.2d 1314 (1973); Savings Bank v. Booze, 34 Conn. Supp. 632, 382 A.2d 226 (1977); T & W Ice Cream, Inc. v. Carriage Barn, Inc., 107 N.J. Sup. 328, 258 A.2d 162 (1969); Alliance Discount Corp. v. Shaw, 195 Pa. Sup. 601, 171 A.2d 548 (1961); Mallicoat v. Volunteer Finance and Loan Corp., 57 Tenn. App. 106, 415 S.W.2d 347 (1966); Grant County Tractor Company v. Nuss, 6 Wash. App. 866, 496 P.2d 966 (1972).

> "may review any decision of a district court of appeal . . . that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.

Art. V, §3(b)(3), Fla. Const. (1980) (emphasis supplied). Jurisdiction for Supreme Court review by certiorari is supplied by a conflict of decisions, not by conflict of opinions or reasons. Jenkins v. State, 385 So.2d 1356, 1359 (Fla. 1980) citing Gibson v. Maloney, 231 So.2d 823, 824 (Fla. 1970).

In the case at bar, the Fourth District Court of Appeal clearly indicated that its decision was in conflict with decisions rendered by the Third District Court of Appeal on the same issue. The issue involved is one of great importance to both the general public and to financial institutions throughout the state. This issue involves whether a creditor loses all rights to a deficiency judgment by virtue of that creditor's omission of the statutory notice required by Fla.Stat. §679.504(3). The decision of the Fourth District Court of Appeal in the instant case follows the "complete bar" line of cases which preclude any deficiency judgment in the absence of the requisite statutory notice. Gepetto's Tale O' The Whale, supra, at 254. This decision conflicts with both the decision of the Third District, Ayares-Eisenberg, supra, and the apparent majority of American jurisdictions which follow the "rebuttal presumption" rule allowing a creditor who has failed to give the requisite notice to recover a deficiency

judgment should that creditor be able to overcome the rebuttable presumption that the collateral was worth the amount received at sale of that collateral.[2/] This conflict between the Third and Fourth Districts leads to uncertainty in the law and, as the Fourth District noted in its opinion in the instant case, "resolution of any conflict is best left to the Supreme Court."

CONCLUSION

Based on the foregoing conflicts noted, and in light of the nature of the rights involved, the Petitioner respectfully requests that this Court exercise its discretion and accept jurisdiction to hear the merits of this appeal.

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2/ See n. 1, supra, at 9.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by first-class U.S. mail, postage prepaid, to: JOHN J. MURPHY, ESQ., Attorney for Respondents, 4600 Sheridan Street, Suite 401, Hollywood, Florida 33021, this 28th day of February, 1986.

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