O/a 12-1-86

IN THE SUPREME COURT OF FLORIDA

Case No. 68,471

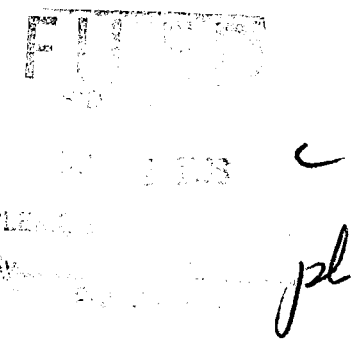
CORAL RIDGE PROPERTIES, INC. and WESTINGHOUSE ELECTRIC CORPORATION,

Petitioners,

vs.

PLAYA DEL MAR, ASSOCIATION, INC.,

Respondent.
_____/



PETITIONERS' REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

LIBRARY REFERENCES

INTRODUCTORY STATEMENT

Throughout its briefs, PLAYA DEL MAR makes reference to "undisputed facts" in affidavits and interrogatory answers offered in opposition to summary judgment. CORAL RIDGE PROPERTIES and WESTINGHOUSE contend that as to summary judgment, however, this evidence was not relevant to anything because the trial courts correctly decided that the documents resolving the prior suit were unambiguous and therefore binding on the parties as a matter of law. Once the trial courts decided this, then extrinsic evidence -- disputed or not -- became irrelevant to the narrow issue of whether summary judgment was timely and properly entered. PLAYA DEL MAR nevertheless makes it appear as though the relevance of the extrinsic evidence was a "given". This whole situation, frankly, is not really as complicated as PLAYA DEL MAR makes it seem.

The real basis of PLAYA DEL MAR's two claims before the trial courts (suits two and three) is that construction defects in the condominium building caused a fire, but that settlement of the first suit for construction defects does not bar recovery simply because, so they claim, PLAYA DEL MAR did not really "intend" to release or settle everything. To understand why an answer would add nothing to the record, however, the relevant sequence of events should again be reviewed. First, the initial suit dealing with construction defects was settled

and a release covering past, present, and future losses was executed in February of 1982. Second, the fire in issue here occurred in August of 1982. Third, a second release from the first suit, prepared to supply a corporate formality missing from the first release, was executed in December of 1982, four months after the fire. Fourth, the second lawsuit for faulty construction relating to the August 1982 fire was filed in December of 1983.[1/] Fifth, the first lawsuit was dismissed in May of 1984, six months after the second suit was filed. When these facts are reviewed in the context of the applicable law, CORAL RIDGE PROPERTIES and WESTINGHOUSE contend that the merit of their position will be quite evident.

1/ As noted in the initial brief on the merits (page two, paragraph (3)), the third suit (actually a subrogation claim) is a "spin off" of the second suit. The fire, settlement documents, and timing sequence are all the same for both suits, however.

DISCUSSION

I

TIMING OF THE SUMMARY JUDGMENT MOTION

The cases cited by the Fourth District in support of its ruling reflect the weakness of that court's reasoning in light of recent interpretations of the summary judgment rule.

So long as the party opposing summary judgment is not prejudiced in any way, what difference can it make that an answer containing the affirmative defense of release is not filed before filing a summary judgment motion raising the same point? As a practical matter, it would have made no difference here at all. As in Baptiste v. Burke, 746 F.2d 257 (5th Cir. 1984), the non-movant (PLAYA DEL MAR) responded to the merits of the motion with affidavits and interrogatory answers and strenuously argued for their admission. Obviously, a reply in avoidance would have raised the same "mistake" argument brought before the trial courts in both instances. Indeed, having an answer on file with a reply in response would not have changed anything. In both cases, PLAYA DEL MAR responded first to the merits, and having lost in both trial courts, it sees the "no answer" ruling of the Fourth District as a technical window for staying in court. PLAYA DEL MAR's own quotation from Baptiste is therefore exactly on point:

> . . . Objection to raising a defense by motion may be waived if the non-movant responds to the merits of the motion . . .
>
> [Id. at 258-59 n.1]

To support its "prejudice" argument, PLAYA DEL MAR's memo prepared by Mr. Pappas' firm and filed after the hearing says that it wanted to depose CORAL RIDGE PROPERTIES' trial counsel of record in this case (Mr. Gordon) because PLAYA DEL MAR "believe[d]" that he had "information relevant to the intent of the parties during the settlement process as well as other information which may be relevant, or lead to relevant evidence . . . ." (R 186) Then, later in the memo, PLAYA DEL MAR suggests that it had "requested relevant discovery of information from . . . CORAL RIDGE PROPERTIES, in an attempt to ascertain the intention of CORAL RIDGE PROPERTIES with regard to the release . . . ." (R 200) It claimed that "the only manner in which [PLAYA DEL MAR could] obtain those facts [was] to subpoena the papers and documents of the drafters and depose the drafters." (R 201-2) In other words, they wanted to fish for extrinsic evidence which "perhaps" would support their mistake claim. They did not know themselves whether or not the evidence would support their position.

In light of this approach, what more could an answer and a reply in avoidance have done? More pleadings would certainly not have made the extrinsic evidence any more relevant. The procedural argument here is truly without merit because the substantive legal arguments were all addressed by the parties and the trial courts. It was obvious that PLAYA DEL MAR was attempting to create an ambiguity in an otherwise unambiguous set of settlement documents in order to avoid their binding

effect. And neither trial court dealing with the issue needed an answer and a reply to figure this out.

If what PLAYA DEL MAR says can sustain the Fourth District's reversal, then impliedly the spirit of the summary judgment rule in Florida requires a much narrower reading than both state and federal authorities now suggest. If PLAYA DEL MAR is correct -- that the affirmative defense of release must be formally set out by an answer, with a reply filed in response, and discovery as to the settlement documents then being permitted to create a fact issue -- then effectively a procedural irregularity becomes a substantive "trap door". The lack of an answer gives PLAYA DEL MAR another chance to reopen the record in the first suit and reargue the merits of its case on all the evidence. This is not the meaning or intent of either the state or federal summary judgment rule which have both evolved to permit enough flexibility so that cases under appropriate circumstances can be terminated as early as possible so long as an adequate record is before the court. Oddly enough, this is precisely what the Fourth District itself taught us in Gutterman - Musicant - Kreitzman, Inc. v. IG Realty Company, 426 So.2d 1216 (Fla. 4th DCA 1983), which it obviously has ignored in deciding this case. Here every possible argument was before the two trial courts and the cases were properly decided on their merits with the trial courts refusing to permit PLAYA DEL MAR's sworn statements as a basis for establishing their "mistake" theory.

II

EXTRINSIC EVIDENCE INADMISSIBLE

PLAYA DEL MAR has admitted in its memorandum in opposition to summary judgment and in its brief that it really did not know what CORAL RIDGE PROPERTIES or WESTINGHOUSE actually thought about the settlement documents. It was just hoping to find out by deposing everyone involved -- including the lawyers -- in order to create enough of an ambiguity as to "intent" to keep its case alive. This is simply not the way a written release is avoided in a damage case.[2/]

2/ Only damage theories -- not reformation -- have been pled. In an action at law, such as this one, extrinsic evidence is inadmissible to vary the terms of a valid written instrument. Flexibility along these lines may be afforded only in equitable proceedings. Spear v. MacDonald, 67 So.2d 630 (Fla. 1953). For example, in Steffens v. Steffens, 422 So.2d 963 (Fla. 4th DCA 1982), the testimony of a draftsman was deemed admissible for reformation purposes alone to show that clerical error caused certain language to be left out of a prenuptial agreement. By contrast here, the first and second sets of releases (drawn by PLAYA DEL MAR's own counsel) are virtually identical, so it is hard to imagine a good faith basis for claiming a mistake under any circumstances. No allegation for reformation appears anywhere. A reformation type argument, however, is raised to avoid summary judgment and several cases are cited. In Milford v. Metropolitan Dade County, 430 So.2d 951 (Fla. 3d DCA 1983), the issue arose in another reformation case whether the original parties to a release intended to extinguish the liability of a third party insurance carrier which was seeking the protection of the release. Likewise, in Gonzales v. Travelers Indemnity Company of Rhode Island, 408 So.2d 741 (Fla. 3d DCA 1982), an insured expressly released personal injury protection in resolution of a first lawsuit, then tried to reform the agreement in a second lawsuit filed by the carrier for a declaration of rights as to uninsured motorist benefits. Reformation was raised by way of a counterclaim. The court held that there was a question as to

(footnote continued on page 7)

An ambiguity found to exist in any agreement must exist on the face of the document itself before extrinsic matters may be considered by the court. Extrinsic evidence is not admissible to create an ambiguity -- period. Boat Town U.S.A. v. Mercury Marine Division of Brunswick Corporation, 364 So.2d 15 (Fla. 4th DCA 1978); Gulf City's Gas Corp v. Tanjello Park Service Company, 253 So.2d 744 (Fla. 4th DCA 1971). See also Dean v. Bennett M. Lifter, Inc., 336 So.2d 393 (Fla. 3d DCA 1976).

In the first suit, PLAYA DEL MAR alleged that everything was wrong with the building, with defects being both patent and latent. (R 141) To resolve the whole construction dispute, all causes of action, including future claims, were settled, paid for, and released. (R 147, 151) Nowhere did PLAYA DEL MAR ever limit its list of problems. In fact, at the time the first suit was finally dismissed, PLAYA DEL MAR actually knew about the fire problem giving rise to the second and third suits because the fire preceded dismissal of the first suit by some twenty-one months.

If the settlement documents are on their face ambiguous, then CORAL RIDGE PROPERTIES and WESTINGHOUSE concede, as they

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(footnote 2 cont'd)

whether the parties intended to release all claims by the release given in the first suit since the release recited that it related to the subject matter of that initial action alone, and that initial action related only to personal injury protection benefits. In this case, of course, the releases cover all matters raised or which could have been raised in the first suit which was for all construction problems with the building -- past, present, and future.

always have, that summary judgment would be improper. But if this Court were to adopt PLAYA DEL MAR's thesis -- that they should be permitted discovery for the purpose of creating an ambiguity under the label of "mistake" -- then how could anyone safely reduce anything to a final writing? Predictably a party to such an agreement could decide at any time that he has entered a bad deal and move to set it aside claiming that he did not intend it to mean what it says. See, Home Development Company of St. Petersburg v. Burzani, 178 So.2d 113 (Fla. 1965).

In reality, the settlement documents make it clear that everything was considered by the parties and nothing was mistakenly excluded. The settlement agreement itself incorporates the allegations of the complaint in the first suit by reference, and the release specifically refers to future damages as well as past and present. Thus not only were existing and known problems included in the first suit, but in paragraph 30 of the complaint, PLAYA DEL MAR went on to allege that the defects

> . . . are not readily recognizable by persons who lack special knowledge or training, or they are hidden by building components or finishes and they are latent defects and deficiencies to the unit owners . . . . (emphasis added) (R 141)

To resolve that first case, the settlement agreement, signed in February of 1982, states in relevant part that the parties were settling and compromising

> . . . all matters in all causes of action arising out of the allegations set forth in the lawsuit as well as all causes of action arising out of the construction and the sale of the PLAYA DEL MAR by CORAL RIDGE . . . . (emphasis added) (R 147)

Under the agreement to settle, PLAYA DEL MAR obligated itself to deliver in escrow a general release as to the liability of CORAL RIDGE PROPERTIES from

> . . . all past, present and future claims, demands and causes of action arising from alleged defective construction of PLAYA DEL MAR . . . . (R 151)

Two releases then were eventually delivered regarding the first lawsuit. One was dated February 25, 1982. (R 165) The second release was then given in order to supply a corporate formality, but only after the fire had occurred. Thus, from the time sequence alone, the absolute absence of any facial ambiguity as to intent could not be more evident. Indeed, the record conclusively establishes this.

To stay in court, however, PLAYA DEL MAR has cited cases where third parties seek the protection of a release, and it has also claimed that allegations of mistake as to unanticipated future consequences would justify consideration of extrinsic evidence. For example, Ayr v. Chance, 372 So.2d 1000 (Fla. 4th DCA 1979) -- cited by the Fourth District and PLAYA DEL MAR -- is of zero significance because in that case a release was asserted as a defense by defendants who were not parties to the release. This was obvious from the face of the

release itself. That is why the Fourth District properly could hold in Ayr v. Chance that summary judgment entered in favor of those defendants not named in the release was wrong. The problem was obviously that certain defendants were trying to get out of a bad situation based upon a defense which did not even apply to them. Ironically, a point made in Ayr v. Chance supports petitioners' case exactly. In footnote one, the court says that in a situation analogous to this case, a release may not be varied by extrinsic evidence where to do so would subject a party to the release to further liability. Id. at 1001 n.1.

PLAYA DEL MAR also relies upon Bagnasco v. Smith, 382 So.2d 401 (Fla. 4th DCA 1980), which likewise involved a third party tortfeasor seeking protection under a release negotiated between plaintiff and another tortfeasor. In ruling that a reservation of rights was appropriate, the Fourth District said that

> . . . the trial court had entered an order after the previous settlement dismissing the settling tortfeasors from the suit but specifically providing that the appellant's claim against the appellees would continue despite the settlement.
>
> [Id. at 402]

Thus, by virtue of the specific reservation of rights as to appellees, Bagnasco is likewise far from helpful.

Nor does Hurt v. Leatherby Insurance Company, 380 So.2d 432 (Fla. 1980) support PLAYA DEL MAR's argument. In Hurt, a

printed release form was held not to preclude the admission of extrinsic evidence to determine whether the parties were in fact released by the execution of the form itself. As in Ayr and Bagnasco, the litigants here seeking protection were not parties to the release. They were third parties having no prior direct relationship with the instrument at all.

PLAYA DEL MAR contends, however, that it did not know about the corroded electrical bus ducts (ostensibly causing the fire) when the releases were executed, so the settlement document should not apply. It cites Ormsby v. Ginolfi, 107 So.2d 272 (Fla. 3d DCA 1958), as authority. While at first blush Ormsby appears to lend some support to PLAYA DEL MAR's position, upon close analysis it too is distinguishable. Ormsby involved a lady who executed a release in exchange for property damages to repair her automobile. The release expressly excluded any item for personal injuries as a result of the accident. Without citation of authority, the Third District concluded that since she later claimed for personal injuries which had nothing to do with the initial claim for released property damage and which she then knew nothing about, evidence was admissible to show that the release related only to property damage and not to personal injury. In making that statement, however, the court expressly stated that its ruling does not do violence to the companion rule that unknown or unexpected consequences of known damage will not invalidate a release. Id. at 274. This being the case, Ormsby cannot control.

The key here is that the discovery of the alleged corroded electrical bus ducts preceded by twenty-one months the final resolution of the first case. Thus, even if Ormsby were arguably relevant, the release cannot be set aside upon proof that it was executed pursuant to a mistake of fact when the fact was known. The fact was faulty construction. The unknown or unexpected consequence was a corroded electrical duct sued upon before the first suit for faulty construction was ever dismissed.

Boole v. Florida Power and Light Co., 3 So.2d 335 (Fla. 1941), cited by PLAYA DEL MAR, is distinguishable on the same basis. In Boole, a release had been given solely for medical expenses to cover the cost of x-rays and medication, but nothing was given for personal injuries, which were not then known. Extrinsic evidence was allowed to explain that damages for personal injuries had not been released because neither party ever contemplated that they were. Id. at 337.

In holding that future claims can indeed be released, the Fourth District in Van de Water v. Echols, 382 So.2d 147 (Fla. 4th DCA 1980), cites Ormsby as being distinguishable. As explained in petitioners' initial brief, Van de Water was a personal injury case in which the injured party released all defendants from all claims "known or unknown". In affirming judgment for defendants, the Fourth District held that a release cannot be avoided simply because damages "prove more serious than had been anticipated at the time of the release."

Id. at 148. In reconciling Ormsby, it said that if the law were otherwise, nobody would ever be safe in accepting a release. Id. at 149.[3/] The wisdom of this rule is obvious. As in this case, the point is that litigation must eventually come to an end. PLAYA DEL MAR has continuously ignored, however, the fact that all defects in the first suit, patent and latent -- past, present, and future -- were resolved, and money was agreed upon and paid. To subject CORAL RIDGE PROPERTIES and WESTINGHOUSE to further litigation on the issue of the meaning of the settlement documents, however, plays into the hands of legally and factually unsound arguments. To adopt the Fourth District's rationale as the law of this case would at the very least create dangerous precedent.

3/ While citing the correct principles relating to the doctrine of res judicata, PLAYA DEL MAR continually ignores the fact that this suit was filed before the first suit was dismissed with prejudice. Even if CORAL RIDGE PROPERTIES, WESTINGHOUSE and the trial court were to have ignored the fact that the construction defects alleged were all inclusive in the first suit, the fact remains that the initial matter was still pending both at the time of the discovery of the alleged corroded bus ducts and at the time this lawsuit was filed.

In order for the doctrine to apply, there must be a concurrence of the following conditions: first, there must be an identity of the thing sued for (here the thing sued for is money damages); second, there must be an identity of the cause of action (here the cause of action is founded upon faulty construction); third, there must be an identity of the persons and parties to the action (in both suits, PLAYA DEL MAR is the plaintiff and CORAL RIDGE PROPERTIES and WESTINGHOUSE are the defendants); and fourth, there must be an identity of the quality and capacity of the person for or against whom the claim is made (in both suits, PLAYA DEL MAR has sought damages to common elements and in both suits the liability of CORAL RIDGE PROPERTIES and WESTINGHOUSE are being sought in their capacity as developers). See 32 Fla.Jur.2d Judgments and Decrees § 107; Pumo v. Pumo, 405 So.2d 224 (Fla. 3d DCA 1981).

CONCLUSION

The entire record of the prior proceeding -- consisting of the complaint, the settlement agreement, the releases and the order of dismissal with prejudice -- was before the trial courts and they saw what happened to all the construction claims in the first suit. As to summary judgment, what more could an answer and a reply have accomplished? Indeed, the spirit and the letter of the rule permit what was done.

It is clear from the settlement documents that the very reason for resolving the initial suit was for PLAYA DEL MAR to receive money in exchange for releasing, discharging, and forever satisfying any possible liability of CORAL RIDGE PROPERTIES and WESTINGHOUSE for construction defects -- past, present, and future -- so that the litigation would come to an end. If the rule were otherwise, a developer or a contractor could never be free from suit for alleged construction defects after it has settled and paid.

It is respectfully urged that the Court reverse and quash the decision of the Fourth District and reinstate the summary judgments entered by the trial courts in both cases.

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that a copy of the foregoing was furnished by U.S. Mail to JOHN PAPPAS, ESQUIRE, Butler, Burnett, Wood & Freemon, 501 E. Kennedy Blvd., Tampa, Florida 33602; ROBERT J. MANNE, ESQUIRE, Becker, Poliakoff, Streitfeld, P.A., 6520 N. Andrews Avenue, Fort Lauderdale, Florida 33310; and PAUL REGENSDORF, ESQUIRE, O'Bryan & Fleming, P.O. Drawer 7028, Fort Lauderdale, Florida 33338, this 29th day of September, 1986.

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