O/a 12-5-86

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IN THE SUPREME COURT OF FLORIDA
Tallahassee, Flo rida

Case No. 68,577

CLARENCE BARBE, III,

Petitioner,

vs.

PIERRE VILLENEUVE, as Trustee for LEHMAN MANUFACTURING (CANADA) LTD., and individually, LEHMAN MANUFACTURING (CANADA) LTD., ATLAS YACHT SALES, INC., a Florida corporation, and ERNIE TASHEA, jointly and severally,

Respondents.
_____/

On Certiorari Appeal From The District Court of Appeal, Fourth District

ANSWER BRIEF ON THE MERITS BY RESPONDENTS, PIERRE VILLENEUVE, AS TRUSTEE FOR LEHMAN MANUFACTURING (CANADA), LTD., and individually, and LEHMAN MANUFACTURING(CANADA) LTD.

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PREFACE

As indicated in Petitioner's Preface, this Case is before the Court on conflict review pursuant to Order of July 23, 1986. These briefs submitted on the merits are directed specifically to the issue of alleged conflict upon which the Court granted jurisdictional review, that being a question as to whether Petitioner made an election of remedy in the lower case.

Respondent will follow the pattern set forth in Petitioner's Brief by referring to Petitioner, Mr. Barbe and Respondent, Mr. Villeneuve by their names. For accuracy, the Respondent is actually Mr. Villeneuve, as Trustee for Lehman Manufacturing (Canada) Ltd., and individually, and Lehman Manufacturing (Canada), Ltd.

STATEMENT OF THE CASE AND FACTS

Villeneuve would disagree with certain of the factual statements as set forth in the statement of case and facts by Petitioner. Although Petitioner, and the Fourth District Court of Appeal decision make a factual statement that Tashea "transferred" title to a second yacht (The Gypsy VI) to Barbe, this question of "transfer" has been disputed all along. Even the testimony of Mr. Barbe and his wife at trial referred to the "transfer" of the title in the nature of a lien or security. The trial judge did not make a specific finding regarding the "transfer" of that title. Barbe's counterclaim against Villeneuve in the case below was based on his assertion that he was a bona fide purchaser of the Gypsy VI. The facts, however,

are agreed that Mr. Barbe paid $45,000.00 and $5,000.00 to Mr. Tashea for the purchase of and repairs to a yacht, the Helen Jane IV in April, 1982. Subsequently, it was discovered that Tashea had forged the true owner's name on the sale documents and that he could not deliver possession of that yacht. In early June, 1982 the true owner of the Helen IV took possession of her from the Barbes, at which time Barbe made demand against Tashea for the return of his money. After Barbe declined to accept a third or fourth mortgage on Tashea's house, Tashea offered to give Barbe the title to the Gypsy VI if Barbe would give him two weeks to return Barbe's money. (R T VolI p107 l.10-22 and p110 l.14 - 17.) Barbe agreed to hold the title for two weeks and the title was executed in blank and tendered to Barbe. (R T VolI p153 l.9-11.) Even the testimony of Barbe himself, his wife and his attorney differed as to whether this tender was a sale or a lien.

Conflicting evidence was presented by Villeneuve and Barbe, in the trial proceedings. It is interesting to note that although the Judge denied all of Villeneuve's claim, including the claim for possession of his personal property, the Judge in fact ordered Barbe to return to Villeneuve certain items of personal property.

Petitioner in his Statement of Facts discusses other facts which Villeneuve would dispute. However, Villeneuve would contend that those disputed facts were discussed at length in the Lower Appeal and are not relevant to the issue on this Certiorari Appeal.

Barbe's counterclaim against Villeneuve for possession of the boat was based upon the theory and allegation that Barbe was a bona fide purchaser of the vessel. As is pointed out in the Statement of Facts by Barbe, Barbe also crossclaimed against Tashea and Atlas Yacht Sales alleging fraud, damages under the federal FTC Act, and civil theft. After pleadings were complete, and during the litigation proceedings on June 16, 1983, Barbe moved for and obtained a default or summary judgment against Tashea and Atlas for $150,000.00 representing treble damages for civil theft (R 440).

At pretrial and during the trial proceedings, Villeneuve raised the defense of estoppel by election as to Barbe's counterclaim. Evidence was presented, without objection, that Barbe had taken the Judgment against Tashea and Atlas in June, 1983.

Villeneuve appealed on several issues and the Fourth District Court of Appeal reversed based on the determination that Barbe had elected a remedy by proceeding to Judgment for money damages on the crossclaim against Tashea, and was therefore estopped from claiming possession of the vessel against Villeneuve.

ISSUE ON REVIEW

Whether the District Court of Appeal erred in applying the doctrine of election of remedies where all of the claims were encompassed in the same suit against different parties and where the supposedly inconsistent facts were established by a default judgment.

SUMMARY OF ARGUMENT

Throughout Petitioner's Brief he refers to the Fourth District Court of Appeal's application of the doctrine of election of remedies as "over technical" or "hypertechnical". Villeneuve contends that this is not a question or issue of an over technical or hypertechnical application of the doctrine, but a correct application of the doctrine.

The application of the doctrine of election of remedies may be summarized as follows: if the remedies sought are consistent, then only the complete satisfaction of one precludes pursuit of the other; however, where the remedies sought are inconsistent, whether factually or legally, election of one precludes the election of the other; and, where inconsistent claims are made in the same lawsuit, a binding election of remedies occurs upon election of a judgment based on one of the inconsistent claims.

Under the peculiar facts of the case at bar, it is clear that Barbe's assertion for claim of theft against Tashea and Atlas is factually inconsistent with Barbe's assertion of the claim for possession against Villeneuve as a bona fide purchaser or buyer in the ordinary course of business. Clearly it is inconsistent to claim that Tashea stole the money from Barbe,

obtain a Judgment against Tashea based upon that theft, and later attempt to claim that the monies were used for purchase of the vessel, supposedly making Barbe a bona fide purchaser as to Villeneuve's claim.

It is not clear from the record whether the Judgment obtained against Tashea was based upon affidavits or verbal proof. However, the proof must have been consistent with the facts alleged in the crossclaim for treble damages under the civil theft count. In taking the entry of money judgment, with threefold damages, against Tashea and Atlas, Barbe relied upon the factual assertion that Tashea and Atlas stole the money. There is no way to reconcile those facts with the assertion that the monies were used to purchase the Gypsy VI.

Barbe was entitled to, and did, plead factually inconsistent claims against Tashea and Villeneuve. Barbe knew he had asserted different claims against Villeneuve when Barbe relied upon his assertions that Tashea stole the monies and took entry of judgment for civil theft treble damages. Having relied on one set of facts to the point of entry of a judgment, Barbe waived his right to pursue the claim for possession of the vessel against Villeneuve, based on a different set of facts. The Fourth District Court of Appeal properly determined that the entry of the judgment against Tashea and Atlas absolutely constituted an election of remedies by Barbe, precluding Barbe from seeking to avail himself of an inconsistent recovery against Villeneuve.

ARGUMENT

The doctrine of election of remedies is well delineated in the 1935 Supreme Court case of McCormick v. Bodecker, 119 Fla. 20 160 So. 43 (1935). There, at page 484, the Court cites from another Florida case as follows:

> Where the law affords several distinct but not inconsistent remedies for the enforcement of a right, the mere election or choice to pursue one of such remedies does not operate as a waiver or estoppel of the right to pursue the other remedies. In order to operate as a waiver or estoppel, the election must be between the coexistent and inconsistent remedies. To determine whether coexistent remedies are inconsistent, the relation of the parties with reference to the right sought to be enforced as asserted by the pleadings should be considered. If more than one remedy exists, but they are not inconsistent, only a full satisfaction of the right asserted will estop the plaintiff from pursuing other consistent remedies. All consistent remedies may in general be pursued concurrently even to final adjudication; but the satisfaction of the claim by one remedy" prevents the use of "other remedies. If in fact or in law only one remedy exists, and a mistaken remedy is pursued, the proper remedy is not thereby waived. Where more than one remedy for the enforcement of a particular right actually exists, and such remedies considered with reference to the relation of the parties as asserted in the pleadings are inconsistent, the pursuit of one with knowledge of the facts is in law a waiver of the right to pursue the other inconsistent remedy." [Cite omitted.]

The Fourth District Court of Appeal in the opinion being reviewed on this Appeal stated: "The purpose of the doctrine of election of remedies is to prevent a double recovery for the same wrong." The Court cited the case of Klondike, Inc. v. Blair, 211 So.2d (Fla. 4th DCA 1968), which concisely stated at page 42: "The doctine of election of remedies is an application of the doctrine of estoppel on the theory that one electing should not later be permitted to avail himself of an inconsistent course."

Barbe argues that Junction Bit & Tool Company v. Village Apartments, Inc., 262 So.2d 659 (Fla. 1972) supports his position that the judgment against Tashea does not constitute a remedy since the Judgment is unsatisfied. However, the facts of Junction Bit are clearly distinguishable in that the case was dealing with a mortgage lien and note and was therefore based upon consistent factual circumstances as well as consistent remedies. Under such consistent circumstances the Courts have held that the election is not a bar unless the first remedy pursued results in satisfaction. The case at bar clearly does not deal with consistent factual circumstances.

In the case at bar, it is clear, even from the factual allegations of the pleadings, as well as from the facts presented, that the claim made by Barbe against Tashea for civil theft of the $50,000.00 and the claim made against Villeneuve for possession as a purchaser, are not factually consistent and the remedies sought are not legally consistent. Therefore, the true issue at bar is whether Barbe's taking of Judgment against Tashea constituted an election precluding Barbe from pursuing the inconsistent claim against Villeneuve.

Barbe contends that the doctrine of election of remedies should not be employed where the Judgment obtained was established by default against one of the parties in the litigation. However, the fact that the Judgment was taken by default does not affect the election itself. See Erwin v. Scholfield, 416 So.2d 478 (Fla. 5th DCA 1982), wherein the Plaintiff made an election by moving for and obtaining a Summary

Judgment. Barbe did not need to proceed to the Judgment against Tashea and Atlas. Unlike some of the cases cited by Petitioner, the Court did not require that Barbe make an election prior to trial, but it was Barbe's voluntary decision to take a Judgment against Tashea with knowledge that the proceedings were still pending as to Villeneuve.

In the case at bar, Barbe argues that the trier in fact should have been entitled to make a factual determination as to the issue of whether the monies were in fact stolen or used to purchase the vessel whose possession was in dispute between Villeneuve and Barbe. However, Barbe himself made the factual determination by relying on the facts to support the default judgment for civil theft against Tashea. To allow Barbe to say that one set of facts applied to Tashea, but a different set of facts applied to Villeneuve would permit Barbe to avail himself of two inconsistent courses. No one forced Barbe to take the default judgment against Tashea for the civil theft treble damages. This was Barbe's election and by doing so, he chose which facts he wished to rely upon. He cannot now come back to the Court and ask that he be allowed to rely on different facts in the case against Villeneuve.

Petitioner further argues that where the remedy elected is illusory, no election has occurred and an inconsistent remedy may be pursued in a later action. In support of this argument Petitioner cites Rolf's Marina, Inc. v. Rescue Service and Repair, Inc., 398 So.2d 842 (Fla. 3d DCA 1981). In Rolf, the Third District Court interpreted the election of remedies to mean

that there must be two or more "available remedies" open to the Plaintiff at the time he institutes the first action. Id. at 843. However, the Fifth District Court addressed Rolf in its decision of Monco of Orlando, Inc. v. ITT Industrial Credit Corporation, 458 So.2d 332 (Fla. 5th DCA 1984) stating at 334: "We see no policy consideration in the requirement that multiple actions should be required to provide one remedy, if a Plaintiff is entitled to one of several inconsistent remedies." Villeneuve would contend that the Court in Rolf, supra, incorrectly applied the doctrine of election of remedies. In any event, Rolf, supra is distinguishable in that the trial court therein required the Plaintiff to make the election before trial. Again, in the case at bar, no one made Barbe make an election. The remedies were available to Barbe until he voluntarily made an election of one remedy by presenting facts to the Court for entry of judgment against Tashea.

Petitioner argues that no prejudice has resulted to Villeneuve by virtue of the default judgment in Barbe's favor. Petitioner again, as in his brief on jurisdiction, cites one sentence out of Williams which is out of context. Williams v. Robineau, 168 So.2d 644 (Fla. 1936) states at Page 646:

> Election is matured when the rights of the parties have been materially effected to the advantage of one or the disadvantage of the other.

Clearly, Barbe has gained an advantage by having a judgment in the amount of $150,000.00 against Tashea and Atlas. Clearly, Villeneuve is prejudiced when Barbe relies on one set of facts during the litigation and then attempts to rely on a different set of facts later in the same litigation.

Petitioner cites Cooley v. Rahilly, 200 so.2d 258 (Fla. 4th DCA 1967) cert. denied 207 So.2d 690 (Fla. 1967) in stating that actual prejudice must occur in order to apply the doctrine of election of remedies. However, Cooley is distinquishable in that the Court was dealing with two separate actions of tort against two separate defendants which the Court said were not inconsistent claims. Further, Barbe's argument would mean that a party could make an election, but not be bound by it.

Barbe asks this Court to allow him to make an election, after he has taken the entry of judgment against Tashea, between the possibly worthless default judgment and a meaningful judgment against Villeneuve. Clearly this should not be permitted in the confines of allowing justice and fairness in the Courts, as it would allow Barbe to determine which facts he wishes to rely upon based upon which defendant he thinks would be more collectible, especially after he finds one judgment may not be readily collectible.

Respondent will concede that Barbe might have waited until the end of the trial to make his election as to which judgment to pursue, after allowing the trier of fact to make the factual determinations. However, Barbe failed to wait until that point for his election, and that is now the crux of this appeal. The bottom line is that no one forced Barbe to take the default or summary judgment against Tashea. Barbe took the factual determination out of the hands of the trial judge by relying on the facts to establish the crossclaim for theft. Barbe made his election voluntarily, thereby waiving the right to claim different facts in his counterclaim against Villeneuve.

Petitioner also argues that no double recovery has in fact occurred as there "is merely a theoretical possibility with no prejudice as to Villeneuve." Barbe recovered a judgment for the monies he gave to Tashea. To allow Barbe to recover possession of the vessel as well would clearly be a double recovery: he not only gets a money judgment for the $50,000.00 he claimed Tashea stole, but he also gets the vessel the monies were supposedly used to purchase. These are the incompatable facts: how could the monies have been used for the purchase of the Gypsy VI if Barbe was deprived the use of his money by the theft by Tashea? Although Petitioner argues that the double recovery is only "a theoretical possibility", the possibility still exists that the judgment against Tashea might be collectible within twenty years and therefore to allow Barbe his judgment against Tashea as well as possession of the vessel against Villeneuve clearly results in Barbe recovering twice. Barbe's decision to take a default judgment for civil theft against Tashea may be "unfortunate", but nonetheless, it was Barbe's choice and he should be bound by it.

Villeneuve concedes that the law is well established that a a party may plead and litigate inconsistent remedies in the same suit. However, the case law cited by Barbe clearly establishes that an election must be made before Judgment on one or the other of inconsistent factual circumstances. General Electric Company v. Atlantic Shores, Inc., 436 So.2d 974 (Fla. 5th DCA 1983). That case is similar to the case at bar in that it involved inconsistent and incompatable factual situations. General Electric involved the question of election of remedies between a

cause of action for a mechanic's lien and a cause of action for replevin of goods which may have become fixtures. In that case there was a disputed question of fact as to when, if ever, the personal property had become fixtures. The determination of that question of fact would determine which remedy was appropriate because clearly, if the goods had become fixtures, General Electric would have been relegated to pursuit of its mechanic's lien remedy and could not pursue replevin. The Court reversed an entry of summary judgment which it found to be based upon some conclusionary inferences, and remanded the cause for resolution of the factual and legal issues regarding the character of the goods in question.

Barbe's assertion that Tashea stole his monies, is clearly inconsistent with Barbe's assertion that the monies were paid to Tashea for purchase of the vessel, thereby placing Barbe in the position of a bona fide purchaser or a buyer in the ordinary course of business. However, Barbe's taking of a civil theft judgment against Tashea is consistent with Villeneuve's assertions throughout the trial proceedings that in fact Tashea had stolen the money from Barbe and Barbe had not actually purchased the Gypsy VI. As Villeneuve argued at trial and again in the appeal to the Fourth District Court of Appeal, if the monies paid in April for the Helen Jane IV were the basis of Barbe's assertion of monies paid for the Gypsy VI in June, he could not have been a good faith purchaser or a buyer in the ordinary course of business in accordance with Florida Statute Sections 672. et seq. and 671.201.

The other cases cited by Petitioner in his brief are disquishable from the facts in the case at bar. In Wolfe v. Aetna Insurance Company, 436 So.2d 997 (Fla. 5th DCA 1983), the Court had directed verdict on one of the Counts pled, thereby removing the opportunity for Plaintiff to elect the other remedy. As supported by Cordell v. World Insurance Company, 358 So.2d 223 (Fla. 1st DCA 1978) and Wolfe, supra, a party may clearly plead and litigate inconsistent remedies. However, although Plaintiff may wait until after entry of verdict to make election between inconsistent remedies, the election must occur before Judgment is entered.

In Wolfe, the Court precluded the Plaintiff from making the election by entering a directed verdict on one of the inconsistent counts. In the case at bar, the Court did not preclude Barbe from making the election. Barbe made the election himself by proceeding to the entry of Judgment on one of his inconsistent counts.

In Erwin v. Scholfield, supra the Court properly applied the doctrine of election of remedies to remedies which were factually consistent but legally inconsistent. The Plaintiff therein sued for specific performance or damages for alleged breach of a real estate contract by the buyers and was subsequently allowed to amend to add a count for recovery of the deposit as liquidated damages. In that case, the Plaintiff ultimately moved for and obtained a summary final judgment for the recovery of the deposit as liquidated damages. Election by the Plaintiff did not occur until he proceeded to the summary judgment. The appellate Court

affirmed the entry of the summary final judgment but reversed on award of attorney fees remanding with directions for the trial court to determine and allow only those fees related to the prosecution of the claim for liquidated damages which was ultimately granted, and not allowing attorney fees for the claims which Plaintiff abandoned.

Petitioner argues that Villeneuve's failure to proceed to a default against Tashea should somehow prevent Villeneuve from claiming that Barbe is estopped by the election Barbe made. However, Villeneuve's tactical proceedings in the case below are not at issue and do not preclude him from raising proper defenses against Barbe.

Petitioner also argues that Villeneuve should be precluded from raising the defense of estoppel of election of remedies in that it was not raised at the time of pleadings. As clearly shown by the record, Villeneuve could not have raised the defense at the time of pleadings as the election was not made until midway through the litigation proceedings. Accordingly, Villeneuve properly raised the defense at the time of trial when Villeneuve learned that the Judgment had been taken against Tashea. Further, although Barbe's counsel may have objected to the argument on the estoppel, the evidence to support the defense of estoppel by election was not objected to. (R T 2/22/84 p. 351) Therefore, the defense was properly before the trial court and Villeneuve was entitled to argue same. Florida Rules of Civil Procedure Rule 1.190(b).

Clearly the claim made by Barbe against Tashea for theft is factually inconsistent with the claim by Barbe against Villeneuve for possession as a bona fide purchaser. These factual allegations and claims are mutually exclusive. In our Court system we attempt to search for the truth in resolving disputes between the parties. Although the Fourth District Court of Appeal below stated that Barbe's taking of Judgment against Tashea may have been "unfortunate", Villeneuve points out that the entry of that Judgment supports Villeneuve's presentation of the facts throughout this case wherein Villeneuve testified and argued that Tashea did not have the authority to sell the Gypsy VI, and did not in fact sell the Gypsy VI to Barbe.

As stated above, Barbe made a voluntary election of facts and should be bound thereby. The Fourth District did not err in applying the doctrine of election of remedies to preclude Barbe from attempting to avail himself of an inconsistent recovery against Villeneuve.

CONCLUSION

Barbe's crossclaim for theft against Tashea and Atlas was inconsistent with Barbe's counterclaim against Villeneuve for possession of the vessel as a bona fide purchaser thereof. Barbe presented to the Judge those facts he was relying upon in obtaining the June 1983 Judgment for damages of $150,000.00 (plus costs and fees) on the crossclaim against Tashea and Atlas. Barbe therefore waived the right to rely on different facts later in the counterclaim against Villeneuve.

The Fourth District Court of Appeal properly determined that Barbe had made an election betwen inconsistent factual allegations, and having relied on one set of facts for entry of judgment on the crossclaim, he was estopped to rely on the inconsistent facts in the counterclaim.

The Fourth District Court of Appeal did not err in its application of the doctrine of election of remedies and its decision does not conflict with the existing case law regarding the doctrine. The fact that Barbe took his judgment by default cannot change the way the doctrine should be applied.

The Petitioner's Writ of Certiorari should be discharged and the decision of the District Court of Appeal, Fourth District, should be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been mailed this 29th day of September, 1986 to:

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