IN THE SUPREME COURT OF FLORIDA
Tallahassee, Florida

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 DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

PETITIONER'S BRIEF ON JURISDICTION

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PREFACE

Petitioner was the defendant/counterclaimant and crossclaimant in the trial court. The parties will be referred to by their proper names.

STATEMENT OF THE CASE AND FACTS

The following facts are all taken from the opinion of the Fourth District. Petitioner Barbe paid Tashea $45,000.00 for a yacht named Helen Jane IV, and an additional $5,000.00 for improvements. Tashea could not deliver the title to Barbe because the yacht was repossessed by its true owner whose signature on the sales contract had been forged. In order to avoid the adverse consequences of that transaction, Tashea then transferred to Barbe title to another yacht, Gypsy VI, which was in the name of Tashea's corporation, Atlas. When Barbe took possession of the Gypsy VI, one Villeneuve claimed ownership. Villeneuve and his corporation, Lehman, sued Barbe to recover the yacht. Barbe counterclaimed to retain possession and title. Barbe also crossclaimed against Tashea and his corporation, Atlas, seeking treble damages under Chapter 812, Florida Statutes.

Tashea and Atlas defaulted and the lower court gave Barbe a final judgment for treble damages against them in in the amount of $150,000.00. Tashea has disappeared and

Barbe has never collected anything against either Tashea or his corporation, Atlas.

There then ensued a trial on the claim of Villeneuve against Barbe to recover possession of the yacht. Barbe prevailed, and final judgment was entered awarding Barbe the yacht. Villeneuve then appealed to the Fourth District arguing that since Barbe had taken a final default judgment against Tashea and Atlas, this constituted an election of remedies which barred Barbe from recovering against Villeneuve on Barbe's counterclaim against Villeneuve.

In reversing, the Fourth District stated:

> The purpose of the doctrine of election of remedies is to prevent a double recovery for the same wrong.
>
> * * *
>
> Barbe recovered a final judgment for compensatory damages for loss of the purchase price of the yacht. The question is whether a claim for recovery of title to the yacht seeks a remedy which is consistent with the remedy pursued on the crossclaim or whether the two are inconsistent. This distinction is crucial because the final judgment on the crossclaim has not been satisfied. If the remedies are deemed to be consistent, only satisfaction of the claim precludes resort to the alternative remedy, whereas if they are inconsistent, the event which operates as an election is entry of final judgment.
>
> As explained in Klondike, the test of inconsistency is whether facts relied upon in obtaining the one remedy are inconsistent with

> those relied upon in obtaining the other. For example, if two remedies are sought, both of which recognize a breach of contract and seek redress for the breach, they are inconsistent. Klondike, 211 So. 2d at 43.
>
> The operative fact relied upon in obtaining the money judgment here was the theft of $50,000 from Barbe. The judgment was for three times the total amount of the claim. In his counterclaim against appellants, on the other hand, Barbe relies on an inconsistent allegation, to wit: that, rather than being stolen by Tashea, the money was given to Tashea as the purchase price for a yacht, and Barbe obtained the Gypsy VI in exchange for the money Tashea received. Therefore, the remedies of a money judgment for the purchase price and an award of the title to the yacht are inconsistent and would result in a double recovery. The action against appellants is thus barred by Barbe having obtained the money judgment in at least the full amount of his claim. In retrospect it is unfortunate for Barbe that he elected to proceed to judgment against Tashea and Atlas, since Tashea has disappeared apparently leaving no assets behind, but the fact remains that the choice was made.
>
> Had Barbe not obtained a judgment on his crossclaim against Atlas and Tashea, the trial court's final judgment against Villeneuve and Lehman would be proper. However, since Barbe elected his remedy, he is barred from seeking an additional award of the yacht and damages for the loss of its use.

The Fourth District reversed the judgment awarding the yacht to Barbe, leaving him only with the uncollectible judgment against Tashea and Atlas. Barbe seeks review based on conflict.

SUMMARY OF ARGUMENT

The opinion of the Fourth District holding that an uncollectible default judgment against one party constitutes an election of remedies barring recovery of property against a different party creates conflict with several Florida cases which hold that there must be a recovery for election of remedies to constitute a bar, and also prejudice. There was no recovery on the default judgment nor any prejudice to the party claiming election of remedies in the present case. There is therefore a conflict which should be resolved by this Court.

ARGUMENT

ISSUE

DOES THE DECISION OF THE FOURTH DISTRICT CREATE CONFLICT?

The essence of the decision of the Fourth District is that since Barbe obtained a default judgment based on allegations that Tashea committed a theft of his $50,000, this was inconsistent with Barbe's claim against Villeneuve that Barbe became the owner of the yacht in exchange for the $50,000 paid Tashea. The Fourth District reasoned that the "remedies of a money judgment for the purchase price and an award of title to the yacht are inconsistent and would result in a double recovery".

The Fourth District held that it was irrelevant that there has been no recovery of money on the default judgment against Tashea. This holding is in direct conflict with the holding of the First District in Floorcraft Distributors, Inc., v. Horne-Wilson, Inc., 251 So.2d 138 (Fla. 1st DCA 1971). In that case, the Smiths, in 1964, gave a personal guaranty on their business to the defendant. In 1965, the Smiths purchased a lot from the plaintiff and gave the plaintiff a promissory note and mortgage. In 1966, the Smiths executed a promissory note and mortgage on the same lot to the defendant for the same debt as the guaranty. Subsequently the Smiths deeded the lot to the plaintiff in lieu of foreclosure. Defendant then sued the Smiths on their personal guaranty and final judgment was entered in favor of defendant.

Subsequently, plaintiff sued defendant to cancel the mortgage from the Smiths to defendant arguing that defendant had elected his remedies by obtaining a judgment on the personal guaranty against the Smiths and, therefore, the later mortgage from the Smiths for the same indebtedness should be cancelled. The trial court held there was no election of remedies and the plaintiff appealed. The First District affirmed, stating on page 140:

> In the case at bar, while the defendant obtained a final judgment in its action

> against the Smiths on their personal guaranty, the evidence before the Court reveals that the Smiths made no payments on their indebtedness to the defendant. This situation brings into play the uniform rule, as recognized in the Lisbon case, that a mortgage lien is not extinguished until the mortgage debt is satisfied. Since there has been no payment on the said obligation, there has been no election of remedies and the defendant is not precluded from a subsequent foreclosure action. (Emphasis added).

In Junction Bit & Tool Company v. Village Apartments, Inc., 262 So.2d 659 (Fla. 1972), this court approved a decision of the Fourth District holding that the doctrine of election of remedies is inapplicable where a judgment is unsatisfied. This court stated on page 660:

> Having reexamined our position advanced in Teague, we now find ourselves in agreement with the District Court below that an unsatisfied judgment does not constitute a remedy, and does not bar a foreclosure action. (Emphasis added).

In the present case, the Fourth District held that obtaining a judgment by default against Tashea precluded Barbe from claiming entitlement to ownership of the yacht from Villeneuve. Thus Villeneuve, who was adjudicated by the trial court to have inferior ownership rights to Barbe as to the yacht, has gained a windfall simply because Barbe took a default judgment, which is uncollectible, against Tashea.

The default judgment against Tashea in no way prejudiced Villeneuve. This creates conflict with Williams v. Robineau, 168 So. 644 (Fla. 1936), wherein this court stated on page 646:

> A position taken which does not injure the opposite party is not an election which precludes a change or raises an estoppel.

The claim against Tashea has not been satisfied, and yet it was held Barbe could not proceed against Villeneuve. This creates conflict with Board of Public Instruction for Bay County v. Mathis, 181 So. 147 (Fla. 1938), in which this court stated on page 149:

> The suits are separate demands against different parties, and, as a matter of law, can be followed until the demand or claims of the School Board have been paid and satisfied. (Emphasis added).

CONCLUSION

The decision of the Fourth District not only creates express and direct conflict, but it also results in a gross miscarriage of justice. As between Villeneuve and Barbe, Barbe was adjudicated to have superior title to the yacht. The fact that Barbe happened to obtain a default judgment which is uncollectible against Tashea for committing a criminal act should not inure to the benefit of Villeneuve

who was adjudicated not to be the owner of the yacht. It is respectfully submitted that review should be granted.

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By: _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished, by mail, this 14th day of April, 1986, to:

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