

IN THE SUPREME COURT OF FLORIDA
Tallahassee, Florida

CLARENCE BARBE, III,

CASE NO.: 68,577

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.

FILED
JUL 1 1988
SUPREME COURT
TALLAHASSEE, FLORIDA
Clerk of the Court
pl

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

RESPONDENT'S ANSWER BRIEF ON JURISDICTION

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PREFACE

Petitioner was the Defendant/Counterclaimant and Crossclaimant at the Trial Court. Respondent was the Plaintiff/Counterdefendant. The parties will be referred to by their proper names.

STATEMENT OF THE CASE AND FACTS

Respondent would agree that the Statement of the Case and Facts as set forth in Petitioner's Brief on jurisdiction is a reasonably accurate recitation of the facts in the opinion of the Fourth District Court of Appeals. However, Petitioner indicates that "Tashea has disappeared and Barbe has never collected anything from either Tashea or his corporation, Atlas." This is a factual statement which is not accurately taken from the opinion of the Fourth District, which actually states: "[T]ashea has disappeared apparently leaving no assets behind...."

At the top of page 3 of its Brief, Petitioner incorrectly quotes the opinion of the Fourth District as follows: "For example, if two remedies are sought, both of which recognize a breach of contract and seek redress for the breach, they are inconsistent." The Court actually stated (on page 5 of their opinion) as follows: "For example, if two remedies are sought, both of which recognize a breach of contract and seek redress for the breach, they are consistent." [Emphasis added.]

Respondent would emphasize that the most relevant portions of the Fourth District's summary of the "operative" facts of the case at bar are quoted on page 3 of the Petitioner's brief.

SUMMARY OF ARGUMENT

The opinion of the Fourth District Court of Appeals in the case at bar does not create any conflict with any other Court decisions and the Fourth District correctly applied the doctrine of election of remedies in the case at bar.

ARGUMENT

ISSUE

DOES THE DECISION OF THE FOURTH DISTRICT CREATE CONFLICT?

Upon a close examination of each of the cases cited by Petitioner, it is clear that the Fourth District Court of Appeals opinion does not create any conflict which needs to be resolved by this Court. As the Fourth District stated on page 5 of its opinion: "As explained in Klondike, [Klondike, Inc. v. Blair, 211 So. 2d 41 (Fla. 4th DCA 1968)] the test of inconsistency is whether facts relied upon in obtaining the one remedy are inconsistent with those relied upon in obtaining the other." Clearly, Barbe's claim against Tashea and Atlas for theft and treble damages is based on facts inconsistent with Barbe's claim for possession against Villeneuve. Barbe's claim against Villeneuve was based on Barbe's assertion that he was a bona fide purchaser of the yacht through payment of the monies to Tashea and Atlas.

Several of the cases relied upon by Petitioner addressed situations involving consistent remedies dealing with a Mortgage lien and Mortgage debt. This is true in both Floorcraft Distributors, Inc. v. Horne-Wilson, Inc., 251 So. 2d 138 (Fla. 1st DCA 1971), and Junction Bit and Tool Company v. Village

Apartments, Inc., 262 So. 2d 659 (Fla. 1972). The Courts have consistently held that a mortgage lien and the note upon which it is based constitute consistent remedies and consistent factual circumstances which do not create an election of remedies for proceeding on one without proceeding on the other, unless the first remedy pursued results in satisfaction.

The Petitioner also asserts a conflict with the Supreme Court decision contained in Board of Public Instructions for Bay County v. Matthis, 181 So. 147 (Fla. 1938). Again, that case did not deal with inconsistent facts and remedies. Both suits against the different parties in that case were based upon the same alleged facts, to wit: a misappropriation of funds.

These cases dealing with consistent facts and remedies are distinguishable from the case at bar, which clearly involved inconsistent factual allegations and remedies. Therefore, no conflict exists between the Fourth District's opinion and these three cases cited by Petitioner.

Finally, Petitioner asserts that Villeneuve was not prejudiced or injured by the Default Judgment taken against Tashea and Atlas and therefore Villeneuve should not have been entitled to raise the issue of estoppel. In support of this assertion, Petitioner cites the case of Williams v. Robineau, 1968 So. 2d 644 (Fla. 1936). However, Petitioner has, by citing out of context, inappropriately cited a single phrase from Williams. The sentence after the one which is cited by Petitioner states:

The election is matured when the rights of the parties have been materially affected to the advantage of one or the disadvantage of the other. Id. at 646. [Emphasis added.]

Barbe obtained an advantage in the form of entry of a substantial money judgment against Tashea and Atlas. The fact that the judgment may be uncollectable does not preclude that the entry of such Judgment constituted an election of remedies. Villeneuve in no way "gained a windfall" simply because Barbe took the default judgment against the other defendants. It was Barbe's choice to rely on either set of alleged facts, (even though only one set of facts could truly be appropriate), and Barbe chose to proceed with the entry of judgment on the basis of theft of the money by Tashea and Atlas. Having relied on those facts to his advantage, Barbe could not then assert that he was a bona fide purchaser as to Villeneuve, as such assertions are clearly inconsistent with the previously relied upon facts.

The holding of Williams distinguished between commencing a cause of action and pursuing the cause of action to a conclusion. The Court determined the former did not constitute an election or an estoppel, while the latter would constitute an election. The factual circumstances in that case reflect that, although a counterclaim had been initiated based upon an inconsistent claim, the Defendant had attempted to amend the inconsistent cause of action before final hearing or entry of a Judgment. The Court determined that the amendment should have been permitted as the Defendant, at that point of the proceedings, had not made a binding election.

In discussing the doctrine of election of remedies, the Court in Williams unequivocally states at 646:

The doctrine of the election of remedies is an application of the doctrine of estoppel on the theory that the one electing should not later be permitted to avail himself of an inconsistent course.

...[T]o be effective and raise an estoppel the remedies must be both coexistent and inconsistent. ... The relation of the parties to the right sought to be enforced may determine whether coexistent remedies are inconsistent.

The Fourth District accurately described the purpose of the doctrine of election of remedies through its reliance and citation of a portion of the opinion contained in Klondike, *Supra*. The decision of the Fourth District Court of Appeals in the case at bar is definitely consistent with the decisions as set forth in each of the cases cited by Petitioner. Therefore no conflict exists. None of the cases cited by Petitioner contain factual circumstances similar to those in the case at bar. The case at bar involves totally inconsistent factual allegations in the coexistent remedies sought.

The case at bar involves a simple resolution of whether the assertion of the claim for theft can be consistent with the assertion of the claim for possession based upon the monies being used and applied for a purchase which created the ownership

interest in Barbe. Barbe based his claim of superior ownership against Villeneuve asserting that the monies he paid to Atlas and Tahsea were in fact monies used for purchase of the vessel. Certainly it is inconsistent to claim that Tashea stole the money and then, in a similar action, claim that instead of being stolen, the money was properly used for the purchase from Villeneuve.

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 these two factual assertions. The factual basis for the remedies sought by Barbe in the Crossclaim against Tashea and Atlas and in the Counterclaim against Villeneuve are clearly inconsistent and therefore, having relied on one set of facts to the point of entry of judgment, Barbe was precluded from relying on different facts to claim possession. The entry of the judgment against Tashea and Atlas absolutely constituted an election of remedies.

CONCLUSION

The decision of the Fourth District creates no express or direct conflict with the Supreme Court or any other District court of Appeal decisions. The Fourth District properly determined that the taking of a judgment based upon a cause of action for theft was positively inconsistent with pursuit of a remedy for possession based upon a claim of purchase allegedly resulting from the same factual situation. The two remedies are

inconsistent and therefore the court properly held that an entry of default judgment against Tashea and Atlas under the theory of theft constituted an election of remedies barring the recovery of possession against Villeneuve.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been
mailed this 5th day of May, 1986 to:

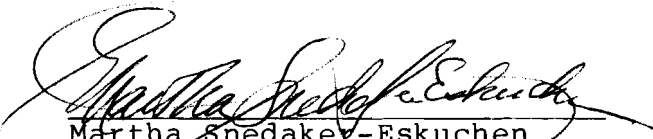
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