DA 12-5-86

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.
_____/

PETITIONER'S BRIEF ON THE MERITS

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PREFACE

This case is before the court on conflict review pursuant to an order of July 23, 1986. This brief is submitted on the merits and is accompanied by an appendix containing the opinion of the Fourth District Court of Appeal to be reviewed and all relevant cases from the conflict brief. Also included in the appendix is a copy of the trial court's final judgment which was reversed by the Fourth District Court of Appeal and its opinion cited in full as Pierre Villeneuve, as trustee for Lehman Manufacturing (Canada), Ltd., and individually, Lehman Manufacturing (Canada) Ltd., appellants vs. Atlas Yacht Sales, Inc., a Florida corporation, Ernie Tashea, jointly and severally, and Clarence Barbe, III, appellees, 483 So.2d 67 (Fla. 4th DCA 1986).

The major parties to this petition for review are the petitioner, Mr. Barbe and the respondent, Mr. Villeneuve. The parties will be referred to by name.

The record will be referred to by (R). It should be noted that the record does not contain a complete transcript of the non-jury trial which occurred in this case. The trial transcript stops at the close of the defendant's case. (R 376). The transcript does not contain rebuttal and

closing argument which was estimated by the parties to last an additional one-half day. (R 377).

STATEMENT OF THE CASE AND FACTS

Most of the facts and legal proceedings are correctly set out in the opinion of the Fourth District Court of Appeal. Mr. Barbe purchased a yacht (Helen Jane IV) from Mr. Tashea who was president of Atlas Yacht Sales, Inc. Barbe paid Tashea $45,000.00 for this yacht and spent and additional $5,000.00 on improvements making Barbe's total expenditure on the Helen Jane $50,000.00. Tashea was unable to deliver title on this yacht and had forged the true owner's name on the documents. The true owner repossessed the yacht and Barbe demanded return of his money and threatened legal action against Tashea. Tashea then transferred title to a second yacht (Gypsy) to Barbe. Title to Gypsy was in the name of Tashea's corporation, Atlas Yacht Sales, Inc. When Barbe took possession of the Gypsy, Mr. Villeneuve appeared and claimed that he was the true owner of the yacht. It was Villeneuve's position that he had placed title to the yacht in the name of Atlas Yacht Sales, Inc. to facilitate an eventual sale in the State of Florida. Mr. Villeneuve was president of Lehman Manufacturing (Canada), Ltd., a marine engine distributor. Villeneuve was in the boat business in Canada and also

serviced Canadian customers while in Florida. (R 277-278). There was a great deal of dispute in the record as to the precise business relationship between Villeneuve and Tashea. The District Court said, Villeneuve was either an employee of Atlas or Villeneuve's corporation, Lehman represented Atlas in Canada. In any event, there was a close business relationship between Tashea and Villeneuve. There was substantial evidence that Tashea in fact paid Villeneuve for his interest in Gypsy whatever it might have been. (R 264-265,268). Villeneuve stated that he had done business with Tashea since 1980. (R 268). Villeneuve also owned 2,500 shares of a corporation known as Atlas Investment and Management Company, a related company. (R 269). Both Villeneuve and Tashea were directly involved in this corporation and in Atlas Yacht Sales, Inc. The corporation in which Villeneuve owned $2,500 shares held only one asset which was a house previously owned by Tashea. (R 269). There was adequate evidence from which the trial court could have found that this house had been transferred by Tashea to Villeneuve in payment for Villeneuve's interest in the boat. In addition, Tashea gave Villeneuve two checks in supposed payment for his interest in the boat. (R 270). It was Barbe's position in trial that in fact Villeneuve had been paid for the boat three times by Tashea. (R 272). Although the details were very confusing Villeneuve and

Tashea were involved in dealings where an amount close to $50,000.00 passed hands and two checks totalling $80,100.00 were transferred. (R 274,275). Villeneuve denied being a true partner with Tashea and said that the deal was that he would represent Atlas Yacht Sales, Inc. in Canada and for people in Florida coming down from Canada. (R 278). There was also substantial evidence that Villeneuve was well aware of Tashea's sharp business dealings and reputation for criminal conduct.

With this factual background, Villeneuve sued Barbe, Tashea and Atlas Yacht Sales for replevin of the boat, Gypsy. The complaint was later amended to add a count against Barbe, Tashea and Atlas for civil theft under Section 812.014, Florida Statutes (1983). Tashea was served but never filed a paper or testified in the case. Barbe answered and counterclaimed against Villeneuve for possession of the boat. (R 367-378). Barbe also cross-claimed against Tashea alleging in Count I that Tashea had taken Barbe's money knowing of Villeneuve's claim against the boat and that this constituted fraud. (R 373-375). Count II of the cross-claim alleged damages under the Little FTC Act, Section 501.210, for deceptive trade practices. Count III of the cross-claim alleged civil theft under Section 812.014, Florida Statutes (1983). (R 373-378).

Tashea never appeared in the case in any way whatsoever. Barbe eventually secured a default judgment for $150,000.00 representing treble damages for civil theft. (R 440). This default judgment on Barbe's cross-claim was entered June 7, 1983 and included $1,500.00 in damages and attorney's fees of $17,500.00. (R 440). Villeneuve chose not to take a default against Tashea despite the fact that he also had an unanswered civil theft claim against him.

Eventually the matter proceeded to a non-jury trial on the complaint and counterclaim between Villeneuve and Barbe. Apparently Villeneuve simply chose to abandon his Tashea claims. Barbe sought possession and title of the Gypsy and damages for loss of use. Shortly after filing the initial suit, Villeneuve had secured possession of the boat through a prejudgment writ of replevin. A great deal of conflicting evidence was presented by Villeneuve and by Barbe. The majority of conflicts centered around the overall business dealings with Tashea who did not appear or testify. The trial judge resolved all of the conflicts in the evidence and concluded that Barbe was the legal owner of the vessel, Gypsy and that he was entitled to $2,715.00 in damages for loss of use. (R 484-485). The parties later stipulated that $19,000.00 was a reasonable sum as attorney's fees for Barbe's counsel and a judgment in this amount was entered. (Supp. R 5-6).

Villeneuve appealed and the Fourth District reversed based on the finding that Barbe had elected his remedy by proceeding to a judgment on the cross-claim against Tashea. The District Court pointed out that the judgment against Tashea had not been satisfied, that it was uncollectable and that, "Tashea has disappeared apparently leaving no assets." Although the opinion of the District Court does not mention it, it is apparent that Villeneuve is entitled to possession of the boat. Villeneuve's appeal had raised five points. The Fourth District concluded that the trial court's disposition as to the first four points were supported by competent, substantial evidence and these were expressly affirmed. These four points were evidentiary in nature. In short, the District Court concluded that the trial court's finding that Barbe was the rightful owner of the boat was correct and supported by the evidence but the judgment had to be reversed because he had, "unfortunately" obtained an "uncollectable" judgment against Tashea.

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 WITHIN THE SAME SUIT AGAINST DIFFERENT PARTIES AND WHERE THE SUPPOSEDLY INCONSISTENT FACTS WERE ESTABLISHED BY A DEFAULT JUDGMENT?

SUMMARY OF ARGUMENT

In a controversy over ownership and possession of a yacht the District Court of Appeal erred in an over-technical application of the doctrine of election of remedies. Where inconsistent claims against different parties are made in the same lawsuit, a binding election of remedies does not occur until satisfaction of a judgment by at least one of the parties in the suit. In addition, under the peculiar facts of this case the court's application of the doctrine of election of remedies results in a clear and obvious miscarriage of justice where a party guilty of wrongdoing has obtained a windfall. Notwithstanding Barbe being the rightful owner of the boat, Villeneuve a wrongdoer) becomes the owner because Barbe "elected" (a remedy by obtaining a worthless default judgment.

ARGUMENT

WHETHER THE DISTRICT COURT OF APPEAL ERRED IN APPLYING THE DOCTRINE OF ELECTION OF REMEDIES WHERE ALL OF THE CLAIMS WERE ENCOMPASSED WITHIN THE SAME SUIT AGAINST DIFFERENT PARTIES AND WHERE THE SUPPOSEDLY INCONSISTENT FACTS WERE ESTABLISHED BY A DEFAULT JUDGMENT?

Due to an erroneous and hypertechnical application of the doctrine of election of remedies, an obvious injustice has occurred. Although the District Court's opinion does not directly address it, this controversy over ownership and

possession of the yacht has quite clearly ended up with the wrong person acquiring ownership and possession of the boat. After hearing conflicting evidence the trial court concluded that Barbe was the true owner of the yacht and that his rights prevailed over Villeneuve's claims. Even though Villeneuve may have had some subordinate interest in the yacht, Barbe was held to be the true owner. The District Court's opinion specifically affirms this ruling by the trial court. However, due to a hypertechnical application of the doctrine of election of remedies which the District Court itself terms as, "unfortunate" the court concluded that the judgment in favor of Barbe must be reversed, as to both title and damages for loss of use. The result is obvious. There are two parties and one boat and if Barbe is not the owner then there is only one alternative -- Villeneuve keeps the boat which he secured under an erroneous prejudgment writ.

Ironically, despite extensive analysis, the District Court's opinion here, does not proceed to the next inescapable step of expressly deciding who is entitled to the boat. Villeneuve seems to win by default solely because Barbe has secured a worthless default judgment against Tashea. The correct legal result should have been that any payment by Tashea to Barbe would have been in the nature of

an off-set or credit in Villeneuve's favor. Mr. Villeneuve has waived this claim because he sued Tashea and intentionally chose not to take a default or proceed to judgment against him. Quite obviously Villeneuve could have had a judgment against Tashea for any amount he chose. The correct legal result would have been to simply credit Villeneuve with any payments made on the judgment secured by Barbe or to give Villeneuve a judgment against Tashea. Villeneuve chose not to take a default against Tashea for the apparent reason that he is in business with the man. It is grossly inequitable to allow Villeneuve to take advantage of this by employing the doctrine of election of remedies, in a hypertechnical manner.

In addition to the equities the law does not require the result reached by the District Court. Research has not disclosed any case even close to this one. A strict application of the doctrine of election of remedies has never been employed in Florida when the facts deemed crucial have been established by a default against one of several parties to the same litigation. No similar case has been found where one party has chosen not to take a default.

This court has addressed the question of election of remedies in Junction Bit & Tool Company v. Village

Apartments, Inc., 262 So.2d 659 (Fla. 1972), and stated as follows:

> The District Court pointed out that the issue of an election of remedies was transparent and of no consequence when no real remedy resulted.
>
> * * *
>
> 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.

In Rolf's Marina, Inc. v. Rescue Service and Repair, Inc., 398 So.2d 842 (Fla. 3d DCA 1981), the District Court considered the doctrine of election of remedies and found it inapplicable, holding that where, "the remedy elected was illusory" no election had occurred. The court commented that, "the law does not mandate so harsh a result." (p. 843). In the absence of a satisfaction of the judgment between Tashea and Barbe no binding election should have been found to have occurred. It is clear that no prejudice whatsoever has resulted to Villeneuve by virtue of the default judgment in Barbe's favor. It is also clear that no double recovery has in fact occurred and that this is merely a theoretical possibility with no prejudice as to Villeneuve. If Barbe ever finds Tashea and attempts to collect the judgment against him, Tashea can defend in

whatever fashion he desires. In Cooley v. Rahilly, 200 So.2d 258 (Fla. 4th DCA 1967), cert. denied 207 So.2d 690 (Fla. 1967), the Fourth District noted the importance of actual prejudice in application of election of remedies. There the court quoted the classic 1936 opinion in Williams v. Robineau, 168 So. 644 (Fla. 1936), that, "a position taken which does not injure the opposite party is not an election which precludes a change or raises an estoppel." In the instant case there is absolutely no disadvantage or prejudice to Villeneuve. As a matter of fact and law Villeneuve is not the owner of the boat. Villeneuve should not be able to insist on a strict application of the election of remedies doctrine to the obvious and clear prejudice of Barbe.

Most of the cases relied upon below predate the more modern forms of alternative and inconsistent pleading specifically authorized by Rule of Civil Procedure 1.110(b). The more modern view of the doctrine of election of remedies is demonstrated in a series of opinions from the First and Fifth Districts. See: Cordell v. World Insurance Company, 358 So.2d 223 (Fla. 1st DCA 1978), Erwin v. Scholfield, 416 So.2d 478 (Fla. 5th DCA 1982), Wolfe v. Aetna Insurance Company, 436 So.2d 997 (Fla. 5th DCA 1983), General Electric

Company v. Atlantic Shores, Inc., 436 So.2d 974 (Fla. 5th DCA 1983), and Monco of Orlando, Inc. v. ITT Industrial Credit Corporation, 458 So.2d 332 (Fla. 5th DCA 1984).

Initially the above line of cases notes the now clearly established law that a party may plead and litigate inconsistent remedies in the same suit. This is not a concept which was accepted in the 1930's when much of the law on this subject was being formulated. However, it is now established that consistency of legal theories is of no consequence and merely requires an election at some point in the proceeding. In Cordell v. World Insurance Company, the First District discussed the question of whether election must occur prior to trial, prior to judgment, or prior to satisfaction. The court noted that no definite decision was necessary because the parties in that case conceded that an election would be made prior to judgment. The instant case presents a different variation of this question. Here there were various theories against and between the various parties and an early judgment was entered on the default against Tashea. After the default the various inconsistent theories between the parties were tried and no election should have been required in this case until the time of the entry of judgment after the trial on the issues between Villeneuve and Barbe. Barbe should have been given a chance

to elect between his worthless default judgment and his meaningful judgment against Villeneuve. No prejudice whatsoever can result from such an election.

The modern view is exemplified by the above cases and Erwin v. Scholfield, notes the distinction between remedies which are factually consistent but legally inconsistent. This is the situation here. The remedy against Tashea for the money paid and converted and the judgment against Villeneuve for possession of the boat are factually consistent but legally inconsistent. Tashea was guilty of theft when he sold the Helen Jane (a different boat) with forged documents intending to convert Barbe's $50,000.00. The theft was complete at that time. At the very least Barbe was entitled to this construction of the facts under the default judgment. There is absolutely no inconsistency between these facts and the facts necessary to establish Barbe's true title to the second boat, Gypsy. Thus although there may be legal inconsistency, there are no factual inconsistencies. Under such circumstances it is only necessary to make an election prior to the entry of both judgments, and no binding election occurred at the time of the first default judgment. Barbe has never had an opportunity to elect as to the second judgment. In Wolfe v. Aetna Insurance Company, supra, the court notes at page 1001

that election between inconsistent remedies may not be required until after a verdict is rendered. Thus, the Wolfe court would allow a party to elect after he is apprised of which claims he has won and which claims he has lost before a jury. The same reasoning should have been employed here.

Monco of Orlando v. ITT Industrial Credit Corporation, is a complex suit related to possession and rights to a milling machine. The plaintiff sued for conversion, replevin and civil theft. The decision stands for the proposition that all of these remedies could proceed up to entry of the judgment on each of the remedies. The court noted at page 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.

Of significant factual importance is the evidence that Tashea and Villeneuve were in business together. The trial court would have had adequate support for a factual conclusion that Villeneuve had been paid for his interest in the boat. It is not inconsistent to assume that Villeneuve had some interest in the boat. It is only necessary to find that Barbe had a superior right in order to award him title to the boat. In addition to all the above it is clear that

Barbe was entitled to damages for loss of use of the boat. Villeneuve took possession of the boat long before Barbe elected any sort of remedy. As such, the trial court was entirely correct in awarding Barbe damages for loss of use and his attorney's fees growing out of the replevin action. There was no reason for the District Court to reverse the award of attorney's fees or damages for loss of use even if the court was correct in applying the doctrine of election of remedies. The parties stipulated that $19,000.00 was a reasonable attorney's fee under the circumstances. (Supp. R 5,6).

In addition to all of the above, the District Court erred because the defense of election of remedies was never raised in the pleadings. At no point did Villeneuve ever plead the defense of election of remedies. The default judgment was entered prior to trial. Villeneuve was well aware that this judgment had been entered and indeed Villeneuve intentionally chose to get a default himself. This issue was raised for the first time at trial and counsel for Barbe moved to strike the argument referred to as estoppel by judgment because it was not raised as an affirmative defense. (R 363). Election of remedies is a defense and the District Court here used it as a sword to award title to Villeneuve. In the trial the judge reserved

ruling on Barbe's motion to strike the defense of estoppel by judgment stating that, "I will consider that as part of the issue the court will have to determine in issuing the final judgment." (R 363,364). Obviously the trial court found that the election of remedies argument at trial was untimely. Inspection of the briefs before the District Court of Appeal indicates very little on this point. Point IV is one page long and does not mention how the point was raised before the trial court.

CONCLUSION

The opinion of the Fourth District should be quashed with directions to affirm the trial court. Alternatively, the matter should be remanded with directions to allow Barbe to elect between the default judgment and the judgment for possession of the boat.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished, by mail, this 28th day of Ausgust, 1986, to:

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