SUPREME COURT OF FLORIDA

SKY LAKE GARDENS RECREATION, INC. Petitioner, v. JUDGES OF THE THIRD DISTRICT COURT OF APPEAL, Respondents.	Case No. _____ 70 057

PETITION FOR WRIT OF MANDAMUS

This petition is filed pursuant to Article V, Section 3(b)(8) of the Florida Constitution and Rule 9.100, Florida Rules of Appellate Procedure. Sky Lake Gardens Recreation, Inc. ("Sky Lake") seeks a writ of mandamus from this court which directs the judges of the Third District Court of Appeal ("the judges") to entertain the appeal which they have dismissed as untimely in Sky Lake Gardens Recreation, Inc. v. Sky Lake Gardens No. 1, 3 and 4, Inc., Case No. 86-2567.

FACTS

1. The parties in the dismissed appeal engaged in litigation in the Eleventh Judicial Circuit Court which resulted in a summary judgment on October 29, 1985 and an amended final judgment on September 22, 1986.

2. On October 17, 1986, both orders were made the subject of an appeal by Sky Lake and docketed by the Third District Court of Appeal as No. 86-2567. (A copy of the Notice of Appeal is attached as Appendix 1).

3. On October 20, the same September 22 amended final judgment was appealed by the other parties in the trial court proceeding ("Gardens") and docketed by the Third District Court of Appeal as Case No. 86-2578.

4. On October 27, 1986, the appeal court entered a show cause order on its own volition directing Sky Lake to

demonstrate why its appeal in Case No. 86-2567 should not be dismissed "as untimely filed." (Appendix 2).

5. Presuming that the court was troubled by the appeal of the summary judgment order of October 29, 1985, since appeal was facially timely as to the September 22, 1986 amended final judgment, Sky Lake filed a response to the court's order to show cause which explained the interdependence between the two orders under Rule 9.110(k), Fla. R. App. P. (Appendix 3).

6. On November 10, the appeals court entered an order following its review of Sky Lake's response which directed that Gardens reply to Sky Lake's response. (Appendix 4).

7. Gardens replied to Sky Lake's response on November 21, raising as a basis for dismissal a ground which was not specified by the court or addressed by Sky Lake in its response. Gardens asserted that an earlier final judgment had been amended only as to attorney's fees, so that all other aspects of the earlier order had became final for appeal purposes upon the expiration of 30 days from the rendition of that first order. (Appendix 5).

8. Sky Lake filed an answer to the reply of Gardens on December 1, pointing out that a motion to amend a final judgment tolls the time for taking an appeal under Rule 9.020(g) of the appellate rules and Rule 1.530(g) of the civil rules. (Appendix 6).

9. On December 9, the court entered an order dismissing Sky Lake's appeal in Case No. 86-2567 as untimely filed. (Appendix 7). No panel of judges on the court is identified in the order as having participated in the decision to dismiss.

10. Sky Lake filed a timely motion for rehearing, calling to the court's attention that, from the recitations in its order of dismissal, the answer of Sky Lake regarding tolling must not have been considered when the order of dismissal was entered.

11. On January 15, 1987, the court denied Sky Lake's motion for rehearing and thus made final its order which dismissed Sky Lake's appeal in Case No. 86-2567 as untimely. (Appendix 8). No particular judges of the court are identified in the order.

12. Sky Lake has now filed a motion to dismiss the appeal brought by Gardens -- Case No. 86-2578 -- on the ground that it derives from the same amended final judgment of September 22, 1986. The district court had not acted on that motion as of the date this petition was filed.

JURISDICTION

The court has jurisdiction to issue writs of mandamus to state officers under Article V, section 3(b)(8) of the Florida Constitution. The judges of the Third District Court of Appeal are state officers. Article V, section (4)(a), Fla. Const.; section 35.06, Fla. Stat. (1985).

Mandamus is the proper remedy to test the correctness of a district court's dismissal of an appeal. State ex rel. Gaines Constr. Co. v. Pearson, 154 So.2d 833 (Fla. 1963). See also New Hampshire Ins. Co. v. Calhoun, 341 So.2d 777, 778 (Fla. 2d DCA 1976) ("mandamus is a proper procedure to test the correctness of a determination of no jurisdiction by a court of lesser jurisdiction").

ARGUMENT

Sky Lake submits that the court incorrectly dismissed its appeal.[1] Sky Lake's appeal was filed within 30 days of the rendition of the order to be reviewed, as required by Rule 9.110, Fla. R. App. P. Nonetheless, the court has dismissed the appeal as "untimely." The only conceivable basis for the

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1 This petition has named all of the judges of the district court as respondents because Sky Lake is without knowledge as to which judges of the court made the determination at issue.

court's action can be the rationale of untimeliness which is set forth in the reply of Gardens served on November 21, 1986.[2] Gardens there asserted that the amended final judgment did not modify anything in the earlier final judgment except to add the denial of a request for attorney's fees which, Gardens asserted, was omitted inadvertently from the court's original final judgment. (Appendix 5, pp. 1, 3). As a matter of law, the district court's dismissal of Sky Lake's appeal is not compatible with the rules of civil and appellate procedure promulgated by this Court, or with Florida caselaw on the subject.

(a) Procedural background

The final judgment adopted by the court had neglected to include a ruling on the trial court's denial of Gardens' attorney's fees. Gardens moved to amend the judgment on a timely basis by means of a motion duly authorized in Rule 1.530(g), Fla. R. Civ. P.

In due course the trial court granted the motion filed by Gardens and entered an amended final judgment which incorporated the denial of fees. That order is the amended final judgment which both sides independently appealed to the district court within thirty days of rendition.

When Gardens appealed the amended final judgment to the district court, it did not limit its appeal to the issue of attorney's fees. Its notice of appeal described the nature of the order as:

> Amended Final Judgment denying [Gardens'] claim for rebate of escalated rent payments tendered prior to the filing of the lawsuit, denying [their] claim for attorney's fees and granting [Sky Lake's] Counterclaim for Rescission.

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2 The district court's denial of the rehearing, which Sky Lake had filed solely to focus the court's attention on the untimeliness argument in Gardens' court-directed reply, makes clear that the court ruled directly on this ground.

Obviously, at that point in time Gardens thought that issues other than fees in the amended final judgment were timely for appeal.

Faced with an opportunity to secure the dismissal of Sky Lake's appeal in Case No. 86-2567 when the district court ordered a pleading on the issue of timeliness, however, Gardens adopted a new stance on appealability and argued that all issues other than fees were foreclosed to Sky Lake. The oddity of that position is Gardens' own appeal, which was inconsistent with that view of appealability. Sky Lake has called this inconsistency to the district court's attention, but no action has been taken as yet. But a concomitant dismissal of Gardens' appeal will not vindicate Sky Lake's right to appeal the adverse rulings of the trial court. The district court has taken away that right, improperly, and only this Court can reinstate it.

(b) Impropriety of dismissal

A motion to amend a final judgment is a rule-authorized, post-trial motion. Fla. R. App. P. 9.020(g); Fla. R. Civ. P. 1.530(g). When filed in a timely manner, as was done here, the motion to amend tolls rendition of the final judgment for all purposes of appeal. There are no exceptions in the rules. This proposition was recognized prior to and after the 1977 revision of the appellate rules, and it was and is integral to both versions. See State ex rel. Park Towers Associates Ltd. v. District Court of Appeal of Florida, Third District, 221 So.2d 136 (Fla. 1969), and Wakulla Wood Products v. Richey, 465 So.2d 660 (Fla. 1st DCA 1985).

Park Towers is particularly instructive because of its treatment of a jurisdictional challenge virtually identical to the one made by Gardens in this case. In that case, the appellant asked the court to amend its final judgment to reflect only that the court had admitted a deposition into evidence. No request was made that the court add another

ruling in the final judgment (such as was done in this case as to the litigated issue of attorney's fees). An amended final judgment was entered which was identical to the initial version, except for the comment on the evidentiary point. Id. at 137. A notice of appeal was filed on a timely basis as to the amended judgment, but more than thirty days after the date of the original final judgment.

In response to a contention that the district court lacked jurisdiction, this Court expressed the bright-line rule that "any post-trial motion permitted by the Rules and which is timely filed delays the 'rendition' of the judgment." Id. at 137. The purpose of the rendition rule, the Court explained, was to avoid the confusion which would otherwise arise as to the timeliness of appeals if the contents of each post-trial motion had to be scrutinized. If the post-trial motion is permitted, it tolls rendition of the original order in its entirety.

The district court has disregarded this principle by ruling in this case that a motion to amend the final judgment which adds a new legal ruling on attorney's fees does not postpone rendition. The district court has determined that an amended final judgment only preserves for appeal the added ruling, and not any original relief which is reconfirmed by the trial court. The effect of the ruling is to require courts and parties to search through amended orders and argue about the components of an amended final judgment, exactly contrary to the Court's directive in Park Towers. Worse, the effect of the ruling is to force an appeal of all final judgments, even though a rehearing is sought by either party. No counsel can risk a ruling like this one for his client. As a practical matter, the district court has invited a host of appeals, at least for docketing and further procedural pleadings, which in the long run will prove to be unnecessary.

The rationale of Park Towers is completely sound and should be reaffirmed. A trial court has before it the entirety

of a final judgment when a timely rehearing motion is filed. The court is free to amend any aspect of its order. Nothing in the cases cited by Gardens to the district court supports the view of "rendition" which the district court has adopted, and which in essence says that the trial court has lost jurisdiction over some aspects of its order.

In Southeastern Fidelity Ins. Co. v. Stevens, 340 So.2d 933 (Fla. 4th DCA 1976), a post-decretal motion to tax costs and attorney's fees resulted in an amended final judgment from which an appeal was taken. The notice of appeal was lodged more than thirty days after the original final judgment. The court found that it lacked jurisdiction of the appeal because (i) the amended judgment merely awarded fees and costs; (ii) the motion to tax costs was not an authorized post-trial motion which could toll rendition; and (iii) an award of fees and costs is separately appealable. This unremarkable result is remarkably distinguishable from the present situation. Here, Gardens filed an authorized post-trial motion tolling rendition which revisited the subject matter of the final judgment in order to "revise legal rights and obligations . . . settled with finality" by the court's prior judgment. Betts v. Fowelin, 203 So.2d 630 (Fla. 4th DCA 1967).

B.G. Leasing, Inc. v. Heider, 372 So.2d 184 (Fla. 3d DCA 1979), also cited by Gardens, involved an amended final judgment which deleted two parties from the judgment. The court held that the remaining defendants could not extend their appeal period by virtue of an amendment relating solely to other parties. Id. at 185.

A third case cited by Gardens involved a timely motion for rehearing but an untimely appeal. Daytona Migi Corp. v. Daytona Automotive Fiberglass, Inc., 417 So.2d 272, 273 (Fla. 5th DCA 1982). Apparently, a second request for rehearing had been filed solely in an effort to preserve lost appellate rights. The second request resulted in the entry of an

identical amended order, save for the phrase "Plaintiff's motion for rehearing is denied." The appellate court held that the time for appeal did not run from this second amended order.

Janelli v. Pagano, 492 So.2d 796 (Fla. 2d DCA 1986), is the last decision which Gardens brought to the district court's attention. Again, Gardens attribute too much to the precedent. In Janelli, an authorized motion for rehearing was filed, but in sharp contrast to the present case a timely appeal was not taken from its denial. Id. at 796. This alone suffices to distinguish Janelli. Additional substantial differences exist, however. The final judgment there reserved jurisdiction as to the amount of fees -- the standard post-decretal situation -- and the amended judgment only fixed the amount of fees. The court held that the order awarding fees was appealable apart from the final judgment, and the circuit court's reservation of the right to award fees did not toll rendition of the original order.

"Access to the courts and appellate review are constitutionally recognized rights and any restrictions thereon should be liberally construed in favor of the right." Lehmann v. Cloniger, 294 So.2d 344, 347 (Fla. 1st DCA 1974). Even if an ambiguity arises under the rules (and Sky Lake does not for a minute acknowledge that one exists), those ambiguities should be construed in favor of access to the appellate courts. Id.

The district court's action has in effect carved out a subset of "unauthorized" motions to amend final judgments. This concept is not found in the rules or supported by the caselaw. A motion to amend judgment places the entirety of the judgment before the court. When an authorized motion to amend final judgment is made by either party, the inescapable consequence is that, by logic, by rule and by judicial precedent, the motion tolls rendition of that final judgment.

If any or all of the district court decisions identified by Gardens are viewed as supporting the notion that rendition of a final judgment is not suspended in full by an

authorized and timely motion to amend that judgment, Sky Lake respectfully urges that the Court use this occasion to reaffirm the "no exception" rule articulated in Park Towers and make the law uniform throughout Florida. The Court has never receded from the absoluteness of Park Towers, and the rules contain no exception. This Court should advise the district courts generally that they may not erode its rendition rules on an ad hoc basis.

CONCLUSION

The district court improperly dismissed Sky Lake's appeal in Sky Lake Gardens Recreation, Inc. v. Sky Lake Gardens Nos. 1, 3 and 4, Inc., Case No. 86-2567. If a trial court's order is made the subject of a timely and authorized motion to amend, rendition of the order for appellate purposes is suspended under the Court's rules without regard to the form or extent of relief requested. The Third District Court of Appeal lost sight of this principle. It's action should be vacated so that Sky Lake can exercise its appellate rights.

RELIEF REQUESTED

Sky Lake requests that the Court issue a writ of mandamus to the judges of the Third District Court of Appeal, commanding the reinstatement of Sky Lake's appeal in Case No. 86-2567.

Respectfully submitted,

Arthur J. England, Jr., Esq.
and
Charles M. Auslander, Esq.
of
Fine Jacobson Schwartz Nash
Block & England, P.A.
Attorneys for Petitioner
2401 Douglas Road
Miami, Florida 33134
(305) 446-2200

CERTIFICATE OF SERVICE

I certify that a true and correct copy of this Petition for Writ of Mandamus was expressa mailed on February 13, 1987 to the clerk of the Third District Court of Appeal.

By: Charles M Cuyler

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