O/a 5-25-88 25

IN THE SUPREME COURT OF FLORIDA

CASE NO. 70, 880

GOLDOME SAVINGS BANK,

Petitioner,

vs.

HOWARD E. WULSIN,

Respondent.

ON REVIEW FROM THE THIRD DISTRICT COURT OF APPEAL
FOR THE STATE OF FLORIDA

INITIAL BRIEF OF PETITIONER

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PRELIMINARY STATEMENT

Plaintiff/Petitioner, PALMETTO FEDERAL SAVINGS AND LOAN ASSOCIATION, now known as GOLDOME SAVINGS BANK, will be referred to as GOLDOME.

Defendant/Respondent, HOWARD E. WULSIN, will be referred to as WULSIN.

Defendant/Respondent, F.R.G. (Florida), INC., will be referred to as F.R.G.

Defendant/Respondent, BEACON REEF LIMITED PARTNERSHIP, will be referred to as BEACON REEF.

References to the record will be (R).

References to the appendix of this Brief will be (App.).

References to the deposition of WULSIN will be (WULSIN depo. pg.). This deposition was included in the record on appeal pursuant to the Order by the Third District Court of Appeal granting GOLDOME's Motion to supplement the record.

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STATEMENT OF THE CASE AND FACTS

This is an appeal from the order of the Third District Court of Appeal of Florida reversing the entry of a Summary Judgment in favor of GOLDOME. The Third District held that the Florida Limited Partnership Act, as it existed prior to January 1, 1987, permitted a limited partner to assert derivative actions on behalf of the limited partnership.

On February 2, 1984, Palmetto Federal Savings and Loan Association filed a foreclosure action on a note and mortgage dated August 20, 1982. The mortgage constituted a first lien on 37 residential condominium units known as the Beacon Reef Condominium in Monroe County, Florida. (R1-11, 192). The borrower was F.R.G. (Florida), Inc., a Massachusetts corporation, authorized to do business in Florida. (R1-2, 7, 10). The lender was Palmetto Federal Savings and Loan Association, a corporation organized and existing under the laws of the United States of America. (R4, 192). On December 10, 1984, Palmetto Federal Savings and Loan Association was succeeded by GOLDOME SAVINGS BANK, a Florida corporation. (R192).

In addition to F.R.G., GOLDOME named as Defendants BEACON REEF Limited Partnership, a Massachusetts limited partnership and owner of the property, and HOWARD E. WULSIN, the partnership's sole limited partner. WULSIN was made a party defendant to the foreclosure action as holder of a third mortgage on the property. (R1-10).

WULSIN answered the Complaint and asserted two affirmative defenses, usury and estoppel, but did not seek the foreclosure of his third mortgage on the property. (R15-18). WULSIN also asserted a counterclaim to recover principal and interest under Florida's criminal usury statute. (R15-18). Thereafter, F.R.G. and BEACON REEF filed an answer adopting the defenses and counterclaim asserted by WULSIN. (R22-25).

In March, 1985, GOLDOME filed a Motion for Summary Judgment on the basis that its loan for the BEACON REEF project constituted a first lien on residential real property and was exempt from Florida usury laws. (R187-193). The trial court denied the Motion for Summary Judgment finding that a material genuine issue existed as to whether the $555,000.00 release fee contained in GOLDOME's mortgage was unreasonable thereby destroying the savings association's usury exemption. (R431). GOLDOME had asserted that the release fee in the mortgage was a profit participation provision expressly excluded from the calculation of interest for usury purposes under Section 687.03, Florida Statutes (1985). (R366-65, 433).

On August 27, 1985, F.R.G. and BEACON REEF filed a Waiver of Affirmative Defenses and a Notice of Voluntary Dismissal of the usury counterclaim. (R453-54). Thereafter, WULSIN filed a Motion for Leave to Intervene and requested the trial court to allow him to assert the usury defense and counterclaim derivatively on behalf of BEACON REEF. (R455-66).

On September 16, 1985, GOLDOME filed a Second Motion for Summary Judgment on the basis that only the borrower, F.R.G., had

standing to raise the usury defense to GOLDOME's foreclosure action and, since that defense had been waived, no material issue existed to preclude the entry of Summary Judgment in favor of GOLDOME. (R4607-69). WULSIN's Motion for Leave to Intervene was argued on the same date as the Motion for Summary Judgment. The trial court entered an Order on October 18, 1985 denying WULSIN's Motion for Leave to Intervene on the basis that the Florida Limited Partnership Act did not permit a limited partner to step into the shoes of the partnership for the purpose of asserting the usury defense. (R605-06, 962).

Summary Judgment was entered in favor of GOLDOME on December 2, 1985. (R963-65). On December 11, 1985, WULSIN filed a Motion to Vacate the Order of Summary Judgment, which was denied by the trial court on January 28, 1986. (R966-85, 1374). WULSIN filed a Notice of Appeal on February 5, 1986, which appealed only the Summary Final Judgment of Foreclosure and the Order denying the Motion to Vacate. (R1397-98). WULSIN did not at any time request the trial court to reconsider the Order Denying the Motion to Intervene entered on October 18, 1985, and no appeal was ever taken from this Order.

The Third District Court of Appeal reversed the entry of the Summary Judgment in favor of GOLDOME. The court found that substantial conflict existed concerning the relationship between BEACON REEF and F.R.G. and, therefore, a genuine issue of material fact existed as to whether BEACON REEF was the real and substantial borrower. The court further found that Section 620.26, Florida Statutes (1981), permits a limited partner to assert a defense on

behalf of a limited partnership when the general partners have refused to assert the defense. (App. at 1-6). Therefore, if BEACON REEF was the actual borrower, both BEACON REEF and WULSIN had standing to assert the usury defense. (App. at 6).

GOLDOME filed a Motion for Rehearing on the basis that the Third District Court of Appeal did not have jurisdiction to review the intervention issue, since WULSIN had failed to appeal the final order entered by the trial court on October 18, 1985. (App. at 7-10). The Third District Court of Appeal denied GOLDOME's Motion for Rehearing. (App. at 11). This appeal followed.

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SUMMARY OR ARGUMENT

The Third District Court of Appeal erred in reversing the Summary Judgment in favor of GOLDOME for two reasons. First, the court did not have jurisdiction to determine whether a limited partner may assert derivative actions since WULSIN had failed to appeal the denial of his Motion to Intervene. A denial of a Motion to Intervene is a final order which must be appealed within thirty days for an appellate court to obtain jurisdiction.

Second, even assuming that it had jurisdiction, the District Court improperly held that limited partners could institute derivative suits under the Florida Limited Partnership Act as it existed prior to January 1, 1987. Prior to January 1, 1987, Florida followed the aggregate theory of partnerships and only the general partners had standing to raise partnership claims.

ARGUMENT

WHETHER THE THIRD DISTRICT COURT OF APPEAL HAD JURISDICTION TO REVIEW THE TRIAL COURT'S DENIAL OF WULSIN'S MOTION TO INTERVENE.

The Third District Court of Appeal should not have even considered the issue of whether a derivative action was available to WULSIN since the court did not have jurisdiction to do so. The issue regarding derivative actions was raised solely by WULSIN's Motion to Intervene. WULSIN failed to appeal the Order Denying the Motion to Intervene which was a final order.

GOLDOME raised this jurisdictional issue during oral argument but the District Court ignored the issue in its opinion reversing the summary judgment.[1] GOLDOME, therefore, moved for rehearing on this issue, but the Motion for Rehearing was denied. It is clear, however, that the District Court lacked jurisdiction to review the intervention issue and WULSIN's appeal should have been dismissed.

The trial court entered the Order Denying WULSIN's Motion to Intervene on October 18, 1985. (R962). The Summary Judgment of Foreclosure was not entered until December 2, 1985. (R963-65). WULSIN filed a Motion to Vacate the order of Summary Judgment on December 11, 1985 but failed to mention the denial of the Motion to

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[1] Jurisdiction may be raised at any stage of the appellate process and will be considered by the court even when not raised in the pleadings or presented to the lower court. Hadley v. Hadley, 140 So.2d 326 (Fla. 3d DCA 1962).

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Intervene or to file a Notice of Appeal of that Motion. (R966-85). The Motion to Vacate was denied by the trial court on January 28, 1986, and WULSIN filed his Notice of Appeal on February 5, 1986. (R1374, 1397-98). Again, the Notice of Appeal did not include the Order Denying the Motion to Intervene and only addressed the Summary Final Judgment of Foreclosure and the Order Denying the Motion to Vacate.

The jurisdiction of an Appellate Court is invoked by filing two copies of a Notice of Appeal with the clerk of the lower court within thirty days of rendition of the Order to be reviewed. Rule 9.110, Florida Rules of Appellate Procedure. An appellate court is without jurisdiction to entertain an appeal not filed within the time prescribed in the appellate rules. The period of time within which an appeal may be filed cannot be extended by court order or stipulation. Harris v. Condermann, 113 So.2d 235 (Fla. 3d DCA 1959), cert. den., 117 So.2d 495 (Fla. 1959). See also Cates v. Heffernan, 18 So.2d 11 (Fla. 1944). Where an appellant has failed to comply with the provisions in the appellate rules regarding the time to commence proceedings, the appeal should be dismissed. Braunstein v. Silhoulte, Inc., 113 So.2d 2d 436 (Fla. 2d DCA 1959); See also Eristavi-Tchitcherinev v. Miami Beach Federal Savings and Loan Association, 16 So.2d 730 (Fla. 1944); and B.G. Leasing, Inc. v. Heider, 372 So.2d 184 (Fla. 3d DCA 1979).

Pursuant to Rule 9.110(h), Florida Rules of Appellate Procedure, multiple final orders may be reviewed by a single notice but only if the notice is timely filed as to each such order.

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Therefore, a notice of appeal must be filed within thirty days of each final order for the court to acquire jurisdiction over each order.

In determining the finality of an Order, the test is whether the Order appealed constitutes "an end to the judicial labor in the trial court, and nothing further remains to be done to terminate the dispute between the parties directly affected." Miami Dade Water and Sewer Authority v. Metropolitan Dade County, 469 So.2d 813, 814 (Fla. 3d DCA 1985). See also S.L.T. Warehouse Company v. Webb, 304 So.2d 97 (Fla. 1974). In the instant case, the Motion to Intervene was a final order since it ended all of WULSIN's attempts to raise defenses as a limited partner to the foreclosure action. Additionally, Florida law is clear that a denial of a Motion to Intervene constitutes a final order. Citibank v. Blackhawk Heating and Plumbing Company, Inc., 398 So.2d 984 (Fla. 4th DCA 1981); Naples Community Hospital, Inc. v. Department of Health and Rehabilitative Services, 463 So.2d 375 (Fla. 1st DCA 1985); and Blue Cross and Blue Shield of Florida, Inc. v. Matthews, 473 So.2d 831 (Fla. 1st DCA 1985), reversed on other grounds, 498 So.2d 421 (Fla. 1986).

Pursuant to Florida case law and the Rules of Appellate Procedure, WULSIN was required to file his Notice of Appeal within thirty days of the entry of the Order Denying his Motion to Intervene in order for the Third District Court of Appeal to acquire jurisdiction over the derivative rights issue. No Motion for Rehearing or Notice of Appeal was filed by WULSIN within thirty days from the entry of the order denying the Motion to Intervene.

Therefore, the Third District Court of Appeal lacked jurisdiction to render its opinion that limited partners had the right to assert derivative claims and the Summary Judgment in favor of GOLDOME should be reinstated.

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WHETHER A LIMITED PARTNER HAD THE RIGHT TO ASSERT A DERIVATIVE SUIT ON BEHALF OF THE LIMITED PARTNERSHIP UNDER FLORIDA LAW AS IT EXISTED IN OCTOBER, 1985.

The Third District Court of Appeal incorrectly held that the Limited Partnership Act in effect at the time of this action permitted derivative actions by limited partners. This holding is in direct conflict with the opinion of the Fourth District Court of Appeal in Amsler v. American Home Assurance Company, 348 So.2d 68 (Fla. 4th DCA 1977), cert. den. 358 So.2d 128 (Fla. 1978) and the Florida Supreme Court's theory for limited partnerships. The decision by the District Court should be reversed and the Summary Judgment in favor of GOLDOME should be reinstated.

Florida follows the aggregate theory of partnerships. I. Epstein and Brothers v. First National Bank of Tampa, 92 Fla. 796, 110 So.354 (Fla. 1926). The aggregate theory is the common law view that a partnership is not a legal entity apart from the members composing it. Ohio Casualty Insurance Company v. Fike, 304 So.2d 136 (Fla. 4th DCA 1974). See also Amsler v. American Home Assurance Company, 348 So.2d 68 (Fla. 4th DCA 1977), cert. den., 358 So.2d 128 (Fla. 1978). In other words, a partnership has no identity apart from its members and is not a person, either natural or artificial. Malibu Partners, Ltd., v. Schooley, 372 So.2d 179 (Fla. 2d DCA 1979), cert. den., 381 So.2d 769 (Fla. 1980). See also Irwindale Company v. Three Islands Olympus, 474 So.2d 406 (Fla. 4th DCA 1985).

The essence of a derivative suit is the assertion by one person of a cause of action technically belonging to another person. Heckler, Limited Partners' Derivative Suits Under the Revised Uniform Limited Partnership Act, 33 Vanderbilt Law Review 343 (1979). Since Florida does not recognize a partnership as a separate entity, it is impossible for a limited partner to maintain a derivative action on behalf of the partnership, a nonexistent entity.

The Fourth District Court of Appeal has previously considered whether a limited partner has the right under the Uniform Limited Partnership Act that existed in Florida prior to 1987 to bring a derivative action on behalf of a limited partnership. That court held that, since Florida adopted the common law aggregate theory of partnerships as opposed to the entity theory, only the general partners of a limited partnership have the right to institute an action on behalf of the limited partnership. Amsler v. American Home Assurance Company, 348 So.2d 68 (Fla. 4th DCA 1977), cert. den., 358 So.2d (Fla. 1978). The Fourth District Court of Appeal noted that Section 620.26, Florida Statutes, which is identical to Section 26 of the Uniform Limited Partnership Act, states that "a contributor, unless he is a general partner, is not a proper party to proceedings by or against a partnership, except where the object is to enforce a limited partner's right against or liability to the partnership." Id. at 71. The court followed a Washington Supreme Court opinion in holding that a limited partner lacks standing to institute suit in light of this section from the Uniform Limited

Partnership Act. See also Vulcan Furniture Manufacturing Corporation v. Vaughn, 168 So.2d 760 (Fla. 1st DCA 1964).

The history of the Florida Legislature's adoption of the Uniform Limited Partnership Act supports the holding by the Fourth District Court of Appeal that the Florida Uniform Limited Partnership Act did not permit derivative suits prior to 1987. The Florida Legislature adopted the Uniform Limited Partnership Act in 1943. Ch. 21887, Laws of Fla. (1943). The Act that was adopted was the 1916 Act approved by the National Conference of Commissioners on uniform state law. Uniform Limited Partnership Act, 6 U.L.A. III (1969). This Act contained no provisions permitting derivative actions by a limited partner on behalf of a limited partnership.

In 1976, the Conference of Commissioners approved the revised Uniform Limited Partnership Act. The revised Act includes a section which permits derivation actions. Specifically, Section 1001 of the Act provides that "a limited partner may bring an action in the right of a limited partnership to recover a judgment in its favor if general partners with authority to do so have refused to bring the action or if an effort to cause those general partners to bring the action is not likely to succeed." Uniform Limited Partnership Act, Section 1001, 6 U.L.A. (1986). Finally, in 1985, the Conference passed several amendments to the revised Uniform Limited Partnership Act, none of which involve the sections permitting derivative actions.

The Florida Legislature declined to repeal the 1916 Act or adopt the revised Limited Partnership Act until 1986. Effective

January 1, 1987, the Florida Act provides for derivative actions by limited partners where the general partners have refused to bring an action or if an effort to cause those general partners to bring the action is not likely to succeed. §620.163, Florida Statutes (1986). There was clearly no such statute in effect at the time that WULSIN attempted to institute his derivative action in this case.

The Third District Court of Appeal relied heavily on New York law and the previously cited Vanderbilt Law Review article in holding that WULSIN, a limited partner, was not barred from asserting the limited partnership usury claim if it could be established that BEACON REEF had the right to raise this defense. In order to arrive at this conclusion the District Court chose to employ a broad construction of Section 620.26, Florida Statutes (1985) and ignored: (1) the holding by the Florida Supreme Court in I. Epstein and Brothers v. First National Bank of Tampa, 92 Fla. 796, 110 So.354 (Fla. 1926) that Florida follows the aggregate theory of partnerships; (2) the decision by the Fourth District Court of Appeal in Amsler v. American Home Assurance Company that limited partners do not have the right to bring derivative actions; and (3) the Florida Legislature's refusal until 1986 to adopt the provisions in the 1987 revisions to the Uniform Limited Partnership Act.

The first opinion followed by the Third District Court of Appeal, Ruzicka v. Rager, 305 N.Y. 191, 111 N.E. 2d 878 (1953), compared limited partners to shareholders of a corporation and held that a partnership was to be regarded as a legal entity for certain purposes. This is in direct contravention of the ruling by the

Florida Supreme Court in I. Epstein and Brothers v. First National Bank of Tampa, 92 Fla. 796, 110 So.354 (Fla 1926), that a partnership is not a legal entity.

In the second case relied upon by the Third District, Klebanow v. New York Produce Exchange, 344 F.2d 294 (2d Cir. 1965), the Second Circuit Court of Appeals noted that New York courts analogize a limited partner to a shareholder of a corporation and do not consider Section 26 of the Uniform Limited Partnership Act an absolute bar to a derivative action by a limited partner. The Third District similarly compared limited partners to shareholders of a corporation and held that "we recognize the right of corporate shareholders to bring derivative suits; thus, we acknowledge circumstances when protection of partnership rights would justify similar remedies." WULSIN v. Palmetto Federal Savings and Loan Association, 507 So.2d 1149, 1151 (Fla. 3d DCA 1987). (App. 4-5).

In reaching this opinion, the court overlooked several points. First, the holding in several of the opinions relied upon by the District Court was that a limited partner may assert partnership claims derivatively against the general partners and the limited partnership. See Moore v. 1600 Downing Street, Ltd., 668 P.2d 16 (Colo. App. 1983); Smith v. Bader, 458 F.Supp. 1184 (S.D. N.Y. 1978); Engle v. Berg, 511 F.Supp. 1146 (E.D. Pa. 1981); Phillips v. KULLA 200, Wick Realty, Inc., 2 Haw. App. 206, 629 P.2d 119 (1981); and, Strain v. Seven Hills Associates, 75 A.d. 2d 360, 429 N.Y.S. 2d 424 (1980). WULSIN never sought to assert claims against the general partners or the BEACON REEF Limited Partnership in the

foreclosure action. He sought to assert defenses derivatively solely against a third party.

The second point overlooked in the District Court's opinion is that limited partnerships are creatures of statute as are corporations. Shareholders of corporations have been granted the right by statute to assert derivative claims since 1976. Ch. 75-250, §50, Laws of Fla. The Florida Legislature declined to create a similar right for limited partners until 1987.

Finally, the court failed to recognize that the disqualification of the general partner to maintain the action on behalf of the partnership was a significant factor for the New York courts in determining whether or not the limited partner had the right to maintain a derivative action. The general partners of BEACON REEF were not disqualified to assert the defense. They chose to waive the usury defense in exchange for a release by GOLDOME of any deficiency claims against the borrower and the limited partnership. (R579-81).

By virtue of its opinion, the Third District Court of Appeal has expanded the derivative rights of limited partners beyond those permitted by the New York courts. In Klebanow, the court stated that it expected New York courts to require strong allegations and proof of disqualification or wrongful refusal by the general partners before a limited partner has the right to sue on behalf of the partnership's behalf. A mere difference of opinion "would be nowhere near enough" to permit intervention by the limited partners. Klebanow v. New York Produce Exchange, 344 F.2d 294, 299 (2d Cir. 1965). See also, McCully v. Radack, 27 Md. App. 350, 340 A.2d

374 (1975) (Klebanow makes it clear that mere differences of opinion over business judgments are insufficient to permit intervention by limited partners).

WULSIN presented no evidence that the general partners were disqualified to maintain any action on behalf of BEACON REEF, only that a settlement had been reached. A derivative action in this instance would constitute an interference with the management by the general partners, something that even the Klebanow court said must not occur.

The opinion by the Third District makes derivative actions by limited partners a matter of right. However, Florida's Revised Limited Partnership Act clearly permits these actions only in exceptional circumstances and does not make it an automatic right. For a limited partner to have the right to assert a derivative claim, he must have been a partner at the time of the transaction of which he complains. §620.164, Fla. Stat. (1986). Additionally, the general partners must have refused to bring the action or any effort to cause the general partners to bring the action would not likely succeed. §620.163, Fla. Stat. (1986). Finally, the limited partner must plead, in detail, the efforts of the limited partner to secure initiation of the action by a general partner or the reasons for not making the effort. §620.165, Fla. Stat. (1986). The District Court completely overlooked these requirements.

Even if the above statutes had been in effect at the time WULSIN sought to intervene, he would have been unable to establish a right to assert the derivative action. It is undisputed that WULSIN was not a limited partner at the time the mortgage was

executed. (WULSIN depo. pgs. 4, 17-18, 43-44, 59-61). (R1-3). In fact, he did not execute the limited partnership agreement until November 1, 1982, two and one-half months after GOLDOME's mortgage was recorded. (WULSIN depo. pgs. 41-45, 48, 54, 59-61, 64). The first requirement above was therefore not met.

WULSIN additionally cannot satisfy the second requirement in the statute. The record on appeal shows that this is not a case where the general partners refused to assert the partnership's claims, as required by the statute. In fact, there was an issue as to whether the limited partnership even had standing to raise the claims since F.R.G. was the borrower under the mortgage. The partners, however, did raise the claims and, after reaching settlement with GOLDOME, waived the claims. (R579-81). Derivative actions under these facts would allow a limited partner to interfere with the management and decision-making duties of the general partner and would prevent a general partner from ever having the authority to settle a suit. This clearly was not the intention of the Florida Legislature in amending the statutes and is the result against which the New York courts cautioned.

CONCLUSION

The District Court lacked jurisdiction to review the denial of the Motion to Intervene and WULSIN's appeal should have been dismissed. Even assuming that it had jurisdiction, the District Court incorrectly ruled that Florida law, prior to 1987, permitted derivative actions by limited partners.

The opinion by the Third District Court of Appeal should be reversed and the Summary Judgment in favor of GOLDOME reinstated.

Respectively submitted,

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