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IN THE SUPREME COURT OF FLORIDA

PALMETTO FEDERAL SAVINGS AND LOAN
ASSOCIATION,

Plaintiff, Petitioner

CASE NO. 70,880

vs.

HOWARD E. WULSIN,

Defendant, Respondent.

FILED

JUL 20 1988

CLERK

By _____

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APPEAL FROM THE ORDER OF THE DISTRICT COURT OF APPEAL
THIRD DISTRICT

PETITIONER'S, PALMETTO FEDERAL SAVINGS AND LOAN
ASSOCIATION'S, BRIEF ON JURISDICTION

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SUMMARY OF ARGUMENT

The decision by the Third District Court of Appeal that a limited partner has the right under Florida law to assert a derivative action on behalf of a limited partnership is directly and expressly in conflict with the decision of the Fourth District Court of Appeal in Amsler vs. American Home Assurance Company, 348 So.2d 68 (Fla. 4th DCA 1977), cert. denied, 358 So.2d 128 (Fla. 1978). The Third District Court of Appeal recognized the existence of the holding by the Amsler Court but expressly stated that it was not following this decision and in fact relied upon New York law to reach its decision. The decisions by the two District Court of Appeals are fully irreconcilable and give rise pursuant to Article V, Section 3(b)(3), Florida Constitution, to jurisdiction in the Florida Supreme Court of this Appeal.

STATEMENT OF THE FACTS

This appeal is from an order of the Third District Court of Appeal reversing the entry of a Final Summary Judgment of Foreclosure by the Circuit Court of the Sixteenth Judicial Circuit in and for Monroe County, Florida.

This action was a foreclosure of a note and mortgage, both dated August 20, 1982, which constituted a first lien on 37 residential condominium units in Monroe County, Florida. (R1-11, 192). The loan was made from Palmetto Federal Savings and Loan Association, a federal savings and loan association located in Manatee County, Florida, to F.R.G., a Massachusetts corporation, authorized to do business in Florida. (R1-2, 4, 7, 10, 192).

The Complaint to Foreclose named F.R.G. as the borrower, Beacon Reef Limited Partnership, a Massachusetts limited partnership, as the owner of the property and Howard E. Wulsin as a lienor of the project by virtue of a third mortgage. (R1-10). Dr. Wulsin is additionally the sole limited partner of the Beacon Reef Limited Partnership.

Initially, F.R.G., Beacon Reef and Dr. Wulsin all raised the affirmative defense of usury and asserted a counterclaim to recover principal and interest under Florida's Usury Statutes. (R15-18). The defenses and counterclaim by Wulsin were raised solely by virtue of his status as a limited partner of Beacon Reef Limited Partnership and not as an inferior mortgagee. (R15-18).

On August 27, 1985, F.R.G. and Beacon Reef Limited Partnership filed a Waiver of Affirmative Defenses and a Notice of Voluntary Dismissal of their usury claims. (R453-54). In response, Wulsin moved for leave to intervene on September 9, 1985 in order to assert the usury defense and counterclaim derivatively on behalf of Beacon Reef Limited Partnership. (R455-66).

On October 9, 1985, the trial court denied Wulsin's Motion for Leave to Intervene and granted Palmetto Federal's Motion for Summary Judgment. The Order denying Wulsin's Motion for Leave to Intervene was signed October 18, 1985. (R962) The Summary Judgment was not entered until December 2, 1985. (R963-965) Thereafter, on December 11, 1985, Wulsin filed a Motion to Vacate the Final Judgment. (R966-985) This motion was denied by the trial court on January 28, 1986. (R1374) Wulsin filed his Notice of Appeal on February 5, 1986 and stated in his Notice of Appeal that the orders being appealed were the Summary Final Judgment entered December 2, 1985 and the Order Denying Rehearing entered January 28, 1986. (R1397-1398).

On May 12, 1987, the Third District Court of Appeal entered the Order which is the subject of this appeal and reversed the trial court's entry of the Summary Judgment. Thereafter, Palmetto Federal filed a Motion for Rehearing on the basis that Wulsin failed to appeal the Order denying his Motion to Intervene dated October 18, 1985 and the Third District Court of Appeal lacked jurisdiction to consider Appellant's claim that he has the right to assert a derivative action under Florida law as a

limited partner. The Appellant Court denied Palmetto Federal's Motion for Rehearing on June 16, 1987. Palmetto Federal's Petition to invoke discretionary jurisdiction of this court was served July 14, 1987.

ARGUMENT

The Third District Court of Appeal reversed the entry of the Summary Judgment of Foreclosure based upon a determination of law that a limited partner in a limited partnership was entitled to assert derivative actions. The opinion expressly and directly conflicts with that 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). It is this conflict that gives rise to this court's discretionary jurisdiction pursuant to Rule 9.030(a)(2)(A)(iv), Florida Rules of Appellate Procedure.

Prior to discussing the conflict between the Third District Court of Appeal's decision in the underlying case and the Fourth District Court of Appeal's decision in Amsler, it should be noted that the Third District Court of Appeal was only able to consider this question by initially disagreeing with the trial court's conclusion that no material issues of fact existed as to who was the actual borrower of the loan. This finding that a material issue of fact does exist, standing alone, is an insufficient reason to have reversed the trial court's Summary Judgment and was relevant only because the Third District of Appeal refused to follow the Fourth District Court of Appeal's opinion in Amsler. In other words, if the Third District Court of Appeal had adopted the Amsler decision, the "issue of fact" as to whether the limited partnership was the actual borrower would have been

immaterial or irrelevant and the trial court's decision would have been upheld.

As pointed out by the Third District Court of Appeal in its opinion, the Fourth District Court of Appeal analyzes the Uniform Limited Partnership Act in terms of the aggregate theory and maintains that a limited partner may not bring a derivative action under the Act. In arriving at this conclusion, the Fourth District Court of Appeal followed the holding of the Florida Supreme Court in Epstein and Brothers v. First National Bank of Tampa, 92 Fla. 796, 110 So.354 (1926) wherein the Florida Supreme Court adopted the common law aggregate theory of partnership.

The appellate court analyzed Section 26 of the Uniform Limited Partnership Act, which is the 1916 Act that was adopted by Florida. That section states "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." §620.26, Fla. Stat. (1985). The Fourth District Court of Appeal analyzed this section in light of the aggregate theory of limited partnerships and concluded that any duty which the defendant might have owed to the limited partners would be owed to the entire membership of the limited partnership and only the general partners would have the right to institute such action. Amsler, 348 So.2d at 71. The court, therefore, held that pursuant to the Act and the view of limited partnerships as recognized by the Florida Supreme Court, a limited partner does not have the right

to assert a derivative action on behalf of the limited partnership under Florida law. Id.

Although the Third District Court of Appeal acknowledged the ruling by the Fourth District Court of Appeal and the existence of Florida law, the court refused to follow the holding set out by the Fourth District Court of Appeal. In fact, the Third District Court of Appeal expressly stated that it was refusing to follow the ruling by the Fourth District Court of Appeal and stated that, while the Fourth District Court of Appeal construed the Uniform Limited Partnership Act narrowly, the Third District Court of Appeal was employing a broader construction. In other words, the Third District Court of Appeal expressly stated that it was refusing to following the ruling set out by the Fourth District Court of Appeal and relied primarily on New York law in holding that a limited partner has the right, under Florida law, to assert a derivative action on behalf of a limited partnership.

It is clear under Florida law that this court has jurisdiction to resolve a conflict resulting when one district court of appeal renders a decision wholly irreconcilable with that of another district court of appeal. L. B. Williams v. W. E. Duggan, 153 So.2d 726 (Fla. 1963). Art. V, Sec. 3(b)(3), Fla. Const. Fla. R. App. P. Rule 9.030(a)(2)(A)(iv). The measure of conflict jurisdiction is not whether the Supreme Court would have arrived at a different conclusion as that reached by the district court but whether the decision of the district court on its face collides with a prior decision of the Florida Supreme Court or another district court on the same point of law so as to create

an inconsistency or conflict among the precedents. Kincaid v. World Insurance Company, 157 So.2d 517, 518 (Fla. 1963). The conflict must be on a question of law involved and determined such that one decision would overrule the other if both were rendered by the same court. Ansin v. Thurston, 101 So.2d 808, 810 (Fla. 1958).

The opinion of the Third District Court of Appeal, on its face, is inconsistent and in direct conflict with the holding of the Fourth District Court of Appeal and would overrule the holding of Amsler if the two courts were the same. In essence, the Fourth District Court of Appeal is permitting a limited partner to assert the rights that were not created by the Legislature until January 1, 1987. This court should exercise its jurisdiction of this appeal and entertain the case on the merits to determine whether a limited partner had the right to assert a derivative action suit under the Florida law that existed in October, 1985.

CONCLUSION

This Court should accept jurisdiction pursuant to Rule 9.030(a)(2)(A)(iv), Florida Rules of Appellate Procedure in order to resolve the conflicting decisions of the Third District Court of Appeal in the underlying case and the Fourth District Court of Appeal in the case of Amsler v. American Home Assurance Company, 348 So.2d 68 (Fla. 4th DCA 1977), cert. den. 358 So.2d 128 (Fla. 1978).

Respectfully submitted,

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