O/A 5-28-88

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IN THE CIRCUIT COURT OF FLORIDA
CASE NO. 70,880

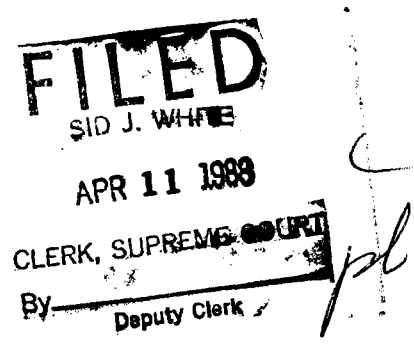
GOLDOME SAVINGS BANK, a
Florida corporation,

Petitioner,

v.

HOWARD E. WULSIN,

Respondent.
_____/



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

REPLY BRIEF OF PETITIONER

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ARGUMENT

I. 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 improperly reviewed the Order Denying Wulsin's Motion to Intervene as the District Court did not have jurisdiction. The Order Denying the Motion to Intervene was a final order and Wulsin's failure to file a Notice of Appeal as to this Order was a fundamental defect.

Wulsin correctly points out the test to determine the finality of an order or judgment. As stated in SLT Warehouse Company v. Webb, 304 So.2d 97, 99 (Fla. 1974), the test to determine the finality of an order or judgment is "whether the order in question constitutes an end to the judicial labor in the cause, and nothing further remains to be done by the court to effectuate a termination of the cause as between the parties directly affected." Wulsin, however, overlooks the additional language in the opinion which states that an order will be final even though other issues remain pending where the order adjudicates a "distinct and severable cause of action, not interrelated with the remaining claims pending in the trial court." Id. See also Miami-Dade Water and Sewer Authority v. Metropolitan Dade County, 469 So.2d 813, 814 (Fla. 3d DCA 1985). An appeal of a final order of this type must be initiated immediately and should not be delayed merely because other claims remain pending between the parties. Mendez v. West

Flagler Family Association, Inc., 303 So.2d 1, 5 (Fla. 1974). Several of the opinions relied upon by Wulsin recognize this requirement. See Duffy v. Realty Growth Investors, 466 So.2d 257, 258 n.1. (Fla. 5th DCA 1985) and Bay & Gulf Laundry Equipment Company, Inc. v. Chateau Towers, Inc., 484 So.2d 615, 616 (Fla. 2d DCA 1985). In fact, the Florida Rules of Appellate Procedure were amended in 1985 to require an immediate appeal when a partial final judgment disposes of the entire case as to any party. The Florida Bar Rules of Appellate Procedure, 463 So.2d 1114 (Fla. 1984). See also Florida Rules of Appellate Procedure 9.110(k).

In applying the test set forth by the courts in SLT Warehouse Company v. Webb, 304 So.2d 97 (Fla. 1974) to the Order Denying the Motion to Intervene, it is clear that the Order constituted a final order and was subject to immediate appeal. Wulsin was sued as a defendant in the foreclosure action because he held a third mortgage on the property and was a party solely in his capacity as an inferior mortgagee. (R3) He was not joined as a limited partner and had not asserted any claims as a limited partner against any parties to the action. (R15-18, 45556) At the time he filed the Motion to Intervene, Wulsin was the only party raising any defenses or asserting a counterclaim. F.R.G. and Beacon Reef had waived their defenses to the foreclosure action, and had dismissed their counterclaim. (R453-66).

By filing the Motion to Intervene, Wulsin was attempting to assert claims as a limited partner (R455-66). In considering the Motion to Intervene, the trial court had to address two issues. The first issue was whether the defense of usury was available to

Beacon Reef Limited Partnership, which was not the borrower under the Note. In the event Beacon Reef did have the right to raise this defense, the second issue, whether Florida law permitted a limited partner from raising defenses of the limited partnership derivatively, became important. The trial court considered both issues and denied the Motion to Intervene based on its finding that Florida law does not permit a limited partner "to step into the shoes of the partnership for purposes of asserting these defenses." (R606).

Thus, the Order denying Wulsin's Motion to Intervene terminated all rights or claims Wulsin could assert as a limited partner and constituted an adjudication of a distinct and severable cause of action and not interrelated with the summary judgment issues which remained pending in the trial court. Therefore, Wulsin was required under Rule 9.110, Florida Rules of Appellate Procedure, to appeal the Order denying the Motion to Intervene within thirty days of the entry of the Order. Wulsin failed to appeal the Order at anytime and, therefore, the appellate court did not have jurisdiction to review the Order.

Wulsin argues that the Order Denying the Motion to Intervene was a non-final order but cites no cases which hold as such. Goldome cited several decisions in its initial brief which recognize a denial of a motion to intervene as being a final order.

Wulsin argues that the Order denying the Motion to Intervene is a non-final Order because the issue of whether Beacon Reef had standing to raise the usury defense was still an issue for the summary judgment hearing. However, the standing of Beacon Reef to

assert defenses to the foreclosure was no longer relevant in the case as Beacon Reef had waived all defenses and Beacon Reef's standing only became relevant again when Wulsin filed the Motion to Intervene. (R453-54). As of the date of the summary judgment hearing, the only defense being raised and subject to consideration by the court was the defense asserted by Wulsin as mortgagee that the loan was criminally usurious and, therefore, unenforceable. (R602-603). Wulsin's main argument as to standing to raise this defense was that Wulsin's position as an inferior mortgagee was the same as that of a junior lienholder contesting the validity of a UCC-9 filing under Article 9. (R601-603). This argument had nothing to do with Beacon Reef's rights to raise any defenses. The court found that the defense of usury was personal to the borrower, F.R.G., and, since the defense had been waived, summary judgment was appropriate. (R606).

Wulsin attempts to avoid this jurisdictional defect by arguing that this court did not accept jurisdiction to review this issue because the jurisdictional issue does not conflict with any other appellate decision. However, Wulsin ignores the case law which holds that jurisdiction errors are fundamental and may be raised at any time. See Hadley v. Hadley, 147 So.2d 326 (Fla. 3d DCA 1962). See e.g., Foley v. State, 50 So.2d 179, 186 (Fla. 1951). In fact, this court has previously held that it is the duty of the court to take note of fundamental defects in pleadings and proceedings even where the errors were not brought here "by assignment of error." Marquette v. Hathaway, 76 So.2d 648, 652 (Fla. 1954).

Finally, Wulsin cites to Eristavi-Tchitcherine v. Miami Beach Federal Savings and Loan Association, 154 Fla. 100, 16 So.2d 730 (1944), a 1944 Florida Supreme Court holding, which states that an appeal from a final decree or judgment opens up all preceding orders for review. However, Wulsin overlooks the requirements of the Florida Rules of Appellate Procedure that a notice of appeal from a final order must be timely filed as to each final order in order for multiple final orders to be reviewed by a single notice. Rule 9.110(h), Florida Rules of Appellate Procedure.

Wulsin failed to file any notice of appeal as to the Order denying the Motion to Intervene. Therefore the Third District Court of Appeal lacked jurisdiction to consider the derivative action issue.

II. 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.

Prior to 1987, under the common law aggregate theory of partnerships as adopted by Florida and the construction of Section 620.26, Florida Statutes by Florida courts, a limited partner was prohibited from bringing derivative actions on behalf of his limited partnership. The holding by the Third District Court of Appeal totally disregards this legal precedent.

A. Florida Law Prohibits Derivative Actions

Florida has been following the aggregate theory of partnerships since 1926. See I. Epstein & Brothers v. First National Bank of Tampa, 110 So.354 (Fla. 1926). Wulsin argues that this principle enunciated by the Florida Supreme Court should not be followed since the opinion was rendered 17 years before Florida adopted the Uniform Limited Partnership Act. Wulsin's argument contradicts Florida law which prohibits a district court of appeal from reconsidering principles announced by the Florida Supreme Court even when changes in laws suggest that principles should be modified. As stated by the First District Court of Appeal, "If principles announced by our Supreme Court are to be revisited, reconsidered or revised, that prerogative rests exclusively with the Supreme Court." Scott v. Terry, 326 So.2d 73, 74 (Fla. 1st DCA 1976), cert. denied, 336 So.2d 107 (Fla. 1976). See also Hoffman v. Jones, 287 So.2d 431, 433-34 (Fla. 1973).

Wulsin's argument also ignores the fact that, subsequent to the adoption of the Limited Partnership Act in Florida, several courts have reaffirmed the principle that Florida follows the common law theory of partnerships. Both the second district and the fourth district have reaffirmed this principle. See Fidelity and Casualty Company of New York v. Homan, 116 So.2d 444 (Fla. 2d DCA 1959), Ohio Casualty Insurance Company v. Fike, 304 So.2d 136 (Fla. 4th DCA 1974) and Amsler v. American Home Assurance Company, 348 So.2d 68 (Fla. 4th DCA 1977), cert. denied, 358 So.2d 128 (Fla. 1978).

Contrary to Wulsin's statement, the opinion in Amsler v. American Home Assurance Company, 348 So.2d 68 (Fla. 4th DCA 1977), cert. denied 358 So.2d 128 (Fla. 1978), is directly on point. In that case, two limited partners sued the attorney who represented the limited partnership for malpractice. The court cited to Section 620.26, Florida Statutes, which states that a limited 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. The court held that in light of this statutory section and the aggregate theory of partnerships, any duty which the attorney might have owed to the limited partners would be owed to the entire limited partnership and "only the general partners would have had the right to institute such action." Id. at 71. The opinion by the Third District Court of Appeal in Wulsin v. Palmetto Federal Savings and Loan Association, 507 So.2d 1149 (Fla. 3d DCA 1987), does not take the holding in Amsler one step further, as stated by Wulsin, but rather holds directly to the contrary of the opinion in Amsler. In fact, this court accepted jurisdiction of this case based upon this obvious conflict.

The Third District Court of Appeal relied upon opinions by courts of other states in reaching its conclusion that Florida permits derivative actions by limited partners. However, the third district was required to follow Florida law over opinions by courts of other states. As stated by the Florida Supreme Court in Stanfill v. State, 384 So.2d 141, 143 (Fla. 1980), decisions of the district courts of appeal represent the law of Florida unless and

until they are overruled by the Florida Supreme Court. In addition, where courts have construed a statutory provision and the legislature, in light of that construction, declines to amend the statute for a period of time, courts must give great weight to the particular construction. See Johnson v. State, 91 So.2d 185 (Fla. 1956) and White v. Johnson, 59 So.2d 532 (Fla. 1952). The first and fourth districts have both held that Section 620.26, Florida Statutes, prohibits a limited partner from asserting claims of the partnership. Vulcan Furniture Manufacturing Corporation v. Vaughn, 168 So.2d 760, 763 (Fla. 1st DCA 1964), and Amsler v. American Home Assurance Company, 348 So.2d 68, 71 (Fla. 4th DCA 1977), cert. denied, 358 So.2d 128 (Fla. 1978). In light of the fact that the legislature failed to change this statutory provision subsequent to these decisions rendered by Florida courts, the Third District Court of Appeal was required to follow these decisions.

Wulsin argues that the third district's reliance on opinions by other states construing the provision of the Uniform Limited Partnership Act identical to Section 620.26, Florida Statutes (1985), is proper since the purpose of the Uniform Limited Partnership Act is to make the law under the Act uniform among the states enacting it. However, the construction of this statutory provision by the courts in various states is hardly uniform. In fact, courts interpreting this statutory provision in Washington, Virginia and Kentucky have held that this provision in the Uniform Limited Partnership Act prohibits derivative actions by limited partners. Lieberman v. Atlantic Mutual Insurance Company, 385 P.2d 53 (Wash. 1963); Yale II Mining Associates v. Gilliam, 586 F.Supp. 893 (W.D.

Va. 1984). See also GA-PAK Lumber Company, Inc. v. Nalley, Jr., 337 So.2d 1270 (Miss. 1976) and Oil and Gas Ventures, Inc. v. Cheyenne Oil Corp., 41 Del. Ch. 596, 202 A.2d 282 (Del. Ch. 1964), aff'd, 42 Del. Ch. 100, 204 A.2d 743 (Del. 1964) (applying New Jersey law).

It is interesting to note that none of the cases cited by Wulsin or relied upon by the third district involve facts similar to the instant action. In this case, the general partners determined that their defenses lacked merit and thereafter settled the litigation in exchange for a waiver of the deficiency. The cases cited by Wulsin mainly involve claims against the general partners themselves and the limited partnership which the partners refused to assert. Wulsin tries to argue that the waiver by the Beacon Reef general partners was self-serving, thereby constituting the fraud required by the opinions cited by the third district as giving rise to derivative action. However, the only statement contained in the record regarding a self-serving waiver is an unsupported conclusion by Wulsin's counsel. (R565-67). The record clearly shows that the general partners agreed to waive the affirmative defenses of usury and inequitable conduct in exchange for an agreement by Goldome to waive any deficiency owed by F.R.G., Inc., the borrower, or Beacon Reef Limited Partnership. (R578-81) As stated by counsel for the general partners, the partners reached this decision to settle after argument on Goldome's First Motion for Summary Judgment and discovery convinced the general partners that there was no merit to the defenses raised. (R578-81) In fact, as pointed out to the court, Dr. Wulsin obviously agreed that the

inequitable conduct defense had no merit since Wulsin had agreed to waive that defense and was proceeding exclusively under the usury defense. (R578-81)

Goldome's initial Motion for Summary Judgment was based on the fact that the construction loan was issued by a federal savings and loan association and constituted a first lien on residential real property and, therefore, was exempt from the Florida usury statutes. (R187-193, 350-70). The trial court refused to apply the statutory exemption provisions. Thereafter, Goldome filed a Motion for Reconsideration and pointed out the exemption provisions of the Monetary Control Act of 1980 which expressly preempt all state usury statutes, including the Florida criminal usury statutes. (R432-36) Goldome addressed this issue in its Answer Brief before the Third District Court of Appeal but the court refused to review the issue. The third district stated that Goldome had failed to file a cross-appeal on this issue.[1] By virtue of the fact that the Florida criminal usury statute was inapplicable to this loan, Beacon Reef and F.R.G. correctly concluded that the usury defense was without merit and it was for this reason that they entered into the settlement with Goldome.

B. The Legislature Did Not Intend to Permit Derivative Actions

The holding by the Third District Court of Appeal permitting derivative actions by limited partners is contrary to the intent of

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[1]The third district's refusal to consider this issue was incorrect in light of its discussions in City of Hialeah v. Martinez, 402 So.2d 602, 603 n.4 (Fla. 3d DCA 1981) and Ash v. Coconut Grove Bank, 448 So.2d 605, 606 n.2 (Fla. 3d DCA 1984) that an appellee's brief is sufficient notice of a cross-appeal notwithstanding want of notice of cross-appeal.

the legislature. Wulsin argues that the changes to the Uniform Limited Partnership Act by the Florida Legislature in 1986 do not necessarily mean that the legislature intended to change the law and that the changes may be designed to clarify what was doubtful and to safeguard against misapprehension as to existing law. However, this argument fails in light of the presumption in Florida, as stated by this court, that the legislature is "presumed to be aware of existing Florida law and the judicial construction of former laws on the subjects of its enactments." Seddon v. Harpster, 403 So.2d 409, 411 (Fla. 1981). It is also presumed that when the Legislature amends a statute, it intends to accord to the statute a meaning different than that accorded to it before the amendment. Id. Therefore, it must be presumed first, that the Legislature was cognizant of the appellate decisions construing Section 620.26, Florida Statutes, and recognizing that the aggregate theory of partnerships when the Legislature revised the Florida Uniform Limited Partnership Act in 1986 and second, that the Legislature intended to change Florida law in 1986 by enacting statutes permitting limited partners to bring derivative actions in limited circumstances.

It is important to note that the Florida Uniform Limited Partnership Act was not merely amended in 1986 but was entirely replaced by the Florida Revised Uniform Limited Partnership Act. Under the revised Act, Section 620.26, Florida Statutes (1985), was repealed and Sections 620.163 through 620.166, Florida Statutes (1986), pertaining to derivative actions, were added. These revisions are subject to the additional presumption that where the

legislature makes material changes to a statute, it is presumed to have intended some objective or alteration of the law, unless the contrary is clear from all the enactments of the subject. Swartz v. State, 316 So.2d 618, 621 (Fla. 1st DCA 1975), cert. denied, 333 So.2d 465 (Fla. 1976). No contrary presumption can be construed from the drastic revisions to Florida's limited partnership laws.

The new Act clearly creates new rights for limited partners which were not part of the Act prior to 1987. In the new derivative action sections, a limited partner who meets the statutory standing requirements may bring an action on behalf of a limited partnership if the general partners have refused to bring the action or if an effort to cause those general partners to bring the action is not likely to succeed. Section 620.163, Florida Statutes (1987). As previously pointed out by Goldome, even if the new Act had been in effect, Wulsin failed to meet the standing requirements of the new Act because Wulsin was not a limited partner at the time the mortgage was executed. Under Section 620.164, Florida Statutes (1987), Wulsin is required to have been a limited partner at the time the mortgage was executed to have standing to bring a derivative action. This statutory section prohibits a limited partner from "buying into a lawsuit," which is precisely what Wulsin has attempted to do in this action.

Wulsin's final arguments in favor of derivative actions are also without merit. Wulsin argues that the Second District Court of Appeal permits a limited partnership holding title to real property to institute litigation in its partnership name to protect its interest and cites to Malibu Partners, Ltd. v. Schooley, 372

So.2d 179 (Fla. 2d DCA 1979), cert. denied, 381 So.2d 769 (Fla. 1980). However, the exception created by the second district in this opinion is not applicable to limited partners. The second district permitted the limited partnership to sue in its partnership name because the general partners would be personally liable to the same extent as if they had been originally named. Id. at 181. Since limited partners are not similarly liable, this reasoning does not apply to Wulsin and the exception should not be extended to permit derivative actions by limited partners.

Finally, Wulsin's argument that the preclusion of derivative action would bar the limited partner from obtaining judicial relief from a general partner's breach of fiduciary duty is contradicted by Wulsin's own statement of the facts. Wulsin has pointed out to this court that he filed a lawsuit, which is pending against F.R.G., Peter Peggs, Peter Hutchins and Goldome in the United States District Court for the Middle District of Florida, shortly after the foreclosure action was initiated. In his federal action, he is alleging usury and breach of fiduciary obligations as well as other claims against these entities and individuals. Wulsin, obviously, has not been barred from seeking relief for breach of fiduciary duty against the general partners and his argument is therefore without merit.

CONCLUSION

The Third District Court of Appeal lacked jurisdiction to review the order by the trial court denying the Motion to Intervene. Further, the third district failed to follow the controlling Florida law which holds that derivative actions by limited partners are prohibited under the Florida Uniform Limited Partnership Act. Therefore, Goldome respectfully requests that the opinion of the Third District Court of Appeal be reversed and the Final Judgment of Foreclosure in favor of Goldome be reinstated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Petitioner has been furnished by U.S. Mail, postage prepaid, to Janie Locke Anderson, Esquire and Vance E. Salter, Esquire, Coll, Davidson, Carter, Smith, Salter & Barkett, P.A., 3200 Miami Center, 100 Chopin Plaza, Miami, Florida 33131, attorneys for Respondent Howard E. Wulsin; and Donald V. Jernberg, Esquire, Isham, Lincoln & Beal, Three First National Plaza, Chicago, Illinois 60602, co-counsel for Respondent Howard E. Wulsin, this 7 day of April, 1988.

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