DA 6-21-88

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, by and through GERALD LEWIS as Comptroller and Head of the Department of Banking and Finance,

Petitioner,

v.

BYRON D. BEELER, BEELER DEVELOPMENT COMPANY, PARKVIEW NURSING HOME, INC., and INVESTORS MORTGAGE AND LOAN COMPANY,

Respondents.

Case No. 71,516

DISCRETIONARY REVIEW OF DECISION OF
THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

PETITIONER'S INITIAL BRIEF

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The State of Florida will be referred to in this brief as either the "Petitioner" or the "Department." The other parties to this appeal will be referred to as "Respondents," with the exception of Byron D. Beeler, individually, who also is referred to as "Beeler." Citations to the record will be made by citing to the Appellant's Appendix as "A." and to the Appellee's Appendix as "A.A.," both filed in the district court.

STATEMENT OF THE CASE

On February 4, 1987, in the Circuit Court of the First Judicial Circuit, in and for Okaloosa County, the Petitioner filed a Verified Complaint for Temporary and Permanent Injunction, Appointment of a Receiver, and Order of Restitution pursuant to Chapters 494 and 517, Florida Statutes (A. No.6). The complaint, which was supported by the affidavits of state examiners, financial specialists, and public investors, showed the perpetration by the Respondents of on-going securities and mortgage fraud. Upon due consideration of the complaint and the supporting sworn statements, the circuit court issued a temporary injunction ex parte on February 5, 1987, enjoining the Respondents from continuing to commit irreparable harm by their violations of Florida law. (A. No.8).

As an ancillary means for the enforcement of the injunction and to prevent the dissipation of assets, the circuit court appointed a neutral third-party as receiver to take possession and control of the Respondents' assets and businesses until final disposition of the case or further order of the court. The Respondents were served with the injunctive order within several hours of its issuance when the receiver took possession of the Respondents' business office.

On April 27, 1987, after the injunction had been in effect for almost three months, the Respondents filed motions to dissolve challenging only the propriety of issuing the injunctive order without prior notice to them. (A., No.3; A.A. No. 5). The Respondents did not raise any issues challenging the underlying factual basis upon which the injunction was issued or allege that any change in circumstances had occurred since February 5 which would eliminate the need for the temporary injunction.

The corporate defendants filed an Application for Hearing with their motion to dissolve, but Byron D. Beeler, individually, did not file, or join in, an application for hearing pertaining to his motion to dissolve. (A., No. 4). On April 21, 1987, the circuit court issued an order setting the hearing on the motions to dissolve for May 12, 1987, and circulated it among counsel for comment and objection. When the parties lodged no objection to the May 12, 1987, hearing date, the order was made a part of the court file. (A.A., No. 4).

The Respondents offered no evidence at the hearing on the motions to dissolve. Accordingly, the trial court heard arguments of counsel on the motions and reviewed the Verified Complaint and affidavits for legal sufficiency. The court also had before it a certificate filed by

Petitioner's counsel prior to the hearing which merely re-recited, as set forth in the Verified Complaint, why no efforts had been made to give the Respondents prior notice regarding the application for injunction. (A.A., No. 8). At the conclusion of the hearing on the motions, the trial court denied the motions to dissolve and kept the injunction and ancillary receivership in effect.

The corporate parties took an interlocutory appeal from the circuit court's order denying their motions to dissolve. On July 30, 1988, the First District Court of Appeal issued an order which dissolved the temporary injunction. The order did not address the receivership and did not indicate when it was to take effect. Consequently, on August 3, 4, and 5, respectively, the Respondents, the receiver, and the Petitioner, filed emergency motions for clarification of the First District's order. The Petitioner also sought a stay of the July 30 order in order to maintain the status quo while it sought rehearing or pursued other appellate remedies.

On August 6, 1987, the district court issued an amended order which required the receiver immediately to deliver possession of all receivership assets to the Respondents. By order dated August 25, 1987, the court denied the Petitioner's motion for clarification and stay

"except as otherwise affected or conditioned" by the court's previous orders.

Without benefit of an opinion, on August 14, 1987, the Petitioner filed a Motion for Rehearing and a Motion for Rehearing En Banc with the district court. By order dated September 7, 1987, the district court ruled that these motions would be acted upon following issuance of the opinion and permitted Petitioner to file amended motions after the opinion issued.

On September 17, 1987, approximately seven weeks after issuance of the initial order, the First District Court of Appeal issued its written opinion in the case sub judice. In the opinion, the district court held that 1) the propriety of dispensing with notice prior to issuance of an injunction may be reviewed again on appeal even though the defendants had the benefit of notice and full review of the notice issue in the trial court, 2) a trial court may issue a temporary injunction upon petition of the state under Chapters 494 and 517, Florida Statutes, without prior notice only if the verified complaint and supporting affidavits establish with certainty that immediate and irreparable harm will result during the time required to give notice; and 3) a temporary injunction is defective and, thus, apparently may be dissolved because an

attorney's certificate was not filed contemporaneously with the complaint, even though the certificate merely recited sworn averments in the complaint and was subsequently filed and considered by the court.

On October 2, 1987, the Petitioner filed amended motions for rehearing and rehearing en banc with the district court. The initial motions for rehearing and the amended motions were denied by the court by separate orders dated October 2 and October 29, respectively.

Following dissolution of the injunction and receivership, the Respondents filed for protection from creditors under Chapter 11 of the Bankruptcy Code in the United States District Court for the Northern District of Florida. In February 1988, Respondent Parkview Nursing Home, Inc., voluntarily converted its Chapter 11 reorganization to a Chapter 7 liquidation. On or about March 22, 1988, the United States Trustee for the Northern District of Florida filed motions for the appointment of a trustee to take control and possession of all remaining business records and assets of the Respondents under the jurisdiction of the bankruptcy court.

By notice dated November 30, 1987, Petitioner invoked the discretionary jurisdiction of this Honorable Court to review the decision of the district court pursuant to Rule

9.030(a)(2)(A)(iv), Florida Rules of Appellate Procedure. Petitioner subsequently filed its brief on jurisdiction with this Court on December 17, 1987. By Order dated March 22, 1988, this Court accepted jurisdiction in the instant cause.

STATEMENT OF THE FACTS

The Petitioner, State of Florida, ex rel. Gerald Lewis as Comptroller of the State of Florida and head of the Department of Banking and Finance ("Department"), is charged with administration and enforcement of Chapter 517, Florida Statutes, "The Florida Securities and Investor Protection Act," and Chapter 494, Florida Statutes, "The Mortgage Brokerage Act." The corporate Respondents are entities owned by, or under the control of, the Respondent Byron D. Beeler ("Beeler"). Prior to February 5, 1987, by means of his corporate entities Beeler engaged in the solicitation and sale to members of the general public of unregistered whole or fractional interests in promissory notes purportedly secured by mortgages.

The corporate entites were used by Beeler to generate mortgage paper and, in turn, to create a false market in bogus mortgage-backed securities by means of intercompany transactions effected by Beeler. For example, one of the Beeler corporate entities, Parkview Nursing Home, Inc., ("Parkview") which did not own any interest in a nursing home, purportedly purchased property for a future sewer project by obtaining a loan from Investors Mortgage and Loan Company ("Investors"), another Beeler entity. Parkview executed a promissory note and mortgage in favor

of Investors, even though no transfer of funds took place. Then, Beeler sold fractional interests to the general public in the note and mortgage given by Parkview to Investors in order to fund the purchase of the property. Beeler also took approximately $50,000 for what he termed a broker's commission even though the loan transaction was between two of his wholly-owned or controlled entities and was funded by the investments of the unknowing public.

Beeler also contrived a market in bogus securities by means of misleading documents and fraudulent representations. Beeler sold "Mortgage Thrift Certificates" that were not issued by a thrift institution and were not certificates of deposit. Instead, these certificates were merely either unsecured promissory notes or fractionalized notes partially secured by second mortgages. Beeler also repeatedly held himself out as a trustee to obtain monies from investors when, in fact, no trust existed.

After receiving numerous complaints from members of the public which detailed the Respondents' failure to repay investment principal upon timely demand, the Department investigated the activities of the Respondents, pursuant to the specific authority of Sections 517.201 and 494.065, Florida Statutes. The investigation involved, but was not limited to, review of the Respondents' bank and other

records, interviews of the Respondents and their employees, and discussions with members of the public who had purchased investments created by the Beeler companies.

Based upon the results of the investigation, the Department filed a complaint in the circuit court for a temporary and permanent injunction, appointment of a receiver, and an order of restitution. The complaint was verified under oath and was supported by a number of sworn affidavits of state financial specialists and public investors. (A., No. 7). The Verified Complaint and incorporated sworn statements together show that the Respondents were not licensed to sell any of the securities they offered to the public and that none of the securities was registered, as required by Chapter 517, Florida Statutes. (A., No. 7, Exhibits 4 and 5).

Furthermore, the complaint and affidavits clearly show that the Respondents were <u>actively</u> soliciting members of the general public to invest in notes and mortgages by means of newspaper advertisements, direct correspondence, and oral representations which were false and misleading. (A., No. 7, Exhibit 1). The fraudulent misrepresentations of the solicitation campaign included untrue, material financial information concerning the collateral securing the notes, the number of defaults by the Respondents on

their obligations under the notes, and the degree of risk inherent in the investment program. Indeed, the advertisements placed by the Respondents in the local newspaper, copies of which were attached as Exhibit 1 to the complaint, show that these solicitations began in 1985 and continued unabated through January, 1987.

Similarly, the Verified Complaint and sworn statements show that the Respondents were financially dependent upon making additional unregistered sales of notes and mortgages and engaging in further fraudulent transactions in order to avoid the collapse of their operation. First, out of a total of approximately $4 million in mortgage investments sold by Beeler to the public, in excess of $1.7 million was in either default or foreclosure. Second, as set forth in the affidavit of Financial Analyst Rita Poff, the Respondents lacked sufficient funds to repay the aggregate principal amount owed to investors. (A., No. 7, Exhibit 10). Third, as set forth in the affidavit of investor Virginia Kammerer, Beeler actually admitted that he could not repay the principal of her investment until he obtained money from a new investor. (A., No. 7, Exhibit 2, Affidavit 4). The cumulative effect of this evidence showed an enterprise desperately in need of new investor capital to

repay or honor existing obligations, commonly known as a "Ponzi" or pyramid scheme.

Additional averments set forth in the Verified Complaint and sworn statements show that the Respondents had engaged in the misappropriation and dissipation of investor funds. Beeler even admitted to Financial Specialist Ben Pridgeon that investor funds in the Parkview Nursing Home sewer project had been commingled and transferred to another corporate account for ultimate disbursement to a creditor of J. Ross Franklin, another individual defendant named in the complaint. (A., No. 7, Exhibit 6, Memorandum of Interview dated September 3, 1986, p. 14). During Mr. Pridgeon's analysis of the bank records of the Parkview Nursing Home account, he found fourteen separate transfers of investor funds, totalling over $200,000, which could not be linked in any way to the Parkview project. (A., No. 7, Exhibit 6, Affidavit).

When questioned by the Department during the investigation, Beeler repeatedly lied about the nature of his operation and his dealings with the public. Beeler claimed that the "Mortgage Thrift Certificates" which he offered for sale and sold to the public were collateralized by whole, first mortgages when, in fact, these certificates were either unsecured or inadequately collateralized by

fractional interests in second mortgages. Beeler also claimed that he personally reviewed appraisals, credit reports, and risks of the program with all potential investors when, in fact, interviews with investors revealed that Beeler rarely, if ever, discussed or disclosed any material aspects of the program with them.

Based upon the sworn statements contained in the Verified Complaint and incorporated affidavits, the circuit court issued a temporary injunction, without prior notice to the Respondents, to preserve the status quo. The order was issued ex parte on the basis that the complaint showed the Respondents, if given advance notice, would very likely cause irreparable harm by dissipating and concealing assets, committing additional violations of Florida law, and concealing, altering or destroying crucial documentary evidence before the application could be considered at a full hearing.

SUMMARY OF ARGUMENT

Notice and full review by the circuit court of the propriety of entry without prior notice of an temporary injunction against the Respondents precluded reconsideration of that issue by the district court. After the Respondents had the benefit of notice of the application for injunction and the opportunity to obtain full review in the circuit court of the propriety of the injunction issued against them, the prior notice issue became moot. Furthermore, the Respondents waived any right they had to direct appellate review of the prior notice issue by filing motions to dissolve and not appealing the injunctive order. Even if the issue of prior notice were not moot and could be considered on appeal, any error pertaining to ex parte issuance was rendered harmless by the hearing on the motions to dissolve.

Assuming arguendo that the prior notice issue is not moot, or has not been waived, and that any failure to give prior notice was not harmless, the trial court properly exercised its discretion in issuing without prior notice a temporary injunction against these Respondents. The specific facts contained in Petitioner's Verified Complaint, which are further supported by affidavit, show that the trial judge did soundly exercise, and certainly did not

abuse, his discretion in issuing the subject injunction without prior notice.

The complaint establishes that the Respondents were engaged in an ongoing, systematic scheme to defraud the public in violation of Florida's securities and mortgage brokerage laws, had misappropriated and dissipated investor funds, and were financially dependent upon making additional unregistered sales of securities to avoid the collapse of their fraudulent enterprise. Evidence of such an unlawful operation, when taken together with the remaining verified allegations in the complaint, constitutes a more than adequate basis upon which the trial judge reasonably could have concluded that immediate and irreparable harm would likely result to the public if the Respondents were given prior notice of the application for a temporary injunction.

Moreover, application of an unreasonably strict and unyielding evidentiary standard for issuance of a temporary injunction without notice is contrary to the public interest and the securities and mortgage brokerage laws. Petitioner's complaint should not have been subjected to strict scrutiny by the trial judge because it is brought pursuant to statutes that expressly confer broad authority upon the state to protect the public from fraud and deceit.

Controlling caselaw requires that Chapters 494 and 517, Florida Statutes, which were enacted pursuant to the police power of the state, be liberally construed, in light of the public purpose underlying these laws and the endless variety of investment schemes which are devised to circumvent the law and defraud the public.

If it further is assumed that the trial court did in some way abuse its discretion in issuing the injunctive order without prior notice, any such error was rendered harmless by the hearing on the motions to dissolve. The Respondents were afforded a full opportunity at that hearing to challenge the propriety of issuing an injunction against them and were fully heard on the matter. Thus, the trial court's denial of the motions to dissolve shows that giving notice to the Respondents, so that they could have been heard prior to issuance of the subject injunction, would not have affected either the issuance or the scope of the injunctive order.

Finally, the requirements of Florida Rule of Civil Procedure 1.610(a) were complied with in this case. In addition, although a separate certificate was not required in this instance, counsel for petitioner timely filed a separate certificate concerning notice before the hearing on the motions to dissolve, wholly precluding any finding

by the district court that the Petitioner substantially failed to comply with the rule. Any possible error related to the prior lack of such a certificate is, moreover, clearly harmless because the trial court considered the certificate at that hearing and denied the motions.

ARGUMENT

I. CHALLENGE OF THE EX PARTE ISSUANCE OF AN INJUNCTION BY MOTION TO DISSOLVE PRECLUDES APPELLATE REVIEW OF THE PROPRIETY OF DISPENSING WITH PRIOR NOTICE

The issue of whether there was a showing sufficient to justify dispensing with notice prior to entry of a temporary injunction cannot be raised on appeal from the order denying a motion to dissolve. Belk's Department Store, Miami, Inc. v. Scherman, 117 So.2d 845 (Fla. 3d DCA 1960); Babuschkin v. Royal Standard Corporation, 305 So.2d 253 (Fla. 3d DCA 1974). Any issue concerning prior notice is made moot by virtue of the opposing party having secured the benefit of notice and an opportunity to be heard on the propriety of entry of the injunction at the hearing on the motion to dissolve. Id. at 847.

The Respondents elected to have the issue of prior notice reviewed by the circuit court on motions to dissolve filed approximately three months after the injunction had been in effect. At the hearing on those motions, the Respondents had the benefit of 3 months prior notice of Petitioner's application for an injunction and a full opportunity to be heard on the propriety of issuing or continuing an injunction against them. Accordingly, any issue of prior notice became moot after that hearing, when

the circuit court heard argument and disposed of the matter by denying the motions to dissolve.

The Respondents in the instant cause could have questioned the lack of prior notice by directly appealing the subject injunctive order to the district court, pursuant to Florida Rule of Appellate Procedure, 9.130(a)(3)(B). Because the Respondents were personally served with the injunctive order within hours of its issuance, on the same day the order issued, a direct appeal of the injunctive order would have afforded the Respondents the opportunity to obtain full and expeditious review of the propriety of dispensing with prior notice to them. Based upon the record in this matter, the Respondents did not, however, want expeditious review of the prior notice issue.

The Respondents' elected to wait three months to raise the issue and not to appeal the propriety of the ex parte issuance of the injunctive order within 30 days of rendition, thereby forfeiting their opportunity to obtain direct appellate review of the prior notice issue. Fla. R.App.P. 9.130(b). By virtue of their repeated appearances before the circuit court while the injunction was in effect, the Respondents waived any right they had to contest the lack of notice prior to issuance of the injunction. See, Belk's Department Store, supra. Indeed, it is anomalous

even to suggest that these Respondents, who repeatedly appeared and were heard on various motions in the trial court for months after the injunction was in effect, subsequently could be heard on appeal to complain that they were improperly denied notice prior to issuance of the injunction.

Assuming arguendo that the issue of prior notice could now be considered, any error pertaining to ex parte issuance was rendered harmless by the hearing on the motions to dissolve. DeCarlucci v. Granulite, Inc., 171 So. 2d 587 (Fla. 2d DCA 1965). At the hearing on the motions to dissolve, the trial court afforded Respondents a full opportunity to be heard on the propriety of the injunction. After fully hearing all the Respondents' contentions at that hearing, the court kept the injunction and receivership in effect, as originally ordered. Accordingly, even if the trial court had given the Respondents notice of the application for a temporary injunction, that notice and opportunity to be heard would not have precluded, affected or limited in any way the injunctive order that issued. Thus, any error pertaining to ex parte issuance clearly would be harmless because prior notice would not have changed the circuit court's ruling on Petitioner's application for temporary injunction.

II. THE EVIDENCE BEFORE THE TRIAL COURT JUSTIFIED ISSUANCE OF AN EX PARTE INJUNCTION UNDER CHAPTERS 494 AND 517, FLORIDA STATUTES, AND DENIAL OF THE RESPONDENTS' MOTIONS TO DISSOLVE

The issuance of an injunction is a matter lying within the sound discretion of the trial court. City Gas Company of Florida v. Ro-Mart South Green Condominium "R", Inc., 350 So.2d 790 (Fla. 3d DCA 1977). Thus, any party seeking dissolution of a temporary injunction must show the issuing court abused its discretion in entering the injunction, not merely that the trial court erred in some way. Durable Uniform and Linen Supply Co. v. Sanitary Linen Service Co., 183 So.2d 226 (Fla. 3d DCA 1966). In addition, the burden of proof is on a moving party to show that a complaint for injunctive relief lacks sufficient equity to authorize a court to issue a temporary injunctive order. Orlando Orange Groves Co. v. Hale, 144 So. 674 (Fla. 1932). The movant must prove that the injunction entered is wholly without basis in the pleadings and evidence. World Security Fund v. Schmidt, 406 So.2d 511 (Fla. 3d DCA 1981). This burden of proof is especially heavy because the complaint must be construed liberally, and as a whole, because of the equitable nature of an injunctive proceeding. Dixie Music Co. v. Pike, 185 So. 441, 447 (Fla. 1938).

The Petitioner's application for ex parte issuance of a temporary injunction contains strong, concrete evidence that immediate and irreparable harm would result to the citizens of the State of Florida during the time required to give notice and that such notice would likely precipitate the injury. Accordingly, this evidence justifies the trial court's issuance of the injunction and its decision to deny the motions to dissolve.

Petitioner's Verified Complaint is replete with specific averments showing how and why giving notice to Respondents of the application for temporary injunction would likely precipitate, and possibly accelerate, further violations of Florida law, the destruction and concealment of records, and the dissipation and concealment of assets. The complaint details numerous instances where the Respondents misappropriated and concealed funds entrusted to them, contrived misleading or false documents, and misrepresented material facts to effect their schemes, in utter disregard of the laws of the State of Florida and its citizens.

The complaint sets forth at length various types of schemes and artifices employed by the Respondents to obtain investor funds for their enterprises, including the creation of bogus mortgage paper, the inflation of property

values, and the minimization of risks. (A., Number 6, p. 5, et seq.) Nineteen specific material misrepresentations and omissions repeatedly used by the Respondents to deceive and mislead the public about the investment scheme are set forth in Count IV of the Complaint. Id. at p. 15, et seq.) Three material misrepresentations made directly by Beeler to the Department when questioned about the program are are set forth in Count VI; seven distinct breaches of fiduciary duty and nine separate violations of Florida's Mortgage Broker Act are stated in paragraphs 20 & 38-46 of the complaint, respectively.

Information uncovered during the investigation by experienced financial analysts and securities specialists through review of books, records and bank accounts, and personal interviews with the Respondents and their employees revealed that the Respondents had commingled, misappropriated and diverted investor funds, had never set-up any trust accounts, and had made unauthorized "roll overs" to defer the return of investment principal. (A., No. 7, Exhibit 6). Further analysis showed $1.7 million of a $4 million portfolio of notes and mortgages was in default or foreclosure and insufficient assets to meet existing liabilities. (A., No. 6, p. 9).

Affidavits obtained from purchasers of the mortgage securities establish that the Respondents were, in fact,

dependent upon making additional unregistered sales and engaging in further fraudulent transactions in order to avoid the collapse of their operation. When investor Virginia Kammerer insisted that Beeler repay the $25,000 principal amount of her investment upon maturity, Beeler stated that he needed to acquire a "new investor" in order to repay her. (A., No. 7, Exhibit 2, Affidavit 4). When investor Phyllis Kline questioned Beeler about why her investment principal had not been returned upon maturity of the note, Beeler stated that he "assumed" that she wished to "roll over" the investment for another year. Beeler then asked Mrs. Kline to give him an additional 60 days to repay the obligation. (A., No. 7, Exhibit 2, Affidavit 6).

Furthermore, when the evidence is considered as a whole, it presents the strongest and most obvious basis for the issuance of a temporary injunction without notice, to wit: the existence of a "Ponzi" or pyramid scheme. The perpetration of a Ponzi scheme represents the most serious threat to the financial security of individual investors and to the integrity and confidence of the public in the capital markets. A trial court, when presented with

evidence of such an enterprise, as in the case sub judice, must have the discretion to enjoin immediately the activities of the principals and entities through which the scheme is carried out.

Because of the strong concrete evidence contained in Petitioner's complaint, it is not surprising that the Respondents initially urged on appeal that a higher, and improper, standard of review be applied to complaint. Not only did the Respondents argue that Petitioner's complaint should be subjected to strict scrutiny, they also attempted to avoid their burden of proof by summarily asserting that there is no factual basis for the allegations at the end of the complaint concerning irreparable harm. To maintain that contention, the Respondents, and the lower court, apparently wholly ignored the 30 pages of specifically pleaded and sworn facts preceding those allegations. Indeed, the Respondents and the lower court apparently ignored the controlling caselaw upon which the Respondents purported to rely.

In Dixie Music Co., supra, the hallmark decision on ex parte issuance of injunctions, the Florida Supreme Court held that where there is a risk that property will be removed and documents destroyed, it is appropriate for a court to issue an injunction and appoint a receiver without

notice. In Dixie Music Co., the plaintiff, a judgment creditor of the defendant, who was an owner of certain coin-operated devices, sought to enjoin the defendant from "removing, concealing or tampering with the records of defendants, and from removing money from the coin-operated devices," and to have a receiver appointed to take possession of the defendant's assets and business. Id. at 442. Plaintiff's complaint stated that "if plaintiff gives notice of this hearing, ...defendants would spirit away, conceal or destroy the records showing the location of said coin-operated devices, would remove from said devices all money contained therein, [and] would tamper with said devices...." Id. at 443.

Based upon those allegations, the lower court granted an injunction and appointed a receiver without notice. On appeal, the defendants argued, as have the Respondents, that the injunction was improper because the complaint contained no "positive, verified allegations of fact...that injury will be done, and the affidavit appended to the bill [was] based purely upon conjecture, conclusion, speculation and belief only." Id. at 444.

The Florida Supreme Court noted that the complaint alleged merely what defendants would do if given notice of the injunction proceeding, and not that a certain injury

was going to occur. Id. at 447. Nevertheless, the court stated:

> But if all of the allegations relating to the necessity of proceeding without notice, when taken together, manifestly make it appear to the judge that the apprehended acts will be committed, precipitating the injury sought to be avoided, the form of the allegation will not be fatal to the cause, since this is a proceeding in equity, where substantive rights can be dealt with more readily than at law.

Id. (emphasis added).

The Florida Supreme Court upheld that injunction issued without notice on the basis that the lower court:

> could have reasonably concluded from the allegations contained in the complaint that if the defendants were notified of the proceeding to place all of the property in receivership and to restrain them from doing certain things in order to satisfy plaintiff's judgment..., [they] might decide to abandon the licenses to operate..., and leave the State with all of the property, leaving plaintiff without any means of satisfying his judgment. In such circumstances, we do not think the chancellor committed reversible error in entering the temporary restraining order and in appointing a receiver.
>
> Id. at 447. (emphasis added).

In view of the exceptionally broad discretion afforded to the trial courts in Dixie Music Co. and the detailed and substantial showing of fraud made by Petitioner in its

complaint, there is simply no basis, legal or factual, for finding that the trial judge in this matter abused his discretion in denying the motions to dissolve and issuing the subject injunction without notice.

In any event, in an enforcement action by the state under the specific authority of Sections 517.191 and 494.071, Florida Statutes, the application of an unreasonably strict and unyielding evidentiary standard for the issuance of a temporary injunction without notice, like the standard enunciated by the First District Court of Appeal in the opinion, is contrary to the public interest and to the securities and mortgage brokerage laws. The Florida securities laws were enacted under the police power of the state and will be given a broad and liberal interpretation to effectuate their purpose to protect the public from fraud and deceit in the sale of securities. McElfresh v. State, 9 So.2d 277 (Fla. 1942). Indeed, the protection of the public interest is of such overriding importance in actions brought by the state pursuant to Chapter 517, Florida Statutes, that irreparable harm is presumed upon a mere showing of a statutory violation. Rich v. Ryals, 212 So.2d 641 (Fla. 1968); Harvey v. Wittenberg, 384 So.2d 940 (Fla. 2d DCA 1980);

Times Publishing Company v. Williams, 222 So.2d 470 (Fla. 2d DCA 1969).

It is further evident from the express wording of Section 517.191(1) that the provisions of Chapter 517 are to be construed liberally in the public interest. Thus, that section provides that Petitioner may obtain injunctive relief against "any...person concerned in or in any way participating in or about to participate in [violations of this chapter or a rule]...or doing any acts in furtherance thereof...."

Similarly, the fraud provisions of the Mortgage Brokerage Act, under which the Petitioner brought the remainder of its complaint, were enacted pursuant to the state's police power. Section 494.071(1) of that Act provides that injunctive relief may be obtained against any person about to violate any provision or rule under the Act. Pursuant to that section, the circuit court may enjoin any such persons from continuing in or engaging in any act in furtherance of violations of the Act. Thus, any sworn complaint brought under that chapter, which shows fraud, should authorize injunctive relief without notice.

The opinion of the district court, however, fails to reflect any consideration of the public interest. The First District elevates the interests of the Respondents over

those of the public and individual investors. To protect the interests of the Respondents, the court apparently required that the Petitioner obtain and present absolutely unequivocal proof to the trial court that the Respondents would violate the law during the notice period before any ex parte injunctive order would be authorized.

The district court opinion fails to recognize that future events are simply not susceptible to strict proof. Even if defendants to an action admit that they will violate the law during the notice period, the course of future events is not absolutely certain. The predictability of future events is especially problematic in a securities and mortgage fraud case, like the one sub judice, where the activities of the principals are, by their very nature, contrived and deceitful. Indeed, individuals involved in such a scheme may announce publicly their "intention to cooperate fully" with the regulators during the investigative phase of the enforcement action while concealing their true plan to fleece the public until the bitter end.

The First District's requirement that greater "direct and positive" evidence of irreparable harm than was presented herein be produced to authorize ex parte injunctive relief under Chapters 494 and 517 is unreasonably severe.

In view of the public purposes underlying those laws, and the endless variety of fraudulent investment schemes which are devised to avoid the legitimate regulatory authority of the state and bilk the public, a flexible and realistic standard of review must be applied to complaints for injunctive relief under these chapters.

It is precisely because of the inherent difficulties of obtaining unequivocal proof of future events in securities and mortgage brokerage fraud cases that the trial courts must be vested with, and permitted to, exercise broad discretion in issuing injunctions. The First District opinion not only interferes with the legitimate exercise of the trial court's discretion in this case, it virtually eliminates this discretion altogether. Curiously, the opinion omits any reference to the trial court's discretion. The First District instead bluntly overrode the trial court's decision by giving undue consideration to a few isolated examples of somewhat equivocal statements and little, if any, consideration to the evidence as a whole, without apparent regard for law or reason.

III. PETITIONER COMPLIED WITH THE REQUIREMENTS OF FLORIDA RULE OF CIVIL PROCEDURE 1.610(a), AND THE INJUNCTION WAS NOT SUBJECT TO DISSOLUTION FOR ANY TECHNICAL VIOLATION

Florida Rule of Civil Procedure 1.610(a)(1)(B) states that the attorney seeking issuance of an injunction without notice shall certify in writing any efforts that have been made to give notice. That rule merely requires that counsel certify any efforts made to give notice. It does not require that counsel certify that no efforts to give notice were made. The rule is drafted to obviate the filing of a certificate that would be immaterial to the trial court in determining whether to dispense with prior notice.

Petitioner specifically prayed for injunctive relief without prior notice to the Respondents, in order to avoid the irreparable harm which likely would have resulted had the Respondents been given an opportunity to remove, conceal or destroy documents, property and assets, or had the opportunity to continue to perpetrate their various schemes during the time required to give notice. In such circumstances, there is no obligation to notify defendants of an application for a temporary injunction. Furthermore, a certificate stating that no efforts were made to give

notice is not required and would have been immaterial to the circuit court in this case in determining whether to grant ex parte Petitioner's application for temporary injunction. Such a certificate would have been mere surplusage.

Subpart (C) of Florida Rule of Civil Procedure 1.610(a), states that the reasons why notice should not be required should be set forth, but that subsection does not state under what circumstances, or by whom, those reasons should be set forth. The only reasonable construction of that subpart is that plaintiff's attorney is required to certify the reasons why notice should not be required when some efforts to give notice are appropriate and have been made. This is so because when notice is not appropriate the reasons why notice should not be required must be set forth in a verified pleading and/or affidavit. Rule 1.610(a)(2), Fla. R. Civ. P.

Thus, because Petitioner made no efforts to give notice there was no requirement that counsel file a separate certificate setting forth the reasons why notice was not required. Those reasons were, moreover, fully set forth in the Verified Complaint and supporting affidavits.

Counsel for Petitioner, nevertheless, did file a written certificate similar to that required by Florida

Rules of Civil Procedure 1.610(a)(1)(B) and (C), stating that no efforts had been made to notify Respondents of the application for a temporary injunction and the reasons why notice should not be given. The circuit court record shows that the certificate was filed prior to the hearing on Respondents' motions to dissolve. (A.A., Number 7).

Even if a certificate of counsel were required in this case, the filing of the certificate after the filing of the complaint could not have constituted a basis for granting Respondents' motions to dissolve. A motion to dissolve, is to be considered and determined based upon the record as it existed at the time of the hearing on the motion to dissolve, not based on the record at the time the injunction was issued. Zuckerman v. Professional Writers of Fla., Inc., 398 So.2d 870 (Fla. 4th DCA 1981).

In the Zuckerman case, the plaintiff's complaint for an injunction was not properly verified at the time it was filed or when the injunction was issued. At the hearing on a motion to dissolve, the plaintiff gave testimony supporting the factual allegations of its complaint. On appeal from the lower court's order denying the motion to dissolve, the district court of appeal held that the complaint and supporting testimony together formed a sufficient basis for keeping the temporary injunction in effect.

Similarly, the circuit court in the present case had before it, when it heard Respondents' motions to dissolve, Petitioner's counsel's certificate concerning notice. The court properly determined that the complaint and certificate clearly formed a sufficient basis for keeping the temporary injunction in effect. See, Id. at 872.

The Respondents cited on appeal blackletter law excerpted from various cases, in an attempt to justify dissolution, notwithstanding the substantial basis for injunctive relief. Using those excerpts, they contended that the subject temporary injunction should be dissolved based upon the mere failure to file a certificate of counsel contemporaneously with the Verified Complaint. The Respondents, in effect, therefore, attempted to constitute an injunctive action a highly technical legal proceeding, although it clearly is quintessentially an equitable matter.

Because injunctive actions are equitable in nature, however, a temporary injunction is subject to being quashed only if the plaintiff has substantially failed to comply with Florida Rule of Civil Procedure 1.610, Torok v. Blue Skies Mobile Home Owners Association, Inc., 467 So. 2d 474 (Fla. 5th DCA 1985). In Torok, the court was willing to hold that the plaintiff had substantially failed to comply

with the rule because none of the rule requirements had been met. In that case, no affidavits had been filed, the pleadings were not verified, and no certificate concerning any efforts to give notice had been filed; the order failed to show the date and time of entry, to define the injury, or to give reasons why it was entered without notice.

In the instant case, there was no real failure to comply with any of the requirements of the rule. As explained above, the rule does not clearly require a certificate of counsel concerning notice when no efforts are made to give notice. Assuming, however, that a certificate were required in this instance, the absence of the certificate at the time of issuance of the order certainly could not be construed as substantial non-compliance.

Furthermore, the initial absence of an attorney's certificate would be harmless error. The trial court had a certificate of counsel before it when it denied Respondents' motions to dissolve the temporary injunction. Accordingly, earlier review of such a certificate would not have affected issuance of the injunction without notice.

In sum, the Respondents have grasped and strained for some basis upon which the subject temporary injunction could be dissolved. There is, however, simply no technical

legal, and certainly no equitable, basis upon which the subject injunction could have been dissolved.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court reverse the decision of the First District Court of Appeal and reinstate the temporary injunction previously entered by the Circuit Court for the First Judicial Circuit against the Respondents.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Matthew W. Burns, Esq., P.O. Box 1226, Destin, Florida 32541, James W. Middleton, Esq., 216 Hospital Drive, Ft. Walton Beach, Florida 32548, and John G. Pierce, Esq., 800 N. Ferncreek Ave., Orlando, Florida 32803 this 15th day of April 1988.

Sharon L. Burnett
COUNSEL FOR PETITIONER