

IN THE SUPREME COURT OF FLORIDA

Case No. 71,516

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

Petitioner,

vs.

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

Respondents.

FILED

SID J. WHITE

JAN 4 1988

CLERK, SUPREME COURT

By

Deputy Clerk

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

RESPONDENTS' BRIEF ON JURISDICTION

~~John G. Pierce, Esquire
800 N. Ferncreek Avenue
Orlando, Florida 32803
(305) 898-4848~~

Joseph C. Rubel, Esquire
301 N. Ferncreek Avenue
Orlando, Florida 32803
(305) 896-3636

Attorneys for Respondents

TABLE OF CONTENTS

TABLE OF CITATIONS	ii
STATEMENT OF THE CASE AND FACTS	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
CONCLUSION	9
CERTIFICATE OF SERVICE	10

TABLE OF CITATIONS

<u>CASES</u>	<u>PAGE</u>
<u>Babuschkin v. Royal Standard Corporation,</u> 305 So.2d 253 (Fla. 3d DCA 1975)	4
<u>Belk's Department Store, Miami, Inc. v. Scherman,</u> 117 So.2d 253 (Fla. 3d DCA 1960)	4, 5, 6
<u>City Gas Company of Florida v. Ro-Mont</u> <u>South Green Condominium "R", Inc.,</u> 350 So.2d 790 (Fla. 3d DCA 1977)	6
<u>DeCarlucci v. Granulite, Inc.,</u> 117 So.2d 587 (Fla. 2d DCA 1965)	4
<u>Dixie Music Company v. Pike,</u> 135 Fla. 671, 185 So. 441 (Fla. 1938)	5, 6, 8
<u>Estate of Cleary v. Cleary,</u> 135 So.2d 428 (Fla. 2d DCA 1962)	5, 7
<u>Godwin v. Phifer,</u> 51 Fla. 441, 41 So. 597 (Fla. 1906)	5, 6, 8
<u>McElfresh v. State,</u> 151 Fla. 140, 9 So.2d 277 (Fla. 1942)	5, 7, 8
<u>Torok v. Blue Skies Mobile Home</u> <u>Owners Association, Inc.,</u> 467 So.2d 474 (Fla. 5th DCA 1985)	7
<u>Zuckerman v. Professional Writers</u> <u>of Florida, Inc.,</u> 398 So.2d 870 (Fla. 4th DCA 1981)	6

OTHER AUTHORITIES

Chap. 64, Fla. Stat. (1959)	5
Chap. 64.06, Fla. Stat. (1959)	5, 6
Chap. 494, Fla. Stat. (1985)	1, 7
Chap. 517, Fla. Stat. (1985)	1, 7

RULES

Fla. R. Civ. P. 1.610 3, 4, 5, 6, 7
Fla. R. Civ. P. 1.610(a) 2, 5
Fla. R. Civ. P. 1.610(a)(1) 2, 7
Fla. R. Civ. P. 1.610(a)(1)(B) 3, 6
Fla. R. Civ. P. 1.610(d) 2, 5
Fla. R. Civ. P. 3.19 5
Fla. R. App. P. 9.130(a)(3)(B) 2, 3, 5

STATEMENT OF THE CASE AND FACTS

Petitioner filed a Verified Complaint against Respondents and others not parties to this appeal in the Circuit Court of Okaloosa County, on February 4, 1987, requesting a temporary and permanent injunction, appointment of a receiver, impoundment of Respondents' bank accounts and an order of restitution. The complaint alleged inter alia that Respondents were acting as unregistered securities dealers engaging in the offer and sale of unregistered securities by means of misrepresentations and fraudulent schemes relating to mortgage transactions, in violation of Chaps. 494 and 517, Fla. Stat. (1985). The complaint further alleged that the Respondents had been conducting their business affairs in the same fashion for at least the past five years, an allegation presumably based upon the Petitioner's annual audit of Respondents.

Respondent, Byron D. Beeler, was, at the time of the application for injunction, a licensed mortgage broker and associated securities person, doing business in the same location for over twenty years in Fort Walton Beach, Florida. He is and was at all times pertinent to this litigation an American citizen.

On February 5, 1987, the trial court issued a temporary injunction without notice or hearing, and appointed a receiver who took immediate possession of Respondents' offices and records. The trial judge also ordered the impoundment of Respondents' bank accounts, which resulted in the seizure of all bank accounts on which Respondent, Beeler, was a signatory

whether or not related to the statutory violations, including his life savings and other accounts involving corporate entities not named as parties to the suit. Subsequently, pursuant to Fla. R. Civ. P. 1.610(a) and (d), Respondents filed motions to dissolve the injunction on the basis of lack of notice, which motions were ultimately denied by the trial court on May 12, 1987.

Pursuant to Rule Fla. R. App. P. 9.130(a)(3)(B), Respondents appealed the order denying the motions to dissolve to the First District Court of Appeal, which ruled that the temporary restraining order and appointment of receiver without notice was obtained in violation of Fla. R. Civ. P. Rule 1.610(a)(1), and accordingly dissolved the injunction.

SUMMARY OF ARGUMENT

The decision of the First District is based upon time-honored principles of appellate review, and due process as well as upon an abundance of case law. Certainly, pursuant to Fla. R. Civ. P. 1.610, a party may challenge an injunction granted without notice by moving to dissolve it at any time. If such a motion is denied, an aggrieved party may appeal such a non-final order under Fla. R. App. P. 9.130 (a)(3)(B). Petitioner mistakes the standard required by Fla. R. Civ. P. 1.610, case law, and the decision sought to be reviewed; all necessitate a clear showing that an immediate threat of irreparable harm exists which forecloses opportunity to give reasonable notice. The First District determined that Petitioner had not met this burden. In addition, the First District Court ruled, that the failure to file an attorney's certificate according to Fla. R. Civ. P. 1.610(a)(1)(B) rendered the injunctive order deficient, a holding which is easily distinguishable from cases relied upon by Petitioner for conflict. In summary, the First District's well-reasoned and well-supported opinion presents no conflict with decisions of this Court or other district courts of appeal and jurisdiction of this court should accordingly be denied.

ARGUMENT

I. The decision of the First District Court of Appeal below presents absolutely no conflict between decisions of this Court and other district courts of appeal on the appealability of an order denying motions to dissolve a temporary injunction where the motions attack lack of notice alone. This is so, primarily, because all relevant cases relied upon by Petitioner involved consideration of the merits of the complaints underlying the injunctions and because they were decided before Fla. R. Civ. P. 1.610 was in effect (or were decided in reliance on a leading case decided before Rule 1.610 was applicable).

Petitioner argues that the decisions in Belk's Department Store, Miami, Inc. vs. Scherman, 117 So.2d 845 (Fla. 3d DCA 1960), DeCarlucci vs. Granulite, Inc., 171 So.2d 587 (Fla. 2d DCA 1965), and Babuschkin vs. Royal Standard Corporation, 305 So.2d 253 (Fla. 3d DCA 1975) all stand for the premise that the question of absence of basis to dispense with notice on an application for temporary injunction cannot be reached on an appeal which is from an order denying a motion to dissolve it. The First District, in the case sub judice, reasoned that in each of those three cases (A 6-10) that because the motions to dissolve attacked more than lack of notice and necessarily required consideration of the merits of issuing the injunctions, the rule is, therefore, that when notice alone is attacked, an appeal from an order denying a motion to dissolve is both permissible and appropriate. In addition, it is critical to note

that in Belk's, decided in 1960, and cases decided subsequently in reliance on Belk's, former Chap. 64, Fla. Stat. (1959), was the prevailing law and Fla. R. Civ. P. Rule 3.19, was the applicable rule. In the case below, current Fla. R. Civ. P. 1.610, encompasses all aspects of application for temporary injunctions. It is axiomatic that when several rules (and surely divisions of the same rule) pertain to the same subject, they are to be construed together and in relation to each other. In re: the Estate of Cleary v. Cleary, 135 So.2d 428 (Fla. 2d DCA 1962). Present Fla. R. Civ. P. 1.610(a) and 1.610(d), when read together, lead to the obvious and inescapable conclusion that when a party wishes to challenge the issuance of a temporary injunction granted without notice, he may do so by moving to dissolve it at any time. Moreover, the present rule guarantees no right to present evidence at a hearing on a motion to dissolve as was available under former Chapter 64.06, Fla. Stat. (1959). Fla. R. App. P. 9.130(a)(3)(B), expressly permits interlocutory appeals of orders refusing to dissolve injunctions. Clearly, petitioner demonstrates no conflict respecting the issue of the appealability of the order denying the motions to dissolve in the instant case.

II. Petitioner's second argument that the First District's opinion conflicts with earlier decisions of this Court in Dixie Music Company vs. Pike, 135 Fla. 671, 185 So. 441 (Fla. 1938), Godwin vs. Phifer, 51 Fla. 441, 41 So. 597 (Fla. 1906), and McElfresh vs. State, 151 Fla. 140, 9 So.2d 277 (Fla. 1942) is equally without merit. Petitioner misperceives the standards

adopted under Godwin and Dixie Music Co.. The requirement that the allegations show "that irreparable injury will be sustained if notice is given" is the responsibility of the party applying for an injunction without notice; it is from these allegations that the Court can determine for itself whether the injury apprehended "will or is likely to result." There is nothing in the case below that suggests the application of any different standards than those set forth in Godwin and Dixie Music Co..

The quotation from Dixie Music Co. relied upon by Petitioner on page 6 of its brief also presents no conflict. The First District thoroughly examined all of the allegations of Petitioner's complaint (A 11,12) and determined it to be wanting in equity for the purpose of obtaining an injunction without notice in that it failed to show that irreparable damage would be sustained if notice were given.

III. Petitioner's argument that the absence of the attorney's certificate in Petitioner's complaint, as required by Fla. R. Civ. P. 1.610 (a)(1)(B) presents no conflict with the cases cited. This is so because Respondents' challenge in the trial court went solely to the notice issue and therefore the rule in Zuckerman vs. Professional Writers of Florida, Inc., 398 So.2d 870 (Fla. 4th DCA 1981) and the cases decided in reliance on Zuckerman do not apply. The Zuckerman court cited to City Gas Company of Florida vs. Ro-Mont South Green Condominium "R", Inc., 350 So.2d 790, (Fla. 3d DCA 1977) which in turn relied upon Belk's, supra. As indicated earlier Belk's, was decided when former Chap. 64.06, Fla. Stat. (1959) was applicable,

guaranteeing to both sides the right to present evidence at a hearing on a motion to dissolve. No such right exists under present Fla. R. Civ. P. 1.610.

Petitioner mistakes the holding in Torok vs. Blue Skies Mobile Home Owners Association, Inc., 467 So.2d 474 (Fla. 5th DCA 1985) which determined that as the result of substantial failures to comply with Fla. R. Civ. P. 1.610, the injunctive order entered by the trial court in that case should be quashed. The case does not hold that only where there are substantial omissions should an injunction be quashed. Rules are rules and the failure of an attorney to certify or testify in writing what efforts were made to give notice should, in and of itself, have been sufficient to reverse the trial court in the instant case. It is important to note, however, that the First District's holding is that the omission of the attorney's certificate filed contemporaneously with the motion for temporary injunction rendered the injunctive order deficient; it reversed the trial court on Petitioner's failure to comply with Fla. R. Civ. P. 1.610(a)(1).

Petitioner is far afield in suggesting that McElfresh vs. State, 151 Fla. 140, 9 So.2d 277 (Fla. 1942) presents conflict with the case sub judice. McElfresh is an appeal from a criminal conviction under the 1939 Securities Act, which a totally different judicial determination than the case below. In addition, no issue respecting property rights was presented. True, Chaps. 494 and 517, Fla. Stat., were enacted to protect the public against fraud; however, nothing contained in either


statute or in McElfresh exempts the State of Florida from having to comply with applicable rules of civil procedure and established case law to properly carry out its police powers.

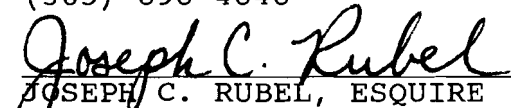
CONCLUSION

Petitioner grossly exceeded the bounds of propriety in seeking and obtaining an injunction without notice to Respondents based upon the allegations of its Complaint and accompanying Affidavits. Nothing in any of Petitioner's arguments or authorities presented assert any conflict whatsoever with decisions of this High Court or with other district courts of appeal.

Injunctions should never be granted lightly and notice should always be required to be given unless the provisions for dispensing with notice have been strictly followed. Great care should be exercised in awarding an injunction, lest it be turned into an instrument of oppression and injury, as was the result of the trial court's action below. Godwin, supra, at 602. To deprive an American citizen of his financial resources and his records so as to leave him utterly helpless to defend himself against allegations brought by the state unconscionably violated the very fabric of the Fourteenth Amendment of the United States Constitution. Accordingly, Respondents respectfully request that this Court refuse to exercise its discretionary jurisdiction to review the decision sub judice.

Respectfully submitted,


JOHN G. PIERCE, ESQUIRE
800 N. Ferncreek Avenue
Orlando, Florida 32803
(305) 898-4848


JOSEPH C. RUBEL, ESQUIRE
301 N. Ferncreek Avenue
Orlando, Florida 32803
(305) 896-3636

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a copy of Respondent's Brief on Jurisdiction has been furnished to Charles L. Stutts and Sharon L. Barnett, Park Trammell Building, 1313 Tampa Street, Suite 615, Tampa, Florida 33602-3394, Matthew W. Burns, Esq., P. O. Box 1226, Destin, Florida 32541, and James W. Middleton, Esq., 216 Hospital Dr., Ft. Walton Beach, Florida 32548, this 31ST day of December, 1987.

Joseph C. Rubel for

JOHN G. PIERCE, ESQUIRE

Joseph C. Rubel

JOSEPH C. RUBEL, ESQUIRE