O/a 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 REPLY BRIEF

GERALD LEWIS
COMPTROLLER OF THE
STATE OF FLORIDA

CHARLES L. STUTTS
General Counsel

WILLIAM G. REEVES
Chief Trial Counsel

SHARON L. BARNETT
ASSISTANT GENERAL COUNSEL
PARK TRAMMELL BUILDING
1313 TAMPA STREET, SUITE 615
TAMPA, FLORIDA 33602-3394

COUNSEL FOR PETITIONER

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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 Respondents' point out that Rule 1.610, Florida Rules of Civil Procedure, authorizes the filing of a motion to dissolve at any time. Clearly, this is what that rule provides, but depending upon the posture of a case, appeal of an order denying a motion to dissolve may raise a moot or previously waived issue. Thus, in the instant case, because Respondents' motions to dissolve were denied, after due notice and full hearing, review of the notice issue was precluded because the issue had been rendered moot or waived. Belk's Department Store, Miami, Inc. v. Scherman, 117 So.2d 845 (Fla. 3d DCA 1960). (Contrary to Respondents' contention, the holding in Belk's is clearly apposite because "[n]o evidence was taken at the [Belk's] hearing on the motion to dissolve, and the chancellor had before him only the pleadings and the statement of counsel and of the receiver." Id. at 847.)

The Respondents' contention that factual issues cannot be raised in a motion to dissolve is incorrect. It is hornbook law that on such a motion, either party has the right to present evidence and the court shall either dissolve or continue the order according to the weight of

the evidence. Orlando Orange Groves, Co., et al., v. Hale, et al., 107 Fla. 304, 144 So. 674 (1933). Furthermore, Rule 1.610(d), Florida Rules of Civil Procedure, provides for both dissolution and modification of injunctions, the latter of which could involve only a factual change in circumstances. Thus, contrary to the Respondents' assertions, the law has always permitted and continues to permit a factual challenge to the basis for an injunction. The Respondents in this case simply chose not to make such a challenge.

Although the Respondents never waived their right to file a motion to dissolve, by virtue of the passage of time and repeated appearances, the Respondents forfeited their right to obtain direct appellate review of the notice issue. The 30 days in which to appeal issuance of an injunctive order, provided by Rule 9.130(b), Florida Rules of Appellate Procedure, afforded ample time for the Respondents to take an interlocutory appeal of the notice issue since the jurisdiction of the district courts of appeal is invoked by merely filing notices. Indeed, it is not even permissible to address in a notice of appeal the merits of the allegations contained in a complaint. Furthermore, if the Respondents lacked the funds to retain counsel during the 30 day period, why didn't they ask the trial court to release funds for this purpose? The plain

truth is that the Respondents' failure to obtain direct appellate review of this matter was due to their own neglect, mistake, or choice and not to structural or due process defects.

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

In their Statement of the Case, the Respondents contend that the complaint may not have been properly verified because the persons who swore to the allegations contained therein had no independent recollection of whether they raised their right hands in connection with administration of the oath. In support of their contention, the Respondents cite to material that was not before the trial court; however, an appellate court cannot reverse a ruling of a lower court where, as here, the Respondents attempt to adduce facts not before the trial court. Patterson v. Weathers, 476 So.2d 1294 (Fla. 5th DCA 1985). Moreover, this issue, which was not raised in the lower court, cannot now be considered because appellate cases are to be reviewed based upon the extant record. Rook v. Rook, 469 So.2d 172 (Fla. 5th DCA 1985).

In any event, there is no requirement concerning hand raising in the giving of oaths. See, Section 92.525, Florida Statutes (1987). Second, the lack of an independent recollection does not mean the attestors did not raise their hands when swearing to the truth of the allegations. Rather, their signatures on the verification pages indicate an oath was orally administered by a notary public and present, at least, prima facie proof of compliance with the verification requirements.

Respondents also contend the trial court improperly considered information contained in exhibits which were attached to the complaint. The Respondents have not shown, and cannot show, however, that the trial court actually considered any unverified information since it is impossible to know on which of the many allegations and exhibits the trial court relied in issuing the ex parte injunction against these Respondents. Even if that fact could be ascertained, it would be immaterial, however, because Mr. Pridgeon and Mr. Padgett swore to all the allegations contained in the complaint, including those contained in the incorporated affidavits. Thus, because all parts of the complaint are verified, the Respondents' contention that the trial court improperly considered unverified information wholly lacks merit.

The Respondents indicate that the injunction was improperly issued ex parte in view of the Petitioner's past knowledge of the Respondents' activities. The argument misapprehends the nature of an injunction which is not to punish for past conduct but to prohibit future unlawful activity. Dotolo v. Schouten, 426 So.2d 1013 (Fla. 2d DCA 1983). The Respondents' assertion also conflicts with the express provisions of Chapters 494 and 517, Florida Statutes, which allow the Petitioner to seek to enjoin certain illegal activity whenever it believes any person "is about to engage" in any act or practice constituting a violation of those chapters. Section 517.191, Florida Statutes; see also, Section 494.071, Florida Statutes.

Furthermore, equitable doctrines, like laches and estoppel, could not be used, as suggested by the Respondents, to preclude the Petitioner's action which was brought in the public interest. See, e.g., Bryant v. Peppe, 238 So.2d 389 (Fla. 3d DCA 1980). Estoppel will not be applied against the state for an omission to act, as Respondents assert, but will be applied only in special circumstances, which must include some positive act on the part of some state official on whom the aggrieved party had a right to rely and did rely to his detriment. State v. Hadden, 370 So.2d 849 (Fla. 3rd DCA 1979).

Contrary to the Respondents' final assertions on this issue, the Petitioner does not complain about being held to the established standard for issuance of ex parte injunctions, which Petitioner clearly met in the instant matter. Rather, the Petitioner has objected to the new unreasonably high and unyielding evidentiary standard applied by the First District which conflicts with the flexible and realistic standard of proof for issuance of ex parte injunctions established by this Court in Dixie Music Co. v. Pike, 135 Fla. 671, 185 So. 441 (1938). It is important to recognize that a standard which retains flexibility through the exercise of the trial court's discretion is especially appropriate when applied to state actions to enjoin securities and mortgage fraud in view of the multitude of investment schemes that are specifically devised to avoid legitimate regulatory authority. Due to its failure to consider the reasonableness of the trial court's action in light of both the public purposes underlying Chapters 494 and 517, Florida Statutes, and the ongoing and deceitful nature of the Respondents' activities, the First District by the decision has created a standard of proof for issuance of injunctions without notice which is unreasonably rigid and departs from established law.

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

The Respondents contend that even when no efforts to give notice are made a certificate of counsel concerning notice should be required to advise the trial court whether notice has been given. This contention is at best anomalous and at worst nonsensical since it would require, in effect, the certification of a nullity. The requirements of the rule expressly address those situations where a party has actually provided or attempted to provide some form of notice to opposing counsel. Furthermore, the court will know from the face of the complaint that no efforts to give prior notice have been, or are to be, made.

IV. THE RESPONDENTS RECEIVED A TIMELY HEARING ON THEIR MOTIONS TO DISSOLVE

Individual Respondent Byron D. Beeler initially waived any right he may have had to a hearing within five days, as the Respondents acknowledge. Several weeks later, Respondent Beeler served a Notice of Hearing

purporting to set his motion to dissolve for hearing although no hearing time had been reserved with the trial court. To the extent that the Notice of Hearing constituted a valid application for hearing, it was withdrawn based upon the consent of counsel and the parties, who agreed it was appropriate to set the motion specially for May 12, 1987. Accordingly, individual Respondent Beeler was not entitled to have his motion to dissolve heard within five days. See, Rule 1.610(d), Florida Rules of Civil Procedure.

The only written application for hearing was filed by the corporate Respondents on April 24, 1987. The corporate Respondents also voluntarily waived or abandoned their application for a hearing within five days, as the First District held on page 4 of its Opinion filed September 17, 1987. Thus, after waiting almost two months to raise the notice issue, these Respondents abandoned their application for a speedy hearing by consenting to a special setting of their motion for hearing on May 12, 1987.

Furthermore, Petitioner urges that the Court consider that the probable rationale for the five-day limit contained in Rule 1.610(d), Florida Rules of Civil Procedure, is to provide for expedited review following initial issuance of an injunctive order or in the event of a

change in circumstances. In the instant case, however, expedited review was not sought following issuance of the injunction, and the Respondents failed to raise any factual issues, much less a change in circumstances.

Accordingly, these Respondents who consented to a special setting of their motions to dissolve, and who never sought expedited review, should not be heard to complain that they did not receive a timely hearing. The Opinion of the First District should be affirmed on this issue.

V. SECTION 517.191(2), FLORIDA STATUTES IS FACIALLY CONSTITUTIONAL AND WAS CONSTITUTIONALLY APPLIED IN THIS CASE

The Respondents contend that pursuant to Section 517.191(2), Florida Statutes, they were deprived of their property without due process of law. They do not, however, even indicate what process they contend they were not afforded. In the face of attacks under both the Federal and Florida constitutions, this Court has long recognized the broad authority of the State of Florida to direct its laws to protect investors in securities against fraud. See, e.g., State v. Minge, 119 Fla. 515, 160 So.2d 670 (1935).

Although the Respondents appear to contend that they were improperly denied a pre-taking hearing, they cite to

Larson v. Warren, 132 So.2d 177 (Fla. 1961), which holds that due process does not require notice and hearing prior to the state's exercise of police power. The opinion in Larson further notes that the cases are legion "which hold that when the public interest requires, the legislature may provide for summary action subject to later hearing or judicial review." Id. at 181. The Respondents also rely on Davis v. City of South Bay, 433 So.2d 1364 (Fla. 4th DCA 1983), which upholds the right of the state to take property without prior hearing under exigent circumstances. Both of these cases fully support the ex parte issuance of the subject injunctive order, which was obtained pursuant to the state's police power under exigent circumstances, namely, the Respondents' continuing illegal activity that was irreparably harming citizens of the State of Florida.

Assuming the Respondents are challenging a pre-hearing taking, they should not be questioning the constitutionality of Section 517.191(2), but rather that of Rule 1.610, Florida Rules of Civil Procedure. Section 517.191(2) does not provide for a pre-hearing taking; it is the aforementioned rule that provides for ex parte issuance of injunctions, which may be enforced by ancillary means such as a receivership. Furthermore, contrary to the Respondents' contentions, review of injunctive

orders, and relief ancillary thereto, is provided for by Rule 1.610(d), Florida Rules of Civil Procedure, and Rule 9.130(a)(3), Florida Rules of Appellate Procedure.

The Respondents also contend that Section 517.191(2) is unconstitutional because it resulted in the receiver's retention of Respondents' mail, in violation of Article I, Section 12, Florida Constitution. As the Respondents themselves state, Article I, Section 12, concerns unreasonable interception, not retention of private communications. Furthermore, the Respondents do not even suggest what was unreasonable about the receiver's retention of the Respondent's mail. Petitioner merely notes that the basis for the receivership set forth in Petitioner's complaint and the availability of full review precludes finding that any aspect of the receivership was unconstitutionally unreasonable.

With respect to Respondents' contention that the state caused an unconstitutional forfeiture of Respondents' estate, it is important to note that both the injunction and receivership were only temporarily imposed until the cause could be determined finally. Furthermore, it is clear that the Respondents, who had all their property returned to them after the First District's ruling in this matter, did not forfeit any of their estate.

Respondents' complaints about the scope of the receivership do not relate to any issue in this appeal. Many weeks after establishment of the receivership, the receiver, by motion, requested that additional interrelated corporate entities and persons not named as parties be brought within the purview of the receivership. The receiver's application was duly noticed and heard by the circuit court. The Respondents were present at the hearing where they made various objections. Accordingly, the scope of the receivership was broadened only after notice and hearing and at the instance of the receiver, who is not a party to this appeal. Thus, this aspect of the receivership has no relation to the subject of this appeal which concerns only the propriety of the ex parte issuance of injunctive relief against these Respondents.

Petitioner finally would urge the Court to consider that Petitioner never interfered with the Respondents' right under Article I, Section 2, Florida Constitution to acquire, possess and protect property, but only with the Respondents' illegal acquisition and possession of property under Florida Law, as described in detail in Petitioner's complaint.

CONCLUSION

Based upon the foregoing arguments and authorities, the Petitioner respectfully requests that this Honorable 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 of Florida.

Respectfully submitted,

Charles L. Stutts
General Counsel
Office of the Comptroller
The Capitol, Legal Section
Tallahassee, FL. 32399-0350
(904) 487-0906
COUNSEL FOR PETITIONER

Sharon L. Barnett by WGR
SHARON L. BARNETT
Assistant General Counsel
Office of Comptroller
1313 Tampa Street, Suite 615
Tallahassee, Florida 33602-3394
(813) 272-2565
Florida Bar No. 323845
COUNSEL FOR PETITIONER

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 Joseph Rubel, Esq., 800 N. Ferncreek Avenue, Orlando, Florida 32803 this 3rd day of June 1988.

Charles L. Stutts

COUNSEL FOR PETITIONER