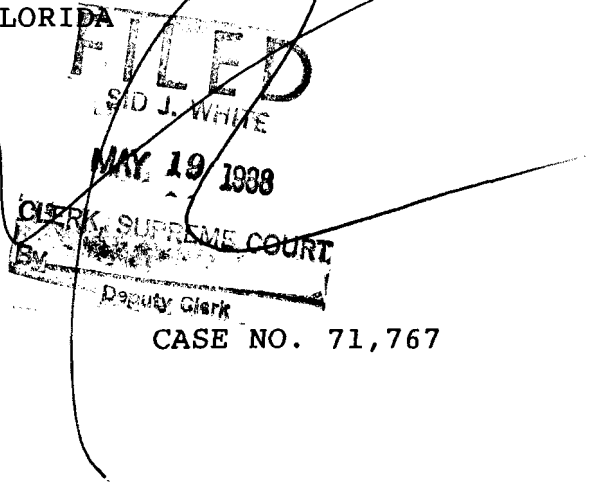
OIA 6-22-88

IN THE SUPREME COURT OF FLORIDA



LANCA HOMEOWNERS INC., a/k/a
LANCA HOMEOWNERS ASSOCIATION,
INC. and the L. C. GRIEVANCE
COMMITTEE and PATRICK MCKERNAN,

Appellants/Cross Appellees

v.

CASE NO. 71,767

LANTANA CASCADE OF PALM BEACH,
LTD.and JAMES A. SMITH,

Appellees/Cross Appellants

_____/

ON APPEAL FROM A DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

CROSS REPLY BRIEF OF APPELLEES/CROSS APPELLANTS LANTANA CASCADE OF PALM BEACH, LTD. and JAMES A. SMITH

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SUMMARY OF ARGUMENT

Contrary to the argument of Cross Appellees, Lanca Homeowners, Inc., (hereinafter "Lanca") and L.C. Grievance Committee, Inc., (hereinafter "L.C."), Cross Appellants, Lantana Cascade of Palm Beach, Ltd., and James A. Smith (hereinafter "Park Owner") raised in both the trial court and the district court of appeal the claim that the resolution in favor of the Park Owner of the issue of the lack of authority of either Lanca or L.C. to represent the tenants of Lantana Cascade Mobile Home Park (hereinafter "the Park") would require the dismissal of the Counter Complaint [sic] (hereinafter the "counterclaim") in this action. The claim was made in the Answer of the Park Owner to the counterclaim, on the record in open court at the hearing which resulted in the order of the trial court which is the subject of this appeal, and in both the Initial Brief of the Park Owner in the district court of appeal and the Park Owner's Petition for Writ of Certiorari in a companion proceeding filed contemporaneously with the appeal sub judice.

This claim was made then, and is made now because dismissal of the pleading setting forth the claim is the appropriate relief to be entered when it is determined that the person or entity bringing it has no authority to bring it. To hold otherwise would be inconsistent with the rules of civil procedure. Indeed, it would be tantamount to sanctioning champerty and maintenance. Therefore, the gratuitous "holding"

of the district court of appeal with respect to the hypothetical maintainability of the counterclaim in this case as a class action should be quashed.

The maintainability of an action as a class action is clearly a question of fact to be decided on a case by case basis. However, the decision in case is guided by rules which clearly are not satisfied under the indisputable facts in this case.

The applicable rules require the class plaintiff to prove that the persons purportedly represented have the necessary community of interest in the claims made in the suit to justify a class action. Where, as here, the factual evidence shows that the entitlement of any member of the putative class to prevail on such claims would be dependent upon different facts and circumstances for each member of the class, the class plaintiff's burden is not met. In such a case, class prosecution is inappropriate and the class action complaint should be dismissed. Therefore, if the Court finds the district court of appeal properly reached the issue of the maintainability of the counterclaim as a class action, it should reverse that portion of the district court's decision which erroneously affirmed the trial court's order on the issue.

ARGUMENT

THE DISTRICT COURT OF APPEAL ERRONEOUSLY AFFIRMED THE TRIAL COURT'S RULING THAT PARTS OF THE COUNTERCOMPLAINT WERE MAINTAINABLE AS A CLASS ACTION

A. The District Court Erred In Ruling At All On The Issues Rendered Moot By Its Principal Holding

Lanca and L.C. incorrectly claim that the Park Owner never asserted at the trial court nor at the appellate court that a decision in favor of the Park Owner on the issue of the lack of standing of Lanca and L.C. to prosecute the counterclaim would be totally dispositive of the counterclaim. In the Answer of the Park Owner to the counterclaim the Park Owner denied the allegations of the counterclaim relating to the maintainability of the suit as a class action, raised an affirmative defense to the same effect and prayed for denial of all of the relief prayed for in the counterclaim. Answer, pp. 1-2, para. 1-6; pp. 3-4, para. 23-34, 27; Supplemental Appendix (hereinafter "Supp. App.") 104-07. In addition, this issue was raised at the evidentiary hearing which resulted in the order which was appealed to the district court of appeal below. Appendix to Answer Brief of Appellees/Cross Appellants (hereinafter "App.") 66. Moreover, in the district court of appeal, sub judice, the Park Owner specifically requested that court to reverse the order on appeal there with instructions that the counterclaim be dismissed. Initial Brief, Case No. 87-315, In The District Court of Appeal of Florida, Fourth District at 13, Supp. App.

120; Petition for Certiorari, Case No. 87-314, In The District Court of Appeal of Florida, Fourth District at 17, Supp. App. 151. Indeed, Count I of the Complaint filed by the Park Owner which initiated these proceedings in the trial court, the Park Owner sought a declaration pursuant to Chapter 86, Fla. Stat. that neither Lanca nor L.C. were authorized to represent the tenants of the Park in any proceeding. Complaint, pp 4-5, Supp. App. 4-5. Thus, this issue has been properly raised and preserved by the Park Owner.

The suggestion by Lanca and L.C. that the trial court could, on remand, permit an "amendment" to substitute a proper class representative as a counterclaimant is likewise incorrect. The rule permitting amendments to pleadings permits amendments by parties only. Fla. R. Civ. P. Rule 1.190. The effect of the decision of the district court is that neither Lanca nor L.C. is a proper party to the counterclaim because neither has a claim of its own against the Park Owner and because neither has the authority to represent the tenants of the Park in a class action. Thus, neither Lanca nor L.C. can move to amend the counterclaim, and there is no other party to the proceeding with standing to do so in their stead.

It must also be remembered that the claim which Lanca and L.C. sought to bring as a class action was a counterclaim, not a complaint. Pursuant to the applicable rules, counterclaims may be brought only by parties against opposing parties. Fla.

R. Civ. P. Rule 1.170. Although there was a party to the complaint other than Lanca and L.C. when the complaint was originally filed, that party has been dismissed. Supp. App. 152. Thus, that individual is not now an "opposing party" who could bring such a claim against the Park Owner.

The rule as to substitution of parties cannot apply because there has been no death, no incompetency, no separation from office and no transfer of interest as required to call into play Fla. R. Civ. P. Rule 1.260. Nor can the rules as to misjoinder of parties fill the void, as there is no claim which could be severed and proceeded with separately as contemplated by Fla. R. Civ. P. Rule 1.250.

The simple fact of the matter is that two corporate entitles without legal authority to do so have filed a claim, their lack of authority to make such a claim has been established, and their claim should now be dismissed. To permit them to amend their claim to add a potentially proper counter- claimant would be highly improper.

Where an entity brings a suit which it has no right to bring, that suit ought to be dismissed upon proof of that fact. Fla. R. Civ. P. Rule 1.110(b)(2)("A ... counterclaim ... shall contain ... (2) a short plain statement of the ultimate facts showing that the pleader is entitled to relief ..."); Rule 1.420(b) ("Any party may move for dismissal of an action ... for failure of an adverse party to comply with these rules ..."). See Supp. App. 153-54. To hold otherwise would

indirectly encourage champerty and maintenance by saying, in effect, "Anyone may file a suit on a claim even if it is not his claim, and, if he is caught at it, he need only solicit the true owner of the claim to take up the suit." Indeed, the argument of Lanca and L.C. concerning the possibility of such an amendment suggests that they plan, upon remand, to solicit the tenants of the Park in order to find one or more tenants willing to take up the prosecution of the counterclaim. Even assuming such planned solicitation were done with the whitest of hearts, it would look to all the world like champerty and maintenance.

Park Owner submits, therefore, that the district court, having found Lanca not to be an appropriate class representative for the prosecution of the counterclaim should have stopped and remanded the case with instructions to dismiss the counterclaim.

B. The District Court of Appeal Erred In The Substance of Its Ruling On The Issues Rendered Moot By Its Principal Holding.

The decision whether an action may be maintained as a class action pursuant to Fla. R. Civ. P. Rule 1.220 is clearly a question of fact. Watnick v. Florida Commercial Banks, 275 So. 2d 278 (Fla. 3d DCA 1973). However, the decision is not to be made ad hoc in each case. Rather, the decision is to be guided by the requirements of Fla. R. Civ. P. Rule 1.220 and the cases interpreting it. One of those requirements is that the necessary community of interest among the members of the

putative class be proven. Rule 1.220(a)(2); Lance v. Wade, 457 So. 2d 1008 (Fla. 1984); Osceola Groves v. Wiley, 78 So. 2d 700 (Fla., 1955); Arthur E. Thomas, et al. v. Rebert Jones, et al., 13 Fla.L.Wkly. 835, Fifth District Court of Appeal, Case No. 86-1131 (En Banc Opinion on Rehearing filed March 31, 1988); Garrett v. Janiewski, 480 So. 2d 1324 (Fla. 4th DCA 1985) rev. denied 492 So. 2d 1333 (Fla. 1986); Costin v. Hargraves, 283 So. 2d 375 (Fla. 1st DCA 1973). The evidence adduced below shows that the members of the putative class have no such community of interest in the claims made in the counterclaim.

The particular facts adduced at the trial court which support this conclusion were discussed in the Answer Brief of Appellees/Cross Appellants at pages 1 through 3 and 18 through 20 and are set forth in their entirety in the Appendix to that brief at App. 6-378 which are, therefore, incorporated herein by reference. Lanca and L. C. incorrectly characterize a small portion of the record in an attempt to argue that the community of interest rule has been satisfied by proof. The portion of the record they cite simply does not constitute such proof.

Although trial counsel for Lanca and L. C. valiantly tried to lead his star witness to testify that certain matters at the Park were matters of common interest, e.g., App. 34, lines 18-19, he failed to elicit testimony that the issues in the counterclaim were of common interest. As to the problems mentioned in the counterclaim, the testimony was "some people suffer more than others", App. 40, l. 23-24, "not all people

utilize that "App. 41, l. 3, and "there are different rent levels? Yes." App. 42, l. 5-6 or "I don't know from my own personal knowledge...To the best of my knowledge they would be common to all of the residents." App. 43 l. 7-15.

Moreover, there was no evidence from Lanca or L. C. concerning the "common interest" of the tenants of the Park in the "judgment" which was the subject of the counterclaim. Indeed, the only evidence on this subject was a copy of the "judgment" and a list of plaintiffs from the case in which the judgment was entered which together showed that not all tenants of the Park ever had any interest in it (App. 92-97, 150-54) and the evidence that a number of the tenants moved in after the "judgment" was entered (e.g. App. 220).

Similarly, there was no evidence as to how the tenants of the Park had any "common interest" in the alleged violations of the "Florida Mobile Home Act". Rather, all of the evidence of "common interest" centered around niggling complaints of individual tenants or small groups of tenants which were offered, along with all of the other allegations more as a background against which to claim "unconscionable rent increases" than as independent claims.

The rent increase claim, of course, is what this case is all about -- rent. Lanca and L. C. claim that there have been "unconscionable" rent increases at the Park every year since 1980. App. 77-81, 103. Where, as here, such claims arise in a context involving hundreds of separate contracts, no showing of

a cooperative enterprise, separate defenses available against some putative class members but not others and the availability of different remedies for some putative class members, such suits may not be brought as class actions. Lance v. Wade, supra; Osceola Groves v. Wiley supra; Costin v. Hargraves, supra; Arthur E. Thomas v. Rebert Jones, supra; Garrett v. Janiewski, supra. As the district court of appeal in the Arthur E. Thomas case held:

> ...[P]rocedural unconscionability involves not external factors faced by an individual, such as anonerous contract term or increased rent, but rather the particular effect each external factor has on each individual and how the individual reacts to such factors. We find, therefore, that because of the basic differences between people, the requirements for procedural unconscionability are too personal, individualized and subjective to be properly asserted in a class action.

13 Fla. L.Wkly at 835.

Admittedly, the trial court found otherwise. However, Park Owner respectfully submits here, as it did in the district court of appeal that the trial court was wrong in failing to consider the differences in the situations of the tenants at all, in the fact of overwhelming uncontradicted evidence of these differences. Therefore, it the Court finds the district court of appeal properly reached this issue at all (see Argument, supra, at A), it should likewise reverse that part of the district court's decision which affirmed the trial court's order on this issue.

CONCLUSION

For the reasons stated supra, at A, this Court should find that the district court of appeal's principal ruling below rendered moot all other issues by ruling that there was no proper counterclaimant as to the counterclaim. Since this ruling mandated dismissal of the counterclaim, the district court should not have considered, hypothetically, the maintainability of the counterclaim as a class action. If this Court so finds, that portion of the district court's decision should be quashed, with instructions to the trial court to dismiss the counterclaim with prejudice.

If this Court were to find that the district court properly addressed the issue of the maintainability of the counterclaim as a class action, then, for the reasons set forth supra at B, this Court should reverse that part of the decision of the district court of appeal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail to Michael B. Small, Esq., Paramount Center, 139 North County Road, Palm Beach, Florida 33480; Douglas B. Beattie, Esq., 250 North Orange Avenue, Suite 500, Orlando, Florida 32801 and David D. Eastman, Esq., David D. Eastman, Esq., P. O. Box 669, Tallahassee, Florida 32302 this 16th day of May, 1988.

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