O/a 11-13-89

IN THE SUPREME COURT OF FLORIDA

CASE NUMBER 73,835

WELLS FARGO ARMORED SERVICES CORPORATION,

Appellant,

vs.

SUNSHINE SECURITY AND DETECTIVE AGENCY, INC., etc., et al.,

Appellees.

ON DISCRETIONARY REVIEW FROM
THE THIRD DISTRICT COURT OF APPEAL

INITIAL BRIEF ON THE MERITS OF RESPONDENTS SUNSHNE SECURITY AND DETECTIVE AGENCY, INC., etc., et al.

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STATEMENT OF THE CASE AND FACTS

The Appellant's statement of the case and the facts is substantially correct except for the following:

On page 2 of the Appellant's statement of the case and the facts it is stated:

> "On April 17, 1985, a motion to amend and amended complaint were filed. R.14-19. The pleading alleged the existence of insurance, added the carrier as a Defendant, added Jacinto Alfonso individually, and included theories of negligent employment and conversion as against Sunshine Security. No order authorizing the filing of that amended complaint appears, but its certificate of service shows it was served by mail on Mr. Alfonso."

The motion to amend and the attempted amendment of the complaint as set forth in (R. 14-19) is misleading and incorrect in that the Appellant in its brief in Case No. 86-688, page 4, said the following:

> "The record on appeal pages 1 through 92 inclusive shows that no order was ever entered authorizing the filing of an amended complaint, therefore, the documents entitled "Amended Complaint" that was filed with the motion for leave to amend complaint is meaningless and the Plaintiff Appellee therefore necessarily is determined to be traveling on the original complaint only." (Emphasis supplied).

After the mandate in Case No. 86-688 entitled SUNSHINE SECURITY & DETECTIVE AGENCY, Appellant vs. WELLS, FARGO ARMORED SERVICES CORPORATION, Appellee, an amended complaint without obtaining an order of the Court or agreement of opposing counsel was filed on April 3, 1987. (R. 227-235). (See Rule 1.190(a), Rules of Civil Procedure).

On January 29, 1988 (R. 296) the trial court entered an order permitting the filing of the amended complaint as of the date of the order. Thereafter, the Appellee here filed a motion to dismiss the amended complaint (R. 297-300) upon various grounds, but generally upon the grounds that the amended complaint disclosed on its face that the alleged causes of actions were barred by the statute of limitation.

Memoranda of law supporting and opposing the motion were filed by the parties. (R. 307-352). Upon a hearing by the trial judge the amended complaint was dismissed with prejudice. On appeal, the District Court of Appeal, Third District of Florida, Appellate Case No. 88-1298 held:

> "The final order dismissing the amended complaint under review is affirmed on the ground that the subject complaint was barred by the doctrine of the law of the case."

The Court went on to say:

> "Where, as here, a final judgment for the plaintiff is reversed on appeal because the complaint failed to state a cause of action, the plaintiff is precluded by the doctrine of the law of the case from reopening the case and filing an amended complaint upon remand containing the same causes of actions ruled upon in the prior appeal and adding new, different theories of recovery not previously asserted." (Cites omitted.) (Emphasis supplied).

The petitioner upon the rendition of the opinion and decision in Case No. 88-1298 sought discretionary review in this Court. After briefs by both par ties on the question of jurisdiction, this Court accepted jurisdiction and reqired the filing of briefs on the merits.

ISSUE ON THE MERITS

WAS THE "LAW OF THE CASE" APPLICABLE TO THE AMENDED COMPLAINT OR ALTERNATELY, WAS THE DISTRICT COURT CORRECT FOR OTHER REASONS, I.E., STATUTE OF LIMITATIONS?

SUMMARY OF ARGUMENT

This Court's order of July 14, 1989, accepting jurisdiction and setting oral argument did not indicate at any point that it was interested in or wanted argument on the merits in Case No. 86-688, 496 So.2d 246 (Fla. 3d DCA 1986). There was no attempt by Petitioner to seek discretionary review of the 1986 opinion and decision. In 496 So.2d 246, supra, the District Court of Appeal found and determined that a final default judgment based upon the original complaint wholly failed to state a cause of action under a scenario which was based on the fact that an employee of this Appellee who was detailed to guard a bank in Hialeah, Florida, had conspired with another guard to rob WELLS FARGO of certain monies at a pick-up to be made by WELLS FARGO at the bank. The District Court of Appeal pointed out:

> "The complaint then seeks to impute its employee's conspiracy to Sunshine based on agency theory. In our view, the employee's tortious actions in so conspiring represent a classic case of an employee acting outside the scope of his employment. The subject employee was hired by the defendant Sunshine to guard the bank in which he, in fact, conspired to rob. In this endeavor, we think the employee was plainly off on a frolic of his own, was in no way furthering the interests of his employer, and, consequently, was not acting within the scope of his employment as an agent of Sunshine under the doctrine of respondeat superior." (Cites omitted). (Emphasis supplied).

The issue now before this Court is whether or not under the facts alleged in the amended complaint which are premised upon the facts found by the District Court in its prior decision to indicate no liability on the part of the Appellee could be construed other than it constituted the law of the case.

Alternatively, causes of action alleged in the amended complaint on their face clearly demonstrate that they are barred by the statute of limitations.

Appellant contends that the District Court's opinion and decision invoking the law of the case in WELLS FARGO ARMORED SERVICE CORPORATION v. SUNSHINE SECURITY & DETECTIVE AGENCY, INC., Case No. 88-1298, 538 So.2d 92 is in conflict with BRUMBY v. CITY OF CLEARWATER, 108 Fla. 633, 148 So. 203 (Fla. 1933); STOSSEL v. GULF LIFE INSURANCE COMPANY, 123 Fla. 227 166 So. 821 (1936); ARKY, FREED, STEARNS, WATSON, GREER, WEAVER & HARRIS v. BOWMAR INSTRUMENT CORPORATION, 537 So.2d 563 (Fla. 1988).

Where the law of the case has been established, as we believe it has in Case No. 86-688, on the basis of certain pertinent facts and unless those facts are inconsistent with the application of law known as the law of the case then it is incumbent upon the appellate court as they did to re-enunciate the same in a subsequent appeal by the same parties on the same question of law.

In addition, the Appellee here contends that an analysis of the amended complaint affirmative shows that such pleadings are

covered by the law of the case and the statute of limitations. The Third District Court of Appeal in its opinion and decision in Case No. 88-1298, 538 So.2d 92 said:

> "We recognize that the trial court dismissed the amended complaint on statute of limitation grounds. Nevertheless, it is well settled that a trial court may be right for any reason appearing in the record and the law of the case reason for affirmance is obvious from this record." (Cites omitted).

Since it appears in the record, the statute of limitations has run against all of the claims asserted by the Petitioner, the alternate conclusion would be justified from the facts in this cause.

ARGUMENT

A.

THE LAW OF THE CASE WAS APPLICABLE AND PRECLUDED AN AMENDED COMPLAINT BASED UPON THE SAME PERTINENT FACTS.

It should be noted that the Petitioner Appellant's amended complaint is premised upon the salient fact that a robbery was committed by an employee of the Appellees. Absent the fact of a robbery by an employee of the Appellees, there would have been no cause of action against the Appellees of any kind. The view taken of these facts in the initial case before the District Court of Appeal and its findings that the employee was off on a lark of his own is inconsistent with his duties as a guard and certainly not done to accomplish the purposes for which he was employed. Consequently, his actions were not

within the scope of his employment nor would come within the ambit of the theory of respondeat superior.

This Court in WEISS v. JACOBSON, 62 So.2d 904 (Fla. 1935) set forth the general rule as to an employer's liability in damages for the wrongful act of his employees:

> "As a general rule under the principles of the common law an employer is liable in damages for the wrongful act of his employee that causes injury to another person, if the wrongful act is done while the employee is acting within the apparent scope of his authority as such employee to serve the interests of the employer, even though the wrongful act also constitutes a crime not a homicide or was not authorized by, or was forbidden by, the employer, or was not necessary or appropriate to serve the interests of the employer, unless the wrongful act of the employee was done to accomplish his own purposes, and not to serve the interests of the employer." (Emphasis supplied).

This Court does not appear to have receded from that statement. Therefore, if it appears that the guard, an employee of Appellees, committed a wrongful act which was not designed to serve the interest of the employer, but did so to accomplish his own purpose, then the act clearly is not within the respondeat superior theory.

After this cause was remanded to the trial court, the amended complaint which was permitted by Court order to be filed, repeated the basic facts alleged in the original complaint which the District Court of Appeal had found failed to state a cause of action.

Following the details of the fact of the robbery which was set forth in the original complaint, the Appellant filed four

additional counts: Bailment, negligent employment, negligence in the hiring of the guard who participated in the robbery, request for punitive damages, and an additional count against new defendants, SECURITY POLYGRAPH AND DETECTIVE BUREAU CORPORATION, INC., JACINTO A. ALFONSO, as surviving Trustee of a dissolved corporation and individually, and MARGARET ALFONSO, as a surviving Trustee of the dissolved corporation and individually and GERTRUDE GOODERICH, individually. None of these defendants had previously been made defendants in the prior proceedings or complaint.

The Appellant places great confidence in this Court's opinion in ARKY, FREED, et al. v. BOWMAR INSTRUMENT, supra, to demonstrate the alleged error of the District Court in reliance upon that decision. In the Arky case, this Court was examining the Third District Court's objection of Arky, Freed's request to order the trial court to direct a verdict in its favor. The request was based upon the fact that twelve days before the trial Bowmar changed its general negligence claim to a specific charge against Arky, Freed, in that they had failed after Bowmar's direct instructions to do so to assert and prove a particular defense. This Court in disapproving the Third District's objection to Arky, Freed's request to order the trial court to direct a verdict in its favor, said among other things:

> "Our growing, complex society and diminishing resources mandate the requirement that litigants present all claims to the extent possible, at one time, and one time only. We disapprove

> the opinion of the Third District below to the extent it conflicts with this decision, and approve the opinions in Freshwater, Designers Tile, Dean Co. and Citizens National. On remand, the district court shall order that a verdict be directed in favor of Arky, Freed." (Emphasis supplied).

It should be noted that this Court did not remand the matter to the District Court with instructions that the trial court permit Bowmar to amend its pleadings to meet the defect but instead directed the District Court to require the trial court to enter a direct verdict in favor of Arky, Freed. It is obvious on the face of this Court's opinion that the District Court's opinion and decision in the case at bar is in no way in conflict with that decision of this Court.

The Appellant has generally stated a principle which does not fit the factual and procedural posture of the case at bar. That is to say, the doctrine of the law of the case does not always preclude amendments after reversal of default judgments but only in those cases in which the fundamental facts must underlie the causes of action are the same as those on which the litigant seeks to premise another cause or causes of action.

Likewise, there is no conflict with the decision of the District Court of Appeal in the case at bar with BRUMBY v. CITY OF CLEARWATER, supra, for the reason that the facts in that case are entirely different from those in the case at bar. In Brumby, the Court noted that the contract was void from its inception and neither party acquired any rights under it. The

contract had been the subject of a proceeding by Brumby against the City of Clearwater. This Court noted that the City was contracting with Brumby to use public funds for the individual benefit of Brumby and to provide facilities for the conduct of his private business which was in violation of the Florida Constitution.

Likewise, the case of STOESSEL v. GULF LIFE INSURANCE CO. OF JACKSONVILLE, supra, is an entirely differenct factual case from the case at bar. In Stoessel, this Court said:

> "When this cause was remanded to the court below it was directed by this Court that it should be reconsidered in the light of the law as enunciated by this Court in Cassens v. Metropolitan Life Insurance Co., supra, and Equitable Life Assurance Society of United States v. Wiggins, supra. That mandate of this Court returned that case to the lower court in the same condition as if the order from which the appeal was taken had not been made. Under these conditions it was proper for the chancellor not only to reconsider that proof which had been submitted in the light of those decisions, but it was also the right of either of the parties by acting promptly and after notice to submit any further evidence that might be of material issue in the light of the opinions and judgments in the cases referred to."

It is obvious from a reading of that portion of this Court's opinion in Stoessel that the application of the rule in that case could not be appropriate to the case at bar. There is no apparent inconsistency with Stoessel. The facts in the cases and the procedural posture of the two cases when compared with Stoessel would appear to have no relevancy.

Generally, the question of law by a court as a last resort governs the case in the trial court through subsequent proceed-

ings. They will seldom be reconsidered or reversed even though they may appear to be erroneous. As has been so often stated whatever is once established between the same parties in the same case continues to be the law of the case as long as the facts on which such decision was predicated continue to be the facts in the case. See AIRVAC, INC. v. RANGER INSURANCE CO., 330 So.2d 467 (Fla. 1976). (Emphasis supplied).

The law of the case was established by the District Court's first opinion and the subsequent efforts by Petitioner Appellants to reassert the same facts in an amended complaint should be covered by the law of the case.

B.

THE DISTRICT COURT OF APPEAL WAS CORRECT IN THE DECISION AND OPINION SOUGHT TO BE REVIEWED IN THE APPLICATION OF THE STATUTE OF LIMITATIONS.

Prior to the reversal of the judgment originally entered below the Petitioner Appellant sought to collect on its judgment and as a result impleaded several banks and individuals including the individuals named in the style of the amended complaint. The Appellee posted a supersedeas bond and obtained an order superseding the judgment and staying further proceedings on collection of the judgment.

The amended complaint which was filed on January 29, 1988 specifically tracked the charging part of the original complaint as to the theft of the $440,000 on December 13, 1983, but then added nine counts, four of which were contained in the

original complaint and which were condemned by the District Court's opinion of October 28, 1986.

Since the amended complaint encompassed four of the original counts of the first complaint which had been found not to state a cause of action in the District Court's first opinion we do not deem it necessary to again argue the application of the opinion to those counts.

Accordingly, we call the Court's attention to count 5 which charges a bailment and alleged that SUNSHINE SECURITY AND DETECTIVE AGENCY (dissolved) was a bailee and the Appellant was a bailor of certain monies and that SUNSHINE SECURITY AND DETECTIVE AGENCY, as bailee, had wrongfully and illegally converted the bailed money. This was a new charge or cause of action not encompassed in the original complaint but based upon the facts stated in the original complaint.

SUNSHINE SECURITY AND DETECTIVE AGENCY, INC. was a dissolved corporation which was alleged to have converted the bailed money. These pleadings on the second appearance of the cause in the trial court constituted a departure in pleading which amounted to a new cause of action. Further, it was against a dissolved Florida corporation which was dissolved under the laws of Florida in March, 1984.

Section 607.297 of the Florida Corporation Act, among other things, provides as follows:

> "The dissolution of a corporation either:
>
> "* * * shall not take away or impair any remedy available to or against such corporation, or its

> directors, officers, or shareholders for any right or claim existing, or any liability incurred, prior to such dissolution if action or other proceeding thereon is commenced within 3 years after the date of such dissolution. * * *"
> (Emphasis supplied).

Since the corporation was dissolved in March, 1984, more than 3 years had elapsed. Any claims existing against the corporation or liability incurred prior thereto could not be the basis for a recovery. See McCLYNN v. ROSEN, et al., 387 So.2d 468 (Fla. 3d DCA 1980). In addition, the corporate statute precludes, as a statute of limitation, an action against the dissolved corporation as well as prohibiting the bringing of any action against the officers, directors or shareholders of the dissolved corporation.

Under Section 95.11(3)(0) there would not appear to be any legal basis for any claim under count 5 of the amended complaint.

Count 6 charges negligent employment. This count was lacking in legal basis for the reason that it was against SUNSHINE SECURITY AND DETECTIVE AGENCY, which had been dissolved in March, 1984. There was the further fact it stated a new cause of action which was not encompassed in the original complaint and was therefore subject to the Statute of Limitations.

An amendment to a complaint adding a new cause of action after the Statute of Limitations has run is barred. See CLICK v. PARDOLL, 359 So.2d 537 (Fla. 3d DCA 1978); HAITIAN VENTURES, INC. v. WISNIEWSKI, et al., 376 So.2d 424 (Fla. 3d DCA 1979);

JOHNSON v. TAYLOR RENTAL CENTER, INC., 458 So.2d 845 (Fla. 2d DCA 1984).

Count 7 of the amended complaint sought to charge JACINTO A. ALFONSO, as a Trustee of a dissolved corporation, SUNSHINE SECURITY AND DETECTIVE AGENCY, dissolved in March, 1984. As previously indicated by the Corporation Act, Section 607.297, it prohibits the bringing of an acting after 3 years from the date of the dissolution against the officers, directors and shareholders of the dissolved corporation -

> "For any right or claim existing, or any liability incurred, prior to such dissolution * * *"

This count is in plain violation of the Corporation Act and in addition, is a new action against a new defendant. Therefore, it should be precluded by the Corporation Statute and the theory of relation back of amended pleadings does not apply when an entirely new party and cause of action are added.

Count 8 is not a new cause of action but a claim of punitive damages. From a cursory examination of the allegations against the cause of action sought to be sustained it is obvious that no such punitive damages could be obtained. In addition, a claim for punitive damages is not based on any recognized legal grounds and without a cause of action, such damages cannot be assessed.

Count 9 is wholly without merit and should have been summarily dismissed for the reason that the relief sought is based upon a judgment that has been reversed. Supplementary proceedings which this count seems to seek cannot be supported without

a valid judgment since obviously, no valid judgment was pending nor had been entered at that time. Count 9 should have been dismissed because it was devoid of any merit. This was an attempt to recover on a judgment which had never been entered or one which had been reversed. Supplementary proceedings as such are not proper or legally permissible unless an appropriate valid judgment has been entered. It was therefore devoid of any merit and the Court's dismissal of the same with prejudice was warranted.

The claims set forth in paragraphs 5 through 9 of the amended complaint were devoid of any merit and the trial court was correct in dismissing the same as well as the entire amended complaint with prejudice. Life cannot be breathed into stale claims. As the District Court of Appeal said in its opinion and decision in this cause:

> "Nevertheless, it is well settled that a trial court may be right for any reason appearing in the record and the law of the case reason for affirmance is obvious from this record."

The Court did not indicate that the trial court's dismissal of the amended complaint on Statute of Limitation grounds was lacking in merit or it would not support the results reached by that Court.

CONCLUSION

The law of the case was clearly applicable to the second appeal by the Petitioner Appellant. It is apparent from a cursory examination of the amended complaint that they no

longer encompassed viable claims; that they affirmatively appeared to have been barred by the Statute of Limitations, Section 95.11(3)(0) and Section 607.297 of the Florida Corporation Act. The opinion and decision of the District Court of Appeal, Third District, should be approved and/or affirmed by this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing INITIAL BRIEF OF APPELLEES ON THE MERITS was served by U.S. mail this 5th day of September, 1989, upon:

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