OA 11-13-89 047

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

REPLY BRIEF ON THE MERITS OF PETITIONER WELLS FARGO ARMORED SERVICES CORPORATION

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OTHER AUTHORITIES:

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STATEMENT OF THE CASE AND ISSUE ON THE MERITS

Petitioner submits that Respondents' restatement of the case adds nothing. All parties agree a motion to amend and amended complaint adding co-defendants and alleging current causes of action against Sunshine Security was filed on April 17, 1985. In the first appeal, Sunshine Security, the only party, took the position that the trial court had authorized amendment. Brief of Appellant, case number 86-688, at 5. Moreover, the Third District determined that in the context of appeal of the default judgment, i.e., the context of the quotation appearing in Respondents' statement as to the effect of amendment on the defaulted defendant, the operant complaint was the original complaint. Sunshine Security should not now be heard to assert no order of court or agreement of counsel was obtained prior to April of 1987.

Respondents further argue that Rule 1.190(a), Fla.R.Civ.P., requires leave of court for amendment. That rule, however, permits one amendment "as a matter of course" before a responsive pleading is served. On April 17, 1985, there had been no responsive pleading filed. The Amended Complaint was "authorized". Additional defendants, served in May of 1987, never asserted "unauthorized" filing.

Petitioner submits that, based Brumby and Stossel, infra, the issue on the merits was correctly stated in its Initial Brief on the Merits.

ARGUMENT

Respondents argue that liability may not be imputed to Sunshine Security on an agency theory, relying upon Weiss v. Jacobson, 62 So.2d 904 (Fla. 1935). This argument side-steps the real issue.[1]

Sunshine Security may be liable under other theories. Respondents concede at pages 7 and 11 of their brief that Petitioner raised four such counts in, inter alia, negligence, bailment, and conversion.[2] Respondents nowhere contend these counts do not state a cause of action, just as Sunshine Security failed to make such a contention previously. The substantive sufficiency of these counts is thus not at issue. Because alternative grounds of recovery exist, conflict exists with Brumby v. City of Clearwater, 108 Fla. 633, 149 So. 203 (Fla. 1933). Amendment should be

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[1] Respondents do not address Fourth and Fifth District cases supporting amendment; the need to balance amendability and finality; cases defining "commencement" of an action; constitutional implications of affirmance of an erroneous decision upon unasserted affirmative defenses, or of extension of "law of the case" to third parties; or the court's discretion not to apply law of the case even when properly raised. Petitioner submits all unanswered points as briefed in its Jurisdictional and Initial Briefs.

[2] Respondents assert that the "new" parties were not "made defendants" in the prior complaint. Alfonso and the carrier were named in the 1985 Amended Complaint; others were added during the first appeal. R.153-154, 14-19; Respondents' Answer Brief, at 10 (conceding impleader based on fraudulent conveyances of Sunshine Security assets).

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permitted except where there is no possibility of alternative theory.

Similarly, conflict with Stossel v. Gulf Life Insurance Company, 123 Fla. 227, 166 So. 821 (1936), exists because remand for "further proceedings" returns the case "in the same condition as if the order from which the appeal was taken had not been made." If the parties and the court are to resume their respective travels through the progress of the case, then the next step in the ordinary sequence was to serve additional parties, and entertain motions directed to pleadings (Respondents now contend the first motion to amend was pending). Had the ordinary sequence been followed, Sunshine Security and its principal, Jacinto Alfonso, would now be defending against the contract and negligence theories. Other defendants would now be joined in defending fraudulent conveyance and conversion counts.

Nor are claims time-barred. Respondents argue that entry of an order authorizing amendment "commences" litigation against new parties or on new theories. Because the only written order appears in 1987, Respondents contend the actions are barred by expiration of the three-year corporate wind-up period. However, an action is "commenced" against parties with the filing of a complaint, or a motion to amend.

Moreover, after commencing an action against a corporation, adding trustees after dissolution is nothing

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more than correction of a misnomer or change in the capacity of the party. Even Respondents' citations support the rule that correction of a misnomer or change in capacity of a party relates back to the date of filing of the original complaint. Johnson v. Taylor Rental Center,Inc., 458 So.2d 845 (Fla.2nd.DCA 1984).

Respondents then argue Count 5 is time barred under 95.11(3)(a), Fla.Stat. But that four year statute did not bar action until December 3, 1987. All "actions" against all parties were "commenced" before that date.[3]

Respondents' cited cases add nothing.

In Click v. Pardoll, 359 So.2d 537 (Fla.3d.DCA 1978), a patient sued an unidentified doctor one day before the effective date of the Medical Liability Mediation Act. Sec. 768.44, Fla.Stat. About 15 months later, the doctor was named by amendment. The court dismissed the claim and required the plaintiff to submit to mediation. Naming the doctor instituted "an entirely new action" and did not relate back to the date of filing of the "Dr. John Doe" complaint. This decision is inapposite where all defendants

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[3] See cases cited in Petitioner's brief below. The Third District implicitly determined the statute of limitations did not bar any theories or action against any parties, or the alternative basis of affirmance of law of the case would have been unnecessary.

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were named and alias summons issued within any four year period of repose.

Haitian Ventures, Inc. V. Wisniewski, 360 So.2d 424 (Fla.3rd.DCA 1979) construed the interrelationship of Sections 607.297 and 607.271(5), Fla.Stat. (1977). The Third District ruled that subsequent reinstatement of a dissolved corporation does not revive claims lost at expiration of the three year wind-up period. The Third has retreated from this rule in Cosmopolitan Distributors, Inc. v. Lehnert, 470 So.2d 738 (Fla.3rd.DCA 1985), rev.denied, 486 So.2d 596 (Fla. 1986). The case is inapplicable, for Sunshine Security trustees were named in 1985. Moreover, if Respondents are correct that trustees are "entirely new" parties, they create a dilemma in which they are strangers to the first appeal and deprived of law of the case.

Airvac, Inc. v. Ranger Insurance Co., 330 So.2d 467 (Fla. 1976) is procedurally inapposite. In that case a losing defendant, after jury trial, failed to raise as an issue on appeal the improper ruling of the trial court in refusing to permit amendment to raise a new defense prior to trial. This court determined that, having failed to contest the propriety of that ruling in the plenary appeal, the defendant could not amend to re-assert the prohibited defense following reversal of the first judgment. Here, there was no ruling on sufficiency of additional counts, no trial, and no failure to raise an issue by the amending

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party. In reality, Airvac is closer to the factual setting of Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, P.A. v. Bowmar Instrument Corp., 537 So.2d 561 (Fla. 1988). The balance between amendability and finality was struck on the side of finality because of the wealth of opportunity for the party to have presented the issue.

Here, substantive sufficiency of additional counts was not at issue in the first appeal because there was no prohibition of amendment and because the order appealed did not affect other defendants. Applicability of law of the case was not at issue in the second appeal because it was never raised by any defendants. Wells Fargo just has not had the wealth of opportunity to contest an adverse ruling as did the defendant in Airvac. This is why the instant decision is constitutionally offensive.

McGlynn v. Rosen, 387 So.2d 468 (Fla.3rd.DCA 1980), pet.denied, 392 So.2d 1376 (Fla. 1981), merely establishes that Section 608.30, Fla.Stat. controls over a longer period established by Section 95.11, Fla.Stat. That rule disposes of no issues in this case.

Finally, Counts 8 and 9 are urged as simply "devoid of merit." But punitive damages may be recoverable for intentional torts, and avoidance of fraudulent conveyances does not require prior reduction of a claim to judgment. Sections 726.102(3), (4); 726.105; 726.108, Fla.Stat.

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CONCLUSION

The Third District Court of Appeal decision should be quashed, in whole or in part, with directions to reverse the trial court order of dismissal, and to remand the cause for further proceedings, including amendments, as the court deems just. Alternatively, both decisions should be quashed, with directions to reinstate the default judgment against Sunshine Security and to remand for further proceedings against other parties as the court deems just.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Reply Brief on the Merits was served by mail this 2nd. day of October, 1989, on: Mallory Horton, Esq., HORTON, PERSE & GINSBERG, 44 West Flagler Street, Miami, Florida.

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