IN THE SUPREME COURT OF FLORIDA

CASE NO.: 74,215
DCA CASE NO: 88-1479

FLORIDA BAR NO.: 224571

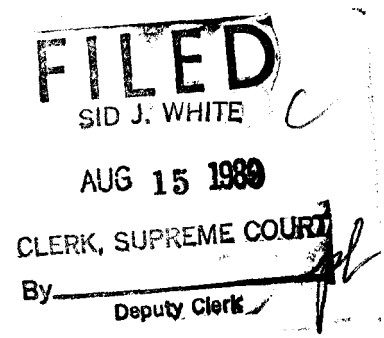
AMERICAN LEGION COMMUNITY CLUB OF COCONUT GROVE, INC.,

Petitioner,

v.

MURRY DIAMOND,

Respondent,
_____/



PETITIONER'S REPLY BRIEF ON THE MERITS

JAMES W. MOORE
Counsel for the American Legion
TAYLOR, BRION, BUKER & GREENE
801 Brickell Ave., 14th Floor
Miami, Florida 33131-2900
(305) 377-6700

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES	PAGE
Gifford v. Galaxies Homes of Tampa, Inc., 204 So.2d 1 (Fla. 1967)	12
Hall v. Florida Board of Pharmacy, 177 So.2d 833, 835 (Fla. 1965)	13
Hough v. Stewart, 543 So.2d 1279 (Fla. 5th DCA 1989)	4,6,7
Lawson v. State, 231 So.2d 205, 207 (Fla. 1970)	14
Lesperance v. Lesperance, 257 So.2d 66 (Fla. 3d DCA 1972)	13
Lineberger v. Domino Canning Co., 68 So.2d 357 (Fla. 1953)	12
MacNeill v. O'Neal, 238 So.2d 614, 615 (Fla. 1970)	13
Marks v. Del Castillo, 386 So.2d 1259 (Fla. 3d DCA 1980), ...	12
Pan American Bank of Miami v. Alliegro, 149 So.2d 45 (Fla. 1963)	14
Wingate v. United Services Automobile Assoc., 480 So.2d 665 (Fla. 5th DCA 1985)	12

PRELIMINARY STATEMENT

Reference to the Petitioner will be by the use of its formal name or "Petitioner". Reference to the Respondent will be by the use of his formal name or "Respondent". Reference to the record on appeal will be by use of the term "R." Reference to the transcript of the hearing on May 6, 1988 will be by use of the term "Tr." Reference to File Number 84-25832 will be by use of an Appendix as to the particular documents necessary for reference and by use of the term "Appendix Exhibit." Reference to the Petitioner's and Respondent's earlier briefs in this Court and in the district court will be by full description with copies of pertinent portions attached in the Appendix.

STATEMENT OF THE CASE AND OF THE FACTS

The Petitioner incorporates by reference its STATEMENT OF THE CASE AND OF THE FACTS, set forth in its Initial Brief.

ISSUES PRESENTED FOR REVIEW

A. WHETHER A SUIT TO SET ASIDE A CONVEYANCE OF REAL PROPERTY IS AN ACTION FOUNDED ON A DULY RECORDED INSTRUMENT AS SET FORTH IN SECTION 48.23, FLORIDA STATUTES (1985), AUTHORIZING THE MAINTENANCE OF A NOTICE OF LIS PENDENS AS OF RIGHT.

B. DID THE LIS PENDENS FILED IN THE LOWER TRIBUNAL CHARGE THE RESPONDENT WITH CONSTRUCTIVE NOTICE SO AS TO SUBJECT THE RESPONDENT TO THE OUTCOME OF THE RULING IN CASE NO, 84-25832 CA (27) QUIETING TITLE IN THE SUBJECT REAL PROPERTY TO THE AMERICAN LEGION COMMUNITY CLUB OF COCONUT GROVE, INC.?

C. DID THE PETITIONER WAIVE ANY OF THE ISSUES SET FORTH IN ITS INITIAL BRIEF THUS PRECLUDING THE PETITIONER FROM ARGUING THOSE ISSUES?

SUMMARY OF ARGUMENT

The Petitioner incorporates by reference its Summary of Argument, as to Issues A and B, set forth in its Initial Brief. As to Issue C, the Petitioner has not waived the issue of the Respondent's constructive notice which issue did not arise until the district court's opinion. The Petitioner, having prevailed in the trial court, was not required to address this issue. However, the issue now having crystalized, the Petitioner has addressed it without waiver. Morever, this Court having accepted jurisdiction, is empowered to address all issues in reviewing the

propriety of the district court's opinion so as to effect resolution of the dispute at hand.

ARGUMENT

A. A SUIT TO SET ASIDE A CONVEYANCE OF REAL PROPERTY IS AN ACTION FOUNDED ON A DULY RECORDED INSTRUMENT AS SET FORTH IN SECTION 48.23, FLORIDA STATUTES (1985), AUTHORIZING THE MAINTENANCE OF A NOTICE OF LIS PENDENS AS OF RIGHT.

The Petitioner submits that Issue A has been extensively briefed in the Initial Brief and Answer Brief, and it relies on its argument set forth in its Initial Brief in replying to the Respondent's Answer Brief.

B. THE LIS PENDENS FILED ON JUNE 27, 1985 CHARGED THE RESPONDENT WITH CONSTRUCTIVE NOTICE SO AS TO SUBJECT THE RESPONDENT TO THE OUTCOME OF THE RULING IN CASE NO. 84-25832 CA (27) QUIETING TITLE IN THE SUBJECT REAL PROPERTY TO THE AMERICAN LEGION COMMUNITY CLUB OF COCONUT GROVE, INC.

Diamond incorrectly asserts in his Answer Brief that the American Legion agreed that "if the 'relief sought' in the American Legion's action against Del Rossi Enterprises was not 'founded on a duly recorded instrument' . . . then Diamond's interest in the property . . . was unaffected by the subsequent outcome of that litigation." [Respondent's Answer Brief at pp. 10-11]. Such a proposition is not supported in the law and was, of course, never "agreed to" by the American Legion.

Even if the "relief sought" in the underlying action was not "founded on a duly recorded instrument", Diamond's judgment is nonetheless inferior to the interest of the American Legion.

First, the trial court, in its discretion, continued the vitality of the lis pendens through the time of the American Legion judgment. Second, Diamond's judgment was obtained within one year of the filing of the lis pendens. Diamond agrees that the lis pendens was valid for at least one year. Having taken the judgment within that year, Diamond is put on constructive notice of the American Legion action, and his position remains inferior to that of the American Legion, even if the lis pendens subsequently expired.

Diamond argues that his actual knowledge (not even constructive notice) of the pending litigation between Del Rossi Enterprises and the American Legion "has no relevance whatsoever" with [the American Legion's] statutory interpretation and refers to the American Legion's argument **as** a "non-sequitur". [Respondent's Answer Brief at p. 15]. To the contrary, the American Legion's position regarding constructive notice and the effect of a valid lis pendens goes to the heart of this issue and is entirely consistent with Florida law. **A** party who acquires an interest in property during the time the property is subject to a lis pendens takes the interest subject to the outcome of the litigation, even if the lis pendens subsequently expires. [See, Hough v. Stewart, 543 So.2d 1279 (Fla. 5th DCA 1989); Cain & Bultman, Inc. v. Miss Sam, Inc., 409 So.2d 114 (Fla. 5th DCA 1982).]

As set forth in the American Legion's Initial Brief, the trial court's order quashing Diamond's writ of execution may be supported even if the Court were to find that the American

Legion's lis pendens expired at the end of one year. Diamond agrees that the lis pendens was valid for at least one year from the time of filing. (Tr. at pp. 426-427). It is also undisputed that Diamond secured his judgment against Del Rossi, the defendant in the American Legion quiet title action, within the one year time period the lis pendens was indisputably effective. (See, Respondent's Answer Brief at p. 7.1. Under the law of lis pendens, Diamond is therefore charged with notice of the claim to the property asserted by the American Legion. His interest is inferior to that secured by the American Legion, even if the lis pendens expired before the time of the judgment quieting title in the American Legion.

Diamond addresses this argument at pages 15-17 and 18-20 of his Answer Brief. Diamond's argument is most notable for what it fails to address, as opposed to what it does address. Completely lacking from Diamond's treatment of the issue is any discussion of the case decisions relied upon by the American Legion to support its position. Instead, the sum and substance of Diamond's argument consists of bald assertions, unsupported by authority, that the lis pendens statute was not intended to achieve the result urged by the American Legion. Without expressly so stating, Diamond's argument rests on the faulty proposition that a valid lis pendens is rendered void ab initio if it subsequently expires.

That, however, is not the law. The case decisions show that a valid lis pendens, which subsequently expires, serves to provide notice to those who take an interest in the property

during the time of effectiveness, that their interest is subject to the outcome of the litigation. The identical issue was squarely before the court in Hough v. Stewart, 543 So.2d 1279 (Fla. 5th DCA 1989), wherein the court stated:

> The issue before us on this appeal concerns the effect of a notice of lis pendens, validated by an interlocutory appellate procedure, which expires prior to final judgment in the trial court, but which was in effect at the time an interest was acquired from a defendant in the trial court.

(543 So.2d at 12801.

In Hough v. Stewart, a suit was brought by Hough claiming that certain property was improperly deeded to a corporation by his wife. A lis pendens was filed shortly after the filing of the lawsuit. During the pendency of the lawsuit, the corporation deeded the property to Stewart, who claimed to be a bona fide purchaser without notice. The lis pendens expired prior to Hough obtaining judgment in the underlying action requiring the property to be deeded to him. However, the lis pendens was in effect when the corporation deeded the property to Stewart. Stewart argued, as does Diamond in this case, that Hough's failure to obtain an extension of the lis pendens after its expiration to include the date of entry of the judgment precludes Stewart from being bound by that judgment. Stewart argued that because of the expiration of the lis pendens, he was no longer on constructive notice of the possibility of the outcome in the Hough litigation.

The Fifth DCA disagreed and held:

> Stewart's argument, of course, overlooks the fact that he was not 'a prospective purchaser' on February 2, 1984. [when the lis pendens expired] His purchase occurred on October 21, 1982, at which time he was put on notice by the lis pendens, subsequently validated by appeal. See Crown Corporation v. Robinson, 128 Fla. 249, 174 So. 737 (1937). A notice of lis pendens is not rendered void ab initio simply because it expires prior to final judgment in the suit.

[543 So.2d at 1281.]

Stewart, having taken the deed to the property during the time of effectiveness of the lis pendens, took the property subject to the outcome of the litigation. Similarly, there is no dispute that Diamond obtained his interest in the property during the time of effectiveness of the American Legion's lis pendens. As in Hough v. Stewart, Diamond takes subject to the outcome of the litigation, whether or not the lis pendens subsequently expires.

To the same effect is Cain & Bultman, Inc. v. Miss Sam, Inc., 409 So.2d 114 (Fla. 5th DCA 1982). This case emphasizes that what is controlling in lis pendens analysis is the time when an interest is obtained in the property. Cain & Bultman acquired a mortgage interest in real property during the one year effectiveness of a lis pendens that had been filed in an action relating to the property. Cain & Bultman argued, however, that since they did not record their mortgage until after the expiration of the lis pendens, their mortgage interest was not inferior to the outcome of the litigation. The Fifth DCA disagreed and held:

> The answer to this contention is that for notice to those who later acquire an interest in real property to be meaningful, such notice must be available at the time the subsequent interest is acquired. Cain & Bultman acquired its mortgage interest on February 13, 1978, which was during the one year (July 13, 1977 to July 14, 1978) that the lis pendens in the Miller-Ackley foreclosure suit was effectual to give notice of Ackley's rights under the agreement for deed. Since Cain & Bultman acquired its mortgage interest with legal (constructive) notice of the Miller-Ackley agreement for deed, its mortgage interest is inferior to the rights of the Ackley's and their successors in interest.

[409 So.2d at 117-118 (emphasis added)].

Thus, the focus is on when the interest was acquired. Having obtained his interest during the time when (even Diamond does not dispute) the lis pendens was effectual, Diamond's position is inferior to that of the American Legion. As shown in Cain & Bultman, subsequent events, including expiration of the lis pendens, do not matter. An expiration of a lis pendens does not render it void ab initio.

C. THE PETITIONER DID NOT WAIVE ANY OF THE ISSUES SET FORTH IN ITS INITIAL BRIEF.

Diamond claims that the issue of the trial court extending the lis pendens through entry of final judgment, and the issue concerning Diamond's constructive notice are not properly before the Court. These issues did not receive extensive analysis or argument in the trial court or the district court because of the reason for the trial court's quashing the writ of execution. The

trial court ruled that the American Legion's action to quiet title was founded upon a duly recorded instrument and therefore, the lis pendens continued from the time of filing to the time of judgment. The American Legion had no need to press these issues when it had prevailed. Only when the district court reversed the trial court did the alternative reasons for upholding the vitality of the lis pendens take on added significance. In any event, these issues have to varying degrees been advanced in the trial court, the district court, and this Court. As to the issue of the trial court extending the lis pendens through entry of final judgment, Diamond claims, "This argument was not raised in the trial court, and therefore was not appropriate for the district court's consideration, nor is it appropriate for this Court's consideration." [Respondent's Answer Brief at page 17, n. 9]. That assertion is not correct. At the hearing on the Motion to Quash Writ of Execution, the American Legion advanced the following argument:

> Mr. Moore: And, secondarily, I think if you look at the final judgment which was entered in Case No. 84 [sic], it indicates that the lis pendens was carried forward through an entry of December of 1987 . . . So I have a two-pronged response. Number one, I think it is founded on a duly recorded instrument, based upon the decision I cited too [sic] and number two, I think by clear evidence of the final judgment itself, it indicates that that [sic] lis pendens was carried on beyond the one-year period which is within the Court's direction [sic] to do. (Tr. 424-25).

Thus, the issue of the trial court's order extending the lis pendens was squarely before the trial court in ruling on the

Motion to Quash Writ of Execution. Furthermore, this issue was briefed at the district court level by both parties and again before this Court. [See, Appellee's Answer Brief in the district court at pp. 13-14, Appendix Exhibit 1; Appellant's Reply Brief in the district court at pp. 3-4, Appendix Exhibit 2; Petitioner's Initial Brief in this Court at pp. 15-16; and Respondent's Answer Brief in this Court at pp. 17-18].

As to the issue concerning Diamond's constructive notice, Diamond argues that the American Legion "waived" this argument by failing to raise it in the trial court or district court. [Respondent's Answer Brief at p. 19]. As set forth above, the American Legion had no reason to raise this argument when it prevailed in the trial court on an alternative theory. Furthermore, the argument was advanced to the district court in the American Legion's Answer Brief.

> The Appellant was cognizant of the pending litigation, by the filing of the lis pendens, at the time he acquired his final money judgment. He was cognizant that the outcome of pending litigation in Case No. 84-25832 (27) might extinguish any claimed interest that he made to the subject real property by virtue of his final money judgment.

[Appellee's Answer Brief at p. 13, Appendix Exhibit 1]. The issue also has been briefed to this Court. [See, Petitioner's Initial Brief at pp. 16-20; Respondent's Answer Brief at pp. 18-20.]

More important than the amount of treatment these issues received in the trial court and district court is the fact that

Diamond's "waiver" argument is based upon a faulty premise. Diamond states that arguments not advanced in the trial court or district court are waived. [Respondent's Answer Brief at 19] Such a position might ring true had the American Legion lost in the trial court, and then attempted to advance new arguments for the first time on appeal. But that is not the case. The American Legion prevailed in the trial court, and it had no reason or obligation to advance arguments beyond those relied upon by the court.

Even when based upon erroneous reasoning, a conclusion or decision of a trial court will generally be affirmed if the evidence or an alternative theory supports it. In affirming a trial court's judgment on grounds not advanced by the trial court, this Court has reasoned:

> In reaching this conclusion, we have considered the elementary theory that a trial court's judgment, even if insufficient in its findings, should be affirmed if the record as a whole discloses any reasonable basis, reason or ground on which the judgment can be supported. In other words, the findings of the lower court are not necessarily binding and controlling on appeal, and if these findings are grounded on an erroneous theory, the judgment may yet be affirmed where appellate review discloses other theories to support it.

[Firestone v. Firestone, 263 So.2d 223, 225 (Fla. 1972) (emphasis added).]

In Firestone, nothwithstanding the erroneous reasoning of the trial court's judgment, this Court perused the record and found reason to affirm the judgment. [See also, Applegate v. Barnett Bank of Tallahassee, 377 So.2d 1150 (Fla. 1979).]

The flaw in Diamond's "waiver" argument is evidenced by cursory review of the Florida case decisions relied upon by Diamond to support the argument. [Respondent's Answer Brief at p. 19, n. 10.] In each of the cases, the court ruled that claimed error of the court below was not preserved for appellate review where the alleged error was not raised below. [See e.g., Clark & Bostic v. State, 363 So.2d 331 (Fla. 1978) (contemporaneous objections required to preserve points on appeal); Lineberger v. Domino Canning Co., 68 So.2d 357 (Fla. 1953) (court not permitted to consider any grounds of objections to the admissibility of evidence except as were specifically made in the trial court); Atlantic Coast Line R. Co. v. Shouse, 83 Fla. 156, 91 So. 90 (1922) (objection must be made regarding testimony to preserve question); Marks v. Del Castillo, 386 So.2d 1259 (Fla. 3d DCA 1980), review denied, 397 So.2d 778 (Fla. 1981) (failure to object to evidence at trial precludes appellate review of propriety of its admission); Dober v. Worrell, 401 So.2d 1322 (Fla. 1981) (failure to raise an affirmative defense before a trial court considering a motion for summary judgment precludes raising the issue for the first time on appeal); Gifford v. Galaxies Homes of Tampa, Inc., 204 So.2d 1 (Fla. 1967) (district court improperly ruled on undisposed of motion that was pending in the trial court); City of Miami v. Steckloff, 111 So.2d 446 (Fla. 1959) (an assigned error will be deemed to have been abandoned when not raised in the briefs); Wingate v. United Services Automobile Assoc., 480 So.2d 665 (Fla. 5th DCA 1985) (alleged error of trial court must be challenged in appellate

briefs); Lesperance v. Lesperance, 257 So.2d 66 (Fla. 3d DCA 1972) (the only point urged for reversal in briefs is the only point preserved for review).]

As shown, each of the cases pertains to an appealing [losing] party's failure to preserve error in the court below or failure to argue error to the appellate court in briefs. These concepts are well-established and the American Legion has no quarrel with them. However, these concepts are far-afield from the facts of this case. The American Legion prevailed in the court below. It had no reason to "preserve error" as it saw no error. Diamond apparently maintains that the American Legion was obligated to advance additional or alternative grounds for supporting the judgment below in order to "preserve" those arguments. Diamond cites to no authority for such a proposition and there is none.

Decisions of this Court have consistently held that an appellee may advance reasons to support a judgment of the trial court different than those given by the lower court. [See, Hall v. Florida Board of Pharmacy, 177 So.2d 833, 835 (Fla. 1965) ("In the absence of a cross appeal or cross-assignment of error the appellee's position is confined to the support of the judgment of the lower court, and his position is not even restricted to the reasons advanced by the lower court; he may advance reasons to support the judgment which may differ with those given by the lower court."); Cerniglia v. C & D Farms, Inc., 203 So.2d 1 (Fla. 1967); MacNeill v. O'Neal, 238 So.2d 614, 615 (Fla. 1970) ("These cases [Hall and Cerniglia] recognize that a party who is content

with the judgment below need not assign error in order to support that judgment and is not limited in the appellate courts to the theories of recovery stated by the trial court."]

The issues are thus properly before this Court. No "waiver" of these arguments has occurred as the American Legion is entitled to support the judgment of the trial court with reasons that were not advanced by the trial court. Further, once this Court accepts jurisdiction over a cause, it may, at its discretion , consider any issue affecting the case. [Cantor v. Davis, 489 So.2d 18 (Fla. 1986).] Thus, even in cases where the non-prevailing party below has failed to preserve an issue in the trial court or district court, this Court has in its discretion considered the issue for the first time. Finally, even though this case came to the Court on a certified question, the scope of review is the entire decision, not just the certified question. "Where a question is certified to this Court by a District Court of Appeal as one of great public interest, our scope of review is extended to the entire decision of the District Court, and not just the question certified." [Lawson v. State, 231 So.2d 205, 207 (Fla. 1970); See also, Pan American Bank of Miami v. Alliegro, 149 So.2d 45 (Fla. 1963); and Boulevard National Bank of Miami v. Air Metal Industries, Inc., 176 So.2d 94 (Fla. 1965).]

The issue of the effect of the trial court's order continuing the vitality of the lis pendens, and the issue of the Diamond judgment's inferiority because of the time when it was secured (i.e. within one year from the filing of American

Legion's lis pendens) have been raised in the trial court and the district court. Further, in attempting to support the ruling of the trial court quashing Diamond's writ of execution, the American Legion may advance, and the Court may consider, arguments different than those relied upon by the trial court in its decision. Finally, this Court has the discretion to consider any issue affecting the case, even one advanced before the Court for the first time.

CONCLUSION

For the reasons stated, the opinion of the Third District Court of Appeal should be reversed, and the trial court's order quashing the writ of execution re-instated.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was served this 14th day of August, 1989 to Joel *s.* Perwin, Esq., Podhurst, Orseck, Suite 800, City National Bank Building, 25 West Flagler Street, Miami, Florida **33130**, and Armando **E.** LaCasa, High, Stack, 3929 Ponce de Leon Blvd., Coral Gables, Florida 33134.

Respectfully Submitted,

TAYLOR, BRION, BUKER & GREENE
Counsel for the American Legion
801 Brickell Avenue, 14th Floor
Miami, Florida 33131
Tel: (305) **377-6700**

By: James W. Moore
JAMES W. MOORE

12,4/jmb2