

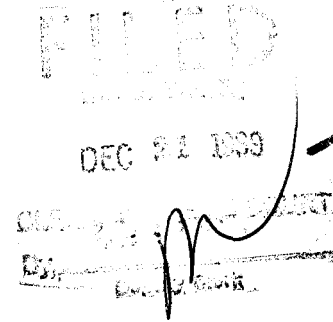
SUPREME COURT OF FLORIDA

Case No. 75,164

BANCO DE COSTA RICA,
Petitioner,

v.

NORBERTO RODRIGUEZ,
Respondent.



PETITIONER'S BRIEF ON JURISDICTION

On Discretionary Review From the
Third District Court of Appeal

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PRELIMINARY STATEMENT

This is a petition to invoke the discretionary jurisdiction of the Supreme Court pursuant to Art. V, § 3(b)(3), Fla. Const. Fla.R.App.P. 9.030(a)(2)(A)(iv) and Fla.R.App.P.9.120.

Petitioner, Banco de Costa Rica, Defendant in the trial court, will be referred to as "Banco" or "Defendant".

Respondent, Norberto Rodriguez, Plaintiff in the trial court, will be referred to as "Plaintiff".

The Appendix to this Brief will be cited as "A-_____" with page designation where appropriate.

The Opinion of the Third District Court of Appeal, a conformed copy of which is contained in the Appendix, shall be referred to as the "Decision".

STATEMENT OF THE CASE AND OF THE FACTS

On May 5, 1987, Plaintiff filed a Complaint against Banco seeking to recover damages based on four (4) dishonored checks ("Checks"), all dated May 5, 1982. A-1. The Checks purport to be drawn by Banco on its correspondent bank account held by Citizens and Southern International Bank of Miami ("C&S").

On or about July 11, 1988, before effecting initial service on Banco, Plaintiff scheduled the deposition of C&S. Plaintiff mailed a copy of the Re-Notice of Deposition, A-2, directly to Banco in San Jose, Costa Rica. In response thereto, on August 15, 1988, Banco served its Motion to Quash Notice and Re-Notice of Deposition/Motion to Quash Subpoena Duces Tecum and to Prevent Taking of the Deposition of Citizens and Southern International Bank of Miami ("Motion to Quash"), seeking to quash the original Notice of Deposition, the Re-Notice of Deposition, the Subpoena Duces Tecum, and to otherwise prevent the taking of the deposition of C&S. A-3. Banco's Motion to Quash was based upon the fact that Plaintiff had not yet caused service of process of the Summons and Complaint, and, therefore, the service of a notice of deposition and the taking of the deposition prior to service of process would violate Florida Rules of Civil Procedure and case law.

On August 25, 1988, the trial court entered its Order on Defendant's Motion to Quash Notice and Re-Notice of Deposition/Motion to Quash Subpoena Duces Tecum and to Prevent

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Taking of the Deposition of Citizens and Southern International Bank of Miami which denied Banco's Motion to Quash. A-4.

On August 26, 1988, Banco filed and served its Motion to Dismiss Complaint for Lack of Personal Jurisdiction and for Failure to State a Cause of Action ("Motion to Dismiss") seeking, inter alia, to dismiss the Complaint for lack of personal jurisdiction. A-5. The Motion to Dismiss, as supported by the Affidavit, A-6, was based upon the fact that Banco does no business in the State of Florida and has no connection with the State of Florida other than the maintenance of correspondent bank accounts.

Plaintiff served its Motion to Strike Defendant's Motion to Dismiss Complaint for Lack of Personal Jurisdiction contending that Banco generally appeared by filing the Motion to Quash. A-7. Banco served its Memorandum of Law in Opposition to Motion to Strike Defendant's Motion to Dismiss Complaint for Lack of Personal Jurisdiction. A-8. The trial court entered its Order on Defendant's Motion to Dismiss Complaint for Lack of Personal Jurisdiction ("Order Denying Motion to Dismiss") which denied Banco's Motion to Dismiss on the basis that Banco generally appeared by filing the Motion to Quash. A-9.

The Third District Court of Appeal affirmed the trial court's Order Denying Motion to Dismiss, holding that Banco sought affirmative relief and generally appeared because the Motion to Quash was a request made "to use the power and authority of a court to prevent the plaintiff from exercising a right accorded by [Fla.R.Civ.P. 1.310(a)]." In reaching its

Decision, the District Court held that Fla.R.Civ.P. 1.310(a) "permit[s] the taking of any deposition by party plaintiff immediately upon filing suit, except that of the defendant within the first thirty days after service of process." A-10.

SUMMARY OF ARGUMENT

Banco's Motion to Quash did not address the merits of the case, and, therefore, based upon the decisions of the Supreme Court and of District Courts of Appeal other than the Third District, Banco did not generally appear by filing the Motion to Quash and was entitled to contest jurisdiction in the subsequently filed Motion to Dismiss. The Decision of the Third District expressly and directly conflicts with the aforementioned decisions of the Supreme Court and other District Courts of Appeal on the same question of law, because the Decision determined that Banco generally appeared by filing the Motion to Quash despite the fact that the Motion to Quash did not address the merits of the case. Therefore, this Court should exercise its discretionary jurisdiction and hear this case on its merits.

The Decision also expressly and directly conflicts with the decision of the Supreme Court promulgating Fla.R.Civ.P. 1.310(a), which provides that absent leave of court, a plaintiff is not entitled to take the deposition of any person within thirty days after service of process and initial pleading on any defendant. The Decision determines that the thirty-day prohibition against depositions in Fla.R.Civ.P.

1.310(a) applies only to depositions of defendants. Therefore, the Decision expressly and directly conflicts with a decision of the Supreme Court on the same question of law, and as a result, this Court's discretionary jurisdiction is respectfully sought.

ARGUMENT

I. THE DECISION CREATES CONFLICT ON THE SAME QUESTION OF LAW, BY FINDING A GENERAL APPEARANCE EVEN THOUGH BANCO DID NOT ADDRESS THE MERITS OF THE CASE.

Banco's Motion to Quash did not address the merits of the case, but sought to quash a notice of deposition and to prevent the deposition until such time that Banco had been served with initial process and the Complaint. The Decision conflicts with this Court's decision in Ortell v. Ortell, 91 Fla. 50, 107 So. 442 (1926), which held:

A general appearance is entered in a cause by the making of any motion which involves the merits.

Id. at 445. Thus, because Banco's Motion to Quash did not involve the merits of the case, Banco did not generally appear by filing same, and, therefore, the Decision expressly and directly conflicts with Ortell.

The Decision also expressly and directly conflicts with the decisions of the Second District Court of Appeal in First Wisconsin National Bank of Milwaukee v. Donian, 343 So.2d 943 (Fla. 2d DCA 1977), cert. denied, 355 So.2d 513 (Fla. 1978),

and Green v. Roth, 192 So.2d 537 (Fla. 2d DCA 1966). In Green, the court held:

If a defendant proceeds first on the merits, as by a motion to dismiss for failure to state a claim or by an answer on the merits, and thereafter attempts to challenge jurisdiction over his person or improper venue, the challenge should fail; it comes too late ... (emphasis supplied by court.)

Id. at 540. Because the defendants in Green filed motions seeking substantial benefits on the merits of the case prior to objecting to jurisdiction, a general appearance was found. Id.

In the Third District, Plaintiff cited to Donian in support of his argument that Banco sought "affirmative relief" and, therefore, generally appeared by filing the Motion to Quash. The Donian decision does not support this argument. Merely seeking procedural relief, without addressing the merits, does not constitute a general appearance. In Donian, the defendants moved for and were granted an order providing for a stay of proceedings, which included certain adjustments to defendants' loan with the plaintiff bank, and which provided for a respite of six to nine months during which the defendants could refinance their loan. The Donian court, citing to the principle of Green, supra, held that the defendants generally appeared by this activity, because prior to objecting to jurisdiction, they sought and obtained relief from the court on the merits of the case which was materially beneficial. Donian, 343 So.2d at 945. In the instant case, Banco's Motion to Quash did not seek material relief on the merits of the case, but sought only to raise a procedural defect in the

actions of the Plaintiff. Therefore, the Decision expressly and directly conflicts with the Green and Donian decisions.

The Decision also expressly and directly conflicts with the Fourth District Court of Appeal's decision in Moo Youna v. Air Canada, 445 So.2d 1102 (Fla. 4th DCA 1984), Pet. rev. dismissed, 450 So.2d 489 (Fla. 1984). In Moo Young, the defendant moved for a more definite statement prior to its motion to dismiss for lack of personal jurisdiction. The court cited to this Court's decision in Public Gas Co. v. Weatherhead Co., 409 So.2d 1026 (Fla. 1982), and held:

The motions filed by appellees did not go to the merits of the case and therefore did not constitute a general appearance waiving the absence of jurisdiction.

445 So.2d at 1104. Accordingly, the Moo Young court held that the appellees were entitled to contest jurisdiction in the subsequently filed motion to dismiss.

Space does not permit individually discussing all of the other cases with which the Decision is in conflict. However, the Court is directed to the dissent of Judge Baskin to the Decision and the cases cited therein, Cumberland Software, Inc, v. Great American Mortaaae Corp., 507 So.2d 794 (Fla. 4th DCA 1987); Kimbrough v. Rowe, 479 So.2d 867 (Fla. 5th DCA 1985); and Green v. Roth, 192 So.2d 537 (Fla. 2d DCA 1966).

The Decision found that Banco generally appeared despite the fact that Banco's Motion to Quash did not address the merits of the case. As a result, the Decision expressly and directly conflicts with the decisions of the Second and Fourth

District Courts of Appeal and of the Supreme Court on the same question of law. This type of conflict has been held to confer jurisdiction in the Supreme Court. Ford Motor Co. v. Kikis, 401 So.2d 1341 (Fla. 1981). Therefore, pursuant to Art V, § 3(b)(3) Fla. Const. and Fla.R.App.P. 9.030(a)(2)(A)(iv), it is respectfully submitted that this Court should exercise its discretionary jurisdiction and hear this case on its merits.

11. THE DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH THE SUPREME COURT'S DECISION PROMULGATING FLA.R.CIV.P. 1.310(a).

Fla.R.Civ.P. 1.310(a) provides in pertinent part:

After commencement of the action any party may take the testimony of any Person, including a party, by deposition upon oral examination. Leave of Court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition within 30 after service of the process and initial pleading upon any defendant (Emphasis added.)

Fla.R.Civ.P. 1.310(a) was promulgated by the decision of this Court in In re The Florida Bar: Rules of Civil Procedure, 265 So.2d 21 (Fla. 1972).

In the Decision, the Third District states:

Rule 1.310(a), Florida Rules of Civil Procedure permit the taking of any depositions by party plaintiff immediately upon filing suit, except that of the defendant within the first thirty days after service of process. The plaintiff in the instant action availed himself of rights accorded under the rule. . . . It has been held that when a request is made to use the power and authority of a court to prevent the plaintiff from exercising a right accorded by the applicable rules of procedure, or statutes, such a request, or

motion, will constitute a general appearance
... . (Emphasis added.)

Thus, the Third District determined that the thirty-day prohibition against depositions provided for in Fla.R.Civ.P. 1.310(a) applies only to depositions of defendants, and that Plaintiff had the right to take the deposition of a non-party prior to service of process on Banco. As a result, the Third District held that Banco's Motion to Quash the notice of deposition constituted a general appearance because it was a request made "to use the power and authority of a court to prevent the plaintiff from exercising a right accorded by the applicable rules of procedure."

The Decision is in express and direct conflict with this Court's decision promulgating Fla.R.Civ.P. 1.310(a). In re The Florida Bar: Rules of Civil Procedure, 265 So.2d 21 (Fla. 1972). Fla.R.Civ.P. 1.310(a) clearly provides that leave of court is required to take the deposition of any person within thirty days after service of process upon any defendant. The Rule does not state that leave of court is only required for depositions of defendants within thirty days of service as held by the Decision.

Fla.R.Civ.P. 1.310(b)(2) provides for an exception to the leave of court requirement if "the person to be examined is about to go out of the state and will be unavailable for examination unless his deposition is taken before expiration of the 30 day period under subdivision (a)." (Emphasis added.) Thus, it is clear that the thirty-day prohibition in

Fla.R.Civ.P. 1.310(a) applies to a deposition of any person, including a non-party witness.

Therefore, because the Decision interprets Fla.R.Civ.P. 1.310(a) to permit the taking of depositions of non-party witnesses within thirty days of service upon the defendant, the Decision expressly and directly conflicts with the Supreme Court's decision in In re The Florida Bar: Rules of Civil Procedure, 265 So.2d 21 (Fla. 1972). Therefore, pursuant to Fla. Const. Art. V, § 3(b)(3), Fla. Const. and Fla.R.App.P. 9.030(a)(2)(A)(iv), it is respectfully submitted that this Court should exercise its discretionary jurisdiction and hear this case on its merits.

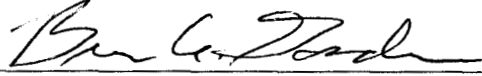
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CONCLUSION

It is respectfully submitted that this Court should accept jurisdiction and hear this case on its merits.

Respectfully submitted,

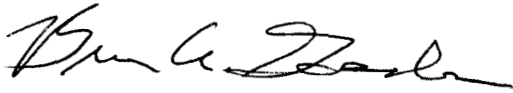
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CERTIFICATE OF SERVICE;

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Petitioner's Brief on Jurisdiction was mailed to Richard M. Goldstein, Esq., Goldstein & Tanen, P.A., Attorneys for Respondent, One Biscayne Tower, Suite 3250, Two South Biscayne Boulevard, Miami, Florida 33131, this 18th day of December, 1989.


BRUCE A. GOODMAN