SUPREME COURT OF FLORIDA

Case No. 75,164

FILED
SID J. WHITE
JAN 5 1990
CLERK, SUPREME COURT
By Deputy Clerk

BANCO DE COSTA RICA,

Petitioner,

v.

NORBERT0 **RODRIGUEZ,**

Respondent.

RESPONDENT'S BRIEF ON JURISDICTION

On Discretionary Review From the Third District Court of Appeal

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SUMMARY OF THE ARGUMENT

The Third DCA's opinion under review does not expressly and directly conflict with any decision of another district court of appeal or of this Court on the same question of law. The cases cited by Petitioner do not conflict with the opinion of the Third DCA on the same question of law. Although a motion addressing the merits may constitute a general appearance, it is not true that a motion which does not address the merits can never constitute a waiver of an in personam jurisdiction objection. The Third DCA's decision so holding does not conflict with the cases relied upon by Petitioner.

The Third **DCA's** decision neither expressly nor directly conflicts with any decision of this Court promulgating Florida Rule of Civil Procedure 1.310. The opinion does not address whether a plaintiff has the right to take the deposition of a non-party prior to service, nor was the Third DCA asked to rule on that issue. There was no determination made of whether the trial court correctly interpreted Rule 1.310 Fla.R.Civ.P. The Third DCA's holding was limited to whether the Petitioner, by seeking the affirmative relief of the trial court without objecting to in personam jurisdiction at the same time, waived its right to subsequently raise an in personam jurisdiction objection. The determination that by seeking affirmative relief, a motion to quash or for protective order constituted a waiver **is** consistent with the decisions of this Court and the other district courts of appeal.

ARGUMENT

The District Court's Opinion Neither Expressly Nor Directly Conflicts With a Decision of Another District Court of Appeal or of the Supreme Court on the Same Question of Law

This Court should decline to exercise its discretionary jurisdiction since the Third DCA's opinion neither expressly nor directly conflicts with a decision of this Court or of another district court of appeal on the same question of law. For discretionary jurisdiction to exist, the conflict between decisions must appear within the four corners of the majority decision and neither the dissenting opinion nor the record itself can be used to establish jurisdiction. Reaves v. State of Florida, 485 So. 2d 829 (Fla. 1986). Inherent or implied conflict may not serve as the basis for discretionary jurisdiction. Department of Health and Rehabilitative Services v. National Adoption Counseling Service. Inc., 498 So. 2d 888 (Fla. 1986).

The Petitioner asserts that the Third DCA's majority opinion expressly and directly conflicts with four other cases. A review of those four opinions compared with the Third DCA's majority opinion clearly demonstrates that there exists no conflict whatsoever.

The first case, Ortell v. Ortell, 91 Fla. 50, 107 So. 442 (1926), is apparently cited by Petitioner for the quotation from Corpus Juris contained within the opinion that the making of a motion involving the merits of a case constitutes a general appearance. The case involves an attack on personal jurisdiction as a result of defective constructive service. This Court ruled in Ortell that because the appellant raised the jurisdictional issue at the very first instance below by special appearance, it was not waived when she moved the court for additional time within which to file

her answer or by her appeal of the interlocutory order overruling her objection to the trial court's jurisdiction. In the instant case, the Petitioner failed to raise the jurisdictional issue at the very first instance below. Petitioner seems to rely upon the cited quotation, which appears as dicta in the opinion, for its corolary; i.e., if the motion did not involve the merits, then there is no general appearance. Ortell neither states nor stands for that proposition. Furthermore, since the adoption of Fla.R.Civ.P. 1.140(b), the distinction between a general and special appearance, in effect, no longer exists. Ward v. Gibson, 340 So. 2d 481 (Fla. 3d **DCA** 1976).

Cases decided since Ortell acknowledge that defendants submit themselves to the jurisdiction of the court **by** actions other than filing a motion involving the merits of the case. Hubbard v. Cazares, 413 ***So.*** 2d 1192 (Fla. 2d DCA 1981) pet. rev. den., 417 So. 2d 329 (Fla. 1982); Cumberland Software, Inc. v. Great American Mortgage Corp., 507 So. 2d 794 (Fla. 4th **DCA** 1987).

The second case relied upon by Petitioner is First Wisconsin National Bank of Milwaukee v. Donian, 343 So. 2d 943 (Fla. 2d **DCA** 1977), cert. den. 355 So. 2d 513 (Fla. 1978). In First Wisconsin the Second DCA held that a litigant who moves the court to obtain some relief of material benefit to him has submitted himself to the court's jurisdiction. In that case, the appellees before questioning personal jurisdiction moved the court to approve an agreement to stay foreclosure proceedings. In the absence of service of process, the Second DCA determined that the appellees' action in requesting court approval of the stipulation constituted a submission by them to the court's jurisdiction. If anything, the decision is consistent

with and supports the Third DCA's ruling in this case that Petitioner sought relief of material benefit to it, i.e. requesting the trial court to exercise its authority to preclude the taking of the deposition, and thereby submitted itself to the court's jurisdiction.

The third case relied upon by Petitioner is Green v. Roth, 192 So. 2d 537 (Fla. 2d DCA 1966). In Green the Second DCA again found a waiver of jurisdictional objection where the defendants initially requested relief in the form of the discharge of a lis pendens and a larger bond which would have benefited them. There is no direct or indirect conflict with these decisions. Both Donian and Green are consistant with the Third DCA's opinion.

The final case cited by Petitioner is Moo Youna v. Air Canada, 445 So. 2d 1102 (Fla. 4th DCA 1984) pet. for rev. dism. 450 So. 2d 49 (Fla. 1984). That case involved motions which the Fourth DCA determined did not address the merits of the case and did not constitute a general appearance. Moo Young does not stand for the proposition propounded by Petitioner that only motions going to the merits of the case waive jurisdictional objections. In fact, the Fourth DCA in a recent case, which was cited in the opinion under review, held that motions other than those directed to the merits but which request affirmative relief do waive a party's objection to personal jurisdiction. Joannou v. Corsini, 14 F.L.W. 1092 (Fla. 4th DCA May 12, 1989). In Joannou, the appellant filed motions for protective order to prevent the taking of depositions claiming that he had not received proper service of notice in accordance with the Florida Rules of Civil Procedure. The appellant who had not yet been served with process did not raise lack of personal jurisdiction at the time that the motions for protective order were filed. The Fourth DCA found that the

appellant voluntarily "made an appearance and claimed rights under the Florida Rules of Civil Procedure which are available to parties." 14 **F.L.W.** at 1093. The court held that such an appearance constituted a request for affirmative relief which waived the subsequent jurisdictional objection. The fact situation in Joannou is identical to the facts in this case.

The Fourth DCA's opinion in Joannou is analagous to and consistant with the Third DCA's opinion at issue. There is no conflict, express or direct, between these opinions and the Fourth DCA's earlier decision in **Moo** Young. They do not deal with the same question of law. These cases do not address motions going to the merits as Moo Young does. Rather, they address motions seeking affirmative relief to which parties are entitled under the Florida Rules of Civil Procedure. This Court's discretionary jurisdiction is based upon "express" conflict on the same question of law. "Express" means appearing within the district court's written opinion. School Board of Pinellas Countv v. District Court of Appeal, **467** So. 2d 985 (Fla. 1985). A review of the Third DCA's opinion shows no express or even implied conflict on the same question **of** law.

Petitioner also asserts that this Court should exercise its discretionary jurisdiction based upon a statement found in dicta in the Third DCA's opinion which Petitioner claims is an improper interpretation of Rule 1.310 Fla.R.Civ.P. It is important to note that it was the waiver of personal jurisdiction that was the issue on appeal and not whether the trial court had correctly interpreted Fla.R.Civ.P. 1.310 and allowed the deposition. The Third DCA understood the issue and properly ruled that the Petitioner by seeking affirmative relief of the court without objecting to jurisdiction at that time waived its right to subsequently object to personal

jurisdiction. The only portion of the Rule which was addressed was 1.310(b) dealing with the method of service of notice of deposition on the defendant. Regardless of what portion of Rule 1.310 or any other rule which Petitioner might have raised to prohibit the deposition, it still neglected to raise an in personam jurisdiction attack at the same time. That failure to raise the issue of in personam jurisdiction in an initial pleading that requested affirmative relief from the court constituted a waiver of Petitioner's right to raise the jurisdictional objection at a later time.

The Third DCA neither miscontrues Fla.R.Civ.P. 1.310 nor did the appeal concern the interpretation of that Rule. The Third DCA was not asked by the Defendant and did not rule on whether the Plaintiff had the right to take the deposition of a non-party prior to service on the Defendant. The issue before the Third DCA and which the opinion focused on was whether the Petitioner had waived its objection to personal jurisdiction by seeking the aid of the court first and attacking jurisdiction later.

The Third DCA's statement in dicta concerning Rule 1.310 Fla.R.Civ.P. is not a central part of its opinion nor is it necessary to its decision. Moreover, there is no express or direct conflict between the statement in the opinion and the rule itself. An interpretation of Rule 1.310 as Petitioner suggests would have no bearing on the outcome of the case or on the district court's opinion. In the absence of such an express or direct conflict, there exists no basis for invoking this Court's discretionary jurisdiction. Rule 9.030(a)(2)(A) Fla.R.App.P.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that there exists no express and direct conflict between the decision of the Third District Court of Appeal under review and a decision of another District Court of Appeal or of this Court on the same question of law, and this Court should accordingly decline jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed by United States Mail this 3 day of January, 1990 to the following: Bruce A. Goodman, Esquire, Ruden, Barnett, McClosky, Smith, Schuster & Russell, P.A., Post Office Box 1900, Fort Lauderdale, Florida 33302.

By: _____
Richard M. Goldstein