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SUPREME COURT OF FLORIDA

CASE NO. 75,164

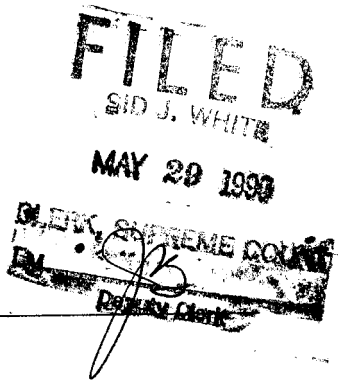
BANCO DE COSTA RICA,

Petitioner,

- versus -

NORBERTO RODRIGUEZ

Respondent.



RESPONDENT'S ANSWER BRIEF ON THE MERITS

On Discretionary Review From the
Third District Court of Appeal

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STATEMENT OF THE CASE AND FACTS

Respondent, NORBERTO RODRIGUEZ ("RODRIGUEZ), accepts the statement of the case and facts provided by Petitioner, BANCO DE COSTA RICA ("BANCO"), with one critical exception -- BANCO never clearly apprises the Court of what was and was not included in its initial pleading in this case.

That pleading, entitled "Defendant's Motion to Quash Notice and Renotice of Deposition/Motion to Quash Subpoena Duces Tecum and to Prevent Taking of the Deposition of Citizens and Southern International Bank of Miami", was solely an attack on RODRIGUEZ's attempt to depose Citizens and Southern International Bank, a non-party. (A-3).[1/] BANCO did not in that motion seek to abate or dismiss the action for lack of jurisdiction over BANCO, nor did it in any other way raise its defense of lack of jurisdiction or the grounds on which that defense was based.

What BANCO did do was invoke its perceived rights as a party, alleging that RODRIGUEZ's notice of the non-party deposition was defective under Rule 1.310(b)(1), Fla. R. Civ. P., which requires a party who desires to take the deposition to ". . . give reasonable notice in writing to every other party to the action." (A-3).

It was not until after the court heard and denied this motion (A-4), that BANCO filed its Motion to Dismiss Complaint for Lack of Personal Jurisdiction and for Failure to State a Cause of Action, first raising the defense of lack of in personam jurisdiction based upon insufficient minimum contacts. (A-5).

1/ References to Petitioner's Appendix herein will be in accord with Petitioner's record citation: "A-___".

SUMMARY OF ARGUMENT

BANCO failed to raise the defense of lack of personal jurisdiction in its initial pleading before the court which invoked BANCO's alleged rights as a party, and asked the court to exercise its jurisdiction to prevent the taking of a non-party deposition. Such a motion, which invokes rights of a party and requests affirmative assistance from the court, when not coupled with a motion or responsive pleading raising the lack of jurisdiction defense, constitutes a waiver of that defense. The Third District Court of Appeals properly found that by filing this motion without raising the jurisdictional challenge, BANCO had waived that defense.

Even assuming ***arguendo*** BANCO did not waive the defense of lack of jurisdiction, that defense was not viable. Long arm jurisdiction was proper in this case under Section **48.193(1)(g), Fla. Stat. (1989).** The complaint alleged that BANCO delivered four bank checks to be collected at the Citizens and Southern International Bank of Miami. BANCO elected Florida as the place of its performance and required RODRIGUEZ to travel to Florida to collect the funds at issue. By requiring its performance to occur in Florida, BANCO certainly availed itself of the benefits of doing business in Florida and could reasonably anticipate being hailed into court here.

ARGUMENT

I.
BANCO Voluntarily Submitted to the Jurisdiction of the Court by Filing a Motion to Prevent a Deposition Without Raising the Defense of Lack of Personal Jurisdiction

It has been held by the Florida courts that a defendant wishing to contest personal jurisdiction must do so in the first step he takes in a case, whether it be the filing of a preliminary motion or a responsive pleading, or else the jurisdiction objection is waived. Bay City Management. Inc. v. Henderson, 531 So. 2d 1013 (Fla. 1st DCA 1988); Cumbarland Software, Inc. v. Great American Mortgage Corp., 507 So. 2d 794, 795 (Fla. 4th DCA 1987); S.B. Partners v. Holmes, 479 So. 2d 280 (Fla. 2d DCA 1985), *rev. denied,* 488 So. 2d 68 (Fla. 1986); Consolidated Aluminum Corporation v. Weinroth, 422 So. 2d 330 (Fla. 5th DCA 1982), *rev. denied,* 430 So. 2d 450 (Fla. 1983); Miller v. Marriner, 403 So. 2d 472, 475 (Fla. 5th DCA 1981); Green v. Hood, 120 So. 2d 223 (Fla. 2d DCA 1960).

In the motion filed below, BANCO did not raise the defense of lack of personal jurisdiction. Quite to the contrary, its motion was based upon its invocation of the rights of a party under the Florida Rules of Civil Procedure with respect to the noticing of a deposition. This case, therefore, is very similar procedurally to Joannou v. Corsini, 543 So. 2d 308 (Fla. 4th DCA 1989), in which, after domesticating a judgment, the plaintiff set depositions of two non-party banks in aid of execution. The defendant filed motions to prevent the taking of the depositions, raising arguments, like BANCO, based on his rights as a party under the Florida Rules of Civil Procedure, although he had not been served with process. Nowhere in the motion did the defendant challenge the jurisdiction of the trial court over his person. The Fourth District held that although the defendant had

(Fla. 4th DCA 1976). In all of these cases, the motions were ". . . explicit in [their] attack on the process . . .". *See,* Baraban v. Sussman, **439** So. 2d 1046, 1047 (Fla. 4th DCA 1983). BANCO's motion, however, sought to quash the subpoena for deposition of a non-party, Citizens and Southern International Bank, not to dismiss this action or quash for insufficiency or lack of process on BANCO. This is a critical distinction,

Nor is the requirement of raising the jurisdiction challenge in the first action in the case satisfied by stating that one "specially appears herein",

as BANCO stated in its motion. In Bay City Management. Inc. v. Henderson, 531 So. 2d 1013 (Fla. 1st DCA 1988), defendants' first action was to file a motion to set aside defaults, in which defendants stated they were making a special appearance to file the motion. The court held that the filing of the motion to set aside default, without the filing of a Rule 1.140(b), Fla. R. Civ. P., responsive pleading or motion challenging the jurisiction of the court, subjected the defendants to the jurisdiction of the court and waived the defect of lack of service of process. The court stated:

> We find that they have waived, and that their "special appearance" -- by filing a motion to set aside the defaults, merely "reserving" the right to raise these defenses, without actually setting forth these defenses and the grounds on which they were based as required by Rule 1.140(b) -- amounted to a general appearance in fact and a waiver of the defects. (Cites omitted).

531 So. 2d at 1016. ***See*** *also,* S.B. Partners v. Holmes, 479 So. 2d 280 (Fla. 2d DCA 1985), *rev.* ***denied,*** 488 ***So.*** 2d 68 (Fla. 1986) (to preserve the defense of lack of personal jurisdiction, the motion raising the insufficiency of process must specifically state the grounds on which it is based and the substantial matters of law intended to be argued.).

Whether a defendant has timely filed his objections to jurisdiction does not and should not turn upon whether his initial pleading or motion involves the merits of a plaintiff's claims; rather, the appropriate question is whether, in that initial motion or pleading, the defendant has asked the court to use its jurisdiction and powers in some way on his behalf. If a defendant does make such a request, particularly if his right to the relief sought hinges on his status as a party to the lawsuit, it is clear that it has invoked the jurisdiction of the Court and cannot thereafter claim that jurisdiction does not exist. As stated in First Wisconsin

National Bank of Milwaukee v. Donian, 343 So. 2d 943, 945 (Fla. 2d DCA 1977), ***cert. denied,*** 355 So. 2d 531 (Fla. 1978), ***citing to,*** Green v. Roth, 192 So. 2d 537 (Fla. 2d DCA 1966), ". . . those who participate in litigation by moving the court to grant requests materially beneficial to them, have submitted themselves to the court's jurisdiction."

BANCO's contention that the only "first step" in which a defendant must raise the issue of in personam jurisdiction is one going to the merits of the plaintiff's claims is not supported by law or reason. BANCO contends that Weatherhead Company v. Coletti, 392 So. 2d 1342 (Fla. 3d DCA 1980), ***approved sub nom,*** Public Gas Company v. Weatherhead Company, 409 So. 2d 1026 (Fla. 1982), supports its position. In Weatherhead, the Third District was asked to rule on whether the filing of a notice of appearance waived a subsequent jurisdictional objection. The Third District took that opportunity to extend the rule first set forth in McKelvey v. McKelvey, 323 So. 2d 651, 653 (Fla. 3d DCA 1976), and held that a document which seeks no relief whatever and is not itself inconsistent with an assertion of lack of jurisdiction will not serve to waive that objection. The court continued, ". . . the mere filing of an entirely neutral and innocuous piece of paper, which indicates no acknowledgment of the court's authority, contains no request for the assistance of its process, and, most important, reflects no submission to its jurisdiction . . ." should not waive the objection of lack of in personam jurisdiction. 392 So. 2d at 1344. In a footnote, the court was careful to state, "There would be a different result if an appearance gave rise to some detriment to the adverse party." 392 So. 2d at 1345, n. 6.

The Motion to Quash filed by Petitioner BANCO was not "neutral and innocuous" -- it asked the court to take affirmative action on its behalf, to the detriment of Respondent RODRIGUEZ, based upon what BANCO perceived to be its rights as a party under the Florida Rules of Civil Procedure. BANCO's motion attempted to preclude RODRIGUEZ from taking discovery of a non-party. As stated by the lower tribunal, "When you come in to take some type of an action to quash a deposition, you are actively participating in the case." (A-9 at p. 9). Thus, under the Weatherhead reasoning, by filing this motion without contemporaneously raising the jurisdictional argument by motion or pleading, BANCO voluntarily requested the court to use its authority and assistance in granting BANCO affirmative relief. Petitioner BANCO could easily have objected to jurisdiction by including the appropriate language attacking jurisdiction in its Motion to Quash.

Paulson v. Faas, 171 *So.* 2d 9 (Fla. 3d DCA 1965), cited by BANCO, is certainly distinguishable as it involved the issue of whether a stipulation between the parties for an extension of time precludes a defendant from subsequently raising the defense of lack of jurisdiction before the court. The case did not involve the filing of a preliminary motion before the court which failed to raise the jurisdictional attack and is consistent with Weatherhead. Likewise, Barrios v. Sunshine State Bank, 456 So. 2d 590 (Fla. 3d DCA 1984), in which a motion for enlargement of time was found not to waive a subsequent jurisdictional attack, involved a motion that was truly "neutral and innocuous", as was contemplated by the Weatherhead court.

The only case which deviates from the Weatherhead logic is Moo Youna v. Air Canada, 445 *So.* 2d 1102 (Fla. 4th DCA 1984), *rev. dismissed* 450 *So.* 2d 489 (Fla. 1984), in which the Fourth District surprisingly held

that a motion to vacate a default judgment which did not include a motion to dismiss for lack of personal jurisdiction did not waive the absence of jurisdiction. This case is in direct conflict with several other cases which hold to the contrary. In Bay City Manaaement. Inc. v. Henderson, 531 ***So.*** 2d 1013 (Fla. 1st DCA 1988), the First District held that the very same motion -- to set aside a default -- sought affirmative relief without preserving the jurisdictional attack, and thus constituted a waiver of that issue. Similarly, in Consolidated Aluminum Corporation v. Weinroth, 422 So. 2d 330 (Fla. 5th DCA 1982), the Fifth District held that a motion to vacate a default which did not contain an objection to personal jurisdiction constituted a defendant's submission to the court's jurisdiction. Likewise in **S.B.** Partners **v.** Molmes, 479 So. 2d 280 (Fla. 2d DCA 1985), the Second District held that the filing of a motion to set aside default constituted a waiver of any objection to process where that issue was not raised in the motion.

Additionally, it must be remembered that the Fourth District, in Joannou v. Corsini, 543 ***So.*** 2d 308 (Fla. 4th DCA 1989), recently held on facts closely on point to the instant case that the attempt of an unserved defendant to try to stop the taking of the deposition of a third party through the filing of a motion for protective order constituted an appearance by which the defendant was deemed to have waived his claim of lack of jurisdiction. Again, the motion for protective order did not go to the merits of any claim but rather, as described by the court, involved an assertion of claimed rights under the Florida Rules of Civil Procedure available to parties.

The motion filed by BANCO clearly acknowledged the court's authority, requested its assistance and sought the affirmative relief of having the court

prevent the taking of a non-party deposition by the other party to the action. Having invoked the court's jurisdiction in that manner, and having failed to file an appropriate motion or pleading going to the question of personal jurisdiction, **BANCO** clearly waived its rights to subsequently make a personal jurisdiction challenge.

II.
BANCO Had the Requisite Minimum Contacts With the State of Florida for the Court to Acquire Personal Jurisdiction

The Complaint filed by RODRIGUEZ alleged that BANCO delivered to RODRIGUEZ four bank checks for collection, which could only be collected at the Citizens and Southern International Bank of Miami, as that was the bank upon which the checks were drawn. (A-1). Long arm jurisdiction in this case, therefore, was not predicated upon § 48.193(1)(a), Fla. Stat. (1989), but rather upon § 48.193(1)(g), Fla.Stat. (1989), which provides for jurisdiction of a person, "breaching a contract in this state by failing to perform acts required by the contract to be performed in the state." Here, Petitioner BANCO itself required that the payment it was obligated to make be made in Florida. RODRIGUEZ had no affiliation to Florida, and was required to come here for BANCO's performance solely at BANCO's request. When BANCO then failed to perform in Florida, the agreement was breached. This makes this case quite different from those cases cited by BANCO.

First, most of the cases BANCO cites deals with a plaintiff alleging long arm jurisdiction pursuant to § 48.193(1)(a), and those cases rightfully hold that the mere fact of having a correspondent banking relationship in Florida is insufficient to satisfy the requirement that a person is "operating, conducting, engaging in or carrying on a business or business venture in this state . . ."[2/] This case is quite

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2/ Cases cited by Petitioner which deal with § 48.193(1)(a), as opposed to § 48.193(1)(g), include Bank of Wessington v. Winters Government Securities Corporation, 361 So. 2d 757 (Fla. 4th DCA 1978) (where the court actually did find jurisdiction under the "general course of business activity" basis); W.C.T.U. Railway Company v. Szilagyi, 511 So. 2d 727 (Fla. 3d DCA 1987); Oriental Import and Exports, Inc. v. Maduro & Curiel's Bank. N.V., 701 F.2d 889 (11th Cir. 1983); Bank of America v. Whitney Central National Bank, 261 U.S. 171, 43 S. Ct. 311, 67 L. Ed. 594 (1923); April Industries. Inc. v. Levy, 411 So. 2d 303 (Fla. 3d DCA 1982); Leema Enterprises. Inc. v. Willi, 575 F. Supp. 1533 (S.D. N.Y. 1983).

different -- here, the activity at issue was to occur in Florida. It is not just the fact that **BANCO** maintained a bank account in this state, but rather that **BANCO** required RODRIGUEZ to come to Florida where BANCO was to perform.

This case is also distinguishable from Venetian Salami Co. v. Parthenais, 554 So. 2d 499 (Fla. 1989), on its facts. In Venetian Salami Co., there was a dispute about whether there was even an agreement between the parties, let alone one under which payment was to be made by the defendant in Florida. The argument that payment was to be made in Florida was based solely upon the general rule that where a contract does not state a place of payment, it is presumed to be at the creditor's domicile. Under such facts, a plaintiff would of course have to show some minimum contacts with the state to satisfy constitutional due process requirements. In this case, the defendant itself required the plaintiff to travel to Florida to collect the funds at issue. This situation is thus quite different in that the defendant, having purposely required performance within Florida, can of course be found to have purposely availed himself of the benefits of doing business within the state so as to satisfy the due process requirements set forth in International Shoe Co. v. Washington, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945). Certainly, by requiring its performance to occur in Florida, BANCO could ". . . reasonably anticipate being hailed into court there." World-Wide Volkswaaen Corp. v. Woodson, 444 U.S. 286, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980).

BANCO attempts to escape these facts by arguing that there was no breach of its performance until notice of dishonor. Whether or not this is true is irrelevant -- either before such notice or after such notice, the obligation on BANCO was to make payment to RODRIGUEZ in Florida. At either time, it failed to fulfill this obligation and therefore breached the contract.

BANCO also attempts to argue that RODRIGUEZ failed to sustain his burden of proof with respect to jurisdiction once BANCO came forward with an affidavit in opposition to jurisdiction. What BANCO neglects to point out is that RODRIGUEZ never had an opportunity to do so because at hearing on the motions relating to jurisdiction, the court did not entertain argument on this point but rather ruled that BANCO had waived its right to attack jurisdiction, so that the other arguments became moot. (A-9). Thus, at the worst, RODRIGUEZ was simply not given an opportunity ***to*** bear its "burden of proof" with respect to the jurisdictional issue.

CONCLUSION

Based upon the law and facts set forth above, Respondent, NORBERTO RODRIGUEZ, respectfully requests that this case affirm the decision of the Third District Court **of** Appeals.

Respectfully submitted,

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By: _____
Susan E. Trench

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed by United States Mail this 25th day of May, 1990 to the following: JOHN H. PELZER, ESQUIRE, BRUCE A. GOODMAN, ESQUIRE - Ruden, Barnett, McClocky, Smith, Schuster & Russell, P.A., NCNB Plaza, Penthouse D, 110 East Broward Boulevard, Post Office Box 1900, Fort Lauderdale, Florida 33302.

By: _____
Susan E. Trench