OA 9-5-90

OA 2 cmg.

SUPREME COURT OF FLORIDA

Case No. **75,164**

BANCO DE COSTA RICA,

Petitioner,

v.

NORBERT0 RODRIGUEZ,

Respondent.

PETITIONER'S REPLY BRIEF ON THE MERITS

On Discretionary Review From the
Third District Court of Appeal

John H. Pelzer, Esq.
Bruce A. Goodman, Esq.
Ruden, Barnett, McClosky, Smith,
Schuster & Russell, P.A.
Attorneys for Petitioner
NCNB Plaza, Penthouse D
110 East Broward Boulevard
Post Office Box **1900**
Fort Lauderdale, Florida **33302**
Telephone: **(305) 764-6660**
Miami: **(305) 944-3283**
Boca: **(407) 392-9771**

TABLE OF CONTENTS

F/44BAG/2

TABLE OF AUTHORITIES

F/44BAG/2

Statutes and Other Authorities

SUMMARY OF ARGUMENT

Banco's Motion to Quash was expressly based upon lack of service of process, and therefore, Banco contested personal jurisdiction in its first paper filed, and the issue was not waived. The Motion to Quash does not go to the merits of the case, or in any way confirm, deny or state a defense to the Complaint, and therefore, it cannot constitute a waiver of personal jurisdiction.

Plaintiff has not and cannot allege a basis for long-arm jurisdiction over Banco. Banco could not have breached a contract in this state. Pursuant to the Uniform Commercial Code, Banco's alleged breach of contract occurred in Costa Rica, not in Florida. Further, the mere failure to pay money in Florida, standing alone, is insufficient to obtain jurisdiction over a non-resident. Therefore, the trial court should have dismissed the Complaint with prejudice, because there is a lack of personal jurisdiction over Banco.

ARGUMENT

I. BANCO DID NOT VOLUNTARILY SUBMIT TO THE JURISDICTION OF THE COURT BY FILING THE MOTION TO QUASH.

Banco's Motion to Quash was expressly based upon Plaintiff's failure to cause service of process, and thus, Banco raised the issue of personal jurisdiction in its first paper filed, and the issue was not waived. A-3. As noted by Judge Baskin in her dissent, Banco's Motion to Quash raises the issue of personal jurisdiction in conformity with Fla.R.Civ.P. 1.140, because it "addresses the issue of jurisdiction by stating repeatedly that service of the complaint and summons had not been effected." A-11, p.4.

The Motion to Quash was procedurally proper as a means to raise the issue of personal jurisdiction. "A party's amenability to the jurisdiction of the court may be reached by a motion to quash for insufficiency of process or insufficiency of service of process." Palmer Johnson Yachts v. Ray Richard, Inc., 347 So.2d 779, 780 (Fla. 3d DCA 1977). Plaintiff correctly notes that the impetus for Banco's Motion to Quash was the improper notice of deposition. Answer Brief at 4. This is not a "critical distinction" but a distinction without a difference. The critical point is that the Motion to Quash was expressly based upon the failure to effect personal service. Thus, Banco contested jurisdiction over the person in its first paper filed, and the issue was not waived. Fla.R.Civ.P. 1.140.

None of the cases cited by Plaintiff in his Answer Brief for the proposition that Banco generally appeared, involved a motion that was based upon lack of service of process, such as Banco's Motion to Quash. Joannou v. Corsini, 543 So.2d 308 (Fla. 4th DCA 1989), relied upon heavily by Plaintiff, illustrates this critical distinction. In Joannou, after a judgment was entered and interrogatories in aid of execution were served, the defendant filed a motion for protective order. The motion did not raise the failure to serve process, but did call upon the court's discretion to limit discovery based upon the merits and substance of the case. Only in answering the interrogatories did the defendant raise the failure to serve process. By contrast, Banco's first filing raised the failure to serve process.

In Green v. Hood, 120 So.2d 223 (Fla. 2d DCA 1960), another case cited by Plaintiff, the court held that a motion to vacate a final decree was a general appearance because the basis of the motion was the failure to join a necessary party to the suit. The Green opinion expressly states that had the motion raised the fact of non-service of process as its basis, then the jurisdictional question would have been preserved. Id. at 224. Following the reasoning of Green, the jurisdictional question was preserved because Banco's Motion to Quash was expressly based on non-service of process.

Banco did not waive the issue of jurisdiction or generally appear by filing the Motion to Quash, because no affirmative

relief on the merits was sought. In Public Gas Co. v. Weatherhead Co., 409 So.2d 1026 (Fla. 1982), this Court approved the decision and rationale of Weatherhead Co. v. Coletti, 392 So.2d 1342 (Fla. 3d DCA 1980). In Coletti, the court adopted "a waiver rule applying only when the defendant, without reserving his jurisdictional objection, takes some action the effect of which is to request relief on the merits." Id. at 1344, n.5. The court held:

> [a] general appearance ordinarily will be effected by making a motion involving the merits of plaintiff's claim and his right to maintain the suit and secure the relief sought.

392 So.2d at 1343-44 (emphasis supplied by the court). Plaintiff asks this Court to strike through the very language emphasized by the Coletti court. Answer Brief at 6.

Because this Court approved the rationale of Coletti in Public Gas Co., 409 So.2d at 1027, it has been established that a waiver of personal jurisdiction can only be effected by the filing of a motion requesting relief on the merits of the case. See also, Moo Youns v. Air Canada, 445 So.2d 1102, 1104 (Fla. 4th DCA 1984), petition for review dismissed, 450 So.2d 489 (Fla. 1984) (a motion for more definite statement which "did not go to merits of the case" did not constitute a general appearance) (incorrectly referenced as involving a motion to vacate default in the Answer Brief at 8.); Barrios v. Sunshine State Bank, 456 So.2d 590, 591 (Fla. 3d DCA 1984) (a motion for enlargement of time did not constitute a general appearance

because it "did not go to the merits of the case"); Paulson V. Faas, 171 So.2d 9 (Fla. 3d DCA 1965) (a stipulation for extension of time does not preclude a defendant from subsequently raising the defense of personal jurisdiction). The Motion to Quash was directed only to Plaintiff's violation of the Florida Rules of Civil Procedure, and it did not involve the merits of the case. The Motion to Quash does not attack the Complaint, raise any defense to the Complaint, or deny any part of the Complaint. Therefore, Banco did not generally appear by filing a motion directed to the merits of the case.

Plaintiff mischaracterizes the Motion to Quash as a motion seeking rights under the Florida Rules of Civil Procedure. To the contrary, the Motion to Quash sought to prevent Plaintiff from violating the Florida Rules of Civil Procedure by scheduling a deposition prior to service of process. Fla.R.Civ.P. 1.310(a) prohibits the taking of a deposition until thirty (30) days after service of process upon any defendant absent leave of court. Plaintiff's notice clearly violated that rule. Further, Plaintiff's mailing of the notice of taking deposition to Banco was improper service which should have been quashed, because it preceded service of process. Fla.R.Civ.P. 1.080 and 1.310(b)(1); see, Drake V. Scharlau, 353 So.2d 961 (Fla. 2d DCA 1978) (pursuant to Fla.R.Civ.P. 1.080, service of paper upon defendant's attorney was improper where it preceded service of process).

Plaintiff makes no effort to defend his actions in the trial court. In the absence of any right to take the deposition, the Motion to Quash cannot be said to seek a "detriment" to Plaintiff, Answer Brief at 6,7, or "affirmative relief" for Banco, Answer Brief at 7. The Motion to Quash sought only to preserve the procedural status mandated by the Florida Rules of Civil Procedure, The Motion to Quash was "neutral and innocuous" within the meaning of Weatherhead and Coletti because it sought no relief from responsibilities under the Rules. Instead, it sought only to forestall abusive tactical maneuvers which themselves violated the Rules.

Even if this Court were to adopt the rationale of the Decision under review, the Motion to Quash still would not constitute a general appearance. The Decision incorrectly determines that Fla.R.Civ.P. 1.310(a) permits the taking of any non-party depositions immediately upon filing suit. A-11, p.2. Based on this erroneous determination, the Third District held that Banco generally appeared because the Motion to Quash sought to prevent Plaintiff from exercising his rights under Fla.R.Civ.P. 1.310(a). A-11, p.2.

The Third District has misinterpreted the plain language of the Florida Rules of Civil Procedure, Rule 1.310(a) prohibits the taking of any depositions, including depositions of non-party witnesses, within thirty (30) days after service of process upon any defendant absent leave of court. Thus, following the Third District's rationale while using a correct

reading of the Rule, Banco did not generally appear by filing the Motion to Quash because the Motion to Quash did not seek to prevent Plaintiff from exercising his rights under the Florida Rules of Civil Procedure.

Based on the foregoing analysis, it is evident that Banco did not voluntarily submit itself to the jurisdiction of the court or waive personal jurisdiction by filing the Motion to Quash. Therefore, the issue of personal jurisdiction was preserved, and the trial court erred in failing to reach the merits of the Motion to Dismiss.

11. THE LONG-ARM STATUTE DOES NOT CONFER PERSONAL JURISDICTION OVER BANCO.

In his Answer Brief, Plaintiff exclusively relies on §48.193(1)(g), Fla. Stat. (1987) for his argument that there is personal jurisdiction over Banco in Florida. Section 48.193(1)(g), Fla. Stat. (1987) provides for long-arm jurisdiction over any person "[b]reaching a contract in this state by failing to perform acts required by the contract to be performed in this state."

Plaintiff has not and can not allege that Banco breached a contract by failing to perform acts required by the contract to be performed in this state. The Complaint alleges that Banco executed and delivered four checks to Plaintiff, in Costa Rica, and that Banco has failed to pay on the checks and has thus breached its contract as drawer of the checks. A-1. The only activity occurring in Florida, as alleged in the Complaint, was the dishonoring of the checks by the drawee bank, C&S. In the Answer Brief, Plaintiff argues that the drawee bank's dishonor in Florida constitutes Banco's breach of contract. This argument ignores and is contrary to the provisions of the Uniform Commercial Code.

Section 673.413, Fla. St. (1987), "Obligation of drawer, and acceptor", provides in pertinent part:

> The drawer engages that upon dishonor of the draft and any necessary notice of dishonor or protest he will pay the amount of the draft to the holder or to any indorser who takes it up.

§673.413(2), Fla. Stat. (1987). Section 673.122(3), Fla. Stat. (1987) provides in pertinent part:

> A cause of action against a drawer of a draft ... accrues upon demand following dishonor of the instrument.

Thus, when the drawee bank, C&S, dishonored the checks in Florida, Banco would not have breached the alleged contract. Plaintiff's cause of action for breach of contract would have accrued upon Plaintiff's demand to Banco following dishonor. §673.122(3), Fla.Stat. (1987). A drawer is only secondarily liable on a check, and such liability does not accrue until demand following dishonor of a check. §§673.413(2), 673.122(3), Fla.Stat (1987); Tepper v. Citizens Federal Savings and Loan Assoc., 448 So.2d 1138, 1140 (Fla. 3d DCA 1984). Banco would not be obligated to pay on the alleged checks until it received Plaintiff's demand following dishonor. Id. at 1140. Such demand could not have been received in Florida, because Banco has no offices, agents or personnel in this state. A-6. Thus, pursuant to the long-arm statute, §48.193(1)(g), Fla. Stat (1987), there is no personal jurisdiction over Banco, because Plaintiff has not and can not allege that Banco breached a contract in this state.

The conclusion that the alleged contract in this case would not have been breached in Florida, is supported by Restatement (second) Conflict of Laws 5215. Comment b of §215 provides in pertinent part:

> In contrast to makers and acceptors, the obligations of indorsers and drawers to pay only arises in the event that the particular maker, acceptor or drawee fails to do so. ... the obligations of an indorser or drawer are governed by the local law of the state where he delivered the instrument and where, ordinarily at least, it must have been tacitly understood that any payment by him would be made. (Emphasis added.)

Plaintiff alleges in the Complaint that Banco delivered the checks to him in Costa Rica. A-1, p.1. Therefore, payment by Banco would be due in Costa Rica, the alleged place of delivery. Thus, the allegations of the Complaint suggest that Banco has breached a contract in Costa Rica, not in Florida. Therefore, long-arm jurisdiction is lacking. §48.193(1)(g), Fla. Stat (1987).

In the Answer Brief, Plaintiff attempts to avoid this established commercial law by arguing that Banco required Plaintiff to travel to Florida to receive payment on the checks. No such journey was necessary. A check may be deposited in virtually any bank in the world and sent through the banking channels to the drawee bank for payment. In fact, the alleged checks attached to the Complaint reveal by their stamps that they were deposited in Switzerland. A-1, p.4. Any fictional journey to Florida which Plaintiff may be deemed to have made to obtain payment on his questionable checks is also insufficient to confer jurisdiction in Florida. Such questions are fully answered by Bank of America v. Whitney Central National Bank, 261 U.S. 171, 43 S.Ct. 311, 67 L.Ed. 594 (1923) and Oriental Imports and Exports, Inc. v. Maduro & Curiel's

Bank, N.V., 701 F.2d 889 (11th Cir. 1983), which hold that the maintenance of correspondent bank accounts is insufficient to cause personal jurisdiction. Plaintiff has not attempted to distinguish those cases.

Plaintiff's Answer Brief also fails to distinguish Venetian Salami Co. v. Parthenais, 554 So.2d 499 (Fla. 1989) from the facts of this case. Similar to the facts of Venetian Salami Co., there is a dispute in this case over whether a contract exists, because Banco denies that the checks are authentic. In Venetian Salami Co., this Court held:

> we do not believe that the mere failure to pay money in Florida, standing alone, would suffice to obtain jurisdiction over a nonresident defendant.

554 So.2d at 503. If Plaintiff had alleged that Banco breached a contract by failing to pay in Florida, personal jurisdiction is lacking based on the holding of Venetian Salami Co.

Plaintiff did not file an affidavit or otherwise offer any evidence at the hearing on the Motion to Dismiss. A-9, p.5. In contrast, Banco filed the Affidavit of Rodolfo Ulloa in support of its objection to personal jurisdiction. A-6. In his Answer Brief, Plaintiff now seeks the opportunity to offer evidence to sustain his burden of proving personal jurisdiction in this state. Plaintiff, however, has lost his opportunity to sustain this burden.

In Venetian Salami Co., this Court set forth the procedure for jurisdictional contests:

> A defendant wishing to contest the allegations of the complaint concerning jurisdiction or to raise a contention of minimum contacts must file affidavits in support of his position. The burden is then placed upon the plaintiff to prove by affidavit the basis upon which jurisdiction may be obtained.

554 So.2d at 502 (emphasis added); see also, W.C.T.U. Railway Co. v. Szilagyi, 511 So.2d 727 (Fla. 3d DCA 1987). Plaintiff can not now seek to sustain his burden having failed to file an affidavit or offer any other proof at the trial level. A remand for an evidentiary hearing is appropriate only where opposing affidavits cannot be reconciled. Venetian Salami Co., 554 So.2d at 503. Plaintiff's argument that he had no opportunity to make his case suggests that Plaintiff planned further litigation gamesmanship in the form of a surprise affidavit served during a hearing. Answer Brief at 12. Remand should not be used to permit such a tactic.

The undisputed evidence before the trial court reveals that the long-arm statute does not confer personal jurisdiction over Banco. Therefore, the trial court erred in denying the Motion to Dismiss, and the Complaint should have been dismissed with prejudice.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the Decision of the Third District should be reversed, and this case remanded to the trial court with directions to dismiss the Complaint with prejudice.

Respectfully submitted,

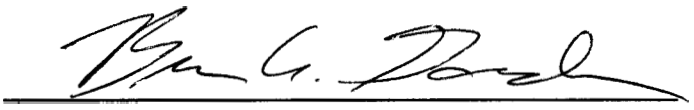
RUDEN, BARNETT, McCLOSKY, SMITH,
SCHUSTER & RUSSELL, P.A.
Attorneys for Petitioner,
Banco de Costa Rica
NCNB Plaza, Penthouse D
110 East Broward Boulevard
Post Office Box 1900
Fort Lauderdale, Florida 33302
Telephone: (305) 764-6660
Miami: (305) 944-3283
Boca : (407) 392-9771

By: _____
John H. Pelzer
Florida Bar No. 376647

By: _____
Bruce A. Goodman
Florida Bar No. 602302

[FI OF I(

WE HEREBY ERTI t a ru and correct copy f Petiti er's y Brief on the Merits was mail i: 9th day of une 1990 to usan E. h Esq. and Richard M. Goldstein, Esq., Goldstein & Tanen, .A. One : 1 Tower, Suite 3250, Two 1 Biscayne Boulevard, Miami, Florida, 33131.



F/33BAG/5