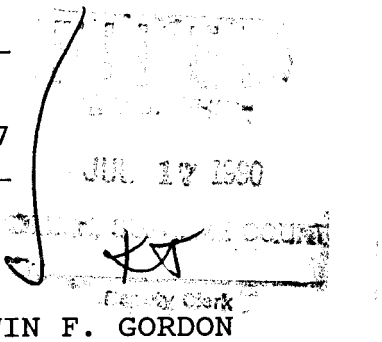
IN THE SUPREME COURT OF THE
STATE OF FLORIDA

CASE NO. 75,965
FOURTH DISTRICT NO. 88-1387



FLORIDA NATIONAL BANK OF MIAMI and EDWIN F. GORDON

Petitioners

v.

BANKATLANTIC, A Federal Savings Bank

Respondent

ANSWER BRIEF OF RESPONDENT

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INTRODUCTION

The matter now before the Court does not present a question of great public importance as the issues for the Court's review are of limited relevance beyond the narrow scope of this factual scenario. This is a case of contract interpretation with the central question being whether the Petitioner/Borrower's prepayment of a mortgage loan was voluntary. The courts below determined that the Borrower deliberately defaulted on his loan obligation and that his subsequent prepayment was voluntary, and thus he should be held to his contractual prepayment penalty obligation. That determination must stand.

Throughout this brief, Petitioners will be referred to as "Gordon" or "Borrower" and Respondent will be referred to as "BankAtlantic" or "Lender."

The symbol "R" shall designate a record citation and "A" shall refer to the Appendix to Petitioners' Brief.

STATEMENT OF THE CASE AND OF THE FACTS

Respondent respectfully submits this statement of the case and of the facts because Petitioners' Brief is not accurate in all respects as to the points in contention.

This matter is before the Court because the Fourth District Court of Appeal certified a question to be of great public importance. The question certified by the Fourth District Court of Appeal is:

> WHETHER IN COMMERCIAL VENTURES, WHERE THE NOTE CONTAINS BOTH A PROVISION FOR ACCELERATION AND A PROVISION FOR PREPAYMENT PENALTY FEES, AND THE MORTGAGEE HAS ELECTED TO ACCELERATE THE MORTGAGE BECAUSE OF AN INTENTIONAL DEFAULT BY THE MORTGAGOR, WHO SUBSEQUENT TO NOTIFICATION OF FORECLOSURE PROCEEDINGS, BUT PRIOR TO A FORECLOSURE SALE, HAS CONSUMMATED A PRIVATE SALE OF THE PROPERTY, IS IT WITHIN THE COURT'S DISCRETIONARY POWER TO CONSIDER THE EQUITIES AND ALLOW BOTH PROVISIONS TO BE EFFECTUATED SIMULTANEOUSLY DUE TO THE PREMATURE TERMINATION OF THE MORTGAGE?

If this Court in its discretion accepts jurisdiction, the issue for determination is whether, on the established facts of this case, the trial court, and the Fourth District Court of Appeal, correctly ruled that the Borrower may not avoid his contractual obligation for a prepayment penalty fee when he intentionally attempts to avoid such obligation by deliberately defaulting on his monthly mortgage payments.

In 1976, BankAtlantic, as Lender, and Gordon, as Borrower, entered into a mortgage loan transaction pursuant to which BankAtlantic loaned Gordon the principal amount of

$3,500,000.00. Gordon executed a promissory note secured by a mortgage which encumbered a 110-unit rental apartment complex known as the "Landmark" located in Broward County, Florida.

Gordon originally acquired and developed the Landmark to create a "tax shelter device" which would generate negative cash flow as a means of sheltering the high income he was then receiving from his unrelated manufacturing business. (R.110-11). Indeed, for several years, Gordon was able to utilize the Landmark successfully to shelter a portion of his substantial income. (R.111).

As early as 1982, Gordon developed a different business plan for the Landmark: he determined to sell the building, in which he had substantial equity, to a purchaser interested in converting the Landmark into a condominium. (A.25; R.92). Gordon intended to use the equity in the Landmark for other business purposes, including paying off unrelated obligations to other creditors. Gordon's new business plan necessarily required that he prepay the mortgage note prior to its stated maturity date of the year 2001. In fact, Gordon testified that as of 1982 he intended to prepay the note (A.25), and that "there was never any question" that he intended to pay off the loan prior to the stated maturity date. (R.116). Also, as part of that business plan, Gordon stopped leasing the apartments in the Landmark to new tenants and refused to renew leases with existing tenants to facilitate conversion of the building to a condominium. (A.25; R.115-16). The inevitable result of these actions pursuant to

Gordon's new business plan was a decrease in rental income. (R.115-16).

Gordon began negotiating for the sale of Landmark in August or September of 1983 (R.92),. Gordon succeeded in locating a purchaser for the Landmark, and in February 1984, he entered into a contract to sell the Landmark to a developer who planned to convert the building into a condominium. (R.78, 92). The sale was not consummated and Gordon continued to pursue and negotiate with several prospective buyers for the property. In April 1984, Gordon tendered a check for that month's mortgage payment, but the check was returned for insufficient funds. (R.96-97).

In May 1984, Gordon approached BankAtlantic a number of times and requested that the prepayment penalty set forth in the note be waived by BankAtlantic when Gordon sold the building and prepaid the note. (R.17-18, 20, 32). BankAtlantic declined to waive the contractual prepayment penalty. (R.18, 32, 56). Thereafter, Gordon deliberately defaulted on the mortgage note by failing to make any subsequent mortgage payments in an effort to avoid the prepayment penalty. (A.26-27; R.24-25, 68-71). Gordon's default forced BankAtlantic to accelerate the loan under the note's default-acceleration clause and to institute foreclosure proceedings.[1/] (A.26-27).

[1/]The note's prepayment clause and default-acceleration clause are reproduced in Petitioners' Brief at 5. The prepayment clause permits the Borrower to make prepayments in any loan year of up to 20% of the principal without penalty of any kind. The (continued...)

Gordon never filed an answer in the foreclosure proceeding. While the foreclosure action was pending, Gordon entered into a contract for the purchase and sale of the Landmark for a total price of $13.5 million. (A.26). At that point, Gordon again requested that BankAtlantic waive Gordon's prepayment obligation. Pursuant to an agreement between Gordon and BankAtlantic, BankAtlantic abated the foreclosure proceeding and permitted Gordon to close on the purchase and sale transaction and to deliver clear title to the purchasers (A.8-13). BankAtlantic requested that Gordon honor the prepayment obligation contained in the mortgage note, but Gordon refused. (A.8-13).

BankAtlantic provided a satisfaction of mortgage to Gordon upon payment of the outstanding indebtedness plus attorneys' fees and costs, and the parties agreed to escrow an amount equal to the prepayment penalty and the Lender's anticipated attorneys' fees. In short, Gordon received sales proceeds in the approximate amount of $13.5 million from the sale of the Landmark and repaid outstanding indebtedness to BankAtlantic in the total amount of $3,585,826.14; the parties agreed to escrow the amount of $251,280.00. Thereafter, BankAtlantic filed a complaint seeking the prepayment penalty and

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1/(...continued)
Borrower is permitted to make prepayments in excess of 20% of the principal amount upon payment of a specified penalty amount. The default-acceleration cause provides that, upon the Borrower's default in the payment of any installment, the entire indebtedness shall become immediately due and payable at the option of the Lender.

attorneys' fees presently held in escrow. (A.16-18). The Borrower answered and filed a motion for summary judgment on the theory that the Lender's acceleration of the loan relieved the Borrower of his contractual prepayment obligation notwithstanding the Borrower's deliberate default on the note. The trial court rejected the Borrower's theory and denied the motion for summary judgment.

At a non-jury trial, both parties presented witnesses and introduced numerous documents into evidence. The Borrower advanced the same theory set forth in his summary judgment motion and, after hearing all the evidence, the trial court once again rejected that theory and ruled in favor of the Lender. In the trial court opinion,[2/] Judge Tedder found that the Borrower's prepayment of the note was voluntary and that the Lender's acceleration of the note was not the cause of the early payment. (A.26). The Court also found that the Borrower deliberately defaulted on the note and that this default forced the Lender to accelerate the note in order to protect its rights. (A.26-28). The trial court concluded that where the Borrower's prepayment of

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[2/] In part, Gordon attacks the validity of the trial court's ruling by innuendo and inference noting that the opinion entered by the court was "prepared by the Lender's counsel" and entered nearly a year after the trial. (Petitioners' Brief at 13-14.) Such comment is disingenuous. At the conclusion of the trial, the court invited counsel for both parties to submit proposed rulings, and both did so. If Gordon's counsel had a genuine objection to this procedure, such objection should have been expressed timely. It is obvious that Gordon's real objection is to the result reached by the trial court, and affirmed by the Fourth District Court of Appeal, and not to the manner in which that result was expressed.

the note is voluntary, the Borrower cannot, by deliberately defaulting on the note, avoid his prepayment obligation and thus obtain greater rights than a borrower who timely pays his debts as they become due. (A.27). In interpreting the contract, the trial court noted that equitable considerations and public policy supported the Lender's right to enforce the prepayment term for which it bargained in this transaction. (A.28).

The Fourth District Court of Appeal affirmed the trial court's finding that Gordon intentionally defaulted on his monthly payments in an attempt to avoid his contractual prepayment obligation under the note.[3/] The Fourth District in its opinion endorsed the general rule that unless otherwise specifically provided for in a mortgage note, a lender cannot upon its acceleration of the due date provided for in the note also collect a prepayment penalty. Florida National Bank of Miami, 557 So.2d at 598. The court ruled, however, that a party to a contract should not profit from his own intentional default, and in scenarios such as the instant case, a trial court should be allotted the discretion to consider the question of whether the borrower intentionally defaulted, and make exceptions to the general rule. Id. The Fourth District concluded that the trial court weighed these considerations and affirmed the trial court's finding of liability. Id. The appellate court, however,

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[3/] Florida National Bank of Miami v. BankAtlantic, 557 So.2d 596 (Fla. 4th DCA 1990).

certified a question to this Court as being one of great public importance, and this Petition for Review ensued.

ISSUES PRESENTED IN THIS REVIEW

SUMMARY OF ARGUMENT

As an initial matter, this Court should decline to exercise its discretionary jurisdiction over this cause because the issues presented for review are limited to the facts of this particular case and thus will have no import in future cases. In the wake of the enactment by the Florida Legislature of the amendments to Florida Statute §697.06 and the fact that "yield maintenance clauses" are now routinely being written into loan documents in Florida, the instant case raises no issues of great public importance.

If this Court, in its discretion, chooses to review this case, it is respectfully submitted that the central question underlying its review is: Which party voluntarily caused the prepayment of the loan? The trial court correctly applied the dispositive analysis to the established facts of this case and held that the Borrower is obligated to pay the prepayment penalty because the Borrower voluntarily caused the prepayment of the loan. The Lender's acceleration of the debt, which was forced by the Borrower's default, does not render the Borrower's voluntary prepayment "involuntary." The Fourth District Court of Appeal agreed that the Borrower intentionally defaulted in an attempt to avoid his contractual prepayment penalty obligation, and held that the trial court acted within its discretion in finding the Borrower liable for the prepayment penalty.

The Fourth District determined that the trial court's findings were supported by substantial competent evidence. Both

lower courts' rulings comport with the reasoning of reported decisions in various jurisdictions, as well as the established equitable principles and public policy of this State. The trial court and Fourth District's rulings are eminently correct and should be affirmed on this appeal.

ARGUMENT

I.

THE QUESTION CERTIFIED BY THE DISTRICT COURT OF APPEAL DOES NOT PRESENT AN ISSUE OF GREAT PUBLIC IMPORTANCE.

The instant controversy is before this Court under the provision of paragraph four of Section 3(b) of Art. V of the Florida Constitution, as amended, which states that this Court "may review any decision of a district court of appeal that passes upon a question certified by it to be of great public importance . . ." (Emphasis supplied.) In interpreting the predecessor provision of Art. V, section 3(b)(4), this Court has determined that the word "may" in the provision that the Supreme Court "may" review a question certified by a district court of a appeal to be of great public interest[4/] denotes sanction or authority and should not be construed as "shall" compelling the Court to decide the merits of the question. Stein v. Darby, 134 So.2d 232, 237 (Fla. 1961).

[4/]The phrase "great public interest" in the predecessor constitution has been replaced by the phrase "great public importance" in the present constitution.

In recognition of the fact that this Court may in its discretion choose not to review a question certified by a district court of appeal, BankAtlantic respectfully suggests that the Court should, in the exercise of such discretion, decline to accept jurisdiction of this Petition on the ground that the question certified is not one of great public importance and that to hear this matter would be a substantial waste of judicial resources. Acceptance by the Court of jurisdiction in this cause will result in the review of an alleged isolated wrong to a single party with little, if any, present or future application to the public at large.

The mortgage loan transaction between BankAtlantic and Gordon and the issues presented in this appeal are, for a number of reasons, unique to this particular case. Regardless of whether the Court adopts the Lender's or Borrower's interpretation of how the issue before the Court should be framed, a mortgagee's right to collect a prepayment penalty fee in a mortgage loan transaction is now controlled by the recently enacted amendments to Section 697.06, Florida Statutes (1987). Section 697.06 sets forth the elements that must exist in a mortgage loan transaction before a lender can enforce a prepayment penalty provision in a note after default by the borrower and acceleration by the lender. As Gordon asserts, in the wake of the recently enacted amendments to Section 697.06, "yield maintenance clauses" of the type contemplated by the statute are now routinely being written into loan documents in

Florida. (Petitioners' Brief at 29). Consequently, loan documents containing "customary" prepayment clauses such as the note in the instant case are now clearly the variant type of loan document executed by mortgagors and mortgagees. The factual scenario presently before the Court is unlikely to again arise due to the enactment of the amendments to Section 697.06. The issues presently before the Court are limited to the instant case on its facts and this Court's resolution of the issues presented by this Petition would have little or no applicability to the current climate of mortgagor/mortgagee relationships in loan transactions. Therefore, the question certified is without public importance, and accordingly the Court should decline to accept jurisdiction of this cause.

II.

THE TRIAL COURT CORRECTLY RULED THAT THE BORROWER MAY NOT AVOID HIS PREPAYMENT PENALTY OBLIGATION

As a preliminary matter, it should be noted that prepayment penalty clauses in notes are valid in Florida and are generally enforced according to their terms. Century Federal Savings and Loan Ass'n v. Madorsky, 353 So.2d 868 (Fla. 1st DCA 1978). It is established law of this State that all provisions of a contract must be read together and enforced by courts as written. J. C. Penney Co., Inc. v. Koff, 345 So.2d 732 (Fla. 4th DCA 1977). Moreover, a party to a contract should not profit from his own intentional default. Waters v. Key Colony East, Inc., 345 So.2d 367 (Fla. 3d DCA 1977).

While the parties are in agreement regarding these general principles, they offer differing characterizations of the issue on appeal. In the Lender's view, the issue before the Court is properly framed as whether the trial court, having found that the Borrower voluntarily prepaid the note, correctly held that the Borrower cannot avoid his prepayment penalty obligation by deliberately defaulting on the note, thereby forcing the Lender to accelerate the loan. By contrast, the Borrower mistakenly defines the issue as whether the contractual prepayment penalty is applicable after the Lender accelerated the debt pursuant to the default-acceleration clause. It is obvious that the Borrower's characterization of the issue omits elements which both the trial court and the Fourth District found dispositive and which are central to this Court's analysis of the matter before it.

The borrower misleads this Court by arguing that the trial court rewrote the contract when it ruled that Gordon was obligated pursuant to the prepayment penalty provision. Rather, it is obvious that the trial court interpreted the contract after reviewing the evidence presented and hearing testimony. The evidence was clear that Gordon voluntarily defaulted and thus prepaid the loan, thereby obligating him, under the agreement, to pay a penalty.

The parties agree that the issue presented is one of first impression in Florida. Neither Florida decisional law nor

statute is directly on point.[5/] However, courts in other jurisdictions have addressed the issue and their analyses are directly applicable here. Indeed, the trial court's ruling is entirely consistent with the reasoning of other reported decisions. See e.g. Matter of LHD Realty Corp., 726 F.2d 327 (7th Cir. 1984), and Eyde v. Empire of America Federal Savings Bank, 701 F.Supp 126 (E.D. Mich. 1988). Moreover, the public policy considerations and equitable principles supporting the lower courts' holdings are firmly established in Florida.

In support of his characterization of this issue before the Court, the Borrower's analysis is as follows: "prepayment" is payment before maturity, and once the Lender "accelerates maturity," "prepayment" is by definition impossible, unless the note specifically provides for a prepayment penalty following acceleration. Although this analysis may have surface appeal, it cannot withstand this Court's scrutiny, and in fact no such "black letter law" is applicable to the established facts of this case. The authority upon which the Borrower relies in his brief is inapposite and readily distinguished, as set forth below.

The Borrower's analysis ignores the central question underlying this appeal: Which party voluntarily caused the prepayment of the loan? The Lender urges, and the courts below agreed after hearing and reviewing all the evidence, that the Borrower voluntarily prepaid the loan as part of his business

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[5/] By its terms, Section 697.06, Fla. Stat. (1987), applies only to notes executed after July 1, 1987.

plan, and that the Borrower's deliberate default on the loan was an attempt to avoid the prepayment penalty, which was also part of his business plan.[6/]

Implicit in the trial court's holding and in the Fourth District's affirmance is the determination that the party who voluntarily caused the prepayment must accept the contractual consequences of his actions. That is, if the Lender voluntarily caused the prepayment, it may not demand the prepayment penalty. However, if the Borrower voluntarily caused the prepayment, he must pay the prepayment penalty and, as here, he may not avoid that obligation by the subterfuge of deliberately defaulting on the note. This reasoning is founded upon the purposes served by the prepayment penalty clause: for the Borrower, the clause permits the early release of his property from the lien upon payment of a penalty; for the Lender, the clause protects the investment income which was bargained for. LHD Realty, 726 F.2d at 330; Eyde, 701 F.Supp at 128-29; and 86 ALR 3d 599. Thus, if the Borrower wishes to obtain the release of his property from

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[6/]The record clearly reflects that Gordon intentionally and voluntarily defaulted on his loan obligations only after BankAtlantic refused to waive the contractual prepayment penalty provision. Gordon testified at trial that he wanted to make the April 1984 mortgage payment and keep the mortgage in good standing and that he did in fact issue a check for that purpose, but that the check was returned for insufficient funds because of a problem with his account with Harris Bank and Trust Company. (R.96-97). The record further reflects that only after Gordon's attempts in May 1984 to persuade BankAtlantic to waive the prepayment penalty proved unsuccessful did he purposefully default on the mortgage note by failing to make any subsequent mortgage payments. Ultimately, because of the return of the April mortgage payment, the trial court found that the mortgage technically went into default as of April 1984.

the lien of the mortgage in advance of the loan's maturity date, he must pay a penalty to compensate the Lender for its loss of the bargained-for investment income. Conversely, if the Borrower does not seek early release from the lien but rather the Lender forces prepayment by accelerating the loan, the Lender may not demand the prepayment penalty.

As shown below, the trial court properly applied this analysis to the established facts and correctly held that Gordon is obligated to pay the prepayment penalty. The Borrower's attempt to substitute a different analysis of the issue before this Court should be rejected by this Court, as it was rejected by both the trial and appellate courts below.

A. <u>The Borrower Voluntarily Prepaid the Note</u>.

Gordon asserts that his prepayment was "involuntary" because it was coerced either by the Lender's acceleration of the loan or by Gordon's adverse financial changes. Although Gordon attempts to characterize his sale of the Landmark as merely the exercise of his equity of redemption, it is undisputed in the record, and the trial court and Fourth District found, that Gordon in fact intended to sell the Landmark as early as 1982 (A.25), and that Gordon had located a purchaser in February 1984, well prior to the default and acceleration of the loan. (A.26). It is abundantly clear from the record that, as the trial court found, the prepayment occurred as part of Gordon's existing business plan to sell the Landmark (R.123), not as the result of any action taken by the Lender. (A.26). Gordon's argument that

his prepayment was "involuntary" is a transparent attempt to avoid a bargained-for obligation and should be rejected.

Gordon's contention that his prepayment was "involuntary" because of his adverse business circumstances is grounded upon misconception of that term in this context. Cases which have considered the issue in this specific context have concluded that adverse business conditions do not make a borrower's prepayment "involuntary". Berenato v. Bell Savings and Loan Ass'n, 419 A.2d 620, 621-23 (Pa. Super. 1980) (and cases cited therein). Rather, prepayment is involuntary only where prepayment is forced by the operation of eminent domain, Shavers v. Duval County, 73 So.2d 684 (Fla. 1954), or by destruction of the subject matter of the mortgage by fire, Chestnut Corp. v. Bankers Bond and Mortgage Co., 149 A.2d 48 (Pa. 1959), for example. Conversely, prepayment is "voluntary" where the borrower acts to terminate the loan prior to the stated maturity date. This is so even where prepayment is "forced" by the borrower's financial hardship. Berenato, 419 A.2d at 622.

B. The Lender's Acceleration of the Debt Does Not Render the Borrower's Voluntary Prepayment "Involuntary."

In some reported decisions, as in this case, the "voluntariness" analysis has been complicated somewhat by the lender's acceleration of the loan. As here, a borrower who fully intends to prepay the note may decide to default, thereby forcing the lender to accelerate the loan, and then seek to take advantage of the lender's action by arguing that the mere fact of

the lender's acceleration renders the borrower's subsequent prepayment "involuntary" per se. No reported decision has ruled that a borrower's intentional prepayment is somehow rendered involuntary by the lender's actions.

Courts which have addressed such circumstances have focused their analyses on the borrower's reliance upon the lender's action in accelerating the loan. That is, where the borrower substantially changed its position in reliance on the lender's action, as by securing a second loan to pay off the mortgage, the lender is not entitled to the prepayment premium. Kilpatrick v. Germania Life Ins. Co., 183 N.Y. 163, 75 N.E. 1124 (N.Y. 1905). Conversely, where a borrower has not relied to his detriment on the lender's action, the borrower has been required to deliver the prepayment amount to the lender. West Portland Development Co. v. Ward Cook, Inc., 424 P.2d 212 (Or. 1967). In the latter instance, payment is deemed "voluntary" because it was caused by the borrower's intention to terminate the obligation, as contrasted with the former example where the borrower prepays only because the lender accelerates. When the borrower intends to prepay, the lender's efforts to protect the rights it bargained for does not detract from the voluntariness of the prepayment.

Following this reasoning, the court in West Portland required a borrower to meet its obligation for a prepayment premium notwithstanding that the lender had previously accelerated the note. The court correctly reasoned that although

the lender accelerated the note, prepayment by the borrower was not caused by the acceleration. West Portland, 424 P.2d at 214. The borrower decided to sell the property not in reliance on the lender's acceleration, but for independent business purposes. The court stated that prepayment was the borrower's "business choice; however, to exercise it, the penalty agreed to had to be paid." Id.

Like the borrower in West Portland, Gordon's prepayment in this case was not caused by the Lender's acceleration. As Gordon testified and the trial court properly found, Gordon made the decision to sell the Landmark as early as 1982 and had located a purchaser and negotiated with that purchaser for the sale of the Landmark prior to the default which forced the Lender to accelerate the loan. (R.92). The sale of the Landmark was not a change in position by Gordon in reliance on the acceleration, but rather the culmination of an independent business plan formulated years earlier. Under the above cited reasoning correctly applied by the lower courts to this case, Gordon must meet his bargained-for obligation to pay a penalty for his voluntary prepayment of the loan.

C. The Borrower's Intentional Default On The Note In An Attempt To Force The Lender To Accelerate Payment Renders The Borrower Liable For His Contractual Prepayment Obligation.

The appellate court below recognized that under scenarios such as in the instant case involving an intentional default by a borrower, courts should make an exception to the

general rule prohibiting a lender from accelerating and collecting a prepayment penalty, and hold the borrower liable for the prepayment fee. Florida National Bank of Miami, 557 So.2d at 598, citing Matter of LHD Realty Corp., 726 F.2d 327 (7th Cir. 1984). In LHD Realty, the court stated that "in appropriate cases" involving intentional default by a borrower seeking to avoid prepayment penalty, courts can enforce the prepayment penalty even where the lender had accelerated the debt. The instant factual scenario is just such a case where holding the borrower to his contractual prepayment obligation is warranted. After BankAtlantic refused Gordon's request to waive the prepayment penalty, Gordon refused to make any subsequent monthly mortgage payments to BankAtlantic and thus, he deliberately defaulted to avoid the prepayment penalty.

Gordon cites to Eyde Brothers Development Corp. v. Equitable Life Assurance Society of the United States, 697 F.Supp. 1431 (W.D. Mich. 1988), aff'd. 888 F.2d 127 (6th Cir. 1989), in an attempt to bolster his contention that the acceleration exception language in LHD Realty is not applicable to the instant case. However, the Eyde Brothers opinion actually supports such application. Although the Eyde Brothers court found that the case before it was not an "appropriate case" in which to apply the LHD Realty acceleration exception, the court considered the equities as to whether an award of both default interest and a prepayment penalty was warranted based on the facts presented. Id. at 1436. This suggests that had the

equities in the case balanced in favor of the lender, the court could have awarded a prepayment penalty even though the lender had accelerated the debt. Gordon's analysis of the Eyde Brothers case fails to include the portion of the court's analysis relating to the equities of the case.

Interestingly, Gordon also fails to bring to this Court's attention what appears to be a companion case to Eyde Brothers. In Eyde v. Empire of America Federal Savings Bank, 701 F.Supp. 126 (E.D. Mich. 1988), the lenders assessed against the borrowers prepayment premiums for the prepayment of two promissory notes.7/

Note A, like the note here, did not explicitly provide for a prepayment penalty in the event the lender accelerated payment. While noting the general rule that precludes a lender from collecting a prepayment premium after accelerating payment, the Eyde court determined that an exception to the general rule in cases of intentional default was applicable. The court described the situation giving rise to such an exception:

> The borrower intentionally defaults on the note in an attempt to force the lender to accelerate payment. Since the lender accelerated, the borrower would avoid prepayment liability.

7/The notes were designated by the court as Note A and Note B. The court's analysis with regard to Note B is irrelevant and inapposite to the facts presented here. Note B clearly and unambiguously provided for a prepayment penalty even if the amount due on that Note was accelerated by the lenders. Such is not the case here.

Id. at 130. The Eyde court concluded that the facts before it indicated there may have been an intentional default. Because the court was of the opinion that there was a question of fact as to whether the borrowers intentionally defaulted, the court denied the borrowers' motion for summary judgment for a refund of the prepayment premiums on Note A.

The factual situation described by the Eyde court giving rise to the exception to the general rule in cases of intentional default is on all fours with the factual scenario found by the trial court to exist in the instant case. The trial court determined, and the Fourth District agreed, that Gordon intentionally defaulted on the loan in an attempt to evade his contractual prepayment obligation. These determinations are entirely supported by competent substantial evidence[8/] and should thus be affirmed by this Court.

In an effort to support his untenable position that he should be relieved of his prepayment obligation, Gordon cites several cases which purportedly stand for the proposition that a lender's default inevitably relieves a borrower of his contractual prepayment penalty obligation. Upon examination, however, all of the cited cases are readily distinguishable on their facts, and none support the application of such a proposition to the facts established in this case. As a group, these cases are readily distinguishable from the case at bar in that none of the cases Gordon relies upon contains any finding

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[8/] See Section III, infra.

that the borrower intended to prepay the loan obligation or voluntarily prepaid the loan. In fact, in each case, the court specifically determined that it was the lender's voluntary action which caused the prepayment.

In Rodgers v. Rainier National Bank, 757 P.2d 976 (Wash. 1988), the court noted at the outset that "a number of assertions which might be relevant are not supported by this record." The Rodgers court did not rule, as Gordon contends, that the borrowers' motivation in defaulting on the loan was irrelevant. Instead, the court responded to the lender's assertion that the borrowers/debtors' default was "deliberate, purposeful and intentional" by stating that:

> Other than the March letter expressing an interest in a payoff or refinancing, the record is silent as to the reasons or circumstances of default... Consequently there are present here no elements of economic coercion, unwritten intent of the parties or reliance and we need not consider the relevance or consequence of such elements.

Rodgers, 757 P.2d at 978. Conversely, the instant record is replete with evidence pointing to the intentional nature of Gordon's default. Unlike the Rodgers court, both the trial court and the Fourth District below concluded that because prepayment was due to consummation of a sale of the Landmark planned for some time, Gordon was liable for the prepayment penalty fee. Both lower courts also correctly concluded that the Borrower's default forced the Lender to institute a foreclosure action because to require BankAtlantic to bring a separate action each

month to enforce the note would be "illogical [and] irrational." (A. 27).

In Slevin Container Corp. v. Provident Federal Savings & Loan Ass'n of Peoria, 424 N.E.2d 939 (Ill. App. 2d 1981), the mortgage was not in default, but rather the sale of the security gave the lender the option to accelerate the indebtedness due. The lender chose to accelerate the loan and the court found that prepayment resulted solely from the action of the lender, and thus the prepayment penalty was inapplicable. Id. at 941. There was no allegation that the borrower had any intention whatsoever to prepay the loan.

In the two Texas Appellate Court cases cited by Gordon, General Motors Acceptance Corp. v. Uresti, 553 S.W. 2d 660 (Tex. Civ. App. 1977), a case brought under the Texas Consumer Credit Code, and Texas AirFinance Corp. v. Lesikar, 777 S.W.2d 559 (Tex. Ct. App. 1989), there was no issue before the respective courts regarding whether the borrower or the lender voluntarily caused prepayment. Unlike the instant case, there was no issue or discussion in either case concerning a borrower having deliberately defaulted on its note, thereby forcing the lender to accelerate the loan. As such, both cases are readily distinguishable from the instant case on their facts.

Gordon cites several more cases in support of the general rule precluding enforcement of a prepayment penalty clause after acceleration of the note by the lender. All of these cases, however, turn upon the lender's voluntary action

which resulted in prepayment of the loan, and none addresses the borrower's voluntary prepayment and intentional default. Indeed, in one of those cases, Burks v. Verschuur, 532 P.2d 757 (Col. App. 1974), there was no prepayment penalty clause in the agreement. In short, Gordon fails to cite decisional law in any jurisdiction which supports application of his proposition to the particular facts of this case.

Likewise, § 697.06, Fla. Stat. (1987), and the Senate Staff Analysis of the amendments to that statutory section, cited by Gordon, lend no support. By its terms, § 697.06 is inapplicable to the specific transaction before this Court because that transaction occurred more than eleven years before the effective date of the statute. Moreover, the trial of this cause occurred two months prior to the effective date of the statute and thus, the trial court could not have applied the statute.

Neither Section 697.06 nor any of the authority cited by Gordon reflects that a yield maintenance clause was even a viable, and enforceable, note provision in 1976. This Court should disregard Gordon's attempt to relate prepayment penalty rules adopted by the Florida Legislature in 1987 to a mortgage note drafted and executed by the parties in 1976. Gordon's repeated references to Section 697.06 and to several recent cases which discuss the use of yield maintenance clauses are nothing more than an attempt by Gordon to obfuscate the real issue before the court: whether, on the clearly established facts of this

case, the trial court, and the Fourth District Court of Appeal, correctly determined that the Borrower may not avoid his contractual obligation for a prepayment penalty.

Assuming arguendo that the yield maintenance clause concept and the cases cited to by Gordon which discuss such clauses could somehow be considered relevant to the courts' determinations below, it is obvious from this record that Gordon waived his right to now raise this issue and argue its applicability to the instant mortgage note. It is axiomatic that an appellate court should decline review of questions which the trial court did not have a full and adequate opportunity to consider. Dober v. Worrell, 401 So.2d 1322 (Fla. 1981); In re Beverly, 342 So.2d 481 (Fla. 1977). Since Gordon never presented to the trial court the issue of the applicability of the yield maintenance statute, this Court should disregard Gordon's references to Section 697.06 and the cases discussing such clauses. Moreover, to the extent that the Fourth District Court of Appeal referred in its opinion to yield maintenance clauses, this Court should disregard such reference as being clearly obiter dicta.

In summary, as reflected above, courts which have addressed the issue now before this Court hold that a lender's acceleration of the debt obviates a borrower's obligation for a prepayment penalty only where the lender's voluntary acceleration causes the prepayment; or where the borrower detrimentally changes his position in reliance upon the lender's acceleration

of the loan. As demonstrated herein, neither exception applies on the established facts of this case. Rather, the facts clearly establish that Gordon intentionally and purposefully defaulted on the note in an attempt to force BankAtlantic to accelerate. Accordingly, as the trial court correctly ruled, the Lender's acceleration of the loan does not operate to relieve the Borrower of his contractual obligation for the prepayment penalty, even under authority cited by the Borrower. The Borrower's obligation should be enforced as written and interpreted.

D. Public Policy And Equitable Principles Support The Trial Court's Ruling.

The trial court's ruling comports with the public policy of this State in important respects. The trial court notes that in the volatile economic climate which presently exists, "lenders should have some guarantees that they can protect themselves through the terms and conditions from agreements they enter into with borrowers" with regard to the risks which they incur by lending money at a fixed rate of interest over a period of time. (A.28).

Additionally, the trial court notes that a waste of judicial resources and clogging of our public courts would result from requiring the Lender to file an action every thirty days on installment payments then due, which the Borrower suggested as the Lender's alternative to acceleration of the loan. (A.27). Indeed, the trial court below described the Borrower's proposed alternative to loan acceleration as "illogical [and]

irrational." (A.27). Conversely, public policies of conserving judicial resources and maintaining the orderly and expedient administration of justice entirely support the trial court's ruling that a series of "installment suits" is not a viable alternative to acceleration of a debt after default.

The trial court's ruling and the Fourth District's affirmance correctly apply important equitable principles which are firmly established in Florida. Primary among these is the principle that a party to a contract cannot profit by his own default. Waters v. Key Colony East, Inc., supra, 345 So.2d at 367. In the instant case, Gordon hopes to receive the undue advantage of prepaying his loan obligation without paying the contractual penalty through the subterfuge of his own intentional default. Gordon incorrectly argues that his prepayment was "involuntary" because BankAtlantic elected, upon his default, to accelerate the loan. In addition to the serious flaws in this reasoning, Gordon's position ignores equity and common sense. A defaulting borrower should not receive better treatment from the law than one who pays his debts as they become due. Waters, supra.

A final consideration is that Gordon realized an immense profit by selling the Landmark for approximately $13.5 million. However, Gordon now seeks to avoid his contractual prepayment penalty obligation and to deprive BankAtlantic of its investment yield on the loan, a comparatively small amount in relation to the sale price of the collateral and the profit

reaped by Gordon. Both lower courts correctly weighed the equities and refused to allow Gordon to realize a huge profit on the sale of the Landmark and then default under the note and deprive the Lender of its modest investment yield.

III.

THE TRIAL COURT'S RULING IS ENTIRELY SUPPORTED BY SUBSTANTIAL COMPETENT EVIDENCE.

As he did on appeal to the Fourth District Court of Appeal, Gordon again challenges, on evidentiary grounds, the trial court's finding that he voluntarily and intentionally defaulted on the note. Gordon incorrectly advises this Court that the trial court's findings, which were deemed by the Fourth District to have support in the record, are not clothed with the presumption of correctness.

To the contrary, it is axiomatic that a trial court's findings of fact are presumed correct and will not be reversed unless totally unsupported by substantive evidence. Hull v. Miami Shores Village, 435 So.2d 868 (Fla. 3d DCA 1983). As stated by this Court: "it is not the prerogative of an appellate court, upon a de novo consideration of the record, to substitute its judgment for that of the trial court." Shaw v. Shaw, 334 So.2d 13 (Fla. 1976). By proposing a de novo review of the trial court's findings, Gordon reveals his misunderstanding of the function of appellate review and of the trial court's determinations in this case.

Contrary to Gordon's assertion that the trial court had before it uncontroverted facts, the material facts in this case were clearly in dispute. Gordon contended at trial that his default was involuntary and solely a result of his other business problems. (A. 24). BankAtlantic presented abundant competent evidence which contradicted this claim and which supports the trial court's finding that Gordon deliberately defaulted on the note. Previously cited trial testimony of Donald Streeter, Paul Rust and Gordon himself fully support the trial court's findings that Gordon intended to sell the Landmark as early as 1982; that Gordon did not default until after he located a buyer and the Lender refused to waive the penalty for prepayment; and that Gordon's default was not caused by his alleged financial troubles, but was instead part of his business plan to sell the Landmark and avoid the prepayment penalty.[9/] Based upon this evidence, and based upon its observation of the demeanor and credibility of each of the witnesses, the trial court found, and on appeal the Fourth District agreed, that Gordon's default was deliberate.

Gordon incorrectly argues that the issue of his deliberate default is irrelevant, and thus he was not required to controvert this testimony at trial. Gordon cannot now, before an appellate court, attack the competence of BankAtlantic's

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[9/]Moreover, as stated above, the fact that a default occurs because of adverse financial changes does not render the subsequent prepayment "involuntary." See discussion in Section II (B), supra.

witnesses and request this Court to depart from the trial court's findings. As stated by this Court:

> It is clear that the function of the trial court is to evaluate and weigh the testimony and evidence based upon its observation of the hearing, demeanor and credibility of the witnesses appearing in the cause. It is not the function of the appellate court to substitute its judgment for that of the trial court through re-evaluation of the testimony and evidence from the record on appeal before it.

Shaw v. Shaw, 334 So.2d at 16.

The trial court's findings, based upon its determinations as to the weight and relevance of the testimony given and the credibility and demeanor of the witnesses, and the affirmance of those findings by the Fourth District Court of Appeal, come to this Court clothed with a presumption of correctness and must stand. An appellate court is not empowered nor equipped to substitute its judgment for that of the trial court. Id.

IV.

BANKATLANTIC IS ENTITLED TO RECOVER THE FUNDS DEPOSITED IN ESCROW, PLUS INTEREST

By agreement, the parties escrowed the amount of $251,280.00 constituting the prepayment penalty plus estimated attorney's fees. The Lender strenuously urges, and the courts below agreed, that BankAtlantic is entitled to recover funds constituting the prepayment penalty plus interest. (A.30); Florida National Bank of Miami, 557 So.2d at 598. The lower courts' rulings comport with applicable legal principles, as

discussed above. BankAtlantic is entitled to prejudgment interest on this amount pursuant to the judgment entered by the trial court. (A.30). See also Argonaut Ins. Co. v. May Plumbing Co., 474 So.2d 212 (Fla. 1985).

CONCLUSION

If this Court, in its discretion, accepts jurisdiction, the certified question should be answered in the affirmative. The judgment of the trial court and the decision of the Fourth District Court of Appeal affirming that judgment are in accord with all decisional law on this issue as well as the established equitable principles and public policy of this State, and are entirely supported by substantial competent evidence. The decision of the Fourth District Court of Appeal should be affirmed.

Respectfully submitted,

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