IN THE SUPREME COURT OF

THE STATE OF FLORIDA

FLORIDA NATIONAL BANK OF MIAMI, INC., f/k/a FLORIDA BANK AT FORT LAUDERDALE, as Trustee, under trust dated March 15, 1968, known as Trust No. LT-0069, and EDWIN F. GORDON, a single man,

Petitioners,

vs.

BANKATLANTIC, a federal savings bank f/k/a ATLANTIC FEDERAL SAVINGS AND LOAN ASSOCIATION OF FORT LAUDERDALE,

Respondent.
_____/

Case No. 75,965

4th District - No. 88-1387

BRIEF OF PETITIONERS

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PREFACE

The Petitioners, FLORIDA NATIONAL BANK OF MIAMI f/k/a FLORIDA BANK AT FORT LAUDERDALE, as trustee, under trust dated March 15, 1968, known as Trust No. LT-0069, and EDWIN F. GORDON, a single man were Defendants/Appellants in the trial and appellate court below; the Respondent ATLANTIC FEDERAL SAVINGS AND LOAN ASSOCIATION OF FORT LAUDERDALE, now known as BANKATLANTIC was Plaintiff/Appellee.

The parties have previously agreed that FLORIDA NATIONAL BANK OF MIAMI f/k/a FLORIDA BANK AT FORT LAUDERDALE, is only nominally involved in this litigation as trustee under a land trust of which EDWIN F. GORDON was the sole beneficiary and real party in interest. (R 16-17, 262-269). Accordingly, for purposes of both brevity and clarity, the Petitioners will be referred to throughout this brief as "GORDON", or "borrower", and the Respondent will be referred to as "BANKATLANTIC", or "lender".

The following symbols will be used: "R", for Record on Appeal; "A" for Appendix.

STATEMENT OF THE CASE AND OF THE FACTS

The Proceedings

This proceeding involves a review of the January 30, 1990 opinion of the Fourth District Court of Appeal affirming a Final Judgment entered in favor of BANKATLANTIC on February 19, 1988, following a non-jury trial before the Honorable George W. Tedder, Jr., Broward County Circuit Judge. GORDON filed a motion for rehearing in the trial court on February 29, 1988 (R 344-345) which was denied May 2, 1988 (R 347). A Notice of Appeal to the Fourth District Court of Appeal was timely filed on May 24, 1988 (R 348-349). On January 31, 1990 the Fourth District Court of Appeal affirmed the judgment of the trial court, but certified to this Court the following question of great public importance:

> 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?

A motion for rehearing was filed by GORDON on February 15, 1990 and denied on March 30, 1990. Review was then sought in this Court by the filing of a timely motion to invoke discretionary jurisdiction under Fla. R. App. P. 9.330.

The litigation arose from a mortgage loan transaction between BANKATLANTIC, as lender and GORDON, as borrower.

Prior to the stated maturity date of the mortgage note, GORDON defaulted on the loan by failing to make a monthly installment payment. After default, BANKATLANTIC voluntarily exercised its rights under an optional default/acceleration clause in the mortgage note, by accelerating the maturity date of the note, and filing a mortgage foreclosure action against GORDON. In its complaint, the lender demanded the full principal balance and accrued interest immediately due and payable. (R 143-149, 262-269, 352, Defendant's exhibit 1). (A 1-7, 8-15).

During the course of the foreclosure proceeding, GORDON sold the mortgaged property to a third party and tendered payment of the entire principal balance, default rate interest, attorneys' fees and costs to BANKATLANTIC. (R 90-91, 352, Defendant's Exhibits 2 and 11). (R 262-269) (A 8-15). The lender refused to satisfy the mortgage and dismiss the mortgage foreclosure action unless the borrower also paid a "prepayment penalty" of $226,280.00. (R 262-269) (A 8-15). The lender relied on a prepayment penalty clause in the note (entirely separate and distinct from the default/acceleration clause) providing that if the borrower should voluntarily prepay the indebtedness, certain penalties would apply.

GORDON disputed BANKATLANTIC'S claim for a prepayment penalty, asserting that the lender's unilateral and voluntary acceleration of the mortgage debt had advanced the stated maturity date of the note to the date of the acceleration and filing of the foreclosure complaint; hence, by definition, eliminating any possibility of a subsequent

"prepayment", and nullifying the provision for a "prepayment penalty." (R 262-269) (A 8-15).

In order to allow the sale to close while preserving the prepayment penalty issue for a later judicial determination, the parties entered into an agreement whereby the borrower paid the lender the full principal balance, default rate interest, attorneys' fees and costs, and in addition placed into escrow the full amount of the disputed prepayment penalty, plus $25,000.00 to secure the lender's attorneys' fees should it be the prevailing party in the further litigation of the issue. (R 262-269) (A 8-15). The mortgage was then satisfied and the sale was closed.

The lender thereafter filed a third amended complaint, seeking only the prepayment penalty and attorneys' fees from the escrow account. (R 255-257) (A 16-18). An answer was filed by the borrower (R 270-271) (A 19-20) and, following the denial of the borrower's motion for summary judgment, (R 273-277, 279-280) the matter was brought on for a one day non-jury trial on March 18, 1987.

The only issue before the trial court was whether a provision in the mortgage note imposing a penalty for prepayment was applicable after the lender unilaterally elected to declare the note due and payable in full pursuant to a separate optional default-acceleration clause. (R 262-269) (A 8-15).

In resolving the issue, it was necessary for the court to construe the contract between the parties (the mortgage note) and in particular to determine the legal effect of two key provisions in the context of the entire agreement:

1.) the prepayment clause:

> "In addition to the regular monthly installments herein provided for, the makers may, without penalty of any kind, make prepayments of the principal aggregating, in any loan year, 20% or less of the principal amount of this note. The makers may also prepay greater principal amounts than said 20% in any loan year, upon payment of 12 months interest on the amount by which such prepayments shall cause, in such loan year, an excess above the maximum free prepayments herein established..."

and,

2.) the default-acceleration clause:

> "All makers and endorsers who now or hereafter become parties hereto jointly and severally waive demand, notice of non-payment and protest, and agree that in the event of default in the payment of any installment due hereunder the whole of said indebtedness shall thereupon at the option of the holder, become immediately due and payable..." (emphasis added) (R 150-151) (A 21-22).

The trial judge heard the testimony of three bank officers on behalf of the lender. (R 13-74). GORDON testified for the defense. (R 75-124). Numerous financial documents were received into evidence (R 352) and a number of stipulations were made of record. (R 16-17, 40, 95-96, 100, 352, Defendant's exhibit 1).

The Factual Background

On May 24, 1976, GORDON executed a mortgage note in the amount of $3,500,000.00 in favor of BANKATLANTIC. (R 150-151) (A 21-22). The note was secured by a mortgage encumbering a 110 unit rental apartment complex known as the "Landmark" located

in Hillsboro Beach, Broward County, Florida. (R 152-153). Legal title to the property was at all times nominally held by Florida National Bank of Miami under a land trust naming GORDON as sole beneficiary. (R 16-17, 262-269). The property was operated and maintained by GORDON under a prime lease from the trust. (R 352, Defendant's exhibit 4). Accordingly, GORDON collected the rental income and was ultimately responsible for the expenses of the property. (R 16-17, 262-269).

From the outset of its operation as an apartment house, the Landmark was not intended to nor did it at any time generate sufficient rental income to cover the mortgage payments and operating expenses. (R 83). When GORDON originally acquired and developed the Landmark, he was the Chairman of the Board and President of Gueder, Paeschke and Frey Company ("G, P, & F") a successful manufacturing business in Milwaukee, Wisconsin. GORDON conceived and implemented the idea for 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 manufacturing business. (R 110). Accordingly, he utilized his substantial income from that company to subsidize the negative cash flow at the Landmark. (R 79, 83, 88, 110). When the mortgage loan was made, BANKATLANTIC was aware that the Landmark was not self-sustaining and that GORDON was dependent on his income from his manufacturing business to meet the expenses of the property. (R 110).

In 1980 and 1981 there was a labor strike at G, P & F which led to the bankruptcy of the company. (R 79-83). As a

result of the G, P, & F bankruptcy and other investment losses, GORDON lost approximately $10,000,000.00 in 1981 and 1982. (R 79). Prior to the labor strike, GORDON drew an annual salary from G, P, & F of $240,000.00 plus corporate dividends. (R 83). However, GORDON'S personal income tax returns for 1981 through 1984, received in evidence without objection, established that his adjusted gross income declined from a loss of -$273,565.00 in 1981 to a loss of -$351,250.00 in 1982 and from a loss of -$568,296.00 in 1983 to a loss of -$3,717,726.00 in 1984. (R 352, Defendant's exhibit 8). The assets of G, P & F were sold by the trustee in bankruptcy in May, 1984, leaving GORDON with over six million dollars in debt to Harris Trust and Savings Bank under personal guarantees of the bankrupt company's loans. (R 81-83, 352 Defendant's exhibit 14).

Following the loss of the income GORDON had derived from G, P, & F, he was forced to rely on his remaining savings to make up the negative cash flow of the Landmark, but by 1983 his personal assets were reduced to virtually nothing. (R 89). Harris Trust and Savings Bank had called for payment on GORDON's personal guaranty, and demanded and obtained a second mortgage[1] on the Landmark to secure the six million he owed. (R 89-90).

During the latter part of 1983, and 1984, the only source of funds available to make payments on the debt service and operating expense of the Landmark was the rental income from the units. (R 100). As a result, GORDON was unable to timely pay the utility bills, causing the

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[1] The $6,000,000. Harris Trust & Savings Bank mortgage was subject to and inferior only to the BANKATLANTIC mortgage.

electrical service for the entire apartment building to be shut off (R 98) and water and sewer liens to be filed against the property (R 352, Defendant's exhibit 10). Checks in payment of the monthly mortgage payments were returned for insufficient funds and several lawsuits were filed against GORDON for non-payment of bills.[2] (R 99-100, 352, Defendant's exhibits 9 and 10). By April, 1984, GORDON was insolvent, and numerous judgments had been entered against him. (R 104).

Financial records received in evidence without objection established that:

In 1982, the rental income from the building was $636,700.00, versus $778,000.00 in debt service and operating expense, producing a negative cash flow of over $140,000.00. (R 85-86, 352, Defendant's exhibit 5).

In 1983, the rental income from the building was $625,937.00 against debt service and operating expenses of $760,473.00 for a cash on cash loss of over $134,000.00. (R 87-88, 352, Defendant's exhibit 6).

In 1984, the rental income from the building dropped to $297,000.00. (R 94, 352, Defendant's exhibit 7). The debt service and operating expense continued (R 352, Defendant's exhibits 2 and 9) but GORDON was unable to pay his mounting debts due to the financial setbacks he had sustained and his resultant insolvency. (R 89, 99-100, 104).

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[2] GORDON's failure to pay operating expenses on the Landmark not only led to lawsuits, interruption of utility service and liens against the property, it also caused disgruntled tenants to withhold rent, thus worsening the already negative cash flow. (R 94).

The parties stipulated that as of April, 1984, the rental income from the Landmark was insufficient to pay the principal and interest on the mortgage to BANKATLANTIC, and that GORDON had financial problems.[3] (R 96-97, 100).

Because of the serious financial setbacks stemming from the bankruptcy of his manufacturing business, and other losses, GORDON was forced to consider selling the building to avoid foreclosure of the mortgages against it. (R 77). On February 24, 1984, GORDON entered into a contract to sell the Landmark to a Frank Imprescia, who planned to convert the building into a condominium. (R 77-79, 352, Defendant's exhibit 4). At the Buyer's insistence, the contract provided that between the date of its execution and closing, GORDON was not to enter into, alter, extend or renew any of the tenants' leases without Imprescia's prior written consent. A closing was to occur before the end of March, 1984 and BANKATLANTIC was to be paid off from the sale proceeds. (R 77-79, 352, Defendant's exhibit 4). Imprescia never closed and in August, 1984, GORDON sent him a letter confirming a May 1, 1984 discussion terminating the contract. (R 96, 102-103, 352, Defendant's exhibit 12).

In late April, 1984, GORDON issued a check on his account with Harris Trust and Savings Bank for the April 1, 1984 payment, which was then past due. Harris returned the check for insuffi-

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[3] Notwithstanding the uncontradicted evidence of GORDON's inability to pay the mortgage payments and BANKATLANTIC's stipulation to his financial problems and negative cash flow, the lender later argued and the trial court and appellate court adopted the view that GORDON's nonpayment had nothing to do with his financial problems, but instead was a "deliberate, purposeful and intentional attempt to avoid" the prepayment penalty. Florida National Bank of Miami v. BankAtlantic, 557 So.2d 596, 598 (Fla. 4th Dist., 1990).

cient funds, and it was never paid. (R 96-97). As a result, the mortgage became in default on May 1, 1984.[4]

During the month of May, 1984, GORDON had three meetings with officers of BANKATLANTIC. (R 17-20). Discussions at these meetings centered on GORDON'S plans to sell the building. (R 17-20). Mr. Imprescia was present at one meeting and a second potential buyer, a Mr. Robert Tilsner, attended another. (R-17-20). On or about May 29, 1984 GORDON asked the officers representing BANKATLANTIC if they would consider waiving a provision in the mortgage note calling for a prepayment penalty in exchange for financing the "end loans" on the sell out of the proposed condominium. (R-17-18) (A-17).[5] At trial, Mr. Paul Rust, one of the officers who attended the meetings stated that in response to GORDON'S request, "[T]he only inference that was ever given that we would even take it to the board was if we receive the end loans and we would try and do something by a pro-rata basis for each end loan we got." (R 18). Mr. Rust also testified that based on the fact that GORDON asked for a waiver it was his

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[4] The mortgage note provided, inter alia, that

> "...This note shall be considered in default when any payment required to be made hereunder shall not have been made within thirty days following its due date..."

(R 143-149; A 1-7).

[5] According to Paragraph 5 of BANKATLANTIC's Third Amended Complaint, this request was made "on or before May 29, 1984" and "denied on or about May 29, 1984".

"belief" that GORDON'S "intent" was to "trick or defraud the bank into losing its prepayment penalty." (R 24).[6]

On June 6 and June 20, 1984 BANKATLANTIC sent "default letters" to GORDON. (R 352, Plaintiff's exhibits 4 and 5). Both letters urged GORDON to bring the loan current, but neither declared an acceleration of the debt. (R 150-151).

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[6] This statement of subjective "belief" was virtually the only "evidence" submitted by BANKATLANTIC on its claim that GORDON "intentionally defaulted". Despite GORDON's contention that his failure to pay the April 1, 1984 and subsequent payments was due to lack of funds, the court ultimately found that he deliberately defaulted. The court supported its finding with the statement that:

> "...The evidence presented established that Gordon did not actually default until after... the bank officers refused Gordon's request to waive the prepayment penalty in the event the building was sold..." (emphasis added).

(A-26; Paragraph 15). No such evidence was ever presented. On the contrary, the evidence was undisputed that Gordon's default in payment occurred two months before his request for waiver was turned down. Indeed, BANKATLANTIC's own pleadings admitted that GORDON was in default for failure to pay the April 1, 1984 and subsequent monthly payments (Original Complaint in Foreclosure, Paragraph 6; See A-2) and that BANKATLANTIC did not turn down his request for a waiver of the prepayment penalty until May 29, 1984 (Third Amended Complaint, Paragraph 5; See A-17). Although this "finding of fact" was completely contradicted by the evidence and BANKATLANTIC's own pleadings, the Fourth District Court of Appeal picked up on it as a central theme in affirming the Final Judgment. Thus, Judge Polen, writing for the court said,

> "...The trial court found the default was a deliberate, purposeful and intentional attempt to avoid the contractual obligations under the note. The borrower did not default until after... the bank had refused his request for waiver of the prepayment fee..." (emphasis added).

Florida National Bank of Miami v. BankAtlantic, supra at 598. In his concurring opinion, Judge Stone wrote "...I concur specially only to emphasize that GORDON's default was found to be deliberate pursuant to a plan, and for the purpose of avoiding the prepayment penalty..." Id. at 599.

GORDON entered into a Purchase and Sale Agreement with Robert Tilsner and John J. Walker on September 7, 1984. (R 352, Defendant's Exhibit 11). Four days later, on September 11, 1984, BANKATLANTIC filed a foreclosure action against GORDON. In the complaint BANKATLANTIC gave notice of its election to accelerate the note "declaring the full amount under said note and mortgage to be now due". (R 38, 143-149) (A 1-7). According to the allegations of the complaint, on or after September 14, 1984, GORDON was required to pay the entire principal amount of the debt plus default interest and attorneys' fees in order to avoid foreclosure and loss of his equity in the property.

On December 18, 1984, GORDON closed on the contract with Robert Tilsner and John J. Walker. (R 352, Defendant's exhibit 2). At closing BANKATLANTIC agreed to satisfy its mortgage in exchange for payment of all outstanding principal, default interest, advances, attorneys' fees and costs, only after obtaining GORDON'S agreement to escrow an amount equal to the prepayment penalty and the lender's anticipated attorneys' fees.

The Judgment

At the conclusion of the trial on March 18, 1987, the court announced that the matter would be taken under advisement, and requested counsel for each of the parties to submit a proposed judgment, stating as follows:

> "THE COURT: Give me a comprehensive judgment that you can defend on appeal. I think there should be some findings of fact and some citations of law, reasoning, as well as you can do it." (R 141).

Both parties submitted proposed judgments as requested, and thereafter, patiently awaited the court's decision. When no ruling was forthcoming by June, 1987, counsel for the borrower requested a status conference "to assist the court and parties in establishing the current status of this case..." (R 331-332). When no ruling was forthcoming by December, 1987, the lender's counsel filed a "Motion to Resolve Terms of Final Judgment", setting it for hearing on December 22, 1987. (R 333-334). Two months later, the lower court finally entered a judgment, ruling that BANKATLANTIC was entitled to collect a prepayment penalty from GORDON in addition to the full principal balance, default rate interest, attorneys' fees and costs demanded by the lender in its foreclosure action, notwithstanding its prior election to accelerate the maturity of the mortgage note sued upon. (R 343, 336-342).

The court supplemented its ruling with a separate order of findings of fact and conclusions of law. In substance, the court held that GORDON intentionally defaulted on the mortgage loan and it would therefore be inequitable for him to escape liability for the prepayment penalty. Accordingly, the Court awarded the prepayment penalty to BANKATLANTIC even though the clear and unambiguous terms of the lender's mortgage note did not provide for it in the circumstances of a prior voluntary acceleration of the debt. (R 336-342).

Both the judgment and the order on findings of fact and conclusions of law were prepared for the trial judge's signature by the lender's counsel, and entered by the court nearly a year

after the trial without the benefit of a transcript of the trial proceedings. (R 336-342, 343) (A 23-29, 30).

The Opinion of the Fourth District Court of Appeal

GORDON presented two issues to the Fourth District Court of Appeal for resolution. First, he argued that as a matter of law the trial court had erred by permitting a mortgage lender to collect a prepayment penalty after the lender had voluntarily accelerated the maturity of the mortgage note under an optional default/acceleration clause. Secondly, GORDON argued that the trial court had erred in finding the borrower's default in payment of a mortgage note intentional and avoidable where that finding was unsupported by competent substantial evidence; contrary to the legal effect of the evidence; and manifestly against the weight of the evidence. In ruling on the first issue, the court endorsed the generally accepted rule that, unless otherwise specifically provided for in the note, the lender cannot upon lender's acceleration also collect a prepayment penalty. However, the court concluded that there ought to be an exception to the general rule in order to "...deal with the difficulty of intentional defaults..." Holding that "...courts should be allotted the discretion to consider the question of the timeliness of default, the voluntary nature of the tender of full payment of the note, and the involuntary nature of the lender's action to accelerate the note, and make exceptions to the general rule...", the court determined this to be an "...appropriate..." case to "...(find) liability for the prepayment penalty..." Florida National Bank v. BankAtlantic, supra at 598. In ruling in favor of BankAtlantic, the Fourth District Court conceded that the lender's mortgage note

in this case did not provide for a prepayment penalty after acceleration pursuant to the optional default/acceleration clause[7], but concluded that the circuit court's equitable jurisdiction gave it the power to correct this omission by supplying the "yield-maintenance" language the lender had neglected to include in its contract with the borrower. The Fourth District Court then certified to this court the question of whether or not Florida courts have "discretionary power to consider the equities" between contracting parties, and, in effect, rewrite their contract to add meaning not present. In certifying this issue, the Fourth District Court has apparently deemed it to be of great public importance that this court make a further pronouncement on the nature and extent of Florida courts' equitable jurisdiction in this area. By its decision below, the Fourth District appears to have expressed a preference for expanding the equitable jurisdiction of Florida's circuit courts to enable trial judges to alter contracts to make them more reasonable from the standpoint of one of the contracting parties, or to otherwise reach a result contrary to the expressed intent ascertainable from the contract's written word if necessary or desirable to accord with the equities of a particular case.

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[7] At page 597 of the opinion, the court observed that "...No 'yield maintenance' clause was provided..." and in a footnote explained that "...A 'yield maintenance' clause in a note is a mechanism designed to insure receipt of the prepayment penalty premium, whether or not the prepayment is voluntary. Many commercial borrowers sought to prepay high interest loans without a prepayment charge by simply defaulting and forcing the lender to accelerate the loan. The borrower could then prepay without any premium and the lender loses the benefit of its contracted interest rate yield. With a "yield maintenance" clause, the borrower cannot evade the contracted rate.

As to the second issue, Fourth District Court of Appeal affirmed the trial court's finding of an intentional default. Explaining its ruling, the Fourth District suggested that the competent substantial evidence in support of the trial court's finding was that "the borrower did not default until after... the bank refused (GORDON's) request for waiver of the prepayment penalty fee." Florida National Bank of Miami v. BankAtlantic, supra at 597. As pointed out in Footnote 6, supra, the court obviously overlooked the fact that the trial court's findings in this regard were completely contradicted by the undisputed evidence and BANKATLANTIC's own pleadings.

SUMMARY OF THE ARGUMENT

Neither the loan documents, relevant statutes nor applicable case law provide for collection of a prepayment penalty after acceleration of the debt. Lender's voluntary election to accelerate changed the maturity date of the mortgage so that it was no longer possible to "prepay" it. Lender had other viable, enforceable remedies available and did not have to accelerate the loan; by so doing, it elected to forego the prepayment penalty. Additionally, Lender's acceleration meant that payment thereafter was involuntary, and not the exercise of a reserved privilege to prepay by the borrower, but rather GORDON's exercise of his equity of redemption, the right to save the property from forced sale by paying off the debt.

BANKATLANTIC's argument below amounted to a request that the trial court rewrite the lender's own loan documents to add provisions that it neglected to include. The rule is firmly

established in Florida that courts have no power to rewrite an otherwise valid contract to add meaning not present or otherwise reach a result contrary to the clearly expressed intentions of the parties. Hardship from what may prove to be an improvident bargain, fairly and voluntarily assumed by contract, does not entitle a party to be relieved from its undertaking on "equitable grounds."

ISSUES PRESENTED IN THIS REVIEW

In light of the opinion rendered by the Fourth District Court of Appeal, it is respectfully submitted that the issues to be resolved by this court may be best described as follows, to wit:

I. WHETHER, IN LIGHT OF THE RECORD BEFORE THE COURT, THE TRIAL COURT ERRED BY PERMITTING BANKATLANTIC TO COLLECT A "PREPAYMENT PENALTY" AFTER THE LENDER VOLUNTARILY ACCELERATED THE MATURITY OF THE MORTGAGE NOTE UNDER AN OPTIONAL DEFAULT-ACCELERATION CLAUSE;

-AND-

WHETHER THE FOURTH DISTRICT COURT OF APPEAL ERRED BY RULING THAT THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION BY IMPOSING THE PREPAYMENT PENALTY AFTER ACCELERATION AS AN EQUITABLE REMEDY FOR THE BORROWER'S "INTENTIONAL" DEFAULT, NOTWITHSTANDING THE ABSENCE FROM THE PARTIES' WRITTEN AGREEMENT OF A PROVISION ALLOWING THE PREPAYMENT PENALTY AFTER DEFAULT/ACCELERATION.

II. WHETHER THE TRIAL COURT ERRED IN FINDING THE BORROWER'S DEFAULT IN PAYMENT OF A MORTGAGE NOTE INTENTIONAL AND AVOIDABLE WHERE THE FINDING WAS UNSUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE; CONTRARY TO THE LEGAL EFFECT OF THE EVIDENCE AND MANIFESTLY AGAINST THE WEIGHT OF THE EVIDENCE;

-AND-

WHETHER THE FOURTH DISTRICT COURT OF APPEAL ERRED IN AFFIRMING THE TRIAL COURT'S FINDING OF AN INTENTIONAL DEFAULT WHERE THERE WAS NO COMPETENT EVIDENCE TO SUPPORT IT AND WHERE BOTH THE TRIAL COURT AND THE APPELLATE COURT RELIED ON "FACTS" WHICH WERE CONTRADICTED IN THEIR ENTIRETY BY UNDISPUTED EVIDENCE AND THE ALLEGATIONS OF BANKATLANTIC'S OWN PLEADINGS.

ARGUMENT

I. IN LIGHT OF THE RECORD BEFORE THE COURT, THE TRIAL COURT ERRED BY PERMITTING BANKATLANTIC TO COLLECT A "PREPAYMENT PENALTY" AFTER THE LENDER VOLUNTARILY ACCELERATED THE MATURITY OF THE MORTGAGE NOTE UNDER AN OPTIONAL DEFAULT-ACCELERATION CLAUSE;

-AND-

THE FOURTH DISTRICT COURT OF APPEAL ERRED BY RULING THAT THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION BY IMPOSING THE PREPAYMENT PENALTY AFTER ACCELERATION AS AN EQUITABLE REMEDY FOR THE BORROWER'S "INTENTIONAL" DEFAULT, NOTWITHSTANDING THE ABSENCE FROM THE PARTIES' WRITTEN AGREEMENT OF A PROVISION ALLOWING THE PREPAYMENT PENALTY AFTER DEFAULT/ACCELERATION.

By its judgment, the trial court, and by its affirmance, the Fourth District Court of Appeal have ruled that a lender is entitled to collect a prepayment penalty from a borrower after the maturity of the borrower's mortgage note has been accelerated pursuant to an optional default-acceleration clause even though the mortgage document, drawn by the lender, clearly and unambiguously expresses a contrary intent. Both the trial court and the Fourth District Court of Appeal have attempted to justify their rulings by expressing the belief that Florida courts have the discretion to impose obligations over and above those agreed to by the contracting parties, to accord with the equities of the matter. In effect, the trial court and the Fourth District Court of Appeal have rewritten the parties' contract to impose an unbargained for penalty on the borrower in order to punish him for "intentionally defaulting", reasoning that the deliberate and purposeful default "forced" the lender to exercise its acceleration option. While there are no other Florida appellate decisions involving identical

facts, the trial judge's ruling in this case and the Fourth District Court's affirmance, conflict with the decisions of every appellate court in the United States which has ever considered this issue. Furthermore, the underlying rationale of the trial court and the Fourth District Court, evinces a dangerously liberal view of a circuit judge's equitable powers and directly conflicts with established principles of law laid down by this court and frequently repeated by district courts of appeal throughout the state, including numerous prior decisions of the Fourth District itself.

A. "Prepayment" is payment before maturity, and once lender "accelerates" maturity, "prepayment" is by definition not possible

In a recent case decided by the Supreme Court of Washington, on virtually identical facts, the Court held that a mortgagee, after electing to accelerate a mortgage upon default, could not collect a prepayment penalty because of the premature termination of the mortgage. Rodgers v. Rainier National Bank, 757 P.2d. 976 (Wash. 1988). In the Rodgers case, just as in the case under review, the debtors on a promissory note failed to make an installment payment and the lender accelerated the maturity date pursuant to a default-acceleration provision. As a requirement for the debtor to avoid foreclosure sale, the lender demanded a prepayment penalty.

Again, just as in this case, it was urged by the lender in Rodgers that the default was "deliberate, purposeful and intentional", amounting to a "sophisticated orchestration" by the borrowers to avoid their contractual obligations. The Rodgers

court ruled that the borrowers' motivation in defaulting on the loan was irrelevant and held:

> "We are limited by this record to an interpretation and application of the unambiguous terms of the promissory note. That note prohibits prepayment during the first four loan years.... It provides for a prepayment fee in the fifth loan year, but it does not specifically provide that the fifth year prepayment fee becomes due when there is a default and acceleration before the fifth loan year. What the note does provide is an option for the lender, in the event of default, to declare due and payable the entire principal sum and accrued interest. The lender unilaterally chose to exercise that option and in so doing negated the prohibition against prepayment and obliterated the fifth year loan year prepayment fee. The inevitable factual and legal consequence of lender's acceleration was to establish a new maturity date, i.e., unpaid principal and accrued interest were due and payable now." (emphasis added).

Similarly, In the Matter of L.H.D. Realty Corporation, 726 F.2d 327 (7th Cir. 1984), the United States Court of Appeals for the Seventh Circuit held squarely that a lender loses the right to a prepayment premium when it elects to accelerate the debt. On facts similar to the instant case, the court held that while valid prepayment premiums are enforceable and serve a legitimate purpose, there are limitations upon the right to receive them. According to the court, one instance in which a lender loses its right to a premium is when it elects to accelerate the debt because of a default. The court explained:

> "This is so because acceleration, by definition, advances the maturity date of the debt so that payment thereafter is not prepayment but instead is payment made after maturity." id., at 330-331.

In Slevin Container Corp. v. Provident Federal Savings and Loan Association of Peoria, 424 N.E.2d 939 (Ill. App. 3d 1981), the Illinois Court of Appeals reversed a trial judge who had held that a prepayment penalty was properly demanded by a mortgage lender following acceleration of a mortgage loan under a "due on sale clause". The court stated:

> "We believe that where the discretion to accelerate the maturity of the obligation is that of the obligee, the exercise of the election renders the payment made pursuant to the election one made after maturity and by definition not prepayment." id. at 941.

In a Texas case, the Court of Civil Appeals considered whether an installment lender was entitled to collect the unearned time price differential after it accelerated the maturity of an installment contract. General Motor Acceptance Corp. v. Uresti, 553 S.W.2d 660 (Tex. Civ. App. 1977). The court ruled in favor of the borrower holding:

> "'Prepayment' is a payment before maturity. 'Acceleration' is a change in the date of maturity from the future to the present ...once the maturity date is accelerated to the present, it is no longer possible to prepay the debt before maturity. Any payment made after acceleration of the maturity date is made after maturity not before." id., at 663.

As recently as September 1989, the Texas Court of Appeals considered the issue again. In ruling against a lender who attempted to exact a prepayment penalty after acceleration of a mortgage note, the court held that the prepayment provision did not apply where the maker defaulted on payments and the payee accelerated; under the circumstances, the maker had not availed itself of the privilege to prepay early and was not liable for the penalty

associated with invoking that privilege. Texas Airfinance Corporation v. Lesikar, 777 S.W.2d 559 (Tex. Ct. App. 1989).

In a recent bankruptcy case in the United States Bankruptcy Court for the Middle District of Florida, the court was confronted with the same issue. In ruling against the lender on its claim for a prepayment penalty after foreclosure of its mortgage, the court said:

> "However in electing to foreclose upon its mortgage, Mutual Benefit accelerated the debt and thereby waives its right to the prepayment premium. In Matter of L.H.D. Realty Corp., 726 F.2d 327, 330-331 (7th Cir. 1984). It is this court's understanding that a party is not entitled to both an acceleration of its debt and a prepayment penalty."

In re Pinebrook Limited, 85 B.R. 160 (Bkrptcy. M.D. Fla. 1988).

Throughout these proceedings, BANKATLANTIC has made much of the point that GORDON intended to sell his building and prepay the BANKATLANTIC loan before BANKATLANTIC elected to accelerate the maturity of the mortgage note. The argument is that since the intent to prepay was formed prior to the default/acceleration, the ultimate payment of the accelerated balance after foreclosure was, in reality, a voluntary exercise of the reserved privilege to prepay rather than an involuntary payment to avoid loss of the debtor's equity through foreclosure. The Fourth District Court of Appeal apparently picked up on this theme in observing that "...prepayment was due to consummation of a sale planned for some time. Therefore, the borrower was liable for the prepayment penalty...." Florida National Bank of Miami v. BankAtlantic, supra at 598. A similar argument was made by a lender in McCarthy v.

Louisianna Time Share Venture, 426 So.2d 1342 (La. Ct. App. 1982). There the court said:

> "We find the language of the note does not contemplate a prepayment penalty when acceleration occurs at the option of the holders; rather it is applicable when prepayment is elected by the maker. Shortly after the April 13th letter Nayquin informed Nelkin that Time Share 'intended' to pay the note in full. However, no tender of full payment was made until May 5, 1981, after the note was accelerated (April 27, 1981) and after suit for executory process foreclosure was filed (May 1, 1981). Hence, prior to payment or any tender, the note had been accelerated. When payment was tendered (and paid) the note was already due at the election of McCarthy, hence, there was no prepayment and the penalty clause was not applicable."

Similarly in this case, GORDON's intent "to sell the building" prior to BANKATLANTIC's election to accelerate maturity is wholly irrelevant. The fact that GORDON merely planned to sell his building as early as 1982 has absolutely nothing to do with the issue to be resolved in this case, which involves the proper legal interpretation of the parties' written agreement requiring a penalty to be paid in the event of a voluntary prepayment by the borrower. The adoption of a so called "business plan" to sell is obviously not the legal or logical equivalent of "prepayment" as contemplated by the terms of the mortgage note drawn by BANKATLANTIC herein. The fact that the Fourth District Court apparently saw merit in BANKATLANTIC's argument in this regard is yet another example of the tenuous nature of the underpinnings of the Fourth District's opinion.[8]

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[8] For another example, see footnote 6, supra, for a discussion of the court's reliance on a "finding of fact" which was entirely contradicted by undisputed record evidence and BANKATLANTIC's own pleadings.

The conceptual difference between a voluntary prepayment, and an involuntary payment after maturity is not new to American jurisprudence. As early as 1905, the Court of Appeals of New York considered this precise issue in Kilpatrick v. Germania Life Insurance Company, 75 N.E. 1124 (N.Y. 1905) and said the following:

> "The distinction between a voluntary and involuntary payment is very clearly pointed out in many cases. In Tripler v. Mayer, etc. of New York, 125 N.Y. 617, 623, 26 N.E. 721, Judge Peckham states: 'the very word used to describe an involuntary payment imports a payment made against the will of the person who pays. It implies that there is some fact or circumstance which overcomes the will and imposes a necessity of payment in order to escape further ills.' In Scholey v. Mumford, 60 N.Y. 498, Judge Rapallo remarks (page 501): 'to constitute a voluntary payment the party paying must have had the freedom of exercising his will. When he acts under any species of compulsion, the payment is not voluntary.'"

In Kilpatrick, the court held that the lender "...voluntarily waived (its prepayment penalty) by bringing suit to foreclose the mortgage and expressly alleging its election in the complaint." Accordingly, payment of the penalty thereafter, was deemed "involuntary". Similarly, in the instant case, notwithstanding the Fourth District Court's apparent conclusion that GORDON's payment was voluntary and that the lender's election to accelerate and foreclose was somehow "involuntary", it is obvious that GORDON's payment was compelled in response to the lender's prosecution of its foreclosure complaint against him and the impending threat of the imminent loss of his property.

In George H. Nutman, Inc. v. Aetna Business Credit, Inc., 115 Misc. 2d 168, 453 N.Y.S.2d 586 (1982), the court, in resolving an identical issue, pointed out the distinction between "accelera-

tion clauses" on the one hand and "prepayment clauses" on the other, by observing:

> "Acceleration clauses give the mortgagee the option to declare the entire mortgage debt due and payable upon the happening of a stated condition such as the default by a mortgagor in the payment of principal and for interest and the right to foreclose for nonpayment. These acceleration clauses exist solely for the benefit of the mortgagee and are enforced according to their terms... Prepayment clauses give the mortgagor the option, upon the payment of a premium, to voluntarily terminate the mortgage prematurely. These clauses are included in mortgage agreements strictly for the benefit of the mortgagor and also will be enforced according to their terms."

In ruling that the mortgagee could not retain a prepayment premium recovered from the mortgagor after the premature termination of the mortgage pursuant to an acceleration clause, the court held that the acceleration was the voluntary act of the mortgagee, not the mortgagor, who was forced to make the prepayment under duress. Accordingly, the mortgagor was entitled to recover the prepayment penalty with interest.

Similarly, in American Federal Savings & Loan Association of Madison v. Mid-America Service Corp., 339 N.W. 124 (S.D. 1983), the issue presented was defined by the court as "...whether the lender may both accelerate the maturity of the note... and also collect a premium or penalty for prepayment..." Holding that "...the mortgagee, not the mortgagor, voluntarily matured the indebtedness...", the court ruled that no prepayment penalty could be collected.

In the case at bar, the Fourth District Court of Appeal apparently placed some importance on obiter dicta contained in Matter of L.H.D. Realty Corp., 726 F.2d 327 (7th Cir. 1984) to the

effect that "in appropriate cases" courts could enforce a prepayment penalty even where the lender had accelerated the debt. The same argument was made by the lender in Eyde Brothers Development Corporation v. The Equitable Life Assurance Society of the United States, 697 F. Supp. 1431 (W.D. Mich. 1988) in which the court explained the dicta in Matter of L.H.D. Realty Corp. Once again the issue was over the entitlement to a refund of a prepayment penalty demanded by a lender who had accelerated the indebtedness. There, the court held:

> "Plaintiff's (borrower's) argument is in accord with the general rule... (that)... the lender loses its right to a premium when it elects to accelerate the debt... (citing Matter of L.H.D. Realty Corp.).... Equitable (lender) urges the court to depart from the general rule so as not to reward plaintiff in its attempt to avoid the prepayment penalty through intentional default. The L.H.D. Realty opinion addressed the same argument. 726 F.2d at 331. After rejecting it, the court suggested nonetheless that in appropriate cases, the courts could enforce a prepayment penalty even where the lender had accelerated the debt. This is not an appropriate case. A fair reading of the prepayment clause indicates it was not designed to operate in conjunction with acceleration of the debt. If parties to a contract wish to avoid the general rule of L.H.D. Realty, it is incumbent upon them to more clearly express their intent in their agreement..."

For other cases reaching the same result on similar facts, see Three C Associates v. IC&LP Realty Co., 524 N.Y.S.2d 701 (App. Div. 1st Dept. 1988); First National Bank of Springfield v. Equitable Life Assurance Society of the United States, 510 N.E.2d 518 (Ill. App. 4th Dist. 1987); Casey v. Businessmen's Assurance Company of America, 706 F.2d 559 (5th Cir. 1983); Tan v. California

Federal Savings & Loan Association, 189 Cal. Rptr. 775 (4th Dist. 1983); and Burks v. Verschuur, 532 P.2d 757 (Col. App. 1974).

B. Exaction of "Prepayment Penalty" following acceleration under default-acceleration clause is not permitted unless the loan contract expressly provides for penalty under such circumstances.

GORDON does not dispute that a properly drawn mortgage note may provide for the assessment of a fee, incident to acceleration, to compensate a lender for being forced to reinvest the proceeds of a defaulted mortgage loan. The concern expressed by the trial judge in this case that lenders "should have some guarantees through their agreements with borrowers" is a legitimate one, given the "risks of lending money over time at a fixed rate" in a "volatile economic climate." (R 336-342). Such "guarantees" in the form of "yield maintenance clauses" or "reinvestment fee" provisions are now routinely being written into loan documents in Florida, as is evident by the recently enacted amendments to Section 697.06, Fla. Stat. (1987) regulating the use of such provisions. As stated in the Senate Staff Analysis of the amendment and reiterated by the Fourth District Court in its opinion in this case at page 597:

> "Recently, many commercial borrowers have sought to prepay high interest loans without a prepayment charge by simply not making payments, thereby forcing the lender to accelerate the loan. Under customary commercial mortgage documentation, the borrower could then prepay without any premium, and the lender would lose the benefit of its contracted interest rate yield. With a 'yield maintenance' clause, the borrower cannot evade the contracted rate. 'Yield maintenance charges' are now commonly being assessed by commercial mortgage lenders in an effort to assure that they receive their stipulated interest rate over the entire term of the mortgage loan. Unlike the customary prepayment charge, a 'yield maintenance'

> charge is due whether the prepayment of the loan is voluntary or involuntary. It is unclear whether such clauses are currently enforceable under Florida law." (emphasis added).

While it is conceded that a properly drawn loan contract may include a provision for the assessment of a "yield maintenance charge" or "reinvestment fee" after default and acceleration, courts have no power to infer that such post-acceleration penalties are payable under a customary prepayment clause under the guise of "intepretation", or in an attempt to "reform" the loan documents on "equitable grounds". Two California cases point up the distinction between the customary prepayment clause, like BANKATLANTIC's, and a clause specifically designed to assess a penalty after acceleration, like those now subject to the statutory restrictions contained in Section 697.06, Fla. Stat. (1987).

In Tan v. California Federal Savings & Loan Association, supra., the court was confronted with an issue involving the applicability of a prepayment penalty after demand for full payment under a "due on sale" clause. The court found that under the clear and unambiguous language of California Federal's note, the penalty was payable "only upon the debtor's exercise of the reserved privilege to prepay," and not as a consequence of the lender's demand.

In contrast to Tan, the California Court of Appeals in Pacific Trust Co. v. Fidelity Federal Savings and Loan Association, 229 Cal. Rptr. 269 (6th Dist. 1986) ruled in favor of a lender who sought a prepayment penalty after default and voluntary acceleration under a note reading as follows:

> "The undersigned agrees that such one hundred eighty (180) days' advance interest shall be due and payable whether said prepayment is voluntary or involuntary, including any prepayment effected by the holder's exercise of the Acceleration Clause hereinafter set forth." (emphasis added).

The court held that Tan and other appellate decisions construing customary prepayment clauses were not controlling because of the distinctly different contract language contained in the Fidelity Federal note. The court said:

> "The terms of the note in Tan...spoke merely of the privilege of prepayment. In contrast, the instant clause is intended to apply in the event the lender elects to accelerate and describes such a situation as an involuntary prepayment." id., at 274.

The difference between these two distinctly dissimilar clauses was elucidated further in In re Schaumberg Hotel Owner Limited Partnership, 97 B.R. 943 (Bkrptcy. N.D. Ill. 1989) where the court discussed the Slevin and L.H.D. Realty cases in the context of a promissory note including a prepayment penalty clause designed to be effective after default/acceleration. There, the court said:

> ...in both Sleven and L.H.D. Realty the loan documents provided that the debtor would incur a prepayment fee if it repaid the loan amount before maturity. In neither case did the loan documents provide that upon default, the lender could both accelerate the debt and collect the prepayment fee... In this case Connecticut General and the debtor bargained for a clause in the promissory note allowing Connecticut General to accelerate the debt and collect liquidated damages upon default:
>
> > 'the (debtor) agrees that the prepayment premium mentioned hereinabove shall be due and payable whet-

> her said payment is voluntary or the result of prepayment created by the exercise of any acceleration clause after a default provided for hereunder or under the mortgage or security documents'
>
> ...Because this right was specifically bargained for and agreed to by the debtor, Connecticut General is entitled to enforce its liquidated damages clause. Such provisions should not be enforced unless clear contractual language requires it... However, because the language of the prepayment clause here makes the premium 'due and payable' upon default and acceleration, Connecticut General's claim to that premium arose..."

Also in Eyde v. Empire of America Federal Savings Bank, 701 F. Supp. 126 (U.S.D.C. 1988) the court analyzed the rights of a mortgagor and mortgagee under a note containing provision for a prepayment penalty, whether voluntary or involuntary. The court held that:

> "It is well settled (that) a lender may lose its right to a premium when it elects to accelerate a debt. This is so because acceleration, by definition, advances the maturity date of the debt so the payment thereafter is not made a prepayment but instead is a payment after maturity. Several courts have held a lender cannot assess a prepayment penalty when the lender accelerates the balance due because of the borrower's default. (citations omitted). ...However, both plaintiff and defendants agreed to a prepayment penalty even in the event of acceleration by the lender. (The note) clearly and unambiguously provides for a prepayment premium, even if the amount due on the note is accelerated by the lender. The pertinent language reads: 'the undersigned shall pay the holder hereof together with any prepayment including prepayments occurring as a result of the acceleration by the holder hereof of the principal amount of this note... a percentage of the amount prepaid in excess of any amount upon which a charge is not permitted by applicable law...' ...There appears to be no case law in Michigan which specifically addresses contractual prepayment clauses. However, the court cites to Pacific

> Trust Company & Fidelity Federal Savings, 184 Cal. App. 3d 817, 229 Cal. Rptr. 269 (1986) as persuasive authority. In that case, the prepayment clause stated that prepayment charges would be paid following 'any prepayment effected by the holder's exercise of the acceleration clause...' id. at 819, 221 Cal. Rptr. 271. The mortgagors missed a monthly installment, and thereafter made no further payments on their mortgage note. The mortgagee accelerated the balance due and commenced foreclosure proceedings. The plaintiff paid the prepayment charge under protest, and filed an action seeking its return. The court first noted that none of the cases relied upon by the mortgagor denying collection of a prepayment charge involved language evidencing the intent of the parties to allow the mortgagee to collect prepayment charges even after acceleration. The court stated that this was a matter of contract, and that the intent of the parties was clear. Since the parties had contractually agreed to allow the mortgagee to collect a prepayment penalty even upon acceleration for default, the court upheld an order for summary disposition against the mortgagor." (emphasis added).

It is evident that BANKATLANTIC's prepayment clause is of the "customary" kind and does not provide for a prepayment penalty after default and voluntary acceleration. While it would have been to BANKATLANTIC'S economic advantage to have drawn the GORDON note with the express provisions necessary to protect its contracted interest rate yield in the event of acceleration, it did not do so.

C. Where a mortgage note prepared by the lender does not provide for the collection of a prepayment penalty after accelerated maturity date, the court cannot re-write the parties' loan contract to insert such a provision.

The trial court went beyond the four corners of the parties' loan contract in holding that the prepayment penalty was applicable and enforceable after default and acceleration in this

case. In effect, the trial court "re-wrote" the agreement in order to bring it into conformance with the court's perception of what it should have been, rather than what it was. The Fourth District Court approved this procedure, apparently on the theory that courts of equity should be free to re-make the parties' contract to include missing provisions if to do so will relieve one of the parties from a harsh result.

It is fundamental that where the language of a contract is clear and unambiguous, the courts are without authority to rewrite or alter its terms to add meaning not present or otherwise reach results contrary to the expressed intentions of the parties. This rule is well established in Florida, both by numerous decisions of this court and by inferior appellate courts throughout the state, including the Fourth District. For example, in Home Development Company of St. Petersburg v. Bursani, 178 So.2d 113 (Fla. 1965) this court quashed a decision of the Second District Court of Appeal which had affirmed the trial court's interpretation of a written contract, stating as follows:

> "No extended discussion is needed to show that, regardless of the equities of the parties, the master (and the courts in adopting his findings and recommendations) went far beyond permissible limits in interpreting the... agreement... assuming that an interpretation was necessary or proper.... By reconstructing the contract of the parties to accord with what he deemed to be the equities of the situation, the master (and the courts which adopted and affirmed his recommendations) ignored the well settled rule that 'courts may not rewrite a contract or interfere with the freedom of contract or substitute their judgment for that of the parties thereto in order to relieve one of the parties from the apparent hardship of an improvident bargain'." (citations omitted).

Also in Beach Resort Hotel Corporation v. Weider, 79 So.2d 659 (Fla. 1955), this court said:

> "Courts may not rewrite a contract or interfere with freedom of contract or substitute their judgment for that of parties thereto in order to relieve one of the parties from an apparent hardship of an improvident bargain."

To the same effect, see Savage v. Horne, 31 So.2d 477 (Fla. 1947); Windham v. Windham, 11 So.2d 797 (Fla. 1943); Excelsior Insurance Company v. Pomona Park Bar and Package Store, 369 So.2d 938 (Fla. 1979); Lane v. Florida Real Estate Commission, 296 So.2d 589 (Fla. 3d DCA 1974); Rodeway Inns of America v. Alpaugh, 390 So.2d 370 (Fla. 2d DCA 1980); Mahler v. Allied Marine, 513 So.2d 677 (Fla. 3d DCA 1987); Bob Paul, Inc. v. Berry Groves, Inc., 501 So.2d 180 (Fla. 2d DCA 1987); S.H. Kress & Co. v. Desser & Garfield, Inc., 193 So.2d 192 (Fla. 3d DCA 1966); Strano v. Reisinger Real Estate, 534 So.2d 1214 (Fla. 3d DCA 1988); Biltmore Systems, Inc. v. Mai Kai, Inc., 413 So.2d 458 (Fla. 4th DCA 1982); Bella Vista, Inc. v. Interior & Exterior Specialties Co., Inc., 436 So.2d 1107 (Fla. 4th DCA 1983); National Health Laboratories v. Bailmar, Inc., 444 So.2d 1078 (Fla. 3d DCA 1984); Saha v. Aetna Casualty & Surety Company, 427 So.2d 316 (Fla. 5th DCA 1983); Bingemann v. Bingemann, 551 So.2d 1228 (Fla. 1st DCA 1989); Camichos v. Diana Stores Corporation, et al., 25 So.2d 864 (Fla. 1946).

It is not the role of courts to make otherwise valid contracts more reasonable from the standpoint of one of the contracting parties. Stack v. State Farm Mutual Auto Insurance Company, 507 So.2d 617 (Fla. 3d DCA 1987); AC Associates v. First National Bank of Florida, 453 So.2d 1121 (Fla. 2d DCA 1984).

A party is bound by language it adopts in an agreement no matter how disadvantageous that language later proves to be. Security First Federal Savings & Loan Association v. Jarchin, 479 So.2d 767 (Fla. 5th DCA 1985).

Furthermore, when the meaning of a contract is settled, the courts are not at liberty to modify it under the guise of "interpretation". Pofford v. Standard Life Insurance Company, 52 So.2d 910 (Fla. 1951); MacIntyre v. Green Pool Service, 347 So.2d 1081 (Fla. 3d DCA 1977); BMW of North America, Inc. v. Krathen, 471 So.2d 585 (Fla. 4th DCA 1985); Jacobs v. Patrino, 351 So.2d 1036 (Fla. 4th DCA 1976).

Moreover, courts are powerless to relieve a party from the result of an improvident agreement by imposing obligations not bargained for in an attempt to reach a result the court deems "fair and equitable". City of Winter Haven v. Ridge Air, Inc., 458 So.2d 434 (Fla. 2d DCA 1984); Simpson v. Young, 369 So.2d 376 (Fla. 1st DCA 1979).

It is not the office of equity to shield a party from that which results from his own improvidence. Nussey v. Caufield, 146 So.2d 779 (Fla. 2d DCA 1962); see also, Flagler v. Flagler, 94 So.2d 592 (Fla. 1957) holding that "courts of equity do not have any right or power to issue such orders as they consider to be in the best interest of 'social justice' at the particular moment without regard to established law." To the same effect see Orr v. Trask, 464 So.2d 131 (Fla. 1985) and State DHRS v. Carwell, 524 So.2d 484 (Fla. 2d DCA 1988).

Before a court of equity can reform a contract, there must be proof of fraud, mistake or overreaching. Belitz v. Riebe,

495 So.2d 777 (Fla. 5th DCA 1986); Hardaway Timber Company v. Hansford, 245 So.2d 911 (Fla. 1st DCA 1971); Cooke v. French, 340 So.2d 541 (Fla. 1st DCA 1976); Estate of Donner v. Adler, 364 So.2d 758 (Fla. 3d DCA 1978); Malt v. R.J. Mueller Enterprises, Inc., 396 So.2d 1174 (Fla. 4th DCA 1981); Homestead Properties v. Sanchoo, 443 So.2d 442 (Fla. 3d DCA 1984); Balto v. Maley, 464 So.2d 579 (Fla. 4th DCA 1985).

As recently stated by this court in Providence Square Associates v. Biancardi, 507 So.2d 1366 (Fla. 1987),

> "...(While) a court of equity has the power to reform a written instrument where, due to a mutual mistake, the instrument as drawn does not accurately express the true intention or agreement of the parties, ... [n]otably in reforming a written instrument an equity court in no way alters the agreement of the parties. Instead the reformation only corrects the defective written instrument so that it accurately reflects the true terms of the agreement actually reached." (emphasis added).

By its certification of the issue herein, the Fourth District Court has asked this court to embrace an unorthodox concept of liberal judicial activism which not only represents a startling departure from established judicial precedent in Florida, but would also create uncertainty in contractual undertakings and relationships and lead to chaos in commercial markets. Historical limitations on the judicial power of courts to meddle in the private contractual matters of sui juris parties should not be taken lightly, nor improvidentally liberalized in the name of public policy. These limitations are universally recognized, and without them certainty in the affairs of men would cease to exist. As was said by the Supreme Court of New Hampshire in the case of Lemire v. Haley, 19 A.2d 436 (N.H. Sup. Ct. 1941):

"In the nature of things obligations arising from contractual relations cannot justly and reasonably be displaced by other obligations. Stated conversely, it is neither just nor reasonable to alter contractual relationships. There is no law or judicial power by which considerations of equity may reform contracts which are free from legal attack on the grounds of fraud and mistake. What parties would have done with more information or facts or with better knowledge of the law is no concern of the courts."

D. Lender was not forced to accelerate maturity of installment debt upon borrower's default where mortgage note provided for alternative remedies which would preserve right to collect prepayment penalty.

The conclusion of the trial court and the Fourth District Court that the lender was "forced" to accelerate the mortgage loan is not only irrelevant, it is obviously incorrect as may be determined by cursory inspection of the note. The plain and unambiguous terms of the instrument permitted, but did not require, acceleration upon default. Additionally, the lender had other viable remedies which would not have precluded collection of a prepayment penalty.

First, rather than accelerate, the lender could have chosen to foreclose for the past due installments with default rate interest, together with attorneys' fees and costs. See Rodgers v. Rainier National Bank, 757 P.2d 976 (Wash. 1988).

Second, the lender could have chosen to wait until the property was sold or refinanced, the default cured, or the loan was matured by passage of time, all the while benefiting from the accrual of interest at the default rate, and remaining secure in the knowledge that its loan was well collateralized (the

building sold in 1984 for 13.5 million, over four times the amount of BANKATLANTIC'S loan).[9] (R 352, Defendant's exhibit 2).

Third, although the lender voluntarily elected its option to accelerate, it still had the option to "decelerate" after it became aware of the impending sale of the property, thereby re-instating the original maturity date and its right to collect a penalty for prepayment before maturity. West Portland Development Co. v. Ward Cook, Inc., 246 Or. 67, 424 P.2d 212 (1967); Berenato v. Bell Savings & Loan Association, 276 Pa. Super. 559, 419 A.2d 620 (1980).

It might be argued that these alternatives were more cumbersome or less attractive than acceleration and foreclosure, but, as in the Rodgers and other cases cited above, the mortgage note here simply did not provide enforceable alternatives.

E. Where parties' loan contract did not provide for a prepayment penalty incident to acceleration, factual issue of whether or not borrower "purposely defaulted" in order to "force" lender to accelerate was irrelevant and immaterial.

There can be little question that both the trial court and the Fourth District Court predicated their decision upon the "finding of fact" that GORDON intentionally defaulted. Otherwise, there would be no reason for the trial judge and the appellate

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[9] In explaining its conclusion that BANKATLANTIC was "forced" to accelerate to "protect its interest in the property", the Fourth District Court observed that its mortgage "looked to be endangered". Florida National Bank v. BankAtlantic, supra at 598. How the court could have conceived that BANKATLANTIC's mortgage interest was in jeopardy given the fact that one of the largest financial institutions in the country held a $6,000,000.00 second mortgage on the property, which had a forced sale value of $13.5 million is, to say the least, puzzling. If there was ever a case in which a mortgagee could comfortably sit back and wait and not foreclose, this was it.

court to have taken such pains to explain their decision to give the loan contract a meaning other than that which was clearly expressed in it. Yet, GORDON'S motivation was entirely irrelevant and immaterial to the only matter in issue in this case, i.e., the legal interpretation of a clear and unambiguous contract drawn by the lender, and by the terms of which the lender was indubitably bound.

In Rodgers v. Rainier National Bank, supra., the Washington Supreme Court was also faced with the argument that a borrower had intentionally defaulted in order to force the lender to accelerate and lose its right to a prepayment penalty. There the court found only "sparse...proof" that the borrowers intentionally defaulted. Nevertheless, the court held that the issue of the borrowers' motivation was wholly irrelevant:

> "Even if that sparse bit of proof supported lender's premise, it is clear that the lender was not forced to accelerate. Rather, it elected to accelerate...Even assuming that Rodgers' default was purposeful, the loan documents failed to provide for a prepayment charge incident to acceleration upon default. The default, whatever its motivation, was not the action which accelerated the maturity date of the note. It was the lender's election to accelerate which invoked the terms of the default/acceleration clause of the note. That clause only provided for payment of principal and accrued interest."

Similarly, the default-acceleration clause in the note in this case provides only for principal and default interest (no prepayment penalty). Although it apparently escaped the attention of both the trial judge and the Fourth District Court, it is noteworthy that while the Complaint in Foreclosure initially filed in this case was the vehicle by which BANKATLANTIC announced its

election to accelerate the debt, no demand was made for a prepayment penalty in the Complaint, which sought only principal, default interest, attorneys' fees and costs.

II. THE TRIAL COURT ERRED IN FINDING BORROWER'S DEFAULT IN PAYMENT OF MORTGAGE NOTE INTENTIONAL AND AVOIDABLE WHERE FINDING WAS UNSUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE; CONTRARY TO THE LEGAL EFFECT OF THE EVIDENCE; AND MANIFESTLY AGAINST THE WEIGHT OF THE EVIDENCE

- AND -

THE FOURTH DISTRICT COURT OF APPEAL ERRED IN AFFIRMING THE TRIAL COURT'S FINDING OF AN INTENTIONAL DEFAULT WHERE THERE WAS NO COMPETENT EVIDENCE TO SUPPORT IT AND WHERE BOTH THE TRIAL COURT AND THE APPELLATE COURT RELIED ON "FACTS" WHICH WERE CONTRADICTED IN THEIR ENTIRETY BY UNDISPUTED EVIDENCE AND THE ALLEGATIONS OF BANKATLANTIC'S OWN PLEADINGS.

GORDON reiterates his position that the trial and appellate courts' consideration of the irrelevant and immaterial issue of the borrower's "intent" in defaulting on his mortgage loan constitutes a clear departure from the courts' duty to construe and enforce the terms of the unambiguous loan contract within its four corners.

However, assuming arguendo that GORDON'S intent in defaulting could somehow be considered relevant to the courts' determination below, it is obvious from this record that the finding of an "intentional" default was unsupported by competent substantial evidence, contrary to the legal effect of the evidence, and manifestly against the weight of the evidence. If that is so, it is the duty of this court to quash the decision of the Fourth District Court of Appeal and reverse and remand the case to the trial court with instructions to enter a judgment in favor of GORDON. Randy International Ltd. v. American Excess Corp. 501 So.2d 667 (Fla. 3d DCA 1987); Design Engineering Corp. of Am. v. Pan Aviation, Inc., 448 So.2d 1112 (Fla. 3d DCA 1984); Oceanic International Corp. v. Lantana Boatyard, 402 So.2d

507 (Fla. 4th DCA 1981); Marrone v. Miami National Bank, 507 So.2d 652 (Fla. 3d DCA 1987); Hull v. Miami Shores Village, 435 So.2d 868 (Fla. 3d DCA 1983); Zinger v. Gattis, 382 So.2d 379 (Fla. 5th DCA 1980); Holland v. Gross, 89 So.2d 255 (Fla. 1956).

The evidence of GORDON'S financial ruin was overwhelming. Furthermore, it was uncontradicted. In fact, GORDON'S financial problems and the insufficiency of rental income to pay mortgage payments in the year of default were stipulated to. (R 96, 100). It appears that the trial court overlooked, ignored, or, simply did not remember the undisputed evidence of GORDON'S insolvency after the eleven months that passed from the day of trial to the date the judgment was entered. Whatever the reason for the inconsistency between the uncontroverted facts and the trial judge's findings, it is well established that findings which rest on conclusions drawn from undisputed evidence are in the nature of legal conclusions. As such, they are subject to appellate review, and, unlike findings drawn from conflicting evidence, they do not come to the reviewing court clothed with the presumption of correctness. Oceanic International Corporation, supra at 511-512.

Without elaboration, the Fourth District Court obliquely observed that there was "support in the record" for the trial court's "finding" of intentional default. Florida National Bank of Miami v. BankAtlantic, supra at 599. Yet it is apparent from a reading of paragraphs 8 and 9 of the trial court's "findings of fact" that the court's determination of a "willful default" was based on nothing more than the speculative testimony of bank

officers Donald Streeter[10] and Paul Rust who said that they "believed it was GORDON'S intent and desire to avoid paying the prepayment penalty." (R 338). The trial judge remarked that "GORDON presented no evidence to contradict their testimony of his intention and desire not to pay the prepayment penalty." (R 338). It was of course not necessary for GORDON to overcome evidence which was irrelevant, immaterial and incompetent in the first instance. It is axiomatic that a witness' subjective belief about another person's state of mind is not competent evidence. Hence, it was manifest error on the part of the trial judge to base his finding that GORDON intentionally defaulted on such testimony. The only competent evidence on this issue was GORDON'S own testimony and the financial records stipulated into evidence which clearly established that the only reason GORDON did not pay his mortgage payment was that he did not have the money to do so.

When an appellate court is convinced that an express or inferential finding of the trial court is without support of any substantial evidence, is clearly against the weight of the evidence or that the trial court has misapplied the law to the established facts, then the decision is clearly erroneous and the appellate court has a duty to reverse because the trial court has failed to give legal effect to the evidence in its entirety.

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[10] A careful analysis of the testimony of Donald Streeter will show that he never expressed such belief. This appears to be just another example of a finding of the trial court which is inexplicably at odds with the testimony and evidence at trial. The fading recollection of busy trial judges who take matters under advisement without ruling for months on end is an occupational hazard. The case at bar is a perfect example of "justice delayed is justice denied."

Estate of Donner v. Anton, 364 So.2d 742, 748 (Fla. 3d DCA 1978). Such is the case here.

III. RELIEF SOUGHT IN THIS PROCEEDING

As in the case of George H. Nutman v. Aetna Business Credit, supra at 586, GORDON paid the penalties exacted under protest. BANKATLANTIC, like Aetna, had no right to exact this payment. GORDON paid the penalty demanded by BANKATLANTIC solely to prevent seizure of the property and loss of his equity therein. GORDON is entitled to recover the full amount escrowed under the circumstances. See Kilpatrick v. Germania Life Insurance Co., 75 N.E. 1124 (1905).

To the extent that GORDON was forced to escrow his own funds with BANKATLANTIC'S attorneys under threat of foreclosure, he has been deprived of the use of his money since December 18, 1984. This is a liquidated sum, and consistent with the holding in Argonaut Ins. Co. v. May Plumbing Co., 474 So.2d 212 (Fla. 1985), GORDON is entitled to interest on the escrowed amount from December 18, 1984.

Pursuant to Section 687.01, Fla. Stat. (1982) interest should be calculated at the statutory rate, there being no contract between the parties which makes provision for a specified rate of interest.[11]

CONCLUSION

The certified question should be answered in the negative. To do otherwise would set a dangerous precedent and lead

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[11] Section 687.01, Fla. Stat. (1982) provides:

> "In all cases where interest shall accrue without a special contract for the rate thereof, the rate shall be 12 percent per annum, but parties may contract for a lesser or greater rate by contract in writing."

to uncertainty in contractual matters. The decision of the Fourth District Court of Appeal should be quashed and the judgment of the trial court should be reversed and this cause remanded with instructions to enter judgment for GORDON for the return of the funds representing the disputed prepayment penalty, with interest at the statutory rate from December 18, 1984.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Petitioners was furnished by U.S. Mail to Sterns Weaver Miller Weissler Alhadeff & Sitterson, P.A., 150 W. Flagler Street, 24th Floor, Miami, FL 33130, this 8th day of June, 1990.

By: _____
DAVID D. WELCH