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

AMENDED REPLY BRIEF OF PETITIONERS

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STATEMENT OF THE CASE AND OF THE FACTS

Respondent's Statement of the Case and of the Facts contains several points which are unsupported or contradicted by the record.

At page 4 of the Answer Brief, Respondent claims GORDON did not default on his mortgage until after BANKATLANTIC refused GORDON's request to waive the prepayment penalty.[1] As support for this statement, Respondent cites Petitioner's Appendix, Pages 26-27 (the "Findings of Fact" drawn for the trial judge's signature by Respondent's attorneys) and Pages 24-25 and 68-71 of the Transcript of the Trial Testimony. While paragraph 15 of the trial court's Findings of Fact (A-26) states 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...", there is, in fact, no evidence anywhere in the record that supports that finding. On the contrary, the evidence was uncontradicted that GORDON's default in payment occurred two months before his request for a waiver was turned down.[2] The only testimony cited by Respondent (R24-25 and R68-71) does not support this "statement of fact" either. Respondent's mis-statement is significant because this entirely fictitious

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[1] Respondent states that GORDON's request was turned down in May 1984, and then states "...Thereafter, GORDON deliberately defaulted on the mortgage note by failing to make any subsequent mortgage payments in an effort to avoid the prepayment penalty..." (emphasis added)(Answer Brief, p. 4).

[2] According to BANKATLANTIC's Complaint in Foreclosure filed September 11, 1984, GORDON defaulted by failing to make the monthly mortgage payment due on April 1, 1984 and subsequent monthly payments (Complaint in Foreclosure, Para. 6; see A-2). According to BANKATLANTIC's Third Amended Complaint, GORDON's request for waiver of the prepayment penalty was not turned down until May 29, 1984 (Third Amended Complaint, Para. 5; see A-17).

sequence of events was cited by the trial court as evidentiary support for the court's finding that GORDON's default was "deliberate". It was also relied upon by the Fourth District.[3]

At page 6 of the Answer Brief, Respondent attempts to divert this Court's attention from the discrepancies between the "Findings of Fact" and the uncontradicted evidence at trial, by claiming that Petitioner has been "disingenuous" in attacking the validity of the trial court's ruling "by innuendo and inference". Respondent misses the point made by Petitioner at pages 13-14 of the Initial Brief. It is not the procedure of the trial judge in requesting proposed judgments from counsel which Petitioner objects to. It is the 11-month delay that occurred before the court entered its findings, and the fact that the finding of "intentional default" has no support of any competent evidence in the record of which Petitioner complains. Petitioner does not take issue with Respondent's statement that a trial judge is in a better position to evaluate the credibility of witnesses than an appellate court. However, credibility is not involved where the trial transcript shows that the findings are contradicted by all of the evidence and the pleadings themselves. While Petitioner has demonstrated the failure to pay the mortgage was due to his financial inability and that there is no competent evidence to support the finding of "intentional default", the Respondent has failed to respond by pointing out competent evidence anywhere in the record in support of the court's finding. Rather than dealing with the rule of Oceanic International Corp. v. Lantana Boatyard, 402 So.2d 807

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[3] Florida National Bank of Miami v. BankAtlantic, 557 So.2d 596, 598 (Fla. 4th DCA 1990).

(Fla. 4th DCA 1981) and other cases cited at pages 42 and 43 of the Petitioner's Initial Brief, Respondent ignores this line of cases and instead resorts to belittling Petitioner's argument, stating that "GORDON reveals his misunderstanding of the function of appellate review..." and that "it is axiomatic that a trial court's findings of fact are presumed correct..." (Answer Brief, p. 30).[4]

Respondent again mis-states the uncontradicted evidence when at page 4 it advises this court that "GORDON's default forced BANKATLANTIC to accelerate the loan under the note's default acceleration clause and to institute foreclosure proceedings..." (Answer Brief, p. 4). The fallacious nature of this statement is evident from Footnote 1, page 4 of the Answer Brief in which Respondent concedes that the prepayment clause includes a provision... "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..." While the trial court also made the "factual" determination that the lender was "forced" to accelerate and foreclose, this determination was not properly one of fact, but of law, and was obviously incorrect. The unambiguous provisions of the loan contract, drawn by the lender, show that BANKATLANTIC was not forced to accelerate or to foreclose, but chose to do so pursuant to a voluntary election of a wholly optional provision.

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[4] In point of fact, Respondent has revealed its misunderstanding of the function of appellate review by offering no response to Petitioner's point that, under settled Florida law, findings of fact based on undisputed evidence are in the nature of legal conclusions, and, unlike findings drawn from conflicting evidence, they do not come to the reviewing court clothed with a presumption of correctness. Oceanic International Corp. v. Lantana Boatyard, supra.

At page 5 of the Answer Brief, Respondent states that when GORDON entered into a contract to sell the Landmark he "...again requested that BANKATLANTIC waive GORDON's prepayment obligation...." There is no citation following this statement, and there is nothing anywhere in the record to support it. Respondent seeks to mislead this court by suggesting that at the December 1984 closing on the sale, GORDON, in effect, conceded that there existed a prepayment obligation, by asking BANKATLANTIC to waive it. Nothing could be further from the truth. In fact, when the foreclosure action was filed in September 1984, BANKATLANTIC did not include a demand for the prepayment penalty in its complaint. By its election to mature the indebtedness and foreclose without seeking a prepayment penalty, BANKATLANTIC conceded that it was no longer entitled to a premium for prepayment. The record shows that GORDON did not ask BANKATLANTIC to waive that which was not even prayed for in the foreclosure complaint. Instead, he tendered full payment of what was demanded in the complaint. It was only then that BANKATLANTIC attempted to resurrect its claim for the prepayment penalty. (See 4th "WHEREAS" clause in December 18, 1984 agreement at Page A-9 of Petitioner's Appendix to Initial Brief).

At page 5 of the Answer Brief, Respondent mis-advises this court that "... BANKATLANTIC abated the foreclosure proceeding and permitted GORDON to close on the purchase and sale transaction..." (Answer Brief, p. 5). Respondent's citation to Appendix A-13 does not support this statement, nor does anything else in the record.

Respondent also contends that GORDON received an "immense profit" by selling the Landmark for $13.5 million (Answer Brief, pp. 5, 29). There is nothing in the record which establishes that

GORDON made any profit on the sale. The record does show, however, that Harris Trust and Savings Bank held a second mortgage for over $6 million, (R-89-90) and that the terms of the sale included a new first mortgage producing cash sufficient only to satisfy BANK-ATLANTIC and partially satisfy Harris Trust Savings Bank. The balance of the purchase price was made up in assumed indebtedness to Harris and new third and fourth mortgage notes, but no cash to GORDON. (Defendant's Exhibit "11").

ARGUMENT

I

WHETHER THE QUESTION CERTIFIED BY THE DISTRICT COURT OF APPEAL PRESENTS AN ISSUE OF GREAT PUBLIC IMPORTANCE

Respondent's first point on appeal is that the issue certified to be of great public importance by the Fourth District Court of Appeal in this action amounts to an "... isolated wrong to a single party with little, if any, present or future application to the public at large..." (Answer Brief, p. 12). At the outset, Petitioner would respectfully point out that when jurisdiction is invoked under Rule 9.030(a)(2)(A)(v)(Certification by a District Court of Appeal to the Supreme Court), the Florida Rules of Appellate Procedure specifically provide that "...no briefs on jurisdiction shall be filed..." See, Rule 9.120(d). Point I of the Argument section of Respondent's Answer Brief, ending with the comment that "... the question certified is without public importance, and accordingly the court should decline to accept jurisdiction of this cause..." amounts to an brief on jurisdiction, expressly prohibited under the aforementioned Rule.

If, notwithstanding counsel's understanding of Fla. R. App. P. 9.120(d), the court deems it appropriate to consider Respondent's arguments on jurisdiction, Petitioner strenuously disagrees that there has been an improper certification by the District Court. On the contrary, the question presented is of great significance and a negative response is vital to prevent the Fourth District's opinion in this case from establishing a dangerous precedent in the field of contract law which would represent a departure from established principles of contract interpretation frequently enunciated by this court and inferior appellate courts throughout the State of Florida. The certified question has extremely broad implications. If the Fourth District's opinion is allowed to stand, its effect will not be confined to the narrow class of cases involving disputes over prepayment penalty clauses in mortgage notes. What the Fourth District is really asking this court is:

> DOES A FLORIDA CIRCUIT COURT IN THE EXERCISE OF ITS EQUITABLE POWERS, HAVE THE AUTHORITY TO REWRITE A CLEAR AND UNAMBIGUOUS CONTRACT IN ORDER TO RELIEVE ONE OF THE PARTIES OF WHAT THE COURT PERCEIVES TO BE AN IMPROVIDENT BARGAIN?

The answer to this question must be a resounding no. And should this court either decline to answer the question, or answer it in the affirmative, the result will be uncertainty in contractual undertakings leading to virtual chaos in Florida commerce.

II

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

Petitioner does not dispute Respondent's statement that "...prepayment penalty clauses in notes are valid in Florida and

are generally enforced according to their terms...," citing Century Federal Savings & Loan Association v. Madorsky, 353 So.2d 868 (Fla. 1st DCA 1978) (emphasis added). However, the lower courts in this case did not enforce this prepayment penalty clause "according to its terms". Rather than confront the central question in this case (whether a court of equity can rewrite a clear and unambiguous contract to engraft a remedy which was neither provided for nor intended by the parties), the Respondent seeks to cloud the issue by arguing that the court merely "interpreted the contract after reviewing the evidence presented and hearing testimony." (Answer Brief, p. 14). Without citing the specific contract language relied upon, the Respondent states merely that "... the evidence was clear that GORDON voluntarily defaulted and thus prepaid the loan, thereby obligating him, under the agreement, to pay a penalty." (Answer Brief, p. 14) (emphasis added). The Respondent fails to explain how GORDON's alleged "voluntary default" is the logical equivalent of "prepayment" of the loan. Neither does Respondent explain where "under the agreement" the alleged "voluntary default... thereby obligat[ed] him" to pay a prepayment penalty. As discussed in Petitioner's Initial Brief, the "prepayment clause" in this contract, drawn by BANKATLANTIC, (and which therefore must be construed strictly against it) was of the "customary kind". There is nothing in BANKATLANTIC's note which allowed it to collect a prepayment penalty after acceleration under its optional default/acceleration clause. There are several cases discussed in Petitioner's Initial Brief which distinguish contracts which permit prepayment penalties after acceleration from those which do not. See pages 30-33 of Initial Brief. Yet Respondent

fails, or simply chooses not to recognize the distinction between a customary prepayment clause and a "yield maintenance clause" which BANKATLANTIC clearly did not have in its loan contract. Respondent places great stock in the dicta contained in In the Matter of LHD Realty Corporation, 726 F.2d 327 (7th Cir. 1984), that "in appropriate cases" courts can enforce a prepayment penalty even after the lender has accelerated the debt. But as Petitioner pointed out in his Initial Brief, the court in 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) discussed the dicta in LHD Realty, and concluded that the case before it was not an appropriate one to enforce the clause because "a fair reading of the prepayment clause indicates it was not designed to operate in conjunction with acceleration of the debt". The court went on to say that "if parties to a contract wish to avoid the general rule of LHD Realty, it is incumbent upon them to more clearly express their intent in their agreement..." id. at 1436.

The more Respondent tries to obfuscate the real issue in this case, the more evident it becomes that the Respondent's argument is no more than a plea that BANKATLANTIC's contract should not be enforced as written because it is just not fair to do so. This court is being asked to throw out a fundamental rule of contract construction and embark on a perilous course which would grant courts of equity unbridled power to ignore private contract rights and substitute their own judgment for that of the parties based on no more than vague notions of fairness. If the Fourth District's opinion is not quashed by this court, it will effectively destroy

the very concept of the court's role as an "interpreter" rather than a "maker" of contracts. Freedom of contract without interference by the courts is a cherished and an important right of constitutional dimensions. In light of the opinion of the Fourth District, it is clear that that right is at stake here.

At page 22 of the Answer Brief, Respondent makes the erroneous statement that GORDON has "... fail[ed] to bring to this court's attention what appears to be a companion case to Eyde Brothers...," i.e., Eyde v. Empire of America Federal Savings Bank, 701 F. Supp. 126 (E.D. Mich. 1988). On the contrary, Petitioner did cite the Eyde v. Empire of America Federal Savings Bank case to the court at page 32 of its Initial Brief. As stated therein, that court discussed the exception to the general rule that a lender loses its right to a prepayment penalty when it elects to accelerate a debt where "(the note) clearly and unambiguously provides for prepayment penalty, even if the amount due on the note is accelerated by the lender."[5] Respondent next attempts to distinguish each case cited by the Petitioner in support of the principle that a lender may not collect a prepayment penalty after voluntarily electing to accelerate the mortgage debt. Starting with Rodgers v. Ranier National Bank, 757 P.2d 976 (Wash. 1988), Respondent argues that case is distinguishable because no "intentional default" was

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[5] The court pointed out that "note B" provided for a penalty upon prepayment "including prepayments occurring as a result of the acceleration by the holder hereof of the principal amount of this note..." While the Respondent argues that the Eyde court analysis of "note B" is irrelevant and inapposite to the facts presented in this case, that is not so. The opinion in Eyde underscores the distinction between BANKATLANTIC's note and notes such as note B in the Eyde case, and others wherein express provisions entitle the lender to what BANKATLANTIC is obviously not entitled to here.

involved. Yet the opinion in Rodgers states that the lender had claimed "the default was deliberate, purposeful, and intentional... a sophisticated orchestration to avoid their contractual obligations..." Rodgers, supra at 978. Rodgers held that the issue of the borrower's motivation was irrelevant. BANKATLANTIC's position in this case is the same as Ranier National Bank in Rodgers and the issue resolved by the Washington Supreme Court is the same issue that is before this court. Thus, Respondent's claim that Rodgers is distinguishable is unfounded.

Respondent also attempts to distinguish Slevin Container Corp. v. Provident Federal Savings & Loan Association of Peoria, 424 N.E.2d 939 (Ill. App. 2d 1981); General Motors Acceptance Corp. v. Uresti, 553 S.W.2d 660 (Tex. Civ. App. 1977) and Texas Air Finance Corp. v. Lesikar, 777 S.W.2d 559 (Tex. Ct. App. 1989) stating merely that in those cases there was no issue concerning the borrower's deliberate default on the note. This is a distinction without a difference. These cases clearly stand for the proposition, endorsed by every court in the United States which has ever squarely confronted the question, that once a lender elects to accelerate the indebtedness under an optional default/acceleration clause in a mortgage note, it cannot thereafter collect a prepayment penalty, unless the contract expressly allows it to do so. The fact that a number of the cases which Petitioner has cited did not include a discussion of the borrower's motivation in defaulting is immaterial. As the court indicated in Rodgers, supra, the borrower's motivation is irrelevant. These cases have all been decided under long standing principles of contract interpretation, as this case should be.

Respondent spends two pages of its Answer Brief discussing the non-applicability of §697.06 Fla. Stat. (1987) to the mortgage note which is the subject of this litigation. Petitioner never suggested that §697.06 Fla. Stat. (1987) applied to the mortgage note, which was drawn by BANKATLANTIC and signed by GORDON in 1976. Petitioner merely cited the statute and the staff analysis, as did the Fourth District Court of Appeal[6] to emphasize the fact that other lenders routinely write into their loan agreements what is commonly known as a "yield maintenance clause", a provision that guarantees the lender a prepayment penalty even after it voluntarily elects to accelerate the maturity of the mortgage debt. The fact that the Florida Legislature enacted legislation to regulate the use of such provisions is a reflection of the proliferation of them in the debt instruments prepared by lending institutions prudent enough to obtain the borrower's contractual agreement to pay a prepayment penalty even after default/acceleration. BANKATLANTIC was not prudent enough to include such a provision and its failure to do so is the cause of its present dilemma, not any conduct on the part of GORDON. Unless this court wishes to alter long-standing judicial precedent, sanction unrestrained interference by judges in the freedom of contract of private citizens, and create chaos in commercial transactions, it should rule that BANKATLANTIC's failure to include a right to a prepayment penalty after acceleration in this mortgage note deprives it of its right to the penalty.

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[6] Florida National Bank of Miami v. BankAtlantic, 557 So.2d 596 (4th DCA 1990), Footnote 1 at 597.

Ignoring settled principles of Florida Contract law, Respondent claims that a borrower is relieved of the obligation to pay a prepayment penalty after acceleration of the debt only if the borrower has changed his position in reliance on the lender's acceleration. Respondent cites West Portland Development Co. v. Ward Cook, Inc., 424 P.2d 212 (Or. 1967) and Berenato v. Bell Savings & Loan Ass'n, 419 A.2d 620 (Pa. Super 1980) as authority for this proposition.

Both West Portland Development Co. and Berenato were cited in the Petitioner's Initial Brief. These cases involved lenders, who after accelerating the maturity of their mortgages under default/-acceleration clauses, chose to "de-celerate" and reinstate the loans. The court's holding in each of these cases involved the question of whether the rescission of a lender's prior election to accelerate reinstates the lender's right to collect a penalty when the reinstated loan is thereafter prepaid. Both decisions stand for the proposition that de-celeration of a loan reinstates the right to a prepayment penalty only if the borrower has not in the interim changed his position in reliance on the acceleration.[7]

Respondent also cites Berenato, together with Shavers v. Duval County, 73 So.2d 684 (Fla. 1954) and Chestnut Corp. v. Bankers Bond and Mortgage Co., 149 A.2d 48 (Pa. 1959) for the proposition that adverse business conditions do not make a borrower's prepayment

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[7] These decisions are of no help to the Respondent because BANKATLANTIC never rescinded its acceleration. These cases are illustrative of one of the many options open to a lender other than acceleration and foreclosure where a borrower defaults. As such they serve to underscore the fact that BANKATLANTIC was not forced to accelerate and foreclose, nor was it prevented from rescinding its acceleration and reinstating the loan, thus reviving the original rights and obligations of the parties.

"involuntary". None of these cases so held and none of them involved a borrower who was financially unable to pay his mortgage payments resulting in the lender's election to accelerate and foreclose. Shavers was a case in which this court held that a lender could not collect a prepayment penalty when property is taken by eminent domain. Respondent misrepresents the holding in that case by stating that this court held that "prepayment is involuntary only where prepayment is forced by operation of eminent domain" (emphasis added) (Answer Brief, p. 18). The same is true for the Chestnut Corp. case involving destruction of the mortgaged property by fire. The court held that no prepayment penalty was collectible, but did not, as Respondent claims, hold that payment is deemed involuntary only where the mortgaged property is destroyed by fire. (Answer Brief, p. 18).

In short, Respondent has cited no case which supports its position nor which would provide authority for this court to affirm the lower courts' decision in this case. Respondent's attempts to "distinguish" the numerous cases throughout the United States which have considered the exact issue before this court is equally unavailing. Although no Florida case has considered the precise question before the court, this action involves nothing more than a simple contract interpretation issue which should be decided consistent with long-established Florida law.

III

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

Respondent states that "the instant record is replete with evidence pointing to the intentional nature of GORDON's default..."

(Answer Brief, p. 24), but no specific evidence is cited. Respondent claims that "BANKATLANTIC presented abundant competent evidence which ... supports the trial court's finding that GORDON deliberately defaulted," but merely refers to "previously cited trial testimony" of Donald Streeter, Paul Rust and GORDON without mentioning where in its Brief the "previously cited" testimony is discussed. Nowhere in the transcript of Donald Streeter's testimony did he offer testimony which supports the court's "finding" of an intentional default. Paul Rust's testimony is equally devoid of support of such finding other than his "belief" that GORDON "intended" to avoid the prepayment penalty because he asked the Bank to waive it. Such statement clearly is not competent evidence and should not have been relied upon by the trial court. The trial court also based its decision on an incorrect understanding of the sequence of events surrounding the dates of default and of the request for waiver of the prepayment penalty, and on Donald Streeter's testimony about which the trial court was undeniably wrong. Nothing in the testimony of Mr. Streeter, Mr. Rust and certainly not GORDON himself in anyway establishes, as Respondent suggests, that GORDON's default was caused by circumstances other than his financial inability to pay.

IV

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

Respondent is not entitled to interest on the $251,280.00 which GORDON was forced to place into escrow with BANKATLANTIC's attorneys in December 1984. Petitioner cited Argonaut Insurance Company v. May Plumbing Co., 474 So.2d 212 (Fla. 1985) for the

proposition that GORDON is entitled to interest from the date he was forced to deposit the funds. BANKATLANTIC now cites the same case as authority for an award of interest to it. The obvious difference in the respective positions of the parties is that GORDON has been deprived of the use of his money since December 18, 1984, and BANKATLANTIC has enjoyed the use of that same money because it has been in the attorneys' "demand deposit account" with BANKATLANTIC ever since December 18, 1984. For BANKATLANTIC to ask for an award of interest in respect to funds which it has enjoyed the free use of for the past six years is both absurd and outrageous. GORDON, however, has been deprived of his monies for the same period and consistent with Argonaut is entitled to interest at 12% per annum.

CONCLUSION

The question certified to this court by the Fourth District Court of Appeal should be answered in the negative. 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 copy of the foregoing Reply Brief was furnished by U. S. Mail to Stearns, Weaver, Miller, Weissler, Alhadeff & Sitterson, P. A., 150 West Flagler Street, 24th floor, Miami, FL 33130 this 16 day of August, 1990.

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