SUPREME COURT OF FLORIDA

RYBOVICH BOAT WORKS, INC.
and ROBERT C. FISHER,

Petitioners,

vs.

RANDALL W. ATKINS,

Respondent.

CASE NO. 76,052

RESPONDENT'S BRIEF ON THE MERITS

ALBERTO A. MACIA, ESQ.
Attorney for Respondent
Shea & Gould
1428 Brickell Avenue
Sixth Floor
Miami, Florida 33131
(305) 372-2000

TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES

STATEMENT OF THE CASE AND OF THE FACTS

Respondent Randall W. Atkins ("Atkins") and Petitioners Rybovich Boat Works, Inc. and Robert C. Fisher ("Rybovich") entered into a written contract pursuant to which Atkins agreed to purchase, and Rybovich agreed to sell, real property located in Palm Beach County, Florida. AA 17.[1] The parties failed to close the sale, and on May 4, 1988, Rybovich filed a five count complaint against Atkins for (1) breach of contract, (2) preliminary and permanent injunctive relief, (3) quiet title to the real property, (4) slander of title to the real property, and (5) intentional interference with a subsequent agreement to sell the real property. AA 1-10; RA 1-10.[2]

More than one year later, on May 10, 1989, Atkins filed a three count counterclaim for (1) specific performance of the contract, (2) tortious interference with a business relationship, and (3) breach of contract. AA 127-135. As an affirmative defense to Atkins' counterclaim for specific performance, Rybovich alleged that it was barred by the applicable statute of limitation. AA 245.[3]

---

[1]The appendix filed by Atkins in the Fourth District Court of Appeal ("Appendix To Petition For Writ Of Certiorari") will be cited as "AA."

[2]The appendix filed by Rybovich in the Fourth District Court of Appeal ("Respondents' Appendix") will be cited as "RA."

[3]Although in its affirmative defense Rybovich did not specify the applicable statute of limitation, AA 245, section 95.11(5)(a) of the Florida Statutes (1987) requires that an action for specific performance of a contract be commenced within one year.

Subsequently, Rybovich filed a motion for summary judgment as to the specific performance count of Atkins' counterclaim and the quiet title count of Rybovich's complaint. AA 247, 272. Rybovich argued that any breach by it of the contract occurred - and thus Atkins' cause of action for specific performance accrued - on December 5, 1987, when the transaction failed to close; on February 18, 1988, when Atkins notified Rybovich in writing that Rybovich had "defaulted" under the contract; or, at the latest, on May 4, 1988, when Rybovich filed the complaint against Atkins. AA 274-277. Thus, argued Rybovich, because Atkins' specific performance counterclaim was filed on May 10, 1989, more than one year after the breach of contract, it was barred by the applicable one year statute of limitation, §95.11(5)(a), Fla. Stat. (1987). AA 274-278.

The trial court granted Rybovich's motion and entered judgment in favor of Rybovich and against Atkins on Atkins' specific performance counterclaim, ruling that "[s]uch action is barred by Section 95.11(5)(a)." AA 289. The trial court also entered judgment in favor of Rybovich and against Atkins on the quiet title count of Rybovich's complaint, declaring the property "free of any right, title, claim or interest of [Atkins]." AA 289.

Atkins filed a petition for writ of certiorari in the Fourth District Court of Appeal, arguing that because his counterclaim for specific performance is compulsory, it is not barred by the running of the applicable statute of limitation. PA 1-3.[4] The

---

[4]The appendix filed by Rybovich in this Court ("Petitioners'

Fourth District granted Atkins' petition and quashed the judgment entered by the trial court. PA 1-3. The Fourth District explained that this Court's ruling in Allie v. Ionata, 503 So.2d 1237 (Fla. 1987), "is broad enough to permit the filing of any claim for affirmative relief, regardless of its nature, as a compulsory counterclaim even though the same may be time-barred." PA 3.

The Fourth District, however, certified the following question to this Court as one of great public importance:

> Does the holding of Allie v. Ionata permit the maintenance of a time barred claim for specific performance when it is filed as a compulsory counterclaim?

PA 6. This Court has discretionary jurisdiction under article V, section 3(b)(4) of the Florida Constitution.[5]

Appendix") will be cited as "PA."

[5]Contrary to Rybovich's assertion, this Court has not accepted jurisdiction. See Fla. Sup. Ct. Int. Op. Proc., Sec. II(A)(2).

ISSUE

Whether An Otherwise Time Barred Claim For Specific Performance Can Be Filed As A Compulsory Counterclaim

SUMMARY OF ARGUMENT

The purpose of a statute of limitation is to protect persons from having to defend against stale claims. With the passage of time, memory fades, evidence is lost, and witnesses move. A statute of limitation, therefore, defines the amount of time a person has, after accrual of a cause of action, within which to file a lawsuit.

When a lawsuit is filed, however, the plaintiff effectively says that he is prepared to litigate all aspects of the controversy, including adverse claims that arise from the same operative facts, i.e., compulsory counterclaims. Having filed a complaint, the plaintiff cannot profess surprise or prejudice resulting from a compulsory counterclaim - by definition it involves the same evidentiary matters as the complaint. Therefore, because the purpose of a statute of limitation is not served by barring an otherwise untimely compulsory counterclaim, the claim is allowed.

ARGUMENT

Under this Court's decision in Allie, as well as under district court of appeal decisions that precede Allie, an otherwise time barred claim can be filed as a compulsory counterclaim. The history of the development of this sensible rule of law is instructive. Ironically, that history begins with two Third District Court of Appeal decisions that did not permit the filing of time barred compulsory counterclaims.

In Horace Mann Ins. Co. v. DeMirza, 312 So.2d 501 (Fla. 3d DCA 1975), the plaintiff, just prior to the running of the applicable statute of limitation, sued the defendant for damages caused by the defendant's negligence in operating a motor vehicle. By the time the defendant counterclaimed for damages caused by the plaintiff's negligence in operating his own motor vehicle, the statute of limitation on the defendant's claim had run. Although the defendant's counterclaim was compulsory, the Third District, on a two to one vote, held that "the defendant's compulsory counterclaim, insofar as it sought affirmative relief for property damage done to [the defendant's vehicle], was barred by the statute of limitations." Id. at 503. In dissent, Judge Pearson wrote:

> It seems to me that the intent of the present rules [of civil procedure] may best be carried out by a holding that a compulsory counterclaim is not barred by the statute of limitations when the principal action is not barred.

Id. Two years later, in Diversified Mortgage Investors v. Benjamin, 345 So.2d 392 (Fla. 3d DCA 1977), another panel of the Third District confirmed the holding in Horace Mann.

Subsequently, however, the First District Court of Appeal took a different stance. In Cherney v. Moody, 413 So.2d 866 (Fla. 1st DCA 1982), the plaintiff, an attorney, sued former clients to recover attorney's fees; the former clients counterclaimed for damages, in an amount exceeding the attorney's fees, caused by the attorney's legal malpractice. Although the attorney's complaint was filed within the statute of limitation period applicable to attorney's fees, the former clients' counterclaim was filed beyond the shorter statute of limitation period applicable to legal malpractice. The trial court dismissed the counterclaim on the ground that it was untimely filed, and the First District reversed:

> Even though we agree with the trial court that the [clients'] claim was barred as an independent cause of action by the expiration of the two year statute of limitations, we nevertheless conclude that it was error to dismiss the counterclaim. . . . [A] counterclaim for recoupment may be asserted although barred by the statute of limitations as an independent cause of action. . . . Here, [the clients] stated a compulsory counterclaim in recoupment arising from the same transaction and occurrence as the [attorney's] complaint, and it was error to dismiss.

Id. at 867. A defendant can recover an "affirmative judgment"

on a compulsory counterclaim filed under Florida Rule of Civil Procedure 1.170. Cherney, 413 So.2d at 869. The First District acknowledged that its holding conflicts with that of the Third District in Horace Mann, but explained:

> We agree . . . with the dissent of Judge Pearson in [Horace Mann] that the intent of the present rules [of civil procedure] will be best served by holding that a compulsory counterclaim in recoupment permits the recovery of an affirmative judgment even though barred as an independent cause of action by the running of the statute of limitations.

Cherney, 413 So.2d at 869.

Citing Cherney, in Evans v. Parker, 440 So.2d 640 (Fla. 1st DCA 1983), the First District held that if a counterclaim arises out of the same facts that form the basis of the complaint, it is unnecessary to decide when the cause of action asserted in the counterclaim accrued, since "the counterclaim is best characterized as compulsory, i.e., in the nature of a claim for recoupment, and, therefore, is not barred by the statute of limitations." Id. at 641.

Recently, this Court expressly approved and adopted the reasoning and holding of the First District in Cherney.[6] In Allie, the purchaser of real property ceased making payments under the sales contract and sued the seller for rescission and restitution; the seller asserted the applicable statute of limitation as an affirmative defense, and counterclaimed for breach of contract. The trial court held the seller's

---

[6]Thus this Court implicitly overruled Horace Mann and Diversified Mortgage.

counterclaim in abeyance, and entered judgment in favor of the purchaser on his complaint for rescission and restitution. The district court of appeal reversed on the ground that the action was barred by the statute of limitation. After remand, the seller revived his pending claim for breach of contract, and the purchaser interposed, this time as a compulsory counterclaim, his claim for rescission and restitution.

Although it was filed beyond the applicable statute of limitation period and could not have been brought as an independent action, this Court held that the purchaser's claim for rescission and restitution was allowable as a compulsory counterclaim. 503 So.2d at 1239-40. Specifically, this Court reasoned that because (i) a defense of recoupment can be asserted beyond the statute of limitation period applicable to the underlying claim, and (ii) a plea in recoupment can be used to obtain affirmative relief, there is no reason not to merge these two concepts into a rule that permits the recovery of an affirmative judgment on a compulsory counterclaim when the applicable statute of limitation bars an independent action:

> It is well established that the defense of recoupment may be asserted even though the underlying claim is barred by the applicable statute of limitations as an independent cause of action. . . . The court below recognized this principle when it held that "a party otherwise barred from instituting an action because of a time limitation is freed from that bar when he acts in a defensive posture." Allie II, 466 So.2d at 1111. Moreover, in Florida, a plea in recoupment may be used to obtain affirmative relief. . . . The question is whether these two concepts should be merged in a rule which permits the recovery of an affirmative judgment in recoupment when the statute of limitations would bar the desired

> relief as an independent cause of action. We are persuaded, as was the court in Cherney, that "the intent of the present rules [of civil procedure] will be best served by holding that a compulsory counterclaim in recoupment permits the recovery of an affirmative judgment even though barred as an independent cause of action by the running of the statute of limitations." 413 So.2d at 869. We adopt the analysis of Justice Shaw in Cherney.

Allie, 503 So.2d at 1239. This Court further reasoned that because the purpose of a statute of limitation is not served by disallowing an otherwise time barred compulsory counterclaim for affirmative relief, such a claim is allowed:

> We are further persuaded by consideration of the purposes of statutes of limitation. The expiration of a statute of limitation does not resolve the underlying merits of the consequently barred claim in favor of either party; it merely cuts off the remedy of the party who has slept on his rights. . . . Limitation statutes are designed as shields to protect defendants against unreasonable delays in filing law suits and to prevent unexpected enforcement of stale claims. . . .
>
> Such statutes protect defendants against claims asserted when all proper vouchers and evidence are lost and after the facts have become obscure from the lapse of time, defective memory or death and removal of witnesses. . . . It is the recognition of the inapplicability of these purposes which has led courts to develop the rule that one may raise as a defense a claim which would otherwise be barred by the statute of limitations. . . . [emphasis by court] A party who seeks affirmative relief, whether through an original complaint or a counterclaim, effectively asserts that he is prepared to prosecute all aspects of that matter. Having sufficient knowledge of the facts to support a complaint and sufficient evidence to prosecute that complaint, he must be prepared to defend against any affirmative defenses arising therefrom. Thus, once a party files an affirmative action, he cannot thereafter profess to be surprised by or

> prejudiced by affirmative defenses or compulsory counterclaims that stem from that action. The same rationale which permits the defense of recoupment at all on a claim which would be barred by the statute of limitations supports the recovery of affirmative relief. We can perceive no logical reason to prohibit an affirmative judgment in such circumstances.

Id. at 1239-40 (emphasis added).

Applying this rationale here, the conclusion is inescapable that Atkins' counterclaim for specific performance is allowable, despite the fact that it may have been filed more than one year after the cause of action accrued. Having filed a complaint against Atkins, Rybovich cannot profess surprise or prejudice as a result of compulsory counterclaims that stem from that action - including Atkins' specific performance counterclaim. Indeed, Rybovich has failed to demonstrate - in any of the three courts this case has visited - surprise or prejudice caused by Atkins' specific performance counterclaim. Other than, of course, that Rybovich would prefer not to have the claim pending. This, however, is not the test of prejudice. It is the inability to defend against a claim - as a consequence of the lapse of time and the loss of memory, witnesses, and evidence - that constitutes prejudice. See id. Having filed an action on a written contract, and having been served with a compulsory counterclaim for specific performance of that very contract, Rybovich obviously cannot profess surprise or prejudice.

In an effort to render Allie inapplicable, Rybovich argues that Atkins' equitable claim for specific performance is not the kind of claim that can be filed beyond the statute of limitation

period as a compulsory counterclaim. Rybovich contends that in Allie the purchaser filed a counterclaim for "damages" and a "money judgment," and therefore Allie applies only to claims for "damages" or a "money judgment." Rybovich is wrong.

As is clear from the opinion in Allie, in that case a seller of real property sued the purchaser for breach of contract, and the purchaser counterclaimed for the equitable remedy of rescission and restitution. Allie, therefore, involved an equitable counterclaim, not a counterclaim at law for only "damages" and a "money judgment." Consequently Allie applies to Atkins' equitable counterclaim. AA 132-133.[7]

Indeed, Atkins' counterclaim is almost identical to the purchaser's counterclaim in Allie. Atkins' counterclaim seeks the equitable remedy of specific performance and damages. AA 132-133.[8] In Allie, the purchaser's counterclaim sought the equitable remedy of rescission and restitution, or damages. Thus, both Atkins' counterclaim and the purchaser's counterclaim in Allie are for equitable relief, respectively specific

---

[7]Incredibly, Rybovich states in its brief that in Allie "the question was not whether equitable relief could be granted as a counterclaim although time-barred as an affirmative claim." This is precisely what Allie involved.

[8]"The law in Florida clearly allows damages incident to granting specific performance," e.g., rents and profits derived "during the interim between the [seller's] default and the eventual closing." Walker v. Benton, 407 So.2d 305, 307 (Fla. 4th DCA 1981). Accord, Shelter Corp. of Canada v. Bozin, 468 So.2d 1094, 1097 (Fla. 2d DCA 1985); Hernandez v. Leiva, 391 So.2d 292, 294 (Fla. 3d DCA 1980).

performance and rescission, and damages. Because it was compulsory, the counterclaim in Allie was allowable; because it is compulsory, so is the one here.

Nor is the holding in Allie as restrictive as Rybovich contends. Using broad language, this Court held that the same rationale that permits an otherwise time barred "defense of recoupment" also permits an otherwise time barred "compulsory counterclaim" for "affirmative relief" and "affirmative judgment." 503 So.2d at 1240. Plainly, that holding allows Atkins' compulsory counterclaim for specific performance and damages, especially considering its similarity with the counterclaim in Allie.[9]

Although Rybovich carefully avoids any mention of the word, much of its argument is based on "laches." Rybovich's brief is replete with allegations of Atkins' "neglect" in filing his counterclaim, of Atkins' failure to exercise "reasonable promptness," that Atkins "slept on his rights," and so on.[10]

---

[9]It should be noted that the reasoning and holding in Allie is not novel. In Rubenstein v. Burleigh House, Inc., 305 So.2d 311 (Fla. 3d DCA 1974), the Third District Court of Appeal held a statute of limitation inapplicable because the defendant "was not surprised nor prejudiced by the [lawsuit]." Id. at 314. The court explained that "when . . . the reasons for the statute of limitations do not exist, . . . a liberal rule should be applied." Id., quoting New York Cent. & H.R.R. Co. v. Kinney, 260 U.S. 340, 346 (1922) (Holmes, J.). See also B & H Sales, Inc. v. Fusco Corp., 342 So.2d 105, 107 (Fla. 2d DCA 1977) (court refused to "literally enforce" one year statute of limitation applicable to mechanic's lien actions where the plaintiff materialman wrongfully sued the fictitious name of the corporation that owned the real property, since to so enforce the statute would have been "manifestly unjust").

[10]Rybovich conveniently ignores the fact that Atkins did not immediately file his counterclaim because concurrent with his

Indeed, Rybovich devotes an entire section of its brief (B6) to the argument that specific performance claims must comply with "the reasonable promptness requirement." Here again Rybovich avoids any mention of "laches," only this time it quotes the holding in Shirley v. Lake Butler Corp., 123 So.2d 267 (Fla. 2d DCA 1960), that a purchaser's right to specific performance "may be barred by his own laches." Id. at 271.

The reason for Rybovich's reluctance to identify the legal basis of its argument is that Rybovich did not assert laches as an affirmative defense to Atkins' counterclaim for specific performance. AA 245-246. Therefore, laches has been waived, see Gause v. First Bank, 457 So.2d 582, 585 (Fla. 1st DCA 1984); Goldberger v. Regency Highland Condo. Ass'n, 452 So.2d 583, 585 (Fla. 4th DCA 1984), and Rybovich cannot rely on it here as support for the dismissal of the counterclaim. See Epperson v. Dixie Ins. Co., 461 So.2d 172, 175-76 (Fla. 1st DCA 1984), rev. denied, 471 So.2d 43 (Fla. 1985); Gisela Investments, N.V. v. Liberty Mutual Ins. Co., 452 So.2d 1056, 1057 (Fla. 3d DCA 1984); Board of Public Instruction v. Travelers Indem. Co., 190 So.2d 32, 34 (Fla. 2d DCA 1966), aff'd, 198 So.2d 24 (Fla. 1967).[11]

Equally unsound is Rybovich's argument that allowing time barred claims for specific performance as compulsory counterclaims will have an adverse effect on the marketability of

---

answer and affirmative defenses to Rybovich's complaint, RA 13-18, Atkins filed a motion for an enlargement of time to file a counterclaim, RA 19-20, which motion the trial court never ruled on.

[11]Rybovich also improperly argued laches in the Fourth District. That court correctly ignored the argument. RA 1-4.

real estate titles. If a contract for the sale and purchase of real property does not close, and the one year period within which the buyer can file a specific performance action lapses, the buyer's claim becomes time barred by section 95.11(5)(a); he cannot thereafter file an action for specific performance. See id. The seller, however, can close a sale to a second buyer who, because he will take title without notice of a valid claim by the original buyer, will be a bona fide purchaser. After the sale to the second buyer, the seller - if he wants to - can sue the original buyer for breach of contract. Even if the original buyer then files a compulsory counterclaim for specific performance, it will have no legal or practical effect: (1) the seller will no longer own the property, and thus will not be able to convey title, and (2) the second buyer will have taken title as a bona fide purchaser.

Thus the fallacy of Rybovich's argument that allowing otherwise time barred claims for specific performance as compulsory counterclaims will cloud real estate titles "until the expiration of the five year limitations period for filing breach of contract claims." Allowing them will actually have no effect on the marketability of titles - after one year, the original buyer loses his right to file an action for specific performance, as contemplated by section 95.11(5)(a). All the Allie holding does is prevent sellers from waiting until year two to file an action for breach of contract so as to preempt a counterclaim for specific performance.

Indeed, even during the one year statute of limitation period, if the original buyer has not filed an action for specific performance, the seller can sell the property to a second buyer who, if he does not have actual notice of the original buyer's claim, will be a bona fide purchaser and will take good title. See Cantrell v. Herring, 198 So. 206, 208 (Fla. 1940); Lassiter v. Curtiss-Bright Co., 177 So. 201, 203 (Fla. 1937); Coates v. Hale, 429 So.2d 761, 762 (Fla. 1st DCA 1983); McDonald v. McGowan, 402 So.2d 1197, 1200 (Fla. 5th DCA 1981). Rybovich's ominous predictions simply have no basis in fact, logic, or law.[12]

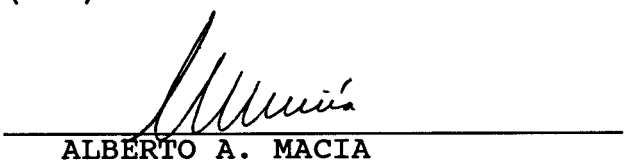
---

[12]Further, contrary to Rybovich's contention, Allie is consistent with section 95.11(5)(a), which states only that an "action" for specific performance must be commenced within one year. The legislature did not require that a "compulsory counterclaim" for specific performance be filed within one year. By using the word "action," and not "compulsory counterclaim," the legislature clearly had in mind the purpose of the statute of limitation - ensuring availability of evidence. This purpose is served by allowing otherwise time barred claims for specific performance as compulsory counterclaims.

CONCLUSION

The law in Florida, as established by this Court and the district courts of appeals, permits the filing of an otherwise time barred claim as a compulsory counterclaim. The courts do not distinguish between different types of compulsory counterclaims. The Fourth District Court of Appeal, therefore, correctly held that Atkins' compulsory counterclaim for specific performance is allowable. This Court should affirm.

ALBERTO A. MACIA, ESQ.
Shea & Gould
1428 Brickell Avenue
Miami, Florida 33131
(305) 372-2000



ALBERTO A. MACIA
#378453

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Respondent's Brief On The Merits was served by mail this 16th day of August, 1990, on Steven L. Schwarzberg, Esq., Honigman Miller Schwartz & Cohn, Attorney for Petitioners, 222 Lakeview Avenue, Suite 800, West Palm Beach, Florida 33401.

ALBERTO A. MACIA
#378453