IN THE SUPREME COURT
OF THE STATE OF FLORIDA

HAVEN FEDERAL SAVINGS & LOAN ASSOCIATION,

Plaintiff, Appellant,

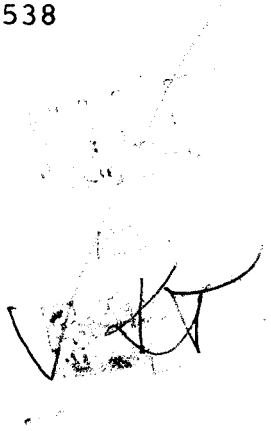
v.

LARRY F. KIRIAN, et al.,

Defendants, Appellees.
_____/

CASE NO. 76,082

DCA-1 89-1538



ANSWER BRIEF OF APPELLEES

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SUMMARY OF THE ARGUMENT

Haven contends that the First District Court of Appeal erred by 1) determining that the trial court committed reversible error when it found that it was required by Florida Statute §702.01 to sever the counterclaims; and, 2) determining that reversible error had been committed by striking the affirmative defenses and granting summary judgment without permitting the affirmative defenses to be presented. Each of these issues is separate and distinct.

In passing on the validity of §702.01, the First District Court of Appeal correctly decided a typical, direct challenge to statutory constitutionality that had been presented to the trial court and was properly framed for disposition by the appellate court. No other basis for disposition existed. Rule 1.270(b) was never relied on by Haven, never placed into issue as a ground for severance, never litigated, and never cited as a basis for decision by the trial court. There was no non-constitutional basis for a decision, as was properly pointed out by Kirian and recognized by the First District Court of Appeal.

The language of Section 702.01 is clear, unambiguous and clearly procedural. The appellate court correctly determined that this Court has consistently held matters of joinder and severance to be procedural.

In any event, the validity of Section 702.01 cannot be sustained as it constitutes a deprivation of constitutional

guarantees as to the right to trial by jury. This issue was properly presented to the First District Court of Appeal, but it was found to be unnecessary to the result. It offers secondary support, however, for the decision at issue.

Haven has improperly invoked the jurisdiction of this Court to review the reversal of the trial court's order striking affirmative defenses and granting summary judgment in the foreclosure action. This issue is separate and distinct from the validity of §702.01, and no basis for jurisdiction is established in Haven's Initial Brief.

In any event, Haven has offered no cogent argument that demonstrates an erroneous decision on the part of the First District Court of Appeal with respect to the second issue. The appellate court merely followed well-established precedent demonstrating that a summary judgment cannot be granted where the defendant asserts legally sufficient affirmative defenses that have not been disproven by the evidence.

STATEMENT OF THE FACTS AND COURSE OF PROCEEDINGS BELOW

Appellant, HAVEN FEDERAL SAVINGS & LOAN ASSOCIATION ("HAVEN"), has filed a recitation of the facts and course of proceedings below that contains critical omissions. Appellees, hereinafter referred to simply as "KIRIAN", will only address those additional matters, which were undisputed below and are evidenced in the Opinion rendered by the First District Court of Appeal.

As noted by the First District:

> [Kirian] filed responsive pleadings in each case: affirmative defenses seeking recoupment or rescission based on fraud and misrepresentation; a counterclaim seeking damages against Haven for fraud and misrepresentation; and a demand for jury trial on these issues. The facts relied upon to support the affirmative defenses and counterclaim filed in each action were identical. [Kirian] asserted that Haven had entered into a conspiratorial arrangement with the owners and developers to defraud potential purchasers and that Haven, having actual knowledge of the project's imminent financial ruin, agreed not to furnish [Kirian] with the documents required by Section 718.503(2) and (3), Florida Statutes, and agreed to assist in painting a rosy investment picture, concealing its own financial interest in the project, and providing financing for prospective purchasers. (Emphasis added)

Haven never raised the issue below, as it does now at Page 14 of its Initial Brief, that "[t]he relief requested is cumulative, not in the alternative." Indeed, it inconsistently acknowledges at Page 2 of the same instrument that "Defendants' two affirmative defenses sought recoupment or, alternatively, rescission."

Similarly, Haven omits to note that its motion to sever the counterclaims for separate trial cited as its only basis amended

Section 702.01, which provides:

> All mortgages shall be foreclosed in equity. In a mortgage foreclosure action, the court shall sever for separate trial all counterclaims against the foreclosing mortgagee. The foreclosure claim shall, if tried, be tried to the Court without a jury.

As pointed out by the First District, "Haven did not cite as a basis for the motion Florida Rule of Procedure 1.270(b), and subsequently argued that the rule was inapplicable, given the existence of the statutory provision." See also, R: 86-87.

Ultimately, the First District concluded that "Judge Wilkes granted the Motion to Sever, stating that 'severance of a mortgagee's foreclosure action and all counterclaims thereto is mandatory under the provisions of Florida Statutes Section 702.01' and that the ruling in the foreclosure action 'shall not be used in any way to preclude a full hearing of the merits of Defendants' counterclaim.'" See also, R: 88-89. Florida Rule of Procedure 1.270(b) was never addressed nor relied upon by the trial court. The original arguments made to the trial court by the parties is summarized in the opinion rendered by the First District, as is the argument subsequently submitted in the rehearing proceedings.

After the rehearing and Petition for Certiorari were denied, Haven filed its Motion for Summary Judgment. As found by the First District, Haven specifically "acknowledged at the hearing that it had not rebutted the affirmative defenses raised in the responsive pleadings and that its prior motion to sever had made no reference to the affirmative defenses." Without prior notice, it

argued that the order severing the counterclaims would be thwarted if the affirmative defenses were permitted to be litigated and orally requested that the trial court strike the affirmative defenses. Ultimately, Judge Lewis struck the affirmative defenses and granted summary judgment in the consolidated cases.

On appeal, Kirian continued to maintain the position that Florida Statutes §702.01 was also invalid facially or as applied owing to a resulting denial of the right to trial by jury as guaranteed by the federal and state constitutions. (Kirian Br. at 11-13; Kirian Reply Br. at 10-12) The First District was not required to and did not make a determination as to this issue.

Haven filed a timely Notice of Appeal citing only Rule 9.030(a)(1)(A)(ii) of the Florida Rule of Appellate Procedure and Article V, Section 3(b)(3) of the Florida Constitution as jurisdictional bases. No further authority was recited, as is acknowledged by Haven at Page 4 of its Initial Brief.

ARGUMENT

The First District Court of Appeal reversed two separate and distinct determinations made by the trial court on independent grounds. First, it determined that the trial court reversibly erred when it found that it was required by Florida Statute §702.01 to sever the counterclaims. Second, it was determined that reversible error had been committed by striking the affirmative defenses and granting summary judgment without permitting the affirmative defenses to be presented. The validity of a Florida Statute was an issue pertinent to the former, but no such issue was present with respect to the latter. Haven addressed each of these questions in turn in its Initial Brief, and the same procedure will be followed herein.

I. THE FIRST DISTRICT COURT OF APPEAL CORRECTLY REVERSED THE TRIAL COURT'S ORDER SEVERING THE COUNTERCLAIMS FROM THE FORECLOSURE ACTION.

Haven has argued that the First District both unnecessarily reached and erroneously determined the issue pertaining to the validity of Florida Statute §702.01. Both of these questions were adversely resolved against Haven below and will be addressed in sequence.

A. Severance of the Counterclaims Could Not Have Been Sustained Without Consideration of the Constitutional Issue.

Haven asserts that it is improper for a court to pass upon the validity of a statute if the case can be decided on other grounds. While the principle is correct, it has no application in the case at bar. Although Haven refers to "common law principles applicable to severance" as providing the alternative, non-

constitutional basis for decision, Florida Rule of Civil Procedure 1.270(b) is the more appropriate reference. The fallacy of Haven's argument is patent.

Haven's motion for severance set forth only one ground. The mandatory language of Section 702.01 was the exclusive basis. Haven contended that severance was a matter of right, not one of discretion. Rule 1.270(b) was never relied on by Haven, never placed into issue as a ground for severance, never litigated, and never cited as a basis for decision by the trial court.

In the Reply Brief filed with the First District at Page 7, Kirian properly objected to any consideration of whether Rule 1.270(b) as a proper alternative basis for severance. The issue had not been raised in the trial court and could not be raised for the first time on appeal. Rule 1.100(b) (all motions "shall state with particularity the grounds therefore"); Cf., Epperson v. Dixie Insurance Co., 461 So.2d 172, 175-6 (Fla. 1st DCA 1984). Similarly, this Court should not consider whether Rule 1.270(b) might have provided an alternative basis for decision when the trial court, in fact, never weighed the issue.

Under Rule 1.270(b), the matter of separation of the issues to be tried rests in the discretion of the trial judge. Vander Car v. Pitts, 166 So.2d 837, 839 (Fla. 2nd DCA 1964). "Nevertheless, a single trial generally tends to lessen the delay, expense and inconvenience to all concerned, and the courts have emphasized the separate trials should not be ordered unless such disposition is clearly necessary, and then only in the furtherance of justice." Id. "It is only in exceptional circumstances that a trial court

should exercise its discretion to bifurcate the case." Glazer v. Glazer, 394 So.2d 140, 141 (Fla. 4th DCA 1981) (Emphasis original); Weasel v. Weasel, 419 So.2d 698 (Fla. 4th DCA 1982). Haven neither pleaded nor made any showing which respect to prejudice or the propriety of severance in this cause under Rule 1.270(b). It may not now assert, as it could not assert before the First District Court of Appeal, that it is a viable alternative basis for decision.

Assuming arguendo that an alternative, non-constitutional basis for decision existed in this cause, Haven would fair no better. The principal contentions of the parties and the ruling of the trial court were all predicated on Section 702.01. Its constitutionality was squarely at issue below. Under the circumstances, it was appropriate for the First District to resolve the constitutional issues on appeal. Fleeman v. Case, 342 So.2d 814, 818 (Fla. 1977). Moreover, the question presented was one of great public importance requiring judicial construction. See, e.g., Green v. State, 166 So.2d 585 (Fla. 1964). Haven's suggestion that the constitutional issue could have been avoided should not be heeded.

At Page 10 of its Initial Brief, Haven asserts that "a factual situation very similar to the instant case" was considered in Padgett v. First Federal S & L Ass'n., 378 So.2d 58 (Fla. 1st DCA 1979). That case is cited by Haven to support is argument, bu thte contention is somewhat perplexing.

In Padgett, the mortgagor's attorney withdrew some two months prior to a scheduled trial date. The day before trial was to occur, replacement counsel filed a notice of appearance and a motion for continuance. On the day of trial, the motion was denied. The

mortgagor produced no evidence to support its complaint and the complaint was dismissed on motion. A foreclosure judgment was entered on the counterclaim. No motion for severance was made. No severance was granted. The facts simply bear no resemblance to those of the case at bar.

The Padgett decision does not address Rule 1.270(b) and it does not discuss "common law principles" relating to severance. The quotations set forth at Page 10 of Haven's Initial Brief, have no meaning within the context of the argument being made. Apparently, they are intended to suggest that "there would be no error in a non-jury trial of the foreclosure action preceding trial" of any fraud or misrepresentation counterclaim issues. If that is the case, then Haven has sorely misperceived the thrust of the Padgett decision for that is not the holding.

Trial by jury and the effect that it has on the sequence of claim resolution was at issue in the Padgett case. It, however, certainly does not stand for the proposition that "severance is a discretionary matter" without limits. It does not constitute an unrestricted license to sever fraud counterclaims from foreclosure actions. While Padgett may relate to the arguments made below with reference to the right to trial by jury (Kirian Reply Brief at 8-12), it is impertinent to the issue under discussion.

Moreover, the Padgett case is otherwise factually distinguishable from the case at bar. In Padgett, the alleged misrepresentations involved the character of the building contractor selected by the mortgagor to build the planned improvements. Selection and employment of the contractor was a transaction

separate and distinct from the construction mortgage loan itself. Herein, it was alleged that Haven, not merely one of its employees, had a financial interest in the condominium project that it failed to disclose. Moreover, it had specific knowledge of facts that materially affected the value of the mortgaged property that it also failed to disclose. The fraud goes to the heart of the mortgage transaction. Haven was alleged to have violated duties owed to the mortgagors with respect to consummation of the mortgage loan sought to be foreclosed. See, e.g., Barnett Bank of West Florida v. Hooper, 498 So.2d 923 (Fla. 1987); Johnson v. Davis, 487 So.2d 625 (Fla. 1985).

In short, Haven has offered no argument of any substance in support of its contention that consideration of the constitutional issue should have been avoided. A typical, direct challenge to statutory constitutionality was presented to the First District Court of Appeal. The issues had been properly framed before and decided by the trial court. Resolution of the issues on appeal was both proper and necessary.[1]

[1]It should be noted that Kirian also argued before both the trial court and the First District that Florida Statute 702.01, both facially and as applied, operated unconstitutionally to deprive him of his right to trial by jury on the legal issues presented by the counterclaims. It was unnecessary for the First District Court of Appeal to reach a decision on these issues, although adequate discussion is contained in the briefs filed below and is summarized infra.

B. The First District Court of Appeal Correctly Determined Florida Statute Section 702.01 To Be Invalid.

At Page 13 of its Initial Brief, Haven asserts that "the First District should have determined whether or not Section 702.01, was procedural or substantive only after considering the Legislature's stated intent to provide greater protection to commercial mortgage landers." In reaching that conclusion, Haven has misconstrued the decision rendered in Van Bibber v. Hartford Accident and Indemnity Insurance Co., 439 So.2d 880 (Fla. 1983). An appropriate analysis requires initial determination of the procedural or substantive character of the statute. Further inquiry into whether the statute "operates in an area of legitimate Legislative concern" is required only if the statute is determined to be substantive in nature. Id. at 883.

Article V, §2(a) of the Florida Constitution confers exclusive authority upon the Supreme Court to "adopt rules for the practice and procedure in all courts." The Legislature "has no constitutional authority to enact any law relating to practice and procedure." In re the Clarification of Florida Rules of Practice and Procedure, 281 So.2d 204 (Fla. 1973). See also, State v. Smith and Figgers, 260 So.2d 489 (Fla. 1972). Where rules and construing opinions have been promulgated by the Supreme Court relating to the practice and procedure of all courts and a statutory provision provides a contrary practice or procedure, the statute must fall. School Board of Broward County v. Surette, 281 So.2d 481 (Fla. 1973); Markert v. Johnston, 367 So.2d 1003 (Fla. 1979). If a statute is procedural, the Legislature has exceeded the authority con-

ferred on it and the intent of the Legislature is irrelevant.

Haven suggests that a "public policy pronouncement" by the Legislature is determinative of the substantive character of a statute. The Florida Supreme Court summarily rejected a similar contention in Markert v. Johnston, supra at 1005, fn. 8:

> A recurring argument advanced by proponents of the statute is that the issue of joinder of insurers is simply a matter of public policy, the declaration of which is primarily a legislative function. It is asserted that only in the absence of a constitutional or statutory declaration may public policy be determined by the courts. The fallacy in that reasoning, of course, is that, as a matter of constitutional imperative, only the Supreme Court has the power to adopt rules of practice and procedure for Florida courts. The fact that our rules may reflect prevailing public policy - whether by design or by coincidence - obviously does not enable the legislature to encroach on our rule-making authority. The separation of powers doctrine precludes the result.

It is only when a statute is determined to be substantive that further inquiry must be made to determine whether or not it regulates "an area of legitimate Legislative concern" and, therefore, is within the constitutional power of the Legislature to enact.[2]

[2]It is submitted that Haven is also in error by ascribing to the Legislature an incorrect intention. The legislative history of Section 702.01, as a whole, demonstrates that the thrust of the provision was to prevent a commercial mortgagor, e.g. rental complex owner, from retaining rents during extended foreclosure proceedings involving permissive counterclaims. The Legislature did not intend to deprive individual homeowners of legitimate affirmative defenses to the foreclosure itself whether denominated as an "affirmative defense" or as a "counterclaim." Foreclosure and judicial sale prior to a full and complete determination as to the right to foreclosure was not envisioned. Haven's claim that the Legislature intended to create "a substantive right to foreclose on a defaulted mortgage undelayed by legal counterclaims" (Initial Br. at 13), i.e. a right to foreclose without establishing the existence of a right to foreclose, borders on the absurd.

In Van Bibber v. Hartford Accident and Indemnity Insurance Co., supra, the Florida Supreme Court first determined that the statutory provision was substantive in character. It then determined that the statute had been enacted pursuant to the valid police powers of the Legislature and was constitutional on that basis. Had the statute been determined to be procedural, the second inquiry would have been unnecessary. This Court made it clear in stating that a "[f]inding that the statute is substantive and that it operates in an area of legitimate Legislative concern precludes our finding it unconstitutional." Id. at 883.

In the case at bar, the statutory provision is clearly procedural and no further inquiry is necessary. It was simply beyond the power of the Legislature to enact Section 702.01. The Initial Brief filed by Haven offers no cogent reasoning upon which to base a finding that the statute is substantive.

This Court has stated without equivocation that joinder and severance are "truly a procedural matter." School Board of Broward County v. Surette, supra at 483. The decision subsequently rendered in School Board of Broward County v. Price, 362 So.2d 1337 (Fla. 1978) does not modify or limit that fundamental proposition. In the Price case, this Court recognized that the substantive right of sovereign immunity was implicated. The statute at issue merely waived sovereign immunity in limited circumstances. The Court held that it was within the perogative of the Legislature to set the boundaries of any waiver of the substantive right to sue a political subdivision of the State. The decision did not alter its prior ruling that joinder and

severance are procedural questions.

In Price, this Court went on to recognize that the prior decision in the Surette case should have been resolved in the same manner. It noted, however, that more than likely no such argument had been before the Court. The stated limitation on the Surette decision was not intended to reflect a recession from the basic principle that joinder and severance are procedural matters.

Any doubt as to the meaning of the Price holding was resolved by the decision rendered in Markert v. Johnston, supra. A statute that "merely specifies the precise moment during the judicial proceeding" at which a substantive claim may be determined is purely procedural in character. Such a provision does not create a substantive right. "The timing of joinder during the course of a trial is, without question, a matter of practice or procedure assigned by the Constitution exclusively to this Court." Id. at 1006.

It is abundantly clear from the precedent that joinder and severance of parties is strictly procedural. In the case at bar, the argument is even stronger. Section 702.01 deals exclusively with the severance of claims made against parties already joined in the action. It pertains strictly to the timing of a resolution of counterclaim issues. No condition precedent to the accrual of any right is established. No substantive right is implicated.

Haven has offered no argument nor any legal authority tending to demonstrate that Section 702.01 is anything but procedural. Its entire argument boils down to claimed "difficulties of

determining whether a particular statute is procedural or substantive in nature" (Initial Br. at 11-12) and legislative intent (Initial Br. at 13). Haven points to absolutely no specific "difficulty" with respect to the procedural/substantive determination in the case at bar. In fact, it cannot refute the plain language of the statute. Public policy questions are irrelevant when the Legislature has crossed its constitutional boundaries. Thus, Haven has demonstrated no basis whatsoever for sustaining the statute in question. The authorities demonstrate that the First District Court of Appeal was correct in its determination that Section 702.01 is invalid.

Haven implicitly concedes the weakness of its argument with respect to the validity of Section 702.01 by concluding its argument as follows: "However, even if this Court holds that such is not the case, Plaintiff believes it should be adopted as a rule of this Court in accordance with the reasoning expressed in Carter v. Sparkman, 335 So.2d 802 (Fla. 1976)." (Initial Br. at 13) The problem inherent in this position is that adoption of the statute as a procedural rule would directly conflict with the right to a trial by jury as guaranteed by the federal and state constitutions. Dairy Queen, Inc. v. Wood, 369 U.S. 469, 8 L.Ed.2d 44, 82 S.Ct. 894 (1962); Beacon Theaters, Inc. v. Westover, 359 U.S. 500, 3 L.Ed.2d 988, 79 S.Ct. 948 (1959); Hightower v. Bigoney, 156 So.2d 501 (Fla. 1963); Cerrito v. Kovitch, 457 So.2d 1021 (Fla. 1984). The decision rendered by the First District Court of Appeal did not require it to reach the validity of the position taken by Kirian both at trial and on appeal.

The case at bar involves both legal and equitable claims. It is "clear that the mixture of the two kinds of claims in the same case, regardless of the parties by whom or the sequence in which they are raised by their respective pleadings, cannot deprive the parties of a right to a jury trial of issues traditionally triable by jury as a matter of right." Padgett v. First Federal S & L Ass'n., supra at 64. If the issues contained in a legal counterclaim are "sufficiently similar or related" to those of the complaint so that a determination of the first fact finder would necessarily bind the later one, such issues cannot be tried nonjury by the court, since to do so would deprive the counterclaimant of his constitutional right to a jury trial. Id.; Adams v. Citizens Bank of Brevard, 248 So.2d 682 (Fla. 4th DCA 1971); Napolitano v. H.L. Robertson and Associates, Inc., 311 So.2d 757 (Fla. 3rd DCA 1975). All issues must be tried first before a jury. The instant cause falls precisely into this category and is distinguishable from the Padgett case in this regard.

In Padgett, the alleged misrepresentations involved the character of the building contractor selected by the mortgagor to build the planned improvements. Selection and employment of the contractor was a transaction separate and distinct from the construction mortgage loan itself. The case at bar presents a very different situation.

It is alleged that Haven, not merely one of its employees, had a financial interest in the condominium project that it failed to disclose. Moreover, it had specific knowledge of facts that materially affected the value of the mortgaged pro-

perty that it also failed to disclose. The fraud goes to the heart of the mortgage transaction. Haven is alleged to have violated duties owed to the mortgagees with respect to consummation of the mortgage loan sought to be foreclosed. See, e.g., Barnett Bank of West Florida v. Hooper, supra; Johnson v. Davis, supra.

The legal issues raised by the claim of fraud in the inducement of the mortgage are sufficiently related to the issues in the foreclosure action and the equitable claim for cancellation or rescission so as to first require a jury trial of the legal claim. Spring v. Ronel Refining, Inc., 421 So.2d 46 (Fla. 3rd DCA 1982) is not distinguishable from the case at bar. The lower court violated Appellants' right to a trial by jury through severing the counterclaims for later trial. See also, cf., Cheek v. McGowan Electric Supply Co., 404 So. 2d 834 (Fla. 1st DCA 1981); Westview Community Cemetery of Pompano Beach v. Lewis, 293 So.2d 373 (Fla. 4th DCA 1974).

Thus, severance and initial determination of the foreclosure action without a jury was constitutionally impermissible. Haven is wholly in error to suggest that this Court should adopt Florida Statute Section 702.01 as a procedural rule of court. Rule 1.270(b), which currently governs severance, conforms to constitutional requirements, whereas Section 702.01 does not. The decision of the First District Court of Appeal invalidating Section 702.01 should be affirmed.

II. THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL REVERSING THE TRIAL COURT'S ORDER STRIKING AFFIRMATIVE DEFENSES AND GRANTING SUMMARY JUDGMENT IN THE FORECLOSURE ACTION SHOULD BE AFFIRMED.

Haven has specifically invoked the jurisdiction of this Court conferred by Article V, Section 3(b)(1) of the Florida Constitution. It has asserted, specifically, that appellate jurisdiction is conferred by virtue of that portion of the decision rendered by the First District Court of Appeal that declares Florida Statute 702.01 to be invalid. The issues raised by Haven's Initial Brief are not confined to this question. Instead, Haven also seeks review of the reversal of the trial court's order striking affirmative defenses and granting summary judgment in the foreclosure action. Haven has failed to comply with the jurisdictional requirements prerequisite to any consideration of that secondary and independent question.

Florida Statute 702.01 deals exclusively with the severance of counterclaims. It does not address procedural issues related to affirmative defenses. Thus, Section 702.01 was in no manner implicated in the determination as to the striking of affirmative defenses and the entry of summary final judgment. Jurisdiction over this issue must stand or fall on its own merits.[3]

The decision of the First District Court of Appeal relative to the striking of affirmative defenses and the entry of sum-

[3]Rule 9.040(a) "does not extend or limit the constitutional or statutory jurisdiction of any court.

mary final judgment did not declare any state statute to be invalid and, in fact, implicated none. The only alternative jurisdictional provision available to Haven for the purpose of review would be Article V, Section 3(b)(3) to the extent that it can be established that the decision "expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law." Haven has offered no citation whatsoever to satisfy this requirement. It has failed in this regard for the simple reason that the decision below is entirely consistent with the existing case law.

Haven conceded at the summary judgment hearing conducted on April 28, 1989 that issues of fact were present with respect to the affirmative defenses. (R: 352) It also recognized that those issues were not removed by virtue of the Order Granting Plaintiff's Motion to Sever. (R: 351-352) Nevertheless, an oral request was made to strike the affirmative defenses. In other words, Haven requested that the trial court divest the Defendants of their property interests and, at some later date, determine only the counterclaims. The Mortgagors were not to be allowed to defend against the foreclosure itself and the resulting judicial sale. The entry of the final judgments of foreclosure under these circumstances was patently erroneous.

Haven acknowledged that the affirmative defenses were legally sufficient. Summary judgment cannot be granted where the defendant asserts legally sufficient affirmative defenses that have not been disproven by evidence. Ton-Will Enterprises, Inc. v. T & J Losurdo, Inc., 440 So.2d 621 (Fla. 2nd DCA 1983);

Howdeshell v. First National Bank of Clearwater, 369 So.2d 432 (Fla. 2nd DCA 1979); Geronazzo v. Saviano, 423 So.2d 544 (Fla. 4th DCA 1982) (reversing summary judgment of foreclosure where issues of waiver and estoppel had not been rebutted); Johnson & Kirby, Inc. v. Citizens National Bank of Ft. Lauderdale, 338 So.2d 905 (Fla. 3rd DCA 1976); Swift Independent Packing Co. v. Basic Food International, Inc., 461 So.2d 1017 (Fla. 4th DCA 1984). Nothing was present in the instant cause to alter the general rule, and the First District Court of Appeal so held.

As indicated earlier, Florida Statutes §702.01 mandates the severance of all counterclaims, not the striking of affirmative defenses. It does not purport to alter any established procedure pertinent to affirmative defenses, let alone permit a court to nullify their existence.

The terms "counterclaim" and "affirmative defense" have precise meanings and are separate and distinct under Florida law. Schupler v. Eastern Mortgage Co., 33 So.2d 586 (Fla. 1948). A counterclaim is a cause of action that seeks affirmative relief, while a defense merely defeats the plaintiff's cause of action either by denial or by avoidance. Lovett v. Lovett, 112 So. 768 (Fla. 1927). The Legislature carefully selected the statutory wording and its plain language permits severance only of counterclaims.[4]

[4]A common law plea of recoupment is available in a foreclosure action. A plea of recoupment presents claims arising from the same contract or growing out of the same transaction that

(Fn. 4 continued on Page)

Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for resort to the rules of statutory interpretation. State v. Egan, 287 So.2d 1 (Fla. 1973). If the language of the statute is clear and admits of only one meaning, the Legislature should be held to have intended what it has plainly expressed. Ervin v. Capitol Weekly Post, Inc., 97 So.2d 464 (Fla. 1957); Holly v. Auld, 450 So.2d 217 (Fla. 1984). The word "counterclaim" is not sufficiently flexible to admit of some other construction beyond its plain and unambiguous meaning. Thus, Florida Statutes §702.01 cannot be construed to include "affirmative defenses."

The trial court ruled that the affirmative defenses "shall be stricken." In other words, the lower court determined that real property may be taken and disposed of by judicial sale without regard to any lawful defensive claims. Patently, such an

(Fn. [4] continued)

is the basis of plaintiff's cause of action. Payne v. Nicholson, 131 So. 324 (Fla. 1930). The plea is purely defensive in nature and allows the defendant to interpose a claim to reduce the amount of plaintiff's demand. Marianna Lime Products Co. v. McKay, 147 So. 264 (Fla. 1933); Delco Light Co. v. John LeRoy Hutchinson Properties, 128 So. 831 (Fla. 1930). As originally envisioned by the common law, an affirmative judgment could not be obtained under the plea. Peacock Hotel v. Shipman, 138 So. 44 (Fla. 1931); Jacksonville Paper Co. v. Smith & Winchester Mfg. Co., 2 So.2d 890 (Fla. 1941); Allie v. Ionata, 466 So.2d 1108 (Fla. 5th DCA 1985). The defensive plea of recoupment remains of critical importance when a claim of the defendant is barred by the statute of limitations or for some other reason cannot be asserted affirmatively. See, e.g., Fred Howland, Inc. v. Gore, 13 So.2d 303 (Fla. 1943); Hendricks v. Stork, 126 So. 293 (Fla. 1930); Horsemann Ins. Co. v. DeMirza, 312 So.2d 501 (Fla. 3rd DCA 1975); Allie v. Ionata, supra. See also, 40 Fla.Jur.2d, Pleadings §90. In other words, the plea of recoupment would be authorized particularly if Florida Statutes §702.01 were deemed to mandate severance of the counterclaim.

action violated Article I, Section 21 of the Florida Constitution and federal and state constitutional guarantees of due process of law. (Kirian Initial Br. at 19-20) The First District Court of Appeal correctly perceived that the striking of the affirmative defenses constituted reversible error. Its decision should be affirmed.

CONCLUSION

For the foregoing reasons, the judgment of the First District Court of Appeal should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Appellees has been furnished to Steven R. Scott, Esquire, GABEL, TAYLOR & DEES, Suite 1600, American Heritage Tower, 76 South Laura Street, Jacksonville, Florida 3202-5450 by U.S. Mail this 9th day of August, A.D. 1990.

Alan K. Smith, Esquire

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