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 NUMBER 76,082

DCA-1 89-1538

INITIAL BRIEF OF APPELLANTS

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STATEMENT OF THE FACTS AND COURSE OF PROCEEDINGS

I. Statement of the Facts.

On or about October 8, 1983, Larry and Sharon Kirian (herein after referred to as "defendants" or the "appellees"), executed and delivered a promissory note and mortgage (R: 19, Exhibits "A" and "B") to Haven Federal Savings & Loan Association in conjunction with the purchase of real property located in Clay County, Florida. The property is commonly known as Unit 1423 of the Ravines Resort Condominiums. On or about December 29, 1983, similar instruments (R: 1, Exhibits "A" and "B") were executed by Larry Kirian and Ciampini Corporation with respect to Unit 1303 of the Ravines Resort Condominiums, (hereinafter referred to as the "Ravines").

II. Course of Proceedings Below.

On July 10, 1987, Complaints were filed by Haven Federal Savings & Loan Association (hereinafter referred to as "plaintiff" or "appellant") in the Circuit Court for the Fourth Judicial Circuit in and for Clay County, Florida and assigned Case Numbers 87-939-CA and 87-940-CA. These actions named Appellees as defendants in two mortgage foreclosure actions. (R: 1-15; 19-35) Both actions allege as their basis defendants' failure to make mortgage payments due on the subject properties March 1, 1987, and thereafter. (Id.) The actions involved common questions of law and fact, and were properly consolidated by the Circuit Court with the consent of all parties in an Order rendered February 22, 1988. (R: 84-85)

Prior to consolidation the defendants filed responsive pleadings in each cause containing their Answer, Affirmative Defenses, Counterclaims and Demand for Jury Trial. (R: 57-61; 62-67) Defendants' two affirmative defenses sought recoupment or, alternatively, rescission. Both affirmative defenses were predicated on theories of fraud, unclean hands and failure of consideration. Each responsive pleadings also contained a counterclaim seeking damages against plaintiff for fraud and misrepresentation. The facts relied on in each action to support the Affirmative Defenses were identical to those relied on for each Counterclaim.

On May 13, 1988, plaintiff filed a Motion to Sever the Counterclaims for Separate Trial. (R: 86-87) The lower court entertained oral argument at a hearing held on June 6, 1988, on the issue of whether severance was appropriate. (R: 373-388) At that time, the Circuit Court requested that the parties present memoranda of law in support of their positions. On June 15, 1988, the Circuit Court entered an Order Granting Plaintiff's Motion to Sever. (R: 88-89)

On June 24, 1988, Defendants' Motion for Rehearing on Order Granting Plaintiff's Motion to Sever was filed. (R: 99-101) Hearing on said motion was heard on June 30, 1988, and on July 5, 1988, the Circuit Court rendered its Order Denying Motion for Rehearing. (R: 102) A Petition for Writ of Common Law Certiorari and/or Writ of Mandamus was subsequently filed by the defendants with the First District Court of Appeal styled as Kirian, et al.

v. Haven Federal Savings & Loan Ass'n., et al., Case No. 88-1741 (Fla. 1st DCA 1988). The First District entered an Order denying the Petition for Certiorari on August 8, 1988, on the basis of the presence of an adequate remedy by appeal.

On February 10, 1989, plaintiff filed its Motion for Summary Final Judgment. (R: 117) It requested at the hearing that the Court strike the affirmative defenses, which were virtually identical to the counterclaim. The Court reserved ruling on the issues pending the submission of memoranda. Memoranda were submitted by both sides. The lower court struck all affirmative defenses and granted summary judgment in each of the consolidated cases, and foreclosure sales were scheduled for July 18, 1989. (R: 198; 202) Defendants filed a notice of appeal challenging the trial court's order severing the legal counterclaims and its later order striking their affirmative defenses and granting summary judgment for appellee on the foreclosure action. (R: 344-345) The trial court stayed the scheduled foreclosure sales pending the outcome of said appeal.

On April 27, 1990, the First District Court of Appeal filed its opinion reversing both orders of the trial court appealed by defendants, stating:

> We find that section 702.01 is procedural in nature and that its language is unequivocally mandatory. We agree with [defendants] that it is exclusively the prerogative of the Supreme Court to set procedural rules for the courts, that Florida Rule of Civil Procedure 1.270(b) gives the trial judge discretion to decide whether to order a separate trial in a situation like the one presented in this case, and that to the extent the statute conflicts with this rule, section 702.01 violates Article V, section 2(a) of the Florida Constitution.

> The trial court therefore reversibly erred when it found that it was required by the statute to sever the counterclaims. We also find no valid basis for striking the affirmative defenses and granting summary judgment for [plaintiff] without allowing [defendants] the opportunity to present their defenses to the foreclosure action.

Notice of Appeal was timely filed seeking review of the decision of the First District Court of Appeal pursuant to 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.

STATEMENT OF THE ISSUES

I. WHETHER THE FIRST DISTRICT COURT OF APPEALS ERRED IN REVERSING THE TRIAL COURT'S ORDER SEVERING COUNTERCLAIMS FROM A FORECLOSURE ACTION PURSUANT TO Section 702.01, FLA. STAT. (1987)

II. WHETHER THE FIRST DISTRICT COURT OF APPEALS ERRED IN REVERSING THE TRIAL COURT'S ORDER STRIKING AFFIRMATIVE DEFENSES AND GRANTING SUMMARY JUDGMENT IN THE FORECLOSURE ACTION

SUMMARY OF THE ARGUMENT

The First District Court of Appeals reversibly erred in overturning the decision of the trial court by ruling Section 702.01, Fla. Stat., unconstitutional. Longstanding principles of deference for legislative enactments require the court to avoid ruling on the constitutionality of a statute where it can be avoided. A ruling on the statute could be avoided in this case as the defendant suffered no real harm from the application of the statute. The application of the statute did not dictate a result contrary to that reached under prior decisions. Further, defendants, despite their protests to the contrary, suffered no real harm in the application of the statute to their case. Thus, there was no reversible error and the First District Court of Appeals should have upheld the statute as constitutional in the context of this case and/or found that defendants, having suffered no real harm from its application, lacked standing to raise the issue of its constitutionality.

The First District court of Appeals also reversibly erred in overturning the Trial Court's order striking defendants' affirmative defenses and granting summary judgment in the foreclosure action. The only stated basis for said decision was that the Trial Court's order would not "[allow defendants] the opportunity to present their defenses to the foreclosure." However, defendants' argument that their affirmative defenses were a "defense" to the foreclosure action was, at best, an after-thought. Further, neither affirmative defense was aimed at

retaining the property in foreclosure, but instead sought restitution of defendants' money and rescission of the sales contracts in question. As the affirmative defenses were a mere re-statement of defendants counterclaims, and defendant could obtain complete relief thereon in the case containing their severed counterclaims, the defenses were appropriately stricken by the trial court.

ARGUMENT

I. THE FIRST DISTRICT COURT OF APPEALS ERRED IN REVERSING THE TRIAL COURT'S ORDER SEVERING COUNTERCLAIMS FROM THE FORECLOSURE ACTION

This Honorable Court has long held that it is the court's duty not to pass upon the validity of a statute if the case can be decided on other grounds. Thus, in Palm Beach Mobile Homes, Inc. v. Strong, 300 So. 2d 881, 883 (Fla. 1974), when this court considered the appeal of an order by the trial court upholding the constitutionality of several statutory provisions, this court refused to rule on any that were not necessary to the disposition of the case, stating:

> The remaining statutory provisions ruled on by the trial court were not material to the instant cause nor was such determination required for the disposition of this litigation. Therefore, the constitutionality vel non thereof will not be passed upon in the present cause by this Court since this Court has previously held that it is a fundamental principal that courts will not pass upon the validity of a statute or even a part of an act in a proceeding . . . wherein the case may be disposed of upon any other ground. Williston Highlands Development Corp., et al. v. Hogue, et al, 277 So. 2d 260 (Fla. 1973); De Jong v. Pallotto, 239 So.2d 252 (Fla. 1970); Mounier v. State, 178 So.2d 714 (Fla. 1965); Lainhart v. Catts, et al, 73 Fla. 735, 75 So. 47 (1917).

In rendering said decision Justice Roberts quoted with approval the prior decision of the Court in P.O. Lissenden Co. v. Board of County Commissioners, 116 So. 2d 632, 635 (Fla. 1959), where the Court held that:

> [W]hile the validity of this statute was raised by the appellant and actually passed upon by the trial court, it was not only not determinative of the issues or essential to the disposition thereof, but such question was wholly immaterial to the determination of the merits of the action. Therefore that portion of the judgment appealed which purports to pass upon the validity of the

> cited statute is obiter dictum and is hereby held for naught.

This principal is of long standing in the law of Florida, and has often been reiterated by the courts of this State. See, e.g., cases cited at 10 Fla. Jur. 2d, Constitutional Law, Section Section 52 and 55. Likewise, as stated by this Court in State v. Hill, 372 So. 2d 84, 85 (Fla. 1979):

> It is a long standing principle of constitutional adjudication that [a] statutory regulation may, consistently with organic law, be applied to one class of cases in controversy, and may violate the Constitution as applied to another class of cases. This does not destroy the statute; but imposes the duty to enforce the regulation when it may be legally applied.

Thus, as further stated by this Court:

> Since this statute may be legally applied to [defendant] under the factual circumstances presented here, he has no standing to complain that it might not be constitutionally enforceable against [another].

Id.

It is the Appellant's contention that these principles require the reversal of the decision of the First District Court of Appeals. In rendering its decision the First District Court of Appeals should have been guided by the prior decisions of this Court, avoiding, if possible, a decision as to the constitutionality vel non of the statute at issue. The question it should have considered is not whether the statute is unconstitutional in some abstract and absolute sense, but whether it could be legally applied in this case to this defendant. Cf. State v. Hill, supra. In this case there was no injustice worked (or unconstitutional result mandated) as the result obtained was

completely consistent with common law principles applicable to severance existing prior to the amendment or Section 702.01, Fla. Stat..

In Padgett v. First Federal, 378 So.2d 58 (1st DCA 1979), the Court considered a factual situation very similar to the instant case, specifically, severance of a mortgagor's action against mortgagee for fraud, misrepresentation and misappropriation of funds, and the mortgagee's counterclaim for foreclosure against subject property. The Padgett court stated:

> [T]he particular facts of each case must be examined to determine the order in which the legal and equitable issues must be tried . . . We have no difficulty in deciding that the issues of fraud, misrepresentation, and misappropriation of funds and property are not issues common to those stated in the foreclosure complaint, and there would be no error in a non-jury trial of the foreclosure action preceding trial of these other issues.

Id. at 64, 65. The Court then issued a ruling which preserved the mortgagor's right to trial by jury by holding:

> [T]he final judgment of foreclosure rendered in favor of [mortgagee] is affirmed. Nothing said in this opinion shall be considered as a ruling on the merits of any claim made by [mortgagor] with respect to which we have held they are entitled to a jury trial.

Id. at 66. The Padgett decision demonstrates that the severance provisions of Section 702.01, Fla. Stat., are in conformity with pre-existing common law principles. Furthermore, although decided long before the 1987 Amendment to Section 702.01, Fla. Stat., the Padgett analysis has been adopted in the instant case in the trial court's Order of Severance, thereby enabling severance to be granted, defendants' legal claims to be tried by jury, and the

legislative intent to be served.

However, assuming that the statute was properly subject to review in this cause, it should have been held constitutional. It is fundamental that, in determining the constitutionality of legislation, courts must give it a construction that upholds it rather than invalidates it, if there is any reasonable basis for doing so. Miami Dolphins, Ltd. v. Metropolitan Dade County, 394 So.2d 981 (Fla. 1981). In appealing this case to the First District Court of Appeals, Defendants asserted that the court's order granting Plaintiff's Motion to Sever violated Article V, Section 2(a) of the Florida Constitution. The First District apparently agreed with defendant's arguments, holding that "Section 702.01 is procedural in nature..." This conclusion is inconsistent with the prior decisions of this Court construing Article V, Section 2(a).

In School Board of Broward County v. Surette, Inc., 281 So.2d 481, 485 (Fla. 1973), this Court stated that the issue of severance is "truly a procedural matter." However, in School Board of Broward County v. Price, 362 So.2d 1337, 1339 (Fla. 1978), this Honorable Court held constitutional a statute "substantially identical" to the statute found unconstitutional in Surette. Thus, the opinion concludes that:

> [I]n view of today's decision the Surette holding is confined to the Surette case and is no longer controlling law.

Id. at 1340.

In Markert v. Johnston, 367 So.2d 1003 this (Fla. 1979) Court

recognized both the difficulties of determining whether a particular statute is procedural or substantive in nature and the need to consider the context and content of the statute at issue in making this determination.

> The specific question crystallized by the multiple briefs in these cases is whether the joinder of a motor vehicle liability insurer is a "procedural" aspect of trial reserved to the rule making authority of the Supreme Court by Article V, Section 2(a) of the Florida Constitution, in which case the statute has impermissibly encroached on a prerogative of the judiciary or a "substantive" right which the Legislature can freely grant to or withhold from this class of litigants. The distinction between those two concepts is, as we know, neither simple nor certain. To understand what the statute endeavors to accomplish, it is necessary to recount the course of joinder prohibitions in Florida's jurisprudence.

Id. at 1004. Although Markert held that Section 727.7262, Florida Statutes, relating to non-joinder of insurance companies in suits against their insureds was unconstitutional, Section 727.7262 was subsequently amended by the legislature and found constitutional by the Supreme Court in VanBibber v. Hartford Accident and Indemnity Insurance Company, 439 So.2d 880 (Fla. 1983).

In evaluating the constitutionality of the amended statute, this Court looked to the content of the challenged statute, reasoning that

> While this Court must determine public policy in the absence of a Legislative pronouncement, such a policy decision must yield to a valid, contrary Legislative pronouncement. . . . Finding that the Statute is substantive and that it operates in an area of legitimate Legislative concern precludes our finding it unconstitutional. If a Statute can be

> construed to be constitutional it should be. Falco v. State, 407 So.2d 203 (Fla. 1981). We hold that Section 027.7262, Florida Statutes (Supp. 1982) is constitutional.

Id. at 883.

In accordance with the decision and analysis of this Court in VanBibber, 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 lenders. The House of Representatives Committee on Commerce Final Staff Analysis clearly expresses the purpose of the bill amending Section 702.01, to provide "greater legal protection for ... mortgage loans granted within this State upon passage of this Bill." (R.114) The greater legal protection afforded mortgagees by the Statute creates a substantive right to foreclose on a defaulted mortgage undelayed by legal counterclaims. In light of the foregoing, the Court should conclude that Section 702.01 is substantive in nature and therefore does not violate Article V, Section 2(a) of the Florida Constitution. 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).

II. THE FIRST DISTRICT COURT OF APPEALS ERRED IN REVERSING THE TRIAL COURT'S ORDER STRIKING AFFIRMATIVE DEFENSES AND GRANTING SUMMARY JUDGMENT IN THE FORECLOSURE ACTION

The First District Court of Appeals has found that the decision of the trial court did not "[allow defendants] the opportunity to present their defenses to the foreclosure." However, the idea that defendants' affirmative defenses could preclude foreclosure is completely at odds with the nature of the defenses pled and the relief requested therein. The first affirmative defense pled in each of the cases consolidated below contains the following request for relief:

> As a direct and proximate result of the wrongful acts of HAVEN FEDERAL SAVINGS & LOAN ASSOCIATION, LARRY F. KIRIAN and SHARON E. KIRIAN have been caused to sustain damages equal to those claimed by HAVEN FEDERAL SAVINGS & LOAN ASSOCIATION and are entitled to recoupment of same, rescission of all documents executed in the course of the transaction, and such other relief as the Court may deem just and appropriate under these circumstances.

(R-57-67). In the second affirmative defense pled, defendants state:

> As a direct proximate result of the wrongful actions of HAVEN FEDERAL SAVINGS & LOAN ASSOCIATION, LARRY F. KIRIAN and SHARON E. KIRIAN have been caused to sustain injuries in the form of the down payment and mortgage payments related to the real property in an amount equal to those damages sought by HAVEN FEDERAL SAVINGS & LOAN ASSOCIATION and they are entitled to recoupment of the same, together with rescission of all documents involved in the transaction and such other relief as the Court deems appropriate and just under the circumstances.

(R-57-67). The relief requested is cumulative, not in the alternative. Defendants have stated unequivocally that they want the contracts involved rescinded and their money back. This was

admitted by counsel for the defendants early in the proceeding at hearing before Judge Wilkes in Motion for Rehearing of the trial court's order granting motion to sever; wherein the court inquired as follows:

> THE COURT: Well, how are you hurt by this if I allow you to raise all of those defenses? As I remember, your counterclaim you're basically looking for money, you're not asking to keep the property, are you?
>
> [DEFENDANTS' COUNSEL][1]: No, Your Honor, but what we are asking in our affirmative defenses, or rather what our affirmative defenses assert is that the mortgage was procured by fraud and therefore we are seeking as an affirmative defense that the documents be rescinded.
>
> THE COURT: Al right. So you want the contract rescinded, right, which is the mortgage and the note?
>
> [DEFENDANTS COUNSEL]: That's a defense to the mortgage and note.

(A-6). Subsequently, however, perhaps realizing that to contend otherwise would invalidate their primary argument against the striking of their affirmative defenses, defendants began to argue that these defenses would allow them to keep the property in question. (<u>See</u>, Appellants Brief before the First District Court of Appeals at p. 18-19). This is clearly contrary to their own demands for relief and prior statements in this cause.

In fact, defendants will be able to obtain complete monetary relief and nullification of the documents involved through their severed counterclaim. They have sustained no damages and suffered no prejudice as a result of the Trial Court's order striking their

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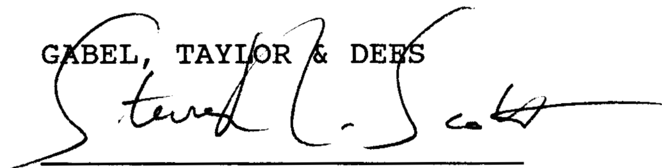
[1]The court reporter has incorrectly designated the operator as Mr. Dees; however, the context and nature of the reply leave no doubt that the response is by Defendants' counsel.

redundant affirmative defenses. Thus, even if the statute relied upon by the Trial Court is unconstitutional, there was no error of sufficient magnitude to justify action by the First District Court of Appeals. See, 3 Fla. Jur. 2d, Appellate Review, Sections 361 and 363. The decision of the First District Court of Appeals should, therefore, be reversed.

CONCLUSION

The First District Court of Appeals should, in keeping with longstanding principles of judicial deference to the policy determinations and enactments of the legislative branch, have avoided ruling on the constitutionality of Section 702.01, Florida Statutes, as its application in this case did not produce a result contrary to prior law. Thus, defendants lacked standing to challenge its constitutionality, and there was no reversible error upon which the District Court's decision could be based. Further, the statute is substantive rather than procedural in nature and should, even if reviewed by the First District, have been upheld on this basis. However, even if procedural in nature, the statute's language pertaining to severance in foreclosure actions should be adopted as a rule by this Honorable Court. Finally, notwithstanding the constitutionality of the statute, the Trial Court did not err in striking defendants affirmative defenses and entering summary judgment in behalf of the plaintiff. The decision of the First District Court of Appeals should, therefore, be reversed, and the orders of the Trial Court affirmed in all respects.

GABEL, TAYLOR & DEES



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