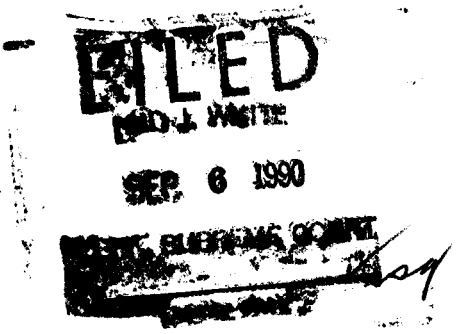

IN THE SUPREME COURT
OF THE STATE OF FLORIDA

HAVEN FEDERAL SAVINGS & LOAN ASSOCIATION,

Plaintiff, Appellant,

v.

LARRY F. KIRIAN, et al.,

Defendants, Appellees

CASE NUMBER 76,082

DCA-1 89-1538

REPLY BRIEF OF APPELLANTS

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STATEMENT OF THE FACTS AND COURSE OF PROCEEDINGS

Appellant, HAVEN FEDERAL SAVINGS & LOAN ASSOCIATION (hereinafter referred to as "plaintiff" or "appellant") disputes the defendant/appellees' statement that plaintiff's "recitation of the facts and course of proceedings below... contains critical omissions." (Answer Brief at p. 3). However, in the interest of brevity, plaintiff will only point out one specific area of appellees' response that appears to be in the nature of argument rather than a statement of fact. Plaintiff will also suplement its prior statement of facts with a brief history of Section 702.01, Fla. Stat.

Defendants claim that "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." Defendant also claims that plaintiff "inconsistently acknowledges at Page 2 of the same instrument that "Defendants' two affirmative defenses sought recoupment or, alternatively, rescission." Defendants misconstrues the point made. Plaintiff has pointed out and will continue to point out the same critical fact: Despite the fact that two affirmative defenses are set forth, they both seek the same relief. As stated by the Plaintiff at page 14 of its Initial Brief, "Defendants have stated unequivocally that they want the contracts involved rescinded and their money back".

Chapter 702.01, Fla. Stat., currently provides that:

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 shall, if tried, be tried to the court without a jury. (emphasis added)

The emphasized language was added to the statute in 1987. Prior to this, this section merely provided that:

> All mortgages shall be foreclosed in chancery, unless otherwise provided by statute.

The emphasized language is the portion of the statute in dispute. However, in the interest of consistency and brevity, this brief will, in general, follow the pattern established in the prior two briefs filed, and refer to Section 702.01, Fla. Stat., in its entirety rather than the specific portion of this section criticized by defendants.

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 reversed the action of the trial court based on two alleged errors. Application of statutory provisions it believed to be unconstitutional and the striking of defendants' affirmative defenses. Even if these actions of the trial court were error, they were not prejudicial to the defendants and did not, therefore, rquire reversal of the decisions of that court. Moreover, neither objection provides grounds for the decision of the District Court. The statute in question is constitutional and the striking of defendants' affirmative defenses was a permissible exercise ofjudicial discretion under Fla. R. Civ. P. 1.140(f). Finally, the language of the statute objected to by defendants should, even if unconstitutional, be adopted as a rule of civill procedure as it accomplishes valuable public policy goals. Thus, the decision of the First District Court of Appeals should be over turned and the decision of the trial court affirmed in all respects.

ARGUMENT

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

A. Severance of the Counterclaims Did Not Prejudice Defendants

Defendants completely misconstrue[1] the first part of Plaintiff's argument on this issue. Plaintiff does not, as implied by defendant at pages 6 and 7 of its Brief, seek to avoid the fact that the decision of the count below was based on Section 702.01, Fla. Stat., rather than Fla. R. Civ. P. 1.270(b). As stated in Plaintiff's summary of its argument under point I:

> 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.

(Initial Brief of Appellants at p. 6).

It is fundamental that reversible error is error that is prejudicial to the defendant. See, generally, 3 Fla. Jur. 2d, Appellate Review, Section 361 et. seq. Without prejudice, there is no error subject to review by the appellate court. Id. This

[1]The other possibility is that defendants wish to avoid an issue that is extremely relevant to this appeal - whether they suffered any real prejudice from the trial court's decision.

concept also rules when constitutional issues are considered. See, School Board of Broward County v. Price, 362 So. 2d 1337,40 (Fla. 1978) (Severance of insurer was error, but was harmless; thus, the decision below was sustained).

In the instant case defendants were not prejudiced by the decision of the trial court. Notwithstanding their arguments to the contrary, it is clear they had no desire to keep the property in question. (See, A-6). They wanted the contracts rescinded and their money returned. Id. While they seek this relief, however, they apparently believe they are entitled to retain and utilize the property in question without payment on their mortgages.[2] The action of the trial court in severing defendants' counterclaims did not prejudice defendants. They will still be able to assert and prove those claims in a separate action[3]. It merely keeps them from unfairly retaining property they have already announced their intention and desire to relinquish.

---

[2]One of the grave and unfortunate ills Section 702.01, Fla. Stat., remedies is the power of a mortgagor, merely by interposing a counterclaim or affirmative defense capable of surviving a motion for summary judgement (not a difficult task) to retain and use mortgaged property without payment or the mortgage in question. In a somewhat analogous context, involving landlord and tenant, this problem has been remedied by statute in a somewhat different manner. See, Section 83.60(2) and 83.61, Fla. Stat.

[3]Cf, Padgett v. First federal S & L Ass'n., 378 So. 2d 58, 64 (1st DCA 1979), wherein the court stated:

> [W]e 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 nonjury trial of the foreclosure actions preceding trial of these other issues.

B. The First District Court of Appeals Erred in Holding Section 702.01, Fla. Stat., Unconstitutional.

Defendants' argument that Section 702.01, Fla. Stat., is clearly procedural in nature ignores the difficulty in drawing this distinction recognized by both this Court and the commentators reviewing this issue. See, e.g., Markert v. Johnson, 367 So. 2d 1003, 1004 (Fla. 1979); The Rulemaking Power of the Florida Supreme Court, XXIV U. FLA. L. REV. 87 (1971); Means, The Power to Regulate Practice and Procedure in Florida Courts, XXXII U. FLA. L. REV. 442, 468 (1980). Inherent Powers of Florida Courts, 39 U. MIAMI L. REV. 257, 276 (1985).

The four cases discussed and relied upon by both plaintiff and defendants in this cause embody this difficulty. In School Board of Broward County v. Surette, 281 So. 2d 481 (Fla. 1973), this Honorable Court struck a statute forbidding mention of insurance coverage in trials against political subdivisions of the state. The decision was based on the conflict between the statute in question and Fla. R. Civ. P. 1.210(a) and 1.270(b).[4] However, in the next case cited by the parties, School Board of Broward County v. Price, 362 So. 2d 1337, 1339 (Fla. 1978), wherein this court dealt with a "substantially identical" statute, this Court expressly receded from its decision in Surette, stating:

> The prohibition of the statute is surely procedural, just as it is substantive. But, given the Legislature's power to

[4]According to at least one commentator, this decision did not specifically adopt the viewpoint that rulemaking under Florida's current constitution is an exclusive judicial prerogative. See, XXXII U. FLA. L. REV. 442, 456.

> enact the prohibition as a condition to waiving sovereign immunity and, in order to honor the separation of powers in this State's constitutional scheme, we will not strike it from the general law. The proviso is constitutional.

A similar pattern was followed by this Court in the next two cases. In Markert v. Johnson, 367 So. 2d 1003, (Fla. 1978), this court struck down a statute allowing joinder of insurers only after rendition of a verdict or entry of a final judgement. However, in VanBibber v. Hartford Acc. & Indem. Ins. Co., 439 So. 2d 880 (Fla. 1983), dealing with a slightly revised version of the same statute,[5] this court arrived at the opposite conclusion. In Price, it was found that the legislature was empowered to condition the right to sue the state on certain criteria that might otherwise be considered procedural in nature. In VanBibber, the legislature "as a condition precedent to having a third-party interest in an insurance policy [required] the vesting of that interest by judgement." 439 So. 2d at 882. It also specifically authorized "a contractual provision prohibiting direct third party suits..." Id. at 883.

Defendants take the position that these cases prescribe a rigid rule by which every questionable statute is to be measured (See, Answer Brief at p. 13). In accordance with this standard, the statory language under review can be only one or the other, substantive or procedural. In fact, the decisions of this Court

[5]The revised version has been described as "virtually the same statute". 39 U. MIAMI L. REV. at 277.

and the analyses of those commentators that have reviewed the problems inherent in this interface of judicial and legislative power indicate that the distinction between the two is anything but clear and is, at times, virtually impossible to make. See, e.g., XXXII U. FLA. L. REV. at 468; 39 MIAMI L. REV. at 376-77. Thus, it is quite possible to have a statute that, while substantive in nature, has procedural aspects. See, School Board of Broward County v. Price, 362 So. 2d at 1339. Likewise, it is quite possible to have a rule with substantive aspects. The Court acknowledged this fact in VanBibber, when it found its own policy determinations overruled by those of the legislature, and stated:

> While this Court may determine public policy in the absence of a legislative pronouncement, such a policy must yield to a valid, contrary legislative pronouncement.

439 So. 2d at 883.

In this case, the legislature has sought to alleviate some of the problems faced by mortgage lenders by requiring counterclaims (if not separately filed) to be severed for prosecution. The legislation in question is undoubtedly aimed at the regulation of a substantive right -i.e.- the right of a mortgagor to assert a claim against the mortgagee. It is not, either on its face or on the history of the legisltion in question, aimed at usurping the power of the Supreme Court to regulate practice and procedure before the courts of this state. It is aimed at the mortgagor, and it merely conditions and regulates the exercise of a "substantive right". Cf. Markert v. Johnson, 367 So. 2d at 1004. It should

not, therefore, be stricken as an impermissible legislative incursion into the rights of the judiciary.

However, even if this Honorable Court does not agree with the foregoing arguments, plaintiff believes that it should adopt and incorporate the elements of Section 702.01, Fla. Stat., under review in this case in a rule of civil procedure. Defendants argue that this course of action would deprive them of their right to trial by jury of all elements so triable. (See, Answer Brief at pp. 15-17). Defendants' argue, at page 17 of their brief, that:

> 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. 3d. DCA 1982) is not distinguishable from the case at bar. (emphasis added).

Plaintiff disagrees with this analysis. First, Spring v. Ronel is distinguishable on its facts. It involved a second mortgage, and there is no indication in the case that the mortgagor had any intention or desire to relinquish the property in question. See, 421 So. 2d at 46,. In the instant case, a first purchase money mortgage is under consideration, and defendants have, in their affirmative defenses, requested "rescission of all the documents executed in the course of the transaction", including those by which they purchased the property.

Second, defendants will not suffer the loss of their right to jury trial on the relevant issues. Foreclosure will not affect or

determine the issues preserved for determination by jury trial in the severed action. The issues defendants seek to preserve for a jury's determination are not pending in the foreclosure action. Thus, how could they be heard or determined. Further, there is no problem in delaying the foreclosure sale, or (preferably from plaintiff's point of view) preserving the proceeds of the foreclosure sale until disposition of the issues reserved for jury trial. See, Padgett v. First Federal S & L Ass'n, 378 So. 2d at 65 (footnote 8 recognizes the right of the trial judge, in proper circumstances, to "withold equitable relief until disposition of all issues"); cf., Fla. R. Civ. P. 1.600 (which would allow deposit with the court of moneys derived from a foreclosure sale).

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

Defendant's initially argue that "Haven has failed to comply with the jurisdictional requirements prerequisite to any consideration of [this] second and independent questions." (Answer Brief at p. 18). This argument is bolstered by two assertions. First, that "Section 702.01 was in no manner implicated in the determination as to the striking of affirmative defenses and the entry of summary final judgement." Id. Second, that "Haven has offered no citation whatsoever "to show that the decision regarding affirmative defenses" expressly and directly conflicts with the decision of another district court of appeal or of the supreme court on the same question of law." Id.

These arguments against the Court's consideration of the second issue on appeal are, however, easily met. As noted by defendants, Fla. R. App. p. 9.040(a) provides that "[i]n all proceedings a court shall have such jurisdiction as may be necessary for a complete determination of the cause." As stated in the Committee notes:

> This provision is intended to guarantee that once the jurisdiction of any court is properly invoked, the court may determine the entire case to the extent permitted by substantive law.

There is, therefore, nothing impermissible or even unusual in this Court's determination of all issues involved in a case in which it has validly acquired or taken jurisdiction. Thus, in Whitten v. Progressive Casualty Ins. Co., 410 So. 2d 501 (Fla. 1982), this Honorable Court disposed of numerous non-constitutional issues involved in the case after finding it has jurisdiction pursuant to Article V of the Florida Constitution to review a decision of the trial court upholding the constitutionality of Section 57.105, Fla. Stat. (1979). Further, this court has held that all that is necessary to invoke the jurisdiction of the Court to hear and decide all the issues of a case is "a genuine issue, fairly and in good faith presented, as to the validity of the statute in controversy and its applicability in the case under consideration." P.C. Lissenden Co. v. Board of County Commissioners, 116 So. 2d 632, 636 (Fla. 1960); see, also, Mournier v. State, 178 So. 2d 714, 715 (Fla. 1965). This burden has certainly been met. Thus,

the other issue presented by the decision of the First District is also properly subject to review in this court.

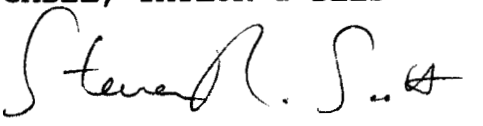
Defendant next moves to the substance of the trial court's decision regarding severance. Defendant first argues that "Haven conceded that... issues of fact were present with respect to the affirmative defenses." (Answer Brief at p. 19). This is not the point. The argument Plaintiff has made and continues to make is that the issues presented by the affirmative defenses were essentially (if not identically) the same issues presented by the defendant's counterclaim. Defendants then argue, by seeking to cast the decision of the trial court in terms redolent with implications of over-reading and arbitrariness, that they have suffered some grave prejudice from the actions of the trial court in striking affirmative defenses. (Id. at p. 19-22). This is not true. As previously noted, defendant will be able to proceed to trial upon all the same issues and obtain the same relief they seek in their affirmative defenses in the trial of their counterclaim. Thus, there has been no prejudicial error requiring reversal of the trial court's decision.

CONCLUSION

The decision of the trial court should, by reason of the foregoing, be sustained.

Respectfully submittted,

GABEL, TAYLOR & DEES



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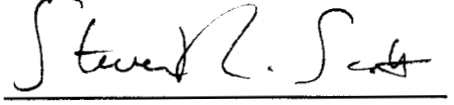
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been submittted by United States Mail to Alan K. Smith, Esquire, 918 Drew Street, Suite A, Clearwater, Florida 35615 and Lawrence J. Hamilton, II, Esquire, 2000 Independent Square, Jacksonville, Florida 32202, this 4th day of September, 1990.



Attorney