IN THE SUPREME COURT OF FLORIDA

TITUSVILLE ASSOCIATES, LTD., etc., et al.,

Petitioners/Defendants,

vs.

BARNETT BANKS TRUST COMPANY, N.A., etc.,

Respondent/Plaintiff.

CASE NO. 76,427

ON REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT (CASE NO. 89-830)

PETITIONERS' REPLY BRIEF

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POINT ONE

THE TRIAL COURT PROPERLY REFUSED TO CONSIDER BARNETT'S MOTION FOR SUMMARY JUDGMENT BECAUSE BARNETT'S NOTICE OF HEARING ON THE MOTION WAS UNTIMELY.

Barnett[1] misstates the law at page 14 of its answer brief, where it represents that:

> the district courts in this state are in uniform agreement, with the sole aberrant exception of Wakefield Nursery v. Hunter, supra, that the clear requirements of Rule 1.510 are met when a Motion for Summary Judgment is served 20 days before a hearing thereon.

The decisions cited by Barnett, Norton v. Gibson, 532 So.2d (Fla. 1st DCA 1988), Brock v. G.D. Searle and Co., 530 So.2d 428 (Fla. 1st DCA 1988), Fruhmorgen v. Watson, 490 So.2d 1032 (Fla. DCA 1986), and Gold v. El Camino Mortgage Corp., 491 So.2d 322 (Fla. 3d DCA 1986), hold that it is error to grant summary judgment on a motion served less than 20 days prior to the hearing. The decisions do not hold that providing less than 20 days notice of the hearing is proper. Barnett's argument is apparently that, because the decisions only addressed the service of the motion, the notice of hearing is, implicitedly at least, not subject to the 20-day requirement of Rule 1.510. However, by holding that a motion served less than 20 days before the hearing is untimely, these decisions in no way (implicitly or otherwise) hold that less than

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[1]All defined terms and abreviations are the same as denoted in Petitioners' Initial Brief on the Merits. Also, in order to avoid confusion, Barnett's answer brief was incorrectly designated as "Reply Brief."

20 days notice of a hearing meets the requirements of Rule 1.510. Barnett's argument is fallacious and simply not supported by the case law.

Moreover, as explained in Levitt's and Titusville's initial brief, Wakefield Nursery v. Hunter, 443 So.2d 465 (Fla. 4th DCA 1984), is neither a sole nor aberrant decision. Indeed, until the decision of the First District below, 560 So.2d 1337 (Fla. 1st DCA 1990), no Florida appellate court had held that less than 20 [formerly 10] days notice of a summary judgment hearing satisfied the requirements of the rule.

Contrary to Barnett's assertion on page 22 of its brief, the Wakefield rule does provide more uniformity and certainty to summary judgment proceedings and does not "fly in the face of reality." (Answer Brief at p. 22). Under Wakefield's construction of Rule 1.510, a nonmoving party knows, at a minimum, that it will have 20 days advance notice that the motion is being called up for hearing. This notice requirement is significant in practical experience since it defines the date by which a party must marshall its resources and serve papers opposing the motion. In this instance, Barnett knew with certainty at the time it served its summary judgment motion that the only date on which its motion could be heard was the trial date. Yet, Barnett still purposely waited 10 days before providing petitioners with the notice of hearing. The one question which Barnett painstakingly avoided in its answer brief is: Why did it wait 10 days before providing notice to petitioners?

Barnett is also wrong in its argument on page 20 of its answer brief that the federal decisions cited by the petitioners are contrary to Wakefield and in accord with the decision of the First District below. The federal decisions addressed by Barnett in fact hold that notice of either the hearing date or the date on which the motion will be decided is subject to the 10-day requirement of Rule 56, Federal Rules of Civil Procedure.

For example, in Moore v. State of Florida, 703 F.2d 516 (11th Cir. 1983), the court reversed the summary judgment on the ground that it violated the 10-day notice requirement of Rule 56(c). The motion for summary judgment was served in November 1980, but granted by the court on February 5, 1981. Thus, the motion had been served for over two months (much less 10 days as minimally required by Rule 56(c)) prior to the date on which the court rendered its decision.

In Milburn v. United States, 734 F.2d 762 (11th Cir. 1984), the court acknowledged that Rule 56(c) did not require an oral hearing, but still reversed a summary judgment because the adverse party was entitled to notice that the matter would be taken under advisement by a date certain and that such notice was subject to the 10-day limit of Rule 56(c). In Milburn, the defendant's motion for summary judgment was served on December 30, 1982, and the plaintiff even served a written response. The trial court did not grant the defendant's motion until March 22, 1983. The summary judgment was nevertheless held improper because it was entered

without 10-days notice of hearing or of a date certain on which the motion would be decided.

Barnett is simply wrong in asserting that the Eleventh Circuit interprets the 10-day notice provision of Rule 56(c) as pertaining only to the motion and not to notice of the date on which the motion would be heard or decided. The federal court decisions in fact are consistent with, and offer strong support in favor of, Wakefield.

POINT TWO

ANY ERROR IN REFUSING TO HEAR BARNETT'S MOTION WAS HARMLESS BECAUSE BARNETT WAS NOT ENTITLED TO A SUMMARY JUDGMENT.

A. THE DISTRICT COURT MISAPPLIED THE LAW GOVERNING LETTERS OF CREDIT; THE DECLARATORY JUDGMENT ENTERED BELOW DOES NOT IN ANY WAY IMPAIR THE INDEPENDENCE OF THE LETTER OF CREDIT FROM THE UNDERLYING TRANSACTION.

Barnett again distorts the argument of Titusville and Levitt regarding the independence of the Letter of Credit from the underlying transaction. It bears repeating that the bank that issued the Letter of Credit is not a party to this litigation. Titusville and Levitt never argued that, if Barnett drew on the Letter of Credit, the issuing bank would not be liable. Clearly, the bank's obligation to the beneficiary, Barnett, would not be affected by the resolution of this case.

As between Petitioners, Levitt and Titusville, and Barnett, the Letter of Credit represented a means of paying obligations assumed by Petitioners--it did not create or represent any new or

additional obligation of either Titusville or Levitt. If Barnett received $750,000 directly from Levitt for application to operating deficits, and drew on the Letter of Credit to obtain funds to apply to operating deficits, Barnett would receive funds caused to be paid by Levitt or Titusville for operating deficits in an amount in excess of the $750,000 limit of the Guarantee. Thus, Barnett would presumably be subject to an action for restitution or money had and received for return of the excess payment.

The argument of Titusville and Levitt is well illustrated by In re Air Conditioning, Inc. of Stuart, 72 B.R. 675 (S.D. Fla. 1987), affirmed except as to attorneys fees award, 845 F.2d 293 (11th Cir. 1988), a case quoted and relied upon by Barnett at page 26 of its answer brief. In that decision, a bankruptcy debtor made an allegedly preferential transfer consisting of an assignment of a certificate of deposit to a bank for the purpose of having that bank issue a letter of credit to the creditor of the debtor. The bankruptcy court entered a judgment nullifying the assignment of the certificate of deposit, nullifying the letter of credit and ordering the bank to return the certificate of deposit to the debtor. On appeal, the district court reversed in part, holding that the portion of the bankruptcy court's order nullifying the letter of credit was contrary to the settled law regarding independence of letters of credit from the underlying transactions. However, the district court held that funds obtained by the creditor from draws on the letter of credit would be subject to recovery as a preferential transfer:

> Since the creditor LSC received the benefit of the letter of credit as a preferential transfer, the trustee should be able to recapture from LSC the payment made pursuant to the letter of credit to the extent of the value of the certificate of deposit transferred to AMERICAN BANK without nullifying the letter of credit or the certificate of deposit itself. While this procedure may appear to be revering form over substance, as LSC will still "be out" the $20,000 under the facts of this case, LSC was at least assured that they would receive payment under the letter of credit. It is only the preference risk which may not be eliminated under the facts and circumstances of this case. Thus, this procedure only places the burden of repayment of the monies paid pursuant to the letter of credit where it belongs, upon LSC who received the preferential transfer to the detriment of other creditors of ACI, not upon AMERICAN BANK who issued the letter of credit.
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> 72 B.R. at 662.

Just as the decision in In re Air Conditioning, Inc., the trial court's declaratory judgment below in no way infringes upon the law governing the independence of letters of credit. The declaratory judgment does not purport to cancel or nullify the Letter of Credit. The issuing bank is not a party and nothing in the judgment thus impairs the bank's obligation to pay on the letter. In In re Air Conditioning, Inc., the fact that the letter of credit could not be nullified did not mean that funds obtained by draws on the letter of credit by the creditor/beneficiary could not be subject to repayment to the party who obtained and opened the letter of credit. Accordingly, the effect of the trial court's declaratory judgment below is that, if Barnett had already obtained

full payment under the $750,000 Guarantee prior to drawing on the Letter of Credit, Barnett would still be able to draw against the Letter of Credit, but would also be subject to claims by Titusville or Levitt for return of the proceeds, just as was the creditor subject to a similar recovery action in In re Air Conditioning, Inc.

In its answer brief, Barnett refers to Levitt's and Titusville's discussion of supplemental relief at page 26, n.8 of Petitioners' initial brief as evidence that Petitioners' argument is contrary to the law regarding the independence of letters of credit. (See Barnett's answer brief at pp. 27-28, 31 n.8). However, supplemental relief has never been formally requested or ruled on by the trial court in this action and is therefore not the subject of this appeal. Consideration of supplemental relief would require a determination of whether the $750,000 Operating Deficit Guarantee had been satisfied. At Barnett's own urging, neither side offered evidence at trial concerning Levitt's and Titusville's performance of the $750,000 Guarantee. Thus, whether it would be appropriate to grant supplemental relief barring Barnett from drawing on the Letter of Credit is not before this Court. Indeed, such relief may never be necessary or sought by Titusville or Levitt in that an actual or potential action for restitution against an institution such as Barnett may well prove to be a perfectly adequate remedy to avoid an overpayment by Titusville or Levitt.

Barnett's argument on the independence of letters of credit misses the point at issue: whether funds obtained by Barnett by draws on the Letter of Credit would count against or act to satisfy or discharge the obligations under the $750,000 Guarantee. All of Barnett's legal authorities (see Respondent's Answer Brief at pp. 27-28), dealt with the liability of an issuing bank which was a party to the litigation. Barnett's argument is in the end a distortion of Levitt's and Titusville's positions and unquestionably helped lead the District Court below into error.

B. THE TRIAL COURT PROPERLY CONSIDERED EXTRINSIC EVIDENCE BECAUSE THE LANGUAGE OF THE OPERATING DEFICIT GUARANTEE, AS APPLIED TO POTENTIAL DRAWS BY BARNETT UNDER THE LETTER OF CREDIT, EITHER COMPELLED A JUDGMENT FOR PETITIONERS OR WAS AT LEAST AMBIGUOUS.

Barnett argues that the Guarantee was a purely personal obligation of Levitt, and it was therefore wrong to allow funds from the Letter of Credit obtained by the partnership, Titusville, to count against Levitt's $750,000 obligation under the Guarantee. Although Barnett quoted liberally from the Guarantee in its answer brief, it failed to address the key provision of the Guarantee where it is stated:

> This guarantee of operating deficits shall not require Guarantor (or Borrower) to advance more than $750,000 under the Guarantee, exclusive of any amounts that may be available for operating deficits from capital Bond Proceeds.

"Borrower" was defined as Titusville. Thus, advances made by Titusville, and not just those by Levitt individually, are expressly included in the Guarantee. If Borrower, Titusville, advanced $750,000 directly to Barnett, there would be no question but that the Guarantee's obligation, including any obligation of Levitt individually, would be satisfied. The only question, therefore, is whether funds obtained by Barnett from draws on the Letter of Credit would not count because those funds were obtained through the medium of the Letter of Credit and not through direct cash payments. Here again, the language of the Guarantee itself answers the question. The only source or medium of payment by either Levitt, guarantor, or Titusville, Borrower, which is excluded from satisfying the Guarantee, is Bond Proceeds. Accordingly, funds advanced by Levitt or Titusville through any means other than Bond Proceeds should count.

Titusville's arranging for the Letter of Credit is equivalent to Titusville's advancing money directly to Barnett. In In re Air Conditioning, Inc., 845 F.2d 293 (11th Cir. 1988), the debtor assigned to the bank a certificate of deposit to induce issuance of a letter of credit to a creditor of the debtor. In defending an adversary proceeding to recover an alleged preferential transfer, the creditor argued that the debtor's assignment of the certificate of deposit was to the bank for its benefit, and thus there had not been a transfer of the debtor's property to, or for the benefit of, the creditor. The court rejected this argument, holding that:

> although the transfer of the certificate of deposit (the debtor's property) was made to American Bank it was clearly for the benefit of LSC [the creditor] because it indirectly secured payment of an undersecured antecedent debt owed by ACI [the debtor].
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> 854 F.2d at 296.

Similarly, opening the Letter of Credit was for the benefit of Barnett, and funds drawn from the letter would be caused to be paid or advanced by Levitt or Titusville.

Petitioners, Levitt and Titusville, are not claiming a right of set-off for funds received by Barnett from another source not identified in the Guaranty, as Barnett argues at page 30 of its answer brief. Any funds Barnett obtains from the Letter of Credit will have been advanced by Titusville or Levitt themselves, and not a third party or separate source, as was the case in the decisions cited Barnett (See pages 30-31 of Barnett's answer brief. Moreover, because funds obtained from the Letter of Credit are not derived from Bond Proceeds, those funds count against and serve to satisfy the Guarantee. The testimony concerning the Letter of Credit and how that functioned as security or a medium of payment in no way contradicted or varied the terms of the Guarantee or Letter of Credit and was therefore properly considered by the trial court.

POINT THREE

THE DECLARATORY JUDGMENT BELOW WAS SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE AND SHOULD THEREFORE BE AFFIRMED.

On page 38 of its answer brief, Barnett argues that:

> The fundamental flaw in petitioners' position is quite simply that the trial court erred in receiving any extrinsic evidence on the parties' subjective intent . . . .

For the reasons stated, the trial court properly received extrinsic evidence relating to the purpose of the Operating Deficit Guarantee and Operating Deficit Letter of Credit. However, Barnett's actions at trial amounted to a waiver of any argument that the trial court improperly accepted extrinsic evidence and, if error was committed by the court in so admitting such evidence, that error was not only invited, but welcomed by Barnett.[2] See Ross v. Florida Sun Life Ins. Co., 124 So.2d 892 (Fla. 2d DCA 1960).

Why did Barnett devote its entire case in chief to admitting extrinsic evidence on the parties' subjective intent? Why did Barnett not object when Levitt and Titusville later sought to admit extrinsic evidence of their own? Barnett's only response to the

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[2] Prior to trial, Barnett acknowledged that the dispositive issue was a question of fact. For example, Barnett stipulated in Section c(1) of the pre-trial stipulation, which specifically addressed Section 4(c) of the trial court's order setting the case for trial and requiring the parties to set forth the remaining factual issues that the remaining factual issue to be tried was the very same factual issue that is the subject of this appeal. In addition, even Barnett's counsel at trial told the Court in its opening statement that: "the evidence is going to show that this is basically a factual case." (emphasis added) (Aug. T. at p. 15).

foregoing questions is contained on page 39 of its answer brief:

> Once the trial court refused to even consider the trustee's Motion for Summary Judgment and proceeded to take parol evidence concerning the "intent" of the parties, the trustee had no choice whatsoever but to present its evidence.

Barnett's argument does not withstand analysis. First, the trial court refused only to consider Barnett's motion for summary judgment; it did not deny the motion. Therefore, the trial court left open the opportunity for Barnett to argue that the documents alone adequately dispose of the issue. Even if the trial court had denied the motion, Barnett could have still relied solely on the language of the documents in order to preserve its argument.

Second, the trial court did not "proceed" to take parol evidence after refusing to consider Barnett's motion. Barnett, as the first party to present evidence at trial, "proceeded" to offer parol evidence in its case in chief.

Third, Barnett did have a choice. It could have offered into evidence the Operating Deficit Guarantee and the Operating Deficit Letter of Credit,[3] and then rested its case. Barnett then would have forced petitioners to be the first party to seek to offer extrinsic evidence. If the petitioners had chosen to do so, Barnett then could have objected. If the trial court had admitted such evidence, Barnett itself then could have sought to admit extrinsic evidence in its rebuttal case. At that point, any

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[3] In fact, both documents were stipulated into evidence before the start of Barnett's case.

potential objections by petitioners would have been fruitless since petitioners would have already opened the door to the admission of such evidence.

The real reason why Barnett chose not to try its case in this manner is because it knew that the most persuasive case it could present was one premised on evidence extrinsic to the plain language of the Operating Deficit Guarantee and Letter of Credit. In sum, Barnett made a purposeful and strategic decision at trial to admit extrinsic evidence. Barnett's strategy simply backfired because its theory was unpersuasive in light of all of the evidence.

Conclusion

For the reasons stated, this Court should quash the decision of the District Court below and reinstate the final declaratory judgment of the trial court.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been furnished, by mail, to William S. Graessle, Esq., 3300 Barnett Center, Jacksonville, Florida 32202, this 1st day of March, 1991.

Attorney

MKF/CAJ/765