

IN THE SUPREME COURT OF FLORIDA

CASE NO: 76,931

FILED

30 J. WHITE

NOV 19 1990

CLERK SUPREME COURT

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JUAN VICENTE PEREZ SANDOVAL,

Petitioner,

vs.

BANCO DE COMERCIO, et al.,

Respondent.

PETITIONER'S
INITIAL BRIEF ON DISCRETIONARY JURISDICTION

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STATEMENT OF THE CASE AND OF THE FACTS

Review is sought of a decision rendered by the Third District Court of Appeals. A copy of the decision is contained in the appendix which accompanies this brief. References to such appendix shall be designated by use of the symbol "A" followed by the respective page number. All emphasis is supplied unless otherwise indicated.

Petitioners Juan Vicente Perez Sandoval and Sandy Bay Investment Co, were the Defendants in a lawsuit instituted by Banco de Comercio and others. The complaint did not plead entitlement to attorney's fees. (A, 2). Upon obtaining a judgment the Plaintiffs, Respondents, filed a motion for attorney's fees which was granted. Review was sought before the Third District. The Third District entered its decision which among other things held:

Appellee's prayed for attorney's fees and costs in a timely post judgment motion. They were not required to plead entitlement to attorney's fees in their complaint.

(A, 2).

The action of the trial court was thereupon affirmed.

POINT ON APPEAL

I

WHETHER THE DECISION RENDERED BY THE THIRD DISTRICT COURT OF APPEALS CONFLICTS WITH THIS COURT'S DECISION IN THE FOLLOWING CASES:

1. BLOUNT BROS. REALTY CO. V. EILENBERGER, 98 Fla. 775, 124 So. 41 (1929);
2. PRICE V. BODEN, 39 FLA. 218, 22 SO. 657 (1897);

3. CLOSE V. WEBSTER, 101 FLA. 838, 132 SO. 814 (1931);

4. BRITE V. ORANGE BELT SECURITIES, CO., 133 FLA. 266, 182 SO. 892 (1938);

5. C & C WHOLESALE, INC. V. FUSCO, 564 SO. 2D 1259 (FLA. 2D DCA, 1990).

SUMMARY OF ARGUMENT

This Court and the Second District in the cases cited above stand for the proposition that unless attorney's fees are requested in the pleadings (i.e., the Complaint, Answer, Counterclaim, etc.) a trial court is powerless to award them. The Third District, however, does not require that the claim be pled. Accordingly, the decision of the Third District is in conflict with this court.

ARGUMENT

We are not unmindful of the bent manifested by this Court in Finkelstein v. North Broward Hospital District, 484 So. 2d 1241 (Fla. 1986) and Cheek v. McGowan Electric Company, 511 So. 2d 977 (Fla. 1987) indicating that in an action the matter of attorney's fees need not be taken up until judgment is entered. Likewise, we are not unmindful of the observations made by the District Courts of Appeal to the effect that a request for attorney's fees need not be pled in the original suit papers but rather can be raised through post trial motions. e.g. Protean Investors, Inc. v.

Travel, etc., Inc., 519 So. 2d 7 (Fla. 3d DCA, 1987); Altamonte Hitch & Trailer Serv. Inc. v. U Haul Co. of Easternm Fla., 498 So. 2d 1346 (Fla. 5th DCA, 1986); Nour v. All State Pipe Supply Co., 487 So. 2d 1204 (Fla. 1st DCA, 1986); Coons v. Shriver, 429 So. 2d 27 (Fla. 2d DCA, 1983); Brown v. Gardens v. The Seat South Condominium Ass'n, 424 So. 2d 181, 182 (Fla. 4th DCA, 1983). However, it appears that this Court has never expressly taken this position. Historically, this Court visited the issue in Price v. Boden, 39 Fla. 218, 22 So. 657 (1897) in which it reversed an award of attorney's fees in a case where the pleadings did not contain a request for attorney's fees. There this Court stated:

In the bill filed by appellee Boden to enforce his lien, there is no claim for attorney's fees, and no allegation for such a demand against appellants. Under the default on the allegations of this bill, the allowance of an attorney's fee was, in our judgment, improper and should not have been allowed.

22 So. at 638.

In Blount Bros. Realty Co. v. Ellenberger, 98 Fla. 775, 124 So. 41 (1929) this Court again stated that:

When a recovery for attorney's fees is sought, the declaration should contain allegations of fact, appropriate to the terms of the particular noted sued on: (a) That the defendant promised to pay a fee, alleging what it was....(b) that the contingency indemnified against has happened and (c) either that plaintiff has paid, or has expressly agreed to pay, said attorney a specified sum for his services...

at 124 So. 42.

Likewise, in Close v. Webster, 101 Fla. 838, 132 So. 814

(1931) an award of fees was reversed with the observation that:

....There is no foundation in the allegations of the bill or in the proof to sustain the decree for solicitors' fees...It is nt alleged in the bill that the complainant had agreed to pay his solicitor a reasonable fee to be fixed by the court...

132 So. at 814.

Then, in Brite v. Orange Belt Securities, Co., 133 Fla. 266, 182 So. 892 (1938) this Court stated:

There was no allegation in the bill of complaint and no proof was offered that the plaintiff had paid, or obligated itself to pay, to its solicitors any fixed or determinable sum. It is true that the parties entered into a stipulation that "in the event it be determined that the Plaintiff would be entitled to recover attorney's fees, ten percent...shall be reasonable fee...; but this does not justify the Chancellor in awarding attorney's fees where there are no allegations in the bill...

The requirement of pleading was also recently passed upon by the Second District in C & C Wholesale, Inc. v. Fusco Management Corp., 564 So. 2d 1259 (Fla. 2d DCA, 1990) where the Court stated:

....We agree with the appellants that Fusco waived its right under the lease to seek fees by not specifically pleading them in its answer. Attorney's fees claimed pursuant to a contract must be pled;

at 1261.

Indeed, recently the 4th District Court of Appeal in Downs v. Stockman, 555 So. 2d 867 (Fla., 4th DCA, 1989) certified this question to this Court:

May a prevailing party recover attorney's fees authorized in a statute or contract by a motion filed within a reasonable time after entry of a final judgment, which motion raises the issue of that party's entitlement to attorney's fees for the first time. at 869

This question essentially raises the same point raised in this proceeding, i. e., need the request for fees be in the complaint or other pleadings to entitle a party to such relief.

Most of the District Court of Appeals, including the Third District in the particular case under review, have decided that claims for attorney's fees not be set forth in the pleadings. The decisions nonetheless conflict with decisions of this court and the Second District. It is necessary to resolve this conflict because it will permit a party when sued to determine or his or her exposure.

CONCLUSION

Based upon the arguments set forth, this Court should take jurisdiction of this matter and review the action of the Third District.

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BY: _____


ARNALDO VELEZ

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was on this 15th day of November, 1990, mailed to Raquel Rodriguez, Counsel for Respondent, 1221 Brickell Avenue, Miami, Florida 33131.

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