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SID J. WHITE

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CLERK, SUPREME COURT.

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IN THE FLORIDA SUPREME COURT
TALLAHASSEE, FLORIDA

EXCELETECH, INC.

Appellant,

vs.

S.W. WILLIAMS, et al,

Appellee.

5TH DCA CASE NO. 90-1716
FLORIDA SUPREME COURT
CASE NO. 78-123

INITIAL BRIEF OF
APPELLANT, EXCELETECH, INC.

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STATEMENT OF THE CASE AND FACTS

On July 19, 1989, Appellee, S.W. WILLIAMS, ("WILLIAMS") obtained a Final Judgment against John D. Brown ("BROWN") and Beth M. House ("HOUSE") for an amount in excess of Four Million Dollars (\$4,000,000) (App. 1-3). Appellant, EXCELETECH, INC. ("EXCELETECH"), was not a party to the underlying litigation and no final judgment has ever been entered against EXCELETECH.

After obtaining a Writ of Execution, Appellee filed a "Motion for Proceedings Supplementary" and sought the appointment of a Special Master (App. 4). This original Motion was accompanied by an Affidavit stating only that Writs of Execution were outstanding and unsatisfied (App. 5). No factual allegations were contained within the affidavit or Motion for Proceedings Supplementary.

On December 9, 1989, the trial court appointed a Special Master in accordance with Section 56.29(11), Florida Statutes (App. 6). However, no additional parties were impleaded and no findings of fact were made.

On February 20, 1990, Appellee filed a Petition in Proceedings Supplementary to implead EXCELETECH (App. 7-9). The Petition was unverified. The trial court did not examine Appellee or any other party. No Affidavit supporting the Petition was submitted. No facts were provided in support of the conclusory allegations contained within the Petition to Implead EXCELETECH. Attorneys for Appellee simply alleged a belief that Defendants BROWN and HOUSE, shareholders in EXCELETECH, might use EXCELETECH as a means of transferring assets in an attempt to avoid satisfying the

outstanding judgment. Appellee also alleged, without supporting affidavits or testimony, a belief that EXCELETECH had property of BROWN and HOUSE which should be applied toward satisfaction of the judgments. No facts were alleged in support of the "belief" and no property was identified within the Petition (App. 7-9).

In response to the Petition, EXCELETECH filed a Motion to Quash/Dismiss Appellee's Petition to Implead EXCELETECH in Proceedings Supplementary (App. 10-15). It was argued that the procedural requirements of Section 56.29, Florida Statutes, had not been met. It was also argued that no "fraudulent transfers" had been alleged because none existed and that no "property" belonging to JOHN BROWN or BETH HOUSE had been identified, within the pleadings, because none existed.

In spite of these arguments and objections, the trial court found that the impleader of EXCELETECH was proper (App. 34-44). On April 12, 1990, the Court issued an Amended order impleading and requiring additional Defendants to show cause (App. 43-45). This Amended Order impleaded EXCELETECH as a party in proceedings supplementary and ordered EXCELETECH to plead any defenses and to show cause, within twenty (20) days of service or process of the Order, why the "... alleged fraudulent transfers" should not be set aside and "... why the property allegedly in its possession" described therein should not be subject to execution by the Plaintiff (App. 43-44). At the time that this order was executed, the record clearly established that there had been no fraudulent transfers and that no property in the possession of EXCELETECH was

subject to execution. In spite of these facts, the fishing expedition began. The Order also directed EXCELETECH to appear before the Special Master, Ronald Sims, for examination at a time and place determined by the Special Master. A Summons, copy of the Order and a copy of the Petition were served on Appellant, EXCELETECH, INC. Appellant responded with a Motion to Quash Process (App. 46-49).

A hearing on EXCELETECH's Motion to Quash Process was conducted on July 10, 1990 (App. 60-65). At this hearing, the trial court decided that existing case law would not be followed. "I'm not going to do it. If I'm wrong, tell the Fifth to say it again" (R. 65).

On July 20, 1990, the Court entered an Order denying EXCELETECH's Motion to Quash Process (App. 67-68). A timely Notice of Appeal was filed by EXCELETECH, INC. on August 17, 1990 (App. 69-70) and the required briefs were subsequently submitted. On October 16, 1990, EXCELETECH filed a timely Request for Oral Argument (App. 71-72). On October 29, 1990, the Fifth District Court of Appeals ordered, sua sponte, that oral argument be dispensed with (App. 73) and on May 16, 1991, issued an opinion affirming the trial court's Order Denying EXCELETECH's Motion to Quash Process. (App. 74-81). Within the opinion, it is noted that the case law cited by EXCELETECH is directly on point and supports its argument (R. 75). In spite of this fact, the Appellate Court receded from three prior decisions, abandoned case law which has been followed for more than ten years and declared itself to be in

direct conflict with the First District Court of Appeals (R. 74-81). A timely Notice to Invoke Discretionary Jurisdiction was filed on June 14, 1991 (App. 82-83).

SUMMARY OF ARGUMENT

EXCELETECH's Motion to Quash Process should have been granted because the trial court improperly impleaded EXCELETECH in proceedings supplementary without regard to due process of law. Appellee failed to establish, and could not have established, a prima facie case, through testimony under oath, affidavit or sworn motion, that EXCELETECH held property subject to their claim before EXCELETECH was impleaded. Appellee merely filed an unverified petition without supporting affidavits alleging only an unsubstantiated belief that BROWN and HOUSE, shareholders in EXCELETECH, may use EXCELETECH as a means of transferring assets to avoid satisfying the underlying judgment along with the unsubstantiated belief that EXCELETECH had property of BROWN and HOUSE, apparently subject to execution. No factual basis was offered in support of these beliefs. Neither the trial court nor the special master examined the Appellee prior to the issuance of the amended order impleading EXCELETECH.

EXCELETECH was impleaded and ordered to show cause why its unidentified property should not be taken away by the creditor in this case when no fraudulent transfers were alleged and no specific property held by EXCELETECH was subject to execution. This error was compounded by the fact that the order impleading EXCELETECH

specifically failed to set forth any findings as to specific assets or transactions to which EXCELETECH could have responded to in writing prior to further proceedings as required by Florida law.

In ordering EXCELETECH to be impleaded in proceedings supplementary, the trial court completely ignored existing Florida case law. The trial court took it upon itself to disregard the well-established procedure to implead third parties in proceedings supplementary. This procedure was implemented to protect the rights of third parties in proceedings supplementary and it has been repeatedly followed by the Florida District Courts of Appeal.

The party seeking supplementary proceedings against third parties is responsible for ensuring compliance with the procedural requirements. Since Appellee failed to follow the appropriate procedure to implead EXCELETECH, the Motion to Quash should have been granted. The trial court was obligated to follow existing Florida law. A third party is entitled to know the nature of the accusations against that party, and the order denying EXCELETECH's Motion to Quash must be reversed.

ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING THE MOTION TO IMPEAD EXCELETECH, INC. IN PROCEEDINGS SUPPLEMENTARY BECAUSE APPELLEE FAILED TO FOLLOW THE STATUTORY PROCEDURE REQUIRED BY SECTION 56.29, FLORIDA STATUTES.

Supplementary proceedings are governed by Section 56.29, Florida Statutes. As a matter of law, prior to impleading any party, the trial court should conduct an examination of the defendant in execution or appoint a Master to do this for it. Section 56.29(2), Florida Statutes. If the examination establishes the judgment creditor's claim to property in the hands of third parties, the trial court should then issue an Order to Show Cause setting forth the findings of specific assets or transactions to which the third parties can respond in writing prior to further proceedings.

A majority of Florida appellate courts have held that a preliminary showing must be made before a third party may be impleaded in proceedings supplementary. Infante v. Jacksonville Bows Football, LTD., 559 So.2d 406,407 (Fla. 1st DCA 1990), Conway Meats, Inc. v. Orange Avenue Partnership, 440 So.2d. 674, 676 (Fla. 1st DCA 1983), Wieczoreck v. H & H Builders, Inc., 450 So.2d. 867,871 (Fla. 5th DCA 1984), affirmed, 475 So.2d. 227, (Fla. 1985), Machado v. Foreign Trade, Inc., 544 So.2d 1061,1062 (Fla. 3rd DCA 1989). Likewise, this Court approved a procedure requiring a prima facie basis for impleader in State ex rel. Phoenix Tax Title Corp.

v. Viney, 163 So. 57,61 (Fla. 1935).

Additionally, it appears from the language in Section 56.29, Florida Statutes, that the legislature intended to require such a preliminary showing before impleading a third-party defendant. Section 56.29(4), Florida Statutes, requires the examination of the judgment debtor as to "all matters and things pertaining to the business and financial interests of defendant which may tend to show what property he has and its location." This language clearly shows the intent of the legislature to require a prima facie showing that the proposed third-party defendant is in possession of disputed assets before impleading a third party into proceedings supplementary.

Although proceedings supplementary are governed by Section 56.29, Florida Statutes, this section does not provide the procedural requirements to be followed in order to implead third parties. Therefore, the procedure for adding third-party defendants into proceedings supplementary has been established in Florida by case law.

In Robert B. Ehmann, Inc. v. Bergh, 363 So.2d 613 (Fla. 1st DCA 1978), the First District Court of Appeals determined that in order to implead third-party defendants, a judgment creditor must: (1) serve the motion for impleader, specifying the creditor's claims against the third-party defendants, and (2) establish at hearing, by making a prima facie case, through testimony under oath, that the third-party defendants hold assets which are subject to the creditor's claim, Id at 614. This procedure has been

followed in Wieczoreck, supra, Conway Meats, supra, Ruddy v. Ashton, 554 So.2d 557 (Fla. 5th DCA 1989) and Timothy Dunn Associates, Inc. v. Seligman, 557 So.2d 207 (Fla. 5th DCA 1990). Under Ehmann, the judgment creditor need not prove his allegations at the hearing on the motion for impleader, but must only establish "a prima facie case, by testimony under oath," that assets held by the third parties are subject to the satisfaction of the creditor's judgment. Id at 615.

By requiring an examination of the judgment creditor, the Ehmann procedure safeguards the due process rights of those who were not parties to the underlying dispute which gave rise to the judgment. The opinion of the Fifth District Court of Appeals, in the case at bar, ignores the due process rights of all proposed third-party defendants in this and in all future litigation.

In the case under consideration, the Fifth District Court of Appeals receded from its previous decisions in Dunn, Ruddy, and Wieczoreck, to the extent those cases required the examination of the judgment creditor or the filing of a sworn motion by the judgment creditor in proceedings supplementary. The Fifth District Court of Appeals no longer requires a judgment creditor to show, by testimony under oath, whether a third party actually holds property of the judgment debtor. Under this procedure, judgment creditors would be allowed to implead third parties into proceedings supplementary by utilizing unverified petitions with absolutely no supporting affidavits. Consequently, anyone could be dragged into legal proceedings and forced to justify the ownership of their

property and business interests supported by an unverified petition based upon a judgment creditor's mere suspicion that the third party may have or may receive property belonging to the judgment debtor. To implead parties under such circumstances would be unduly intrusive into the private affairs of strangers to the underlying dispute.

The opinion, in the case at bar, also notes that Section 56.29(4) only requires the examination of the judgment debtor. However, although Section 56.29(4) addresses only the examination of the judgment debtor, it does signify the need to establish a preliminary showing before a third party could be impleaded. If this preliminary showing cannot be established through the examination of the judgment debtor, then it must be established by the judgment creditor through testimony under oath, sworn motion or affidavit.

The party seeking supplementary proceedings is responsible for complying with the necessary procedures. Conway Meats, 440 So.2d at 674, 676. In the case now under consideration, Appellee did not follow the procedures required by due process of law. Appellee merely filed an unverified petition in proceedings supplementary to implead EXCELETECH alleging only an unsubstantiated belief that Defendants, BROWN and HOUSE, "may" use EXCELETECH as a means of transferring assets in an attempt to avoid satisfying the Appellee's judgment along with the unsubstantiated belief that EXCELETECH had unidentified property of BROWN and HOUSE which should be applied towards satisfying the underlying Judgment.

Furthermore, neither the trial court nor the special master examined the Appellee before entering the order impleading EXCELETECH and no affidavits supporting the motion were submitted to the Court.

This Court should reverse the holding of the Fifth District Court of Appeals in this matter which ignores due process of law and require compliance with the procedure set forth in Ehmann, which affords due process of law. At the very least, a judgment creditor should be required to file a sworn motion or affidavit establishing a prima facie case that the proposed third-party defendant holds specific assets subject to the claim. To hold otherwise, would allow judgment creditors to engage in unfounded "fishing expeditions" into the personal assets and business affairs of strangers to the dispute that gave rise to the underlying judgment. Advertects, Inc. v. Sawyer Industries, Inc., 84 So.2d. 21,24 (Fla. 1955). Such strangers to the underlying dispute should not be forced into legal proceedings and required to justify the ownership of all of their property without some preliminary showing by the judgment creditor.

ARGUMENT

II. EXCELETECH WAS IMPROPERLY IMPEADED IN PROCEEDINGS SUPPLEMENTARY BECAUSE THE TRIAL COURT FAILED TO FOLLOW ESTABLISHED FLORIDA LAW.

A trial court is obligated to follow decisions of other District Courts of Appeal in this state in the absence of

conflicting authority and where the Appellate Court in its own district has not decided the issue. Chapman v. Pinellas County, 423 So.2d 578 (Fla. 2d DCA 1982).

The decisions of the District Courts of Appeal represent the law of Florida unless and until they are overruled by the Florida Supreme Court. Stanfill v. State, 384 So.2d 141,143 (Fla. 1980). At the time Appellee petitioned the trial court to implead EXCELETECH in proceedings supplementary and at the time the amended order was entered which impleaded EXCELETECH, the Fifth District Court of Appeal had already established that the Ehmann procedure was to be followed when impleading third parties in proceedings supplementary. Dunn, supra, Ruddy, supra, and Wieczoreck, supra.

In the opinion affirming the denial of EXCELETECH's Motion to Quash, it was conceded that Ehmann, as contended by EXCELETECH, is directly on point and supports its argument (R. 75). In spite of this fact, the trial court overruled prior case law and refused to follow decisions rendered within its own district.

By affirming the amended order of the trial court which impleaded EXCELETECH, the Fifth District Court of Appeals has, in effect, sanctioned the trial court's disregard for precedent. This decision sends the message that precedent need not be followed by a trial court. It creates total chaos in the administration of the judicial process and undermines the very authority of the District Courts of Appeal. Since the Appellee did not comply with the procedural requirements as set forth by established case law, this Court should reverse the decision of the Fifth District Court of

Appeals which improperly affirmed the trial court's order denying EXCELETECH's Motion to Quash Process.

ARGUMENT

III. THE TRIAL COURT ERRED IN DENYING EXCELETECH'S MOTION TO QUASH BECAUSE APPELLEE FAILED TO PROVIDE SUFFICIENT NOTICE OF THE PROPERTY ALLEGEDLY SUBJECT TO THEIR CLAIM.

Third parties must be afforded due process of law before their property rights can be placed in jeopardy in proceedings supplementary. In Mission Bay Campland, Inc. v. Sumner Financial Corporation, 71 F.R.D. 432 (M.D.Fla. 1981), the Court determined that the fundamentals of due process in proceedings supplementary include: (1) fair notice of the charges and allegations, (2) an opportunity for third persons to present their case, and (3) a hearing before an impartial decision-maker. See also, Wieczoreck, 450 So.2d at 867, 871-872.

The clear purpose of requiring fair notice of the charges and allegations is to ensure that a person being sued has an ample opportunity to defend himself. In order to properly defend, one must know the specific allegations against him. Therefore, in proceedings supplementary, due process is guaranteed only if notice is given as to specific property which the judgment creditor alleges to be subject to his claim.

In the case at bar, Appellee merely filed an unverified petition in proceedings supplementary to implead EXCELETECH,

without supporting affidavits, alleging only their unsubstantiated belief that Defendants, BROWN and HOUSE, "may" use EXCELETECH, INC., as a means of transferring unidentified assets in an attempt to avoid satisfying the Appellee's judgment along with the unsubstantiated belief that EXCELETECH has unidentified property of BROWN and HOUSE which should be applied toward satisfaction of the Judgment. There were no allegations of any specific assets or transactions which would be subject to examination in proceedings supplementary. Furthermore, neither the trial court nor the special master examined the Appellee about specific assets or transactions before the order impleading EXCELETECH was entered. Certainly, the bare allegation that EXCELETECH has property of BROWN and HOUSE that should be applied towards Appellee's judgment, did not provide sufficient notice of which property would be subject to their claim, and did not provide EXCELETECH with an ample opportunity to defend itself.

Almost identical circumstances were considered by the First District Court of Appeals in the case of Conway Meats, supra. In Conway Meats, the judgment creditor attempted to implead a third-party corporation based on the fact that the judgment creditor had an unsatisfied judgment against the debtor and that the debtor and the third-party corporation had the same officers, shareholders and registered agents. The judgment creditor failed to allege specific assets which were transferred from the debtor to the third-party corporation. The First District Court of Appeals determined that the motion to implead the third-party corporation in proceedings

supplementary was improperly granted and reversed the order impleading the third-party corporation.

A cause of action must be plead with certainty, Zito v. Washington Federal Savings & Loan Association of Miami Beach, 318 So.2d 175,176 (Fla. 3rd DCA 1975), cert. denied, 330 So.2d 23 (Fla. 1976), and cannot be based on vague and general allegations. Foley v. Hialeah Race Course, 53 So.2d 771 (Fla. 1951). Every fact essential to a cause of action must be pleaded distinctly, definitely and clearly. Ocala Loan Company v. Smith, 155 So.2d 711,716 (Fla. 1st DCA 1963). Appellee's petition to implead EXCELETECH in proceedings supplementary was based on vague and general allegations. No facts supporting the petition were plead with any specificity. When the fundamental requirement of pleading a cause of action with specificity is ignored, as in the case under consideration, confusion and often unnecessary expense is introduced into a simple case that could have been handled expeditiously and with a minimum of expense.

Pleading conclusions of law unsupported by allegations of ultimate fact is legally insufficient. Chris Kraft Industries, Inc. v. Van Valkenberg, 267 So.2d 642,645 (Fla. 1972). Appellee's allegation that EXCELETECH has property of BROWN and HOUSE which is subject to the underlying judgment is merely a conclusion of law. Appellee's petition fails to allege ultimate facts to support this conclusion of law. As such, Plaintiff's petition to implead EXCELETECH into proceedings supplementary was legally insufficient and was therefore improperly relied upon by the trial court to

implead EXCELETECH in proceedings supplementary.

Appellee failed to provide sufficient notice in its petition to implead EXCELETECH in proceedings supplementary as to the specific property which would be subject to their claim. As a result, EXCELETECH was not afforded due process of law. If due process is not observed in proceedings supplementary, then the proceedings are a nullity. Ryans Furniture Exchange, Inc. v. McNair, 120 Fla. 109, 162 So. 483 (1935). Therefore, EXCELETECH's Motion to Quash Process should have been granted and the decision of the Fifth District Court of Appeals affirming the order denying EXCELETECH's Motion to Quash Process should be reversed.

ARGUMENT

IV. EXCELETECH WAS DENIED DUE PROCESS OF LAW BECAUSE THE TRIAL COURT FAILED TO IDENTIFY THE PROPERTY ALLEGEDLY SUBJECT TO APPELLEE'S CLAIM IN THE ORDER IMPLEADING EXCELETECH IN PROCEEDINGS SUPPLEMENTARY.

An order impleading a third party into proceedings supplementary should sufficiently describe the property in controversy, the claim of the judgment creditor and the relief which he seeks. Mission Bay Campland, *supra*, Wieczoreck 450 So.2d at 871, Meyer v. Faust, 83 So.2d 847 (Fla. 1955), Ehmann, 363 So.2d at 614. This is necessary to give fair notice to the third person of the charges and allegations. Failure to do so would preclude a "full and fair hearing," Meyer, 83 So.2d at 848.

In the pending case, the amended order impleading EXCELETECH directs EXCELETECH to show cause, within 20 days of service of process of the order, why "the alleged fraudulent transfers should not be set aside, and why the property allegedly in its possession described herein [emphasis added] should not be subject to execution by plaintiff...". This language completely fails to describe the property in controversy. How can EXCELETECH be required to respond when the order impleading EXCELETECH does not set forth any findings of specific assets or transactions at issue? What "alleged fraudulent transfers" is the order referring to? Appellee's petition to implead EXCELETECH also does not allege any fraudulent transfers. What "property allegedly in its possession described herein" is the order addressing? There is no property described at all within the amended order impleading EXCELETECH. If there was, this appeal most likely would not even exist.

Clearly, the order impleading EXCELETECH into proceedings supplementary did not sufficiently describe the property in controversy. EXCELETECH should not be required to guess which property is the subject of these proceedings. The law requires that an impleaded third-party defendant be placed on notice of the accusations being made. It has been argued that EXCELETECH "found out" what the accusations were through its own discovery and its own diligence. Therefore, it is argued that the deficiencies in the pleadings and the procedures followed to implead EXCELETECH should simply be ignored.

This is typical of the type of argument asserted by Appellee

throughout these proceedings where case law and procedure need not be followed because it is inconvenient or fails to serve the "purpose" of Appellee. This "purpose" is to utilize "shotgun" pleadings and to change the requested relief as often as possible. The procedure utilized in this case is exactly what is not to be allowed in proceedings supplementary. If the court could not allege fraudulent transfers and could not identify specific property subject to the creditor's claim, the order impleading EXCELETECH should not have been entered.

Therefore, since the order impleading EXCELETECH failed to place EXCELETECH on fair notice as to which property was in controversy, the pleadings failed to state a cause of action and EXCELETECH was not afforded a full and fair hearing as guaranteed by due process of law and this Court should reverse the decision of the Fifth District Court of Appeals which affirmed the order denying EXCELETECH's Motion to Quash Process.

CONCLUSION

For all the foregoing reasons, Appellant, EXCELETECH, INC. requests that the Supreme Court reverse the decision of the Fifth District Court of Appeals which affirmed the denial of Appellant's Motion to Quash Process and order the Fifth District Court of Appeals to remand the case to the trial court with instructions to grant EXCELETECH's Motion to Quash Process. Appellant would also request that the Supreme Court adopt the procedure to implead third parties in proceedings supplementary as set forth in the case of

Robert B. Ehmann, Inc. v. Bergh, 363 So.2d 613 (Fla. 1st DCA 1978).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by regular U.S. Mail this 15th day of July, 1991, to the following:

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