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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

REPLY BRIEF OF

APPELLANT, EXCELETECH, INC.

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TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS

ARGUMENT

I. THE TRIAL COURT FAILED TO FOLLOW ESTABLISHED FLORIDA CASE LAW WHEN IT IMPLEADED EXCELETECH INTO PROCEEDINGS SUPPLEMENTARY.

Appellee argues that EXCELETECH was properly impleaded under prior case law. This is patently untrue and has absolutely no basis in reality.

The procedure to implead third parties into proceedings supplementary, as set out in Robert B. Ehmann, Inc. v. Bergh, 363 So.2d 613 (Fla. 1st DCA 1978), was clearly established as the procedure to be followed by the District Courts of Appeal in Florida at the time EXCELETECH was impleaded. Furthermore, the Fifth District Court of Appeals, itself, had already adopted the Ehmann procedure in three separate opinions, Ruddy v. Ashton, 554 So.2d 557 (Fla. 5th DCA 1989), Wieczoreck v. H & H Builders, Inc., 450 So.2d. 867 (Fla. 5th DCA 1984), affirmed, 475 So.2d. 227, (Fla. 1985), and Timothy Dunn Associates, Inc. v. Seligman, 557 So.2d 207 (Fla. 5th DCA 1990). The Ehmann procedure unambiguously requires the trial court or a special master to conduct an examination of the judgment creditor. If the examination of the judgment creditor 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. Id at 614.

In the case at bar, neither the trial court nor the special master examined WILLIAMS prior to impleading EXCELETECH. Most

importantly, the Motion to Implead EXCELETECH made no specific factual allegations and the Amended Order Impleading EXCELETECH did not set forth any specific findings of fact or identify any assets or transactions which would have allowed EXCELETECH to respond. Therefore, it is indisputable that EXCELETECH was not properly impleaded under all prior case law.

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). The trial court had absolutely no discretion to disregard the Ehmann procedure. The trial court cannot arbitrarily refuse to follow decisions of the District Courts of Appeal simply because the trial judge may disagree with these decisions. The trial court's statement; "I'm not going to do it. If I'm wrong, tell the Fifth to say it again" (App. 65), clearly demonstrates the type of defiant attitude that cannot be tolerated and sanctioned in a system of justice which relies upon precedent for continuity and stability. Without continuity, the law would have no direction and every disputed issue, no matter how often litigated in the past, would be ripe for further litigation. If the order impleading EXCELETECH is not reversed, a clear message will be sent to the trial court in the pending case as well as every other trial court in Florida indicating that precedent can be ignored and the law need not be followed. It is imperative that this message not be sent.

II. **A JUDGMENT CREDITOR MUST ESTABLISH A PRIMA FACIE CASE BEFORE IMPLEADING A THIRD PARTY INTO PROCEEDINGS SUPPLEMENTARY.**

Appellee argues that a judgment creditor need not establish a prima facie case before impleading a third party in proceedings supplementary. In support of this argument, Appellee cites four Florida Supreme Court cases which preceded Ehmann, Ryans Furniture Exchange, Inc. v. McNair, 120 Fla. 109, 162 So. 483 (1935), State ex rel. Phoenix Tax Title Corp. v. Viney, 163 So. 57,61 (Fla. 1935), Richard v. McNair, 121 Fla. 733, 164 So. 836 (1935) and Advertects, Inc. v. Sawyer Industries, Inc., 84 So.2d 21,24 (Fla. 1955). It is argued that these cases do not require a judgment creditor to establish a prima facie case before impleading a third party into proceedings supplementary.

This is untrue. This Court specifically approved the procedure requiring a prima facie basis for impleader in Phoenix, wherein this Court interpreted the Order to Show Cause (rule nisi), directed to the third-party defendant, as presenting

> prima facie findings against the respondents which they are required to answer and upon the allegations of which issues may be made up for jury trial . . .

Id at 61.

This Court again reaffirmed the need for a judgment creditor to establish a prima facie case before impleading third parties into proceedings supplementary in Advertects, wherein this Court held that

> in order to justify the issuance of a rule directing individual stockholders to show cause why they should not be held personally accountable for the corporation's debts, there should be a preliminary showing that the

> corporation is in actuality the alter-ego of the stockholders. . .

Id at 24.

Although the judgment creditor in Advertects was seeking to collect a corporate debt through the individual stockholders, the same principles apply. A judgment creditor must make some preliminary showing before dragging a stranger to the underlying dispute into legal proceedings.

The Florida Appellate Courts have followed this law in holding that a preliminary showing must be made before a third party may be impleaded in proceedings supplementary. Ehmann, supra, Infante v. Jacksonville Bowls Football, LTD., 559 So.2d 406 (Fla. 1st DCA 1990), Conway Meats, Inc. v. Orange Avenue Partnership, 440 So.2d. 674 (Fla. 1st DCA 1983), Wieczoreck, supra, and Machado v. Foreign Trade, Inc., 544 So.2d 1061 (Fla. 3rd DCA 1989).

Appellee concedes that due process entitled EXCELETECH to a hearing after fair notice of the charges and allegations (Appellee Answer Brief, p. 7). Given this concession, it is hard to imagine why the Appellee persists in maintaining that a prima facie case is unnecessary before a third-party defendant can be impleaded. How else can a third-party defendant know what property is allegedly subject to execution? How else can a third-party defendant prepare for and receive a fair hearing on a motion to implead that party?

A prima facie case is also required under the Florida Rules of Civil Procedure. Fla.R.Civ.P. 1.100(b) states that an application to a court for an order shall be by motion and state with particularity the grounds therefore. By requiring a movant to

state with particularity the grounds for relief, Rule 1.100(b) is in essence requiring a movant to establish a prima facie case. The Rule places the burden on the movant to allege, within the motion, specific ultimate facts, (a prima facie case), which if proven true, would warrant the granting of the relief requested.

Florida Rule of Civil Procedure 1.110(b) also demonstrates the necessity of alleging a prima facie case in claims for relief. Rule 1.110(b) requires a short and plain statement of the ultimate facts, not just conclusions of law. If a pleading fails to allege ultimate facts which are necessary to establish a cause of action, then it is subject to attack by a motion to dismiss for failure to state a cause of action. Just as in the pre-judgment context, pleadings for post-judgment relief must allege ultimate facts, which if proven, would establish a right to the relief requested.

If a judgment creditor is not required to allege ultimate facts in its motion for impleader, which would place third-party defendants on notice of the property allegedly subject to execution, then why bother making any allegations at all? Why bother holding a hearing? Certainly, any such hearing would violate due process as the responding party would not have "fair notice" of the charges and allegations against him.

Allowing judgment creditors carte blanche, to implead third parties without establishing a prima facie showing that the third party has assets subject to its claim, would be disastrous. Judgment creditors will be allowed to engage in "fishing expeditions" and drag strangers into legal proceedings with no

basis in fact. The third-party defendant will be required to expend a great deal of time and money in an effort to show good cause why its assets should not be subject to the judgment creditor's claim in response to a vague and unsubstantiated order to show cause issued by the courts of this state at the simple "request" of a creditor. This is wholly unfair, completely unnecessary, and clearly a violation of due process of law.

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

Appellee argues that EXCELETECH was afforded due process because sufficient notice of the relief sought was provided before EXCELETECH was impleaded into proceedings supplementary. In support of this position, Appellee cites specific documents and hearings which they allege provided EXCELETECH with sufficient notice of the property subject to its claim. This argument is without merit.

Appellee concedes that the due process to which EXCELETECH was entitled included a hearing after fair notice of the charges and allegations. (Appellee's Answer Brief, p. 7). Fair notice was required prior to impleading EXCELETECH. Therefore, only documents produced or hearings that took place before the hearing on Appellee's Motion to Implead EXCELETECH would be relevant and material in determining whether EXCELETECH had fair notice of the allegations.

In the present case, the petition to implead EXCELETECH in proceedings supplementary was filed on February 20, 1990. (App., p. 7-9). The hearing on Appellee's petition for impleader took place on April 5, 1990 (App., p. 16) and the Amended Order Impleading EXCELETECH into proceedings supplementary was entered on April 12, 1990. (App., p. 43-45).

The notice allegedly given to EXCELETECH prior to the hearing on April 5, 1990, was the motion and hearing on the request for a temporary injunction and the Motion to Implead EXCELETECH. The motion for the injunction contained the same general conclusory allegations contained within the Appellee's petition to implead EXCELETECH and therefore did not provide any additional notice. The Motion for Injunction completely failed to identify any specific assets subject to the Appellee's claim.

All of the other sources which Appellee contends put EXCELETECH on notice of the property subject to Appellee's judgment occurred <u>after</u> EXCELETECH was impleaded and are therefore irrelevant. Certainly, events that took place after the hearing on April 5, 1990, could not possibly have assisted EXCELETECH in preparing a defense for that very same hearing. Therefore, in order to determine whether or not EXCELETECH had sufficient notice, this Court need only look to Appellee's petition to implead EXCELETECH in proceedings supplementary.

In the case under consideration, 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. 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.

Pleading conclusions of law unsupported by allegations of ultimate fact is legally insufficient. Chris Kraft Industries, Inc. v. Van Valkenberg, 267 So.2d 642 (Fla. 1972). Appellee's allegations 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 any ultimate facts to support this conclusion of law.

Pleadings "... must be sufficiently clear and direct to make it unnecessary for the respondent or the court to be clairvoyant in ascertaining the nature of the claim." Parker v. Panama City, 151 So.2d 469,472 (1st DCA 1963). Appellee's petition to implead and the Amended Order Impleading EXCELETECH required EXCELETECH to be clairvoyant in order to see which property might be subject to

Appellee's claim based on the vague pleadings and limited information provided. These vague pleadings provide a glaring example of Appellee's strategy throughout the course of these proceedings. The strategy involves the filing of "shot-gun" pleadings in a deliberate effort to blind-side the respondent and pursue all options while alleging no specific theory of liability and no legal cause of action. This strategy was not only sanctioned by the trial court in this case, it was aided and abetted by an order to show cause which used the same strategy!

Almost identical pleadings were considered and rejected by the First District Court of Appeals in the case of Maiden v. Carter, 234 So.2d 168,170 (1st DCA 1970). In Maiden, the amended complaint alleged that the defendant received assets from a certain estate to which the defendant had no lawful claim and to which the defendant was not entitled. No facts were alleged to support these conclusions. The Maiden court noted that the complaint was silent as to the nature or value of the assets received by the defendant, the time they were received, from whom they were received or the circumstances surrounding their receipt. The First District Court of Appeals determined that for the foregoing reasons "the complaint was so vague, indefinite and uncertain as to render a response thereto virtually impossible." Id at 170.

In Appellee's petition to implead EXCELETECH, we have the same vague, indefinite and uncertain claim for relief. Appellee merely states the legal conclusion that EXCELETECH has property of Brown and House which should be applied to the underlying judgment. The

petition is completely silent as to the nature or value of the assets subject to the claim, the time these assets were received, from whom they were received, or the circumstances surrounding the receipt of these assets. Thus, for the same reasons as expounded in Maiden, the petition utilized to implead EXCELETECH in proceedings supplementary made it impossible for EXCELETECH to adequately render a response.

IV. FAILURE OF THE MOTION TO IMPLEAD EXCELETECH AND THE ORDER IMPLEADING EXCELETECH TO PROVIDE SUFFICIENT NOTICE OF THE ASSETS SUBJECT TO THE CLAIM WAS NOT HARMLESS ERROR.

Appellee argues that their failure to provide sufficient notice of the property subject to its claim was harmless error. It has been asserted that Appellant, EXCELETECH, INC., learned through the course of discovery, at its own expense, what remedies were being sought by Appellee and therefore, all procedural due process requirements have been met. This is untrue. A creditor seeking to implead a third party in proceedings supplementary is responsible for ensuring compliance with the necessary procedure. Conway Meats, supra at 676. If the necessary facts showing that the third-party defendant possesses assets subject to execution is not established prior to the issuance of an order impleading a third party, then there is no basis to allow the pursuit of such a claim.

In determining whether the error in Appellee's petition for impleader was harmless, the primary consideration is whether EXCELETECH actually received sufficient notice of the property

subject to Appellee's claim in order to prepare and present its defense at the hearing on April 5, 1990.

Appellee concedes that it "... may have been better for WILLIAMS and the court, in the motion and order regarding the impleader, to set forth with more specificity the money held by EXCELETECH for Brown and House." (Appellee's Answer Brief, p. 16-17). Appellee, however, denies that EXCELETECH was denied due process. It is argued that EXCELETECH's only complaint is that notice was not in a form to its liking. Again, this is untrue. Sufficient notice was not provided in any form before EXCELETECH was impleaded.

Appellee analogizes the case under consideration to the circumstances in Wieczoreck, supra, wherein the Fifth District Court of Appeals held that the third-party defendant was not denied due process despite having his property taken before being fully impleaded. However, in Wieczoreck, although the third-party defendant was not impleaded before his property was taken, the creditor did file an affidavit specifically delineating the property subject to its claim and also by sworn affidavit gave the reasons why the transfer was fraudulent. Id at 869. Therefore, in Wieczoreck, the error was harmless because the judgment creditor's pleadings provided sufficient notice of the specific property subject to execution and the facts surrounding the alleged fraudulent transfer.

Any error in Wieczoreck was purely technical. Conversely, in the case under consideration, the error was substantive.

Appellee's error was a serious violation of due process in that EXCELETECH was not afforded sufficient information in order to properly prepare its defense and was thereby denied a fair hearing.

Likewise, the trial court's failure to identify the property allegedly subject to Appellee's claim in the Amended Order Impleading EXCELETECH was also a serious violation of due process. 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, Inc. v. Sumner Financial Corporation, 71 F.R.D. 432 (M.D.Fla. 1976), Wieczoreck, supra, and Meyer v. Faust, 83 So.2d 847 (Fla. 1955), and Ehmann, supra. This is necessary to give fair notice to the third person of the charges and allegations.

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..." (App., p. 43-45). 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 does not allege fraudulent transfers. What "property allegedly in its possession described herein" is the order addressing? There is no

property described within the Amended Order Impleading EXCELETECH.

By not specifying the property allegedly subject to execution, the order forces EXCELETECH to guess which portion of its property is subject to these proceedings. This is not harmless error. It violates EXCELETECH's due process rights because it requires EXCELETECH to respond to indefinite accusations or have its property taken away by court order!

V. DUE PROCESS OF LAW REQUIRES A JUDGMENT CREDITOR TO ESTABLISH A PRIMA FACIE SHOWING, THROUGH TESTIMONY UNDER OATH, AFFIDAVIT OR SWORN MOTION, THAT THE PROPOSED THIRD-PARTY DEFENDANT HOLDS ASSETS SUBJECT TO THE CLAIM BEFORE IMPLEADING THE THIRD PARTY INTO PROCEEDINGS SUPPLEMENTARY.

Impleading a third-party defendant into proceedings supplementary is an extraordinary remedy. As such, the judgment creditor should be required to first establish a prima facie case, through testimony under oath, affidavit or sworn motion, that the proposed third-party defendant holds assets subject to the claim, before impleading a third party into proceedings supplementary.

In the pending case, 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. Pursuant to this decision, judgment creditors would be allowed to implead third parties into proceedings supplementary by utilizing unverified petitions with

absolutely no supporting affidavits or testimony. Consequently, anyone could be dragged into legal proceedings and forced to justify the ownership of their property and business interests based solely upon unverified petitions supported solely by the judgment creditor's unfounded suspicions. To implead parties under such circumstances would be unduly intrusive into the private affairs of strangers to the underlying dispute.

In the case under consideration, the Fifth District Court of Appeals determined that the Florida Rules of Civil Procedure. control the method by which a party may be impleaded. Appellee argues that because an examination of the creditor or the filing of a sworn motion is not specifically required under the Rules, it should not be required in proceedings supplementary. However, the Rules do not address the procedural requirements in proceedings supplementary. These Rules, which do not specifically address proceedings supplementary, should not be utilized to circumvent the due process rights of proposed third-party defendants which have been specifically recognized by our Appellate courts.

This Court should reverse the holding of the Fifth District Court of Appeals in this matter which ignores due process and adopt the procedure as announced in Ehmann, supra, which guarantees 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 assets subject to the claim. To hold otherwise, would allow judgment creditors to draw strangers into a legal arena and obtain orders to

show cause by simple request based on unfounded accusations. Such strangers to the underlying dispute should not be forced into legal proceedings and required to justify the ownership of all their property without the judgment creditor establishing some basis for his belief that the third party has assets subject to the claim and without an order from the presiding judge affirming that a prima facie case has been established and identifying the property at risk.

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 27th day of August, 1991, to the following:

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