047

IN THE SUPREME COURT OF THE STATE OF FLORIDA

MURRAY H. GOODMAN,

Appellant,

CASE NO. 78,246

ON APPEAL FROM THE 4TH DCA,
LT NO. 90-2042

vs.

BRASSERIA LA CAPANNINA, INC.
AND VITA MURPHY,

Appellees.

_____/

APPELLANT'S REPLY BRIEF

DAVID R. ATKINSON, JR.
GUNSTER, YOAKLEY & STEWART, P.A.
777 S. Flagler Drive, Suite 500
West Palm Beach, FL. 33402-4587
(407) 655-1980
ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CITATIONS

PREFACE

Appellant, Murray H. Goodman, was the Plaintiff in the trial court and was the Appellee in the Fourth District Court of Appeal and will be referred to as "Landlord." Appellees, Brasseria La Capannina, Inc. and Vita Murphy, were the Defendants in the trial court and were the Appellants in the Fourth District Court of Appeal and they will be referred to as "Tenants." Just as in the Initial Brief, the symbol "R-___" denotes the Appendix to the Landlord's Brief filed with the Fourth District Court of Appeal. The Symbol "A-__" denotes the Appendix filed by Landlord with his Initial Brief to this Court.

INTRODUCTION

The Tenants' Answer Brief devotes six pages to their version of the facts. Tenants make numerous "factual" statements that are not supported by any "evidence" in the record. Because those factual inaccuracies are immaterial to the primary issue before this Court -- whether Florida's distress for rent statutes are facially unconstitutional - Landlord will wait and address those claims at the end of this Reply Brief.

ARGUMENT

At pages 15 and 16 of the Answer Brief, Tenants misconstrue Landlords's argument that the constitutional requirements of Phillips v. Guin & Hunt, Inc. 344 So.2d 568 (Fla. 1977), are satisfied if a judge determines that all of the essential elements of the cause of action are contained in the Verified Complaint. Tenants assert that this argument proves Tenant's claim that the statute does not provide the judge with the required discretionary authority relating to issuance of the writ.

The Tenants have misconceived Landlord's arguments. Landlord's position is twofold:

(1) The judicial discretion, or perhaps a more appropriate term the "judicial determination", required to satisfy due process is that a judge prior to issuing a distress writ, must review a verified pleading and make an independent determination that a prima facie showing of the essential elements provided by statute has been sufficiently made. See, Phillips, 344 So.2d at 574 (Initial Brief - Point II, pp. 23-25); and

(2) Even assuming arguendo that the Fourth DCA majority correctly concluded that Phillips requires that the trial judge have discretion to deny the writ even if a prima facie showing has been made; the statute can, nevertheless, still be construed, consistent with the law of Florida, in a constitutional manner. (Initial Brief - Point I).

I. THE FOURTH DCA ERRED IN HOLDING THE AMENDED DISTRESS STATUTES DO NOT COMPLY WITH THE DUE PROCESS REQUIREMENTS ENUNCIATED IN PHILLIPS (INITIAL BRIEF - POINT II)

The majority opinion of the Fourth DCA quoted a portion of this Court's Phillips decision as follows:

> ... it is constitutionally imperative that a writ issue only after an impartial factual determination is made concerning the existence of the essential elements necessary for the issuance of the writ. Consequently, a writ must be issued by a judicial officer based upon a prima facie showing rather than pro forma by the clerk of the court, unless the initial pleading is made under oath to a clerk who makes an independent factual determination that the requirements of the statutes have been complied with. Only then can the individual have his use and enjoyment of the property protected from arbitrary encroachment. Under [former] Section 83.12, Fla. Stat., the distress writ [was] issued by the clerk, based upon an unverified complaint without the necessity of a preliminary factual determination as to the validity of the claim.

Brasseria La Capannina, Inc. v. Goodman, 579 So.2d 193 (Fla. 4th DCA 1991)(A-2), quoting Phillips, 344 So.2d at 574 (emphasis changed).

The majority of the Fourth DCA and the Tenants, at pages 10-11 of their Answer Brief, read into the foregoing quote an additional requirement that judicial discretion exist beyond making an

independent factual determination that the verified complaint satisfies the statute and alleges a prima facie case. Phillips, however, does not enunciate such a requirement. The Fourth DCA and the Tenants misinterpret the meaning of the phrase "a preliminary factual determination as to the validity of the claim". A review of page 574 of the Phillips opinion, including footnotes 7 and 9; shows that this Court held that the key to satisfying due process is that there must be an initial judicial determination based on verified factual allegations, that the Statute has been satisfied. See, id. at 574, n. 9.

The Phillips decision does not envision any additional preliminary factual determination beyond determining that the verified complaint alleges a prima facie case and satisfies the Statute. See, also, Gazil, 356 So.2d at 313, n. 4. In fact, a requirement that there be a factual determination beyond scrutinizing the verified complaint would require a preliminary hearing in every case, which clearly is not required. Id. at 313. What factual inquiry, beyond reviewing the Verified Complaint, would the Fourth DCA have the trial court make at the initial ex parte hearing?

Since Landlord filed his Initial Brief, the majority opinion of the Fourth DCA in the instant case has been expressly rejected by the Third DCA and has been highly criticized by a prominent Florida legal commentator. In Comacoa, Inc. v. The Honorable Jack M. Coe, 16 F.L.W. D2005 (Fla. 3rd DCA Aug. 16, 1991), the Third DCA held that once a trial judge makes the initial determination, based on a

verified complaint or affidavit, that the requirements of Florida's pre-judgment replevin statute have been complied with, the judge is mandatorily required to issue the writ in accordance with the statute. Id. Judicial discretion exists in making the initial independent determination that the Statutory requirements have been complied with. See, id. at 2007, n.7.

Chief Judge Schwartz carefully analyzed the Fourth DCA's Brasseria decision and rejected its holding. Id. at 2007, n. 7. Judge Schwartz' analysis of the Brasseria decision so clearly enunciates Landlord's argument that it is set forth in full:

> We disagree with any implication by analogy with Brasseria La Capannina, Inc. v. Goodman, 579 So.2d 193 (Fla. 4th DCA 1991) that the mandatory nature of the duty to issue the writ thus provided by Section 78.068 may render it unconstitutional. Such a conclusion would be directly contrary to Gazil, 356 So.2d at 312, which explicitly upheld the [replevin] statute as written.
>
> In any event, Brasseria which found Section 83.12, Fla. Stat. (1989) was invalid because it provides that "[a] distress writ [for rent] shall be issued by a judge of the court which has jurisdiction of the amount claimed," 579 So.2d at 193 [e.s.], and that subsequent amendments did not cure the defect identified in Phillips v. Guin & Hunt, Inc., 344 So.2d 568 (Fla. 1977) was, in our view, wrongly decided. [Emphasis added]. Among other things, it overlooks that Ch. 80-282, Laws of Fla. added the requirement that a complaint for distress for rent (like one under Section 78.068), be "verified. "[Emphasis added.] ... The present law thus remedies the flaw pointed out in Phillips itself:
>
> > 'In the instant cause, appellants filed an affidavit in support of their claim. The statute is nevertheless deficient on its face

> in that it makes no provision for a sworn statement before the issuance of a distress writ. We note that an affidavit was an express requirement of the statute's predecessor. In amending the statute in 1967 to read in its present form, the Legislature eliminated the necessity of an affidavit. After 1967: Ch. 67-254, Section 34, Laws of Florida. In its place they substituted only the requirement of an unverified complaint.'

Phillips, 344 So.2d at 574, n. 9. So amended, [current] §§83.11 - 12 seem fully to comply with the requirements set forth in Phillips:

> '[I]t is constitutionally imperative that a writ issue only after an impartial factual determination is made concerning the existence of the essential elements necessary for issuance of the writ. Consequently, a writ must be issued by a judicial officer, based upon a prima facie showing rather than pro forma by the clerk of court, unless the initial pleading is made under oath to the clerk who makes an independent factual determination that the requirements of the Statute have been complied with. Only then can the individual have his use and enjoyment of the property protected from arbitrary encroachment. [e.s.]'

Brasseria, 579 So.2d at 193. It goes without saying that under both Sections 83.12 and 78.068, the court may not issue the writ without first making the 'independent factual determination that the requirements of the statute have been complied with.' 579 So.2d at 193. Since this is true, the verification provision constitutionalizes both statutes. [Emphasis added]. See, Gazil, 356 So.2d at 312. Moreover, Phillips specifically permits a clerk to make the necessary determination of

> the sufficiency of the complaint. Phillips, 344 So.2d at 574. Since, under §§83.12 and 78.068, that finding must be made by the court, there is even less objection to their validity.

Comacoa, 16 F.L.W. at D2007, n. 7.

Although Comacoa uses slightly different terminology than used in Landlord's Initial Brief, the point made is precisely the same. That is, the "discretion" or the "judicial determination" required in order for statutes providing for pre-judgment remedies to be constitutional, is found in the independent judicial determination that the verified complaint or affidavit satisfies the requirements of the statute and alleges a prima facie case (See, Initial Brief, p. 24). Once the court has made that independent factual determination, it must issue the writ in accordance with the statute.

The determination of what circumstances are appropriate for distress is within the province of the Legislature and is not left to the discretion of the Court. See, Gazil, 356 So.2d at 313, n.4. In Gazil, this Court stated that its analysis of United States Supreme Court precedent did not reveal any decision limiting the state's (i.e., the Legislature's) right to identify the circumstances which are appropriate for pre-judgment remedies. Id. at 313, n.4. The judicial function of the Court, prior to issuing a writ, is to independently determine if the plaintiff has presented sworn allegations that satisfy the criteria set forth by the Legislature.

Comacoa also correctly points out that after the initial determination is made that the Statute has been complied with, there

is no room for judicial discretion because there is no appropriate basis upon which such discretion could be properly exercised. Id. at D2006. The Third DCA stated:

> Perhaps most important of all in our conclusion that the issuance of the writ is not discretionary, is the total inability of the Appellee to suggest, or of us to imagine any cognizable or appropriate basis upon which the discretion of the court could be properly exercised to deny the relief sought .... Surely, it cannot be, as Appellee's attorney suggest, the judge's own belief that it would be 'more equitable' or 'better' to proceed only after notice. Such a claim is profoundly unacceptable. While a judge, of course, may disagree with the particular statutes, he or she is not free to refuse to enforce it on any such ground (citation omitted). Under the Appellee's view the court would be permitted to deny the required relief based on no more than a personal desire not to do so.... Since, then, there is no basis for the exercise of discretion to deny the writ, there can be no ability to deny it all.
>
> * * *
>
> It goes without saying that under both §§83.12 and 78.068, the court may not issue the writ without first making the 'independent, factual determination that the requirements of the statute have been complied with.'

Id. at D2006, D2007, n. 7.

The Fourth DCA's opinion in the instant case is also being criticized in the upcoming edition of Florida Practice and Procedure wherein Trawick states:

> The distress statute was held unconstitutional in Brasseria La Capannina, Inc. v. Goodman, 579 So.2d 193 (Fla. 4th DCA 1991). The court used a minor procedural point for its decision.... In this decision, form has been exalted over substance. The tenant is

> given the same opportunity as in the replevin statute with less expenditure of judicial time. Cf. Comacoa v. The Honorable Jack M. Coe, 16 F.L.W. D2005 (Fla. 3rd DCA Aug. 16, 1991).

Forthcoming 1991 edition of Florida Practice and Procedure, §32-8, footnote 1.

The Tenants argue at page 10 of their Answer Brief that the amendments to the statute "only change the face of the person who makes a purely ministerial decision." That argument overlooks the fact that the key to the independent factual determination required by Phillips is the requirement that there be a verified complaint or an affidavit from which the court can make such factual determination. See, Phillips, 344 So.2d. at 574, 574 n.7, n.9. The predecessor Statute did not require sworn allegations and for that reason failed to survive Constitutional challenge.

Florida's Amended Distress Statutes enacted in response to Phillips require:

(1) that the complaint must be verified (§83.11 Fla. Stat. (1989)) so that the judge can make an independent factual determination as to whether the Plaintiff is entitled to the relief requested;

(2) that the Defendants may move for dissolution of the writ at any time and that the Court shall hear the motion not later than the day on which the Sheriff is authorized under the writ to levy on the distrained property (§83.135 Fla. Stat. (1989));

(3) that the Court shall have jurisdiction to order the relief provided in the distress statutes (§83.11 Fla. Stat. (1989)); and

(4) that the distress writ may only be issued by a judge, not by a clerk (§83.12 Fla. Stat. (1989)).

As the Dissent in Brasseria concluded, the Amended Statutes satisfy all of the requirements of Phillips 344 So.2d at 568. Accordingly, this Court should reverse the majority decision of the Fourth DCA.

Tenants concede in their Brief that the lower court federal decisions relied on by the Fourth DCA are not binding on Florida State Courts (Tenants' Answer Brief page 11 n.3). Moreover, to the extent those decisions require that a judge have discretion beyond making an initial factual determination that the verified pleading satisfies the requirements of the statute, they are contrary to this Court's decisions in Phillips 344 So.2d. at 568 and Gazil 356 So.2d. at 312, as well as the Third DCA's decision in Comacoa, 16 F.L.W. at 2005. In State v. Dwyer, 332 So.2d 333 (Fla. 1976), this Court, citing stare decisis, rejected a constitutional challenge to a Florida Statute that was based on lower federal court authority and stated "[w]here an issue has been decided in the Supreme Court of the State, the lower courts are bound to adhere to this Court's ruling when considering similar issues ...Id. at 335. The Fourth DCA deviated from this rule by relying on Wyatt v. Cole, 710 F.Supp. 180 (S.D. Miss. 1989); and Johnson v. American Credit, 581 F.2d 526 (5th Cir. 1978).

If the Fourth DCA's decision stands, Florida's current pre-judgment attachment §76.03, Fla. Stat. (1989); garnishment §77.03(1), Fla. Stat. (1989) and replevin §78.068, Fla. Stat. (1989) statutes are subject to constitutional challenge. To uphold the

Brasseria decision, this Court would have to recede from Phillips and Gazil and would have to overturn Comacoa, supra.

II. THE FOURTH DCA FAILED TO APPLY THE RULES OF STATUTORY CONSTRUCTION CONTROLLING IN FLORIDA (INITIAL BRIEF POINT-I).

Point I in Landlord's Initial Brief argues that the Fourth DCA's construction of the Amended Distress Statutes is erroneous. The prior version of the Statute provided that "[o]n filing the [unverified] complaint, the clerk shall issue a distress writ ..." §83.12, Fla. Stat. (1977). That statute required the clerk to perform the ministerial task of issuing a distress writ simply upon the filing of a unverified complaint without any judicial review.

The current version of §83.12 eliminated the phrase "[o]n filing the complaint" and required that if a writ is to be issued, it is to be issued by a judge. Moreover, current §83.11 requires that the complaint be "verified." The thrust of Point I of the Initial Brief is that the use of the word "shall" in current §83.12 requires that when a writ is to be issued, it must be issued by a judge. The determination of the appropriate circumstances for issuing a writ, however, is controlled by §83.11. Clearly under the Statute a judge must independently determine that §83.11 has been complied with prior to issuing a writ.

Additionally, even assuming arguendo that the Fourth DCA is correct in its conclusion that Phillips requires a judge to have discretion beyond the initial factual determination that the statute has been complied with, application of the rules of construction set forth in Rich v. Ryals, 212 So.2d 641, 643 (Fla. 1968) and other

authorities cited in Point I of the Initial Brief mandate that the statutes be interpreted in a constitutional manner. Tenant's response to this argument, at pages 13 & 14, of the Answer Brief, is to cite cases that have interpreted the word "shall" in a contrary manner. As Tenant points out, the interpretation of the word "shall" depends upon the context. Of the cases cited to this Court, the context within which the word "shall" was used in the decision of Rich v. Ryals, 212 So.2d at 643 is most closely analogous to the instant case.

III. TENANT'S ARGUMENT THAT THE DISTRESS STATUTES WERE UNCONSTITUTIONALLY APPLIED IN THIS CASE IS ERRONEOUS (POINT II OF TENANT'S ANSWER BRIEF).

Tenants raise in their Answer Brief the claim that the distress writ was unconstitutionally applied in this case. Although that issue was submitted to the Fourth DCA, its opinion did not address that point. Tenants did not file a notice of cross-appeal relating to that issue and thus did not preserve it for review by this Court. In an effort to justify and legitimate this issue for consideration by this Court, Tenants rely on allegations from their Counterclaim. (Answer Brief, p. 2). Tenants' Counterclaim, however, was dismissed with prejudice and is not before this Court for consideration, nor is it the subject of any appeal.

Tenants attempt to misdirect the Court by stating that the Sheriff denied Tenants "access to the premises for the purpose of running it as a restaurant business." (Answer Brief, pp. 3, 4). Tenants have never claimed that the Sheriff or anyone else forbid them from entering the rental premises (prior to the entry of the

Final Judgment of Eviction of July 10, 1990; see, R-179). Rather, the Tenants argued that because the writ enjoined them from selling or removing all property liable to distress, including their inventory, that Tenants were effectively precluded from doing business (R-65; R-100).

The Tenants concede in their Brief, at page 17, that the purpose of the Statute is to "enjoin the removal or destruction of property from the premises which might otherwise serve as security for the Landlord for unpaid rent." Tenants' interpretation of the distress statute, however, is that it only applies to fixtures and furnishings, but not to a Tenants' inventory. That claim is absolutely contrary to the express language of §83.09 Fla. Stat. (1989) which provides "no property of any tenant or lessee shall be exempt from distress and sale for rent, except beds, bedclothes and wearing apparel." Tenants' interpretation of the distress statute -- i.e., that it only applies to furniture and fixtures and not to a commercial tenants inventory -- renders the distress statutes and Landlord's liens meaningless to most commercial landlords. That is, in most commercial tenancies the only thing the tenant owns is its inventory. That is precisely the situation in this case. Tenants' assertion at pages 7 and 22 of its Brief that the Landlord has over $300,000 worth of security, separate and apart from the food and alcohol, is not supported by any evidence in the record. The record

citations presented by Tenants in support of that claim relate to arguments of Tenants' counsel, not to any evidence in the record.[1]

Landlord's counsel at the very first hearing objected to Tenants' attorney's unsworn "testimony" during argument (R-88). The claim that Tenants put over $300,000 of improvements into the premises is contrary to the admissions made by Tenant's counsel during the first hearing on May 18, 1990 and the Defendants' express admission. (R-105). Tenants' counsel admitted: "the property is all owned by the Plaintiff with the exception of the food and the liquor." (A-105); and the Defendant, Vita Murphy, admitted "Murray H. Goodman [Landlord] owns everything." (A-106).

There is not one scintilla of evidence in the record to support the assertions, which were first made by Tenants' counsel at a hearing six weeks after the issuance of the writ (R-162), that the Tenants made unreimbursed capital improvements to the property. Accordingly, Tenants' argument that the Landlord had adequate security, without the issuance of the writ, for the over $50,000 in past due rent (R-138) is unsupported by any evidence in the record, is wrong, and should be ignored by this Court.

The Tenants at page 19 of the Answer Brief argue that the writ could have been worded in a manner which would have allowed the business to continue by requiring an escrow of the proceeds of the

---

1 Although Landlord disagrees with many of the "factual" statements made by Tenants, in the interest of brevity, the Landlord will not address each of Tenants' claims, rather Landlord refers the Court to pages 3-7 of the Initial Brief which sets forth Landlord's version of the facts.

sale of the food. The Tenants made no such suggestion to the Trial Court during either of the hearings held on May 18, 1990 (just two days after the distress writ was issued) (R-84; R-110). The first time Tenants made any suggestion that the court could have allowed for an escrow rather than enjoining the sale of the security subject to the Landlord's lien was at a hearing held almost six weeks after the writ was issued. (R-158).

Tenants state in their Answer Brief, at pages 5 and 6, that the record does not indicate why the hearing on the Motion to Dissolve did not occur for six weeks. What is clear from the record is the delay in the hearing had nothing to do with the Landlord or the Court (see R-92, R-96, R-102, and R-104). The trial judge repeatedly offered to hold a full evidentiary hearing any time Defendants desired, including after business hours (see, R-92, R-96, R-102, R-104). The Tenants chose to wait six weeks to seek a hearing on their Motion to Dissolve Distress Writ. In light of Tenants claim they were denied due process it is not an idle question to ask why they waited six weeks to seek a hearing?

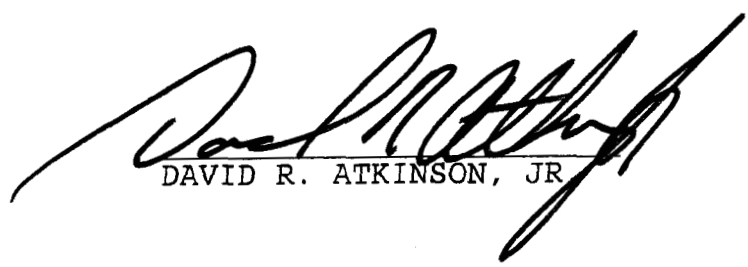
Tenants' Answer Brief, at pages 21 and 22, relies on Guzman v. Western State Bank of Devil's Lake, 516 F.2d 125 (8th Cir. 1975), for the proposition that in order for a pre-judgement attachment statute to be constitutional, it must require verified assertions by the creditor that it believes the property will be concealed or disposed of. This Court in Gazil, 356 So.2d at 312 (which was decided after Guzman) specifically rejected that very argument. Id. at 313, n.4.

In this case, the trial court did more than due process requires by giving the Tenants three separate opportunities for full evidentiary hearings (R-84, R-110, and R-140). Two of these hearings were held on May 18, 1990, just two days after the writ was issued (R-84, R-110). The trial judge balanced the Tenants' due process rights and the Landlord's right to have security for the over $50,000 in past due rent the Tenants owe (R-138). The Tenants did not post a bond nor did they present any evidence to refute the allegations that they had failed to pay rent, totalling over $50,000. In fact, the Tenants in the eviction action, stipulated that they failed to pay rent (R-180).

CONCLUSION

For the foregoing reasons, Landlord respectfully requests that this Court reverse the decision of the Fourth District Court of Appeal which declared Florida's distress statute §83.12 facially unconstitutional. Further, this Court should reject Tenants' argument that the Statute was applied in an unconstitutional manner in this case.

Respectfully submitted,



DAVID R. ATKINSON, JR.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument has been furnished, by U.S. MAIL, to Jack Scarola, Esquire, Searcy, Denney, Scarola, Barnhart & Shipley, P.A., 2139 Palm Beach Lakes Blvd., West Palm Beach, Florida 33401 And Russell S. Bohn, Esquire, Edna L. Caruso, P.A., Suite 4-B/Barristers Bldg., 1615 Forum Place, West Palm Beach, Florida 33401, this 14th day of November, 1991.

GUNSTER, YOAKLEY & STEWART, P.A.
777 S. Flagler Drive, Suite 500
West Palm Beach, FL. 33402-4587
(407) 655-1980

By _____
DAVID R. ATKINSON, JR.
Florida Bar No. 0767239

738/284