IN THE
SUPREME COURT OF FLORIDA

Case No: 78,248

DISTRICT COURT OF APPEAL
SECOND DISTRICT
CASE NO: 91-568

GLENEAGLE SHIP MANAGEMENT, CO.,
and
CHESAPEAKE SHIPPING, INC.,

Petitioners,

v.

ANTHONY LEONDAKOS and
CAROL LEONDAKOS, his wife,

Respondents.

ANSWER BRIEF OF RESPONDENTS

COREY R. STUTIN, ESQUIRE
TRAPP, CHASTAIN and UITERWYK
Post Office Box 433
Tampa, Florida 33601
(813) 254-0500
Florida Bar #334022
Attorneys for Respondents

TABLE OF CONTENTS

ALL REFERENCES SET FORTH AS (A-) WILL REFER TO THE APPENDIX TO THE BRIEF OF PETITIONERS

TABLE OF CITATIONS

STATEMENT OF THE CASE AND FACTS

The Respondents specifically disagree with Petitioners statements regarding the complaint; the long arm statutes; the affidavits and the comment about Respondents failure to file affidavits and take depositions. These statements are unnecessary to the matter before this Court as the issue of jurisdiction is not before this Court and has not yet been ruled on by the trial Court.

The discovery request, which is the subject of this appeal, is necessary in order to determine who had to be deposed in preparation of Respondents opposition to Petitioners motion to dismiss and to produce the documents which would be examined during those depositions. Only then would the Respondents be we required and prepared to submit its affidavits and refute Petitioners affidavits.

Respondents agree with the remainder of Petitioners statement but would add that Petitioners sought review by this Court because of a conflict between two District Courts of Appeal on the issue of whether discovery is available on jurisdictional issues while such issues are pending before the trial Court. The issue of jurisdiction is not at issue here, although a review of the Petitioners brief would lead one to believe otherwise.

SUMMARY OF THE ARGUMENT

The issue before this Court is whether discovery is appropriate on jurisdictional issues while the matter of jurisdiction is pending before the trial Court. The Second District Court of Appeals decision approves discovery on jurisdictional issues believing that the federal rule allowing such discovery is the best approach. Despite believing that the federal rule is the better way the Third District Court of Appeals in F. Hoffman LaRoche & Co. v. Felix, 512 So. 2d 997 (Fla. 3d DCA 1987) declined the use of discovery pending a determination of jurisdiction.

The law presently in Florida allows non-party discovery and evidentiary hearings on issues of jurisdiction. The Florida Courts recognize the judicial power to hear and determine questions involving jurisdiction which the federal Courts recognize by allowing full use of discovery on jurisdictional issues.

The Florida rules are patterned after the federal rules, which have, long ago, recognized the availability of discovery on jurisdictional issues. Federal Courts realize that when a party comes into Court to contest jurisdiction that the Court should not be denied the evidence necessary to decide the issue.

The Second District Court of Appeals decision recognizes that the issue of jurisdiction is one which should be fully developed and the use of discovery, under the Courts supervision, will not cause any greater latitude to the litigants except to develop and

present to the Court the evidence necessary to decide jurisdictional issues. This approach is clearly one which does not offend traditional notions of fair play and substantial justice and should be approved by this Court.

ARGUMENT

DISCOVERY IS APPROPRIATE ON JURISDICTIONAL ISSUES WHEN THE MATTER OF PERSONAL JURISDICTION OVER THE DEFENDANT IS PENDING IN THE TRIAL COURT.

In the Court below, the Second District Court of Appeal held that jurisdictional discovery should be allowed while a motion to dismiss for lack of jurisdiction is pending. In so holding the Court stated:

> We believe the federal rule represents the better approach to the question, and hold that "jurisdictional discovery" is available during the pendency of jurisdictional issues, subject of course to the supervision of the trial Court.

The Court below declined to adopt the holding of F. Hoffman LaRoche & Co. v. Felix, 512 So. 2d 997 (Fla. 3d DCA 1987) which held jurisdictional discovery was not available. Hoffman LaRoche was decided and based solely on prior case law of the third district which held that jurisdictional discovery was not available while the jurisdictional matter was pending on appeal. Far Out Music, Inc., v. Jordan, 438 So. 2d 912 (Fla. 3d DCA 1983), Ward v. Gibson, 340 So. 2d 481 (Fla. 3d DCA 1976).

The Court in Hoffman LaRoche, felt compelled to extend the discovery prohibition while the jurisdictional issue was still pending at the trial Court level, and not just on appeal. Despite this, the Hoffman Court stated in footnote 3:

> Were the question an open one, the panel would be most inclined to follow the modern federal cases, (citations omitted), which, seemingly without exception, adopt the rule that appropriate jurisdictional discovery, including interrogatories, production and depositions directed to "parties," are available while the jurisdictional issue is pending.

The Court in Hoffman LaRoche went further and quoted from Silk v. Sieling, 7 F.R.D. 576, 577 (E.D. Pa. 1947) the following:

> There can be no doubt that this Court has the judicial power to hear and determine questions involving its jurisdiction either of the person or of the subject matter nor that, in order to resolve fact issues on which jurisdiction depends, the ordinary process of the Court is available to cause evidence bearing on the fact in issue to be produced. For this limited purpose the Court has obtained jurisdiction, albeit a special, limited or preliminary jurisdiction, over the Defendants when, appearing specially, they challenge the validity of the service.

Petitioners now seek review of the lower Courts decision pursuant to Article I, Section 3(b)(3), of the Florida Constitution because of a conflict between the Second District Court of Appeals decision in the case at bar and Hoffman LaRoche. Petitioners are requesting this Court to follow the ruling, not the desire, of Hoffman LaRoche and thus overrule the lower Court. It would therefore appear that the issue before this Court is the availability of discovery to both Plaintiff and Defendant, prior to the trial Courts determination of personal jurisdiction. This also appears to be the argument, as framed, by Petitioners.

However, rather than pursue this argument, the Petitioners

have chosen to take this opportunity to argue jurisdiction. Petitioners put the cart before the horse. The issue of jurisdiction is still pending in the trial Court and is not before this Court. It would therefore serve no purpose to get into the arguments regarding issues of jurisdiction which Petitioner is attempting to draw Respondent into. However, the thrust of the argument, if considered, does involve this Court to consider matters of record in this case. In that light it should be pointed out that there is a real question here whether Petitioners have established a clear showing of a lack of jurisdiction.

The complaint filed in this matter "...sufficiently alleges personal jurisdiction...", (A-11). Respondents have not filed any motion or pleading raising the defenses of insufficiency of process or service of process. No motion of any kind has been properly made in accordance with Florida Rule of Civil Procedure 1.140(b) which states in part "A motion making any of these defenses shall be made before pleading if a further pleading is permitted." The Petitioners chose to file instead their Answer and Affirmative Defenses (A-3) over one month before their Motion to Dismiss Complaint (A-4) was filed. The defenses merely state as to each Petitioner "...that this Court lacks personal jurisdiction as to [Gleneagle and Chesapeake]" and nothing more. The defenses of insufficiency of process or service of process have been waived.

Florida Rule of Civil Procedure 1.140(b) clearly provides in

asserting these defenses that:

> The grounds on which any of the enumerated defenses are based and the substantial matters of law intended to be argued shall be stated specifically and with particularity in the responsive pleading or motion. Any ground not stated shall be deemed to be waived... (emphasis added)

Petitioners have failed to state, in their responsive pleading, any grounds whatsoever for there being a lack of personal jurisdiction or any other defense and a plain reading of the rule indicates that they have waived such grounds as they now assert in their motion.

There is obviously more here on the issue of jurisdiction than first appears, however, and Respondents reiterate that these matters should not be considered in deciding the use of discovery on jurisdictional matters.

The case law submitted by Petitioners, however, does have significance. Respondents recognize this Courts decision in Venetian Salami Co. v. Parthenais, 554 So. 2d 499 (Fla. 1989) as authoritative on the requirements of the trial Court and the parties in the determination of a motion "...to quash service of process for lack of jurisdiction over the defendant." Unfortunately, again, the issue before this Court in Venetian Salami Co. had nothing to do with discovery before a motion on jurisdiction is heard and ruled upon. Despite this, this Court did hold that an evidentiary hearing was necessary where the evidence

before the trial Court was in direct conflict. Thus, it appears that the rules of discovery may now be used to prepare and submit evidence at such a hearing. It also appears from the case law of Florida that prior to any hearing on a motion regarding jurisdiction the parties are entitled to non-party discovery. Biernath v. First National Bank and Trust, 530 So. 2d 505, (Fla. 3d DCA 1988), which case relies on Hoffman LaRoche.

Interestingly, the Third District in Thomas v. Lane, 348 So. 2d 408, 409, 410 (Fla. 3d DCA 1977) stated, in regard to an order on appeal which abated the action pending more substantial proof to determine jurisdiction that:

> ...it is error to require a foreign resident to journey into this jurisdiction for the purpose of giving an oral deposition in support of his motion to quash substituted service of process. The trial judge might have required him to submit to an oral deposition in his State of residency. Otherwise, unless a Defendant voluntarily presents himself under a special appearance to the trial Court, proofs going to the issues as made by the pleadings should be either by affidavit or those methods of discovery not requiring physical presence by the Defendant in this jurisdiction. (emphasis added)

All methods of discovery can be accomplished without the presence of the Defendant in this jurisdiction. This is exactly what occurs when a non-resident Defendant defends any action. Interrogatories do not require presence to be answered; production can be done by making copies or traveling to where the matters to be produced are located; and non-resident Defendants are most

always entitled to have their depositions taken where they work or reside. This is exactly the type of discovery which is the subject of this appeal.

All of the decisions of this Court, the lower Courts of this State and Federal Courts recognize that the determination of jurisdiction is not a simple matter. Inherent in these decisions is that each Court has the inherent power to determine questions of its jurisdiction and in order to do so should have available the ordinary processes of the Court.

In Silk, supra, the Federal Court was reviewing Federal Rule 26(a) and determined under the Federal Rules of Civil Procedure that:

> The question presented by the Plaintiff's motion is the interpretation of the phrase in Rule 26(a), "after jurisdiction has been obtained over any Defendant."
> .....
> I see no reason why the word "jurisdiction" in Rule 26(a) must be construed to mean complete jurisdiction. To do so would permit the Defendants in this case to withhold their own testimony upon the very issue which they themselves have raised and thus deny the Court the evidence of the persons who know more about it than anyone else.

Further, the Court in Silk, supra in discussing Federal Rule of Civil Procedure 33, where interrogatories may be required only from an adverse party at that time, stated:

> Where a person who has been sued comes into Court to deny the right of the Plaintiff to proceed

> with the case, he would seem to me to be an adverse party, by any reasonably liberal interpretation of that term in its setting in the Rule.

The Court in Blanco v. Carigulf Lines, 632 F. 2d 656 (5th Cir 1980) noted that Federal Rule of Civil Procedure 33 now provides that any party may serve upon any other party interrogatories to be answered by the party served and based upon this statement in the rule, remanded the case to require the party contesting jurisdiction to answer interrogatories on that issue before final resolution of the jurisdictional issues could take place. It should be noted that the Blanco case involved a seaman who filed an action against a foreign ship owner, identical to the action of the Respondent against Petitioner in this matter.

The present Federal Rules of Civil Procedure 26(a) and 33 are the same as Florida Rules of Civil Procedure 1.280(a) and 1.340. Other than the decision of the lower Court here and the Hoffman LaRoche Court there does not appear to be any decisions in Florida interpreting these rules as they may apply to discovery of jurisdictional issues as the federal cases, cited above, do.

In discussing the application of Federal decisions on the Florida Rules of Civil Procedure the Court in Zuberbuhler v. Division of Administration, 344 So. 2d 1304, 1306 (Fla. 2d DCA 1977) quoted:

> ... it's well known that our Rules of Civil Procedure are patterned very clearly after the Federal rules, and it has been the practice of the Florida Courts closely to examine and

> analyze the Federal decisions and commentaries under the Federal rules in interpreting ours. Jones v. Seaboard Coast Line RR Co., 297 So. 2d 861, 863 (Fla. 2d DCA 1974)

The Federal decisions clearly make no distinction between use of party or non-party discovery on the availability of the rules to the litigants on jurisdictional issues. Florida should not make any distinction as well in interpreting the availability of discovery on jurisdictional issues.

The case law presently in Florida clearly allows non-party discovery prior to jurisdictional determination and evidentiary hearings after determination where the evidence is in conflict. All the Second District's decision does, if approved, is allow the discovery door to swing with less resistance and provide that the trial Court will have before it all the necessary evidence to make a determination of jurisdiction on the issues to be considered, a process approved and followed by the Federal Courts for quite some time. Traditional notions of fair play and substantial justice are clearly met by providing litigants the ability to determine and provide the Court with the necessary evidence on jurisdictional issues.

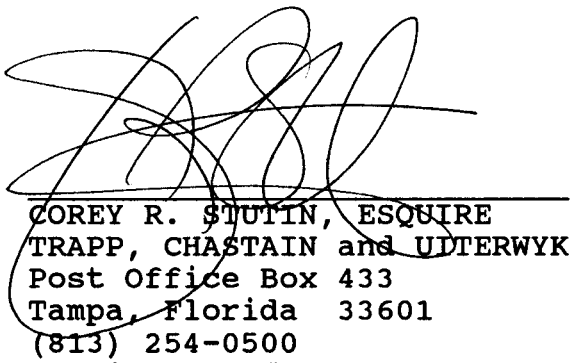
The use of the discovery rules on matters of jurisdiction will cause no more of a "fishing expedition" than that term is frequently used by Defendants in discovery towards the merits of the case. The decision by the Court below doesn't contemplate any expansion of the rules on discovery nor any greater latitude

afforded litigants in their use, it only allows the litigants to informatively oppose a pending motion to dismiss for lack of jurisdiction.

CONCLUSION

Respondents respectfully request this Court to approve the decision of the Second District Court of Appeal, disapprove Hoffman LaRoche, and remand this case to the trial Court so that discovery can be completed.

Respectfully Submitted,



COREY R. STUTIN, ESQUIRE
TRAPP, CHASTAIN and UTTERWYK
Post Office Box 433
Tampa, Florida 33601
(813) 254-0500
Florida Bar #334022

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the office of DAVID W. McCREADIE, ESQUIRE, Post Office Box 838, Tampa, Florida 33601 by U.S. Mail this 26 day of November, 1991.

Corey R. Stutin, Esquire
TRAPP, CHASTAIN, & UITERWYK
Post Office Box 433
Tampa, Florida 33601
(813) 254-0500
Florida Bar #334022