

IN THE
SUPREME COURT OF FLORIDA

Case No: 78,248

GLENEAGLE SHIP MANAGEMENT, CO.,
a foreign corporation, and
CHESAPEAKE SHIPPING, INC., a
foreign corporation,

Petitioners,

v.

ANTHONY LEONDAKOS and
CAROL LEONDAKOS, his wife,

Respondents.

BRIEF OF RESPONDENTS ON JURISDICTION

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SUMMARY OF THE ARGUMENT

The decisions of the Second and Third District Courts of Appeal do not expressly and directly conflict. Both districts allow jurisdictional discovery when such issues are still pending in the trial court and not finally resolved. The decision of the Second District Court of Appeals allows only jurisdictional discovery, which was stated as the preferred method in F. Hoffman LaRoche & Company v. Felix, 512 So. 2d 997 (Fla. 3d DCA 1987), under the facts that were before the Second District in this case.

The Third District Court of Appeals, by its decision in Hoffman LaRoche, never intended to frustrate discovery concerning jurisdictional issues and so stated in Biernath v. First National Bank and Trust, 530 So. 2d 505 (Fla. 3d DCA, 1988) which relied on Hoffman LaRoche for its authority to allow jurisdictional discovery where such was being frustrated in the trial court.

ARGUMENT

The Decision of the Second District Court of Appeal does not expressly and directly conflict with the decision of the Third District Court of Appeal in F. Hoffman LaRoche & Company v. Felix, 512 So. 2d 997 (Fla. 3d DCA 1987).

The premise of the jurisdictional argument set forth by Petitioner in its brief, is to establish express and direct conflict between the decisions of the Second and Third District Courts of Appeal and relies solely on the following;

- a. Hoffman LaRoche & Company v. Felix, 512 So 2d 997

(Fla. 3d DCA 1987) "... held that jurisdictional discovery cannot be taken from a putative defendant where the trial court has not yet decided the question of personal jurisdiction, for such a defendant does not become a 'party' for purposes of discovery until jurisdictional questions are 'finally determined.'" (Brief of Petitioner's on Jurisdiction, p. 1)

b. The decision of the Second District Court of Appeal "...held Leondakos was entitled to take jurisdictional discovery of Gleneagle in this case even before the trial court had decided the jurisdictional issues, and stated specifically that 'jurisdictional discovery is available during the pending of jurisdictional issues.'" (Brief of Petitioners on Jurisdiction, p.3)

Simply put, Petitioner contends there is express and direct conflict because Hoffman LaRoche says, no, and the Second District says yes, to the issue of discovery of jurisdictional matters while the jurisdiction issue has not been fully decided.

This purported conflict has already been resolved by the Third District, in part, by Biernath v. First National Bank and Trust 530 So. 2d 505 (Fla. 3d DCA, 1988) when, in citing to Hoffman LaRoche as authority, they held:

The order appealed dismisses a complaint for lack of in personam jurisdiction over a properly served defendant where full discovery on jurisdictional issues was frustrated. We reverse on the appellant's first point without reaching other procedural questions. A plaintiff may seek

non-party discovery as to issues of jurisdiction over the defendant.

Accordingly, the latest pronouncement of the Third District Court of Appeals has resolved any question in favor of allowing discovery of jurisdictional matters prior to deciding whether in personam jurisdiction is present. In addition, the Hoffman LaRoche decision was not meant to frustrate discovery of jurisdictional issues while the matter of jurisdiction was still pending. Nor was it meant to frustrate the method, because Hoffman LaRoche, and the cases it relied on never addressed the sole issue of jurisdictional discovery. This is further emphasized by the Court in Hoffman LaRoche when it demonstrated a preference for the policy followed in the federal judicial system on discovery of jurisdictional issues only.

The Hoffman LaRoche, supra, decision relied on the Third Districts prior decisions in Ward v. Gibson, 340 So. 2d 481 (Fla. 3d DCA 1976) and Far Out Music, Inc. v. Jordan, 438 So. 2d 912 (Fla. 3d DCA 1976).

In Ward, supra the issue concerned the appearance of the defendant for deposition, when service was made upon defendant's attorney while an appeal was pending contesting the court's in personam jurisdiction. The court held that under these circumstances the defendant was not required to appear and quashed the notice stating, "Inasmuch as the jurisdiction of the trial court over the defendant is the subject matter of an interlocutory

appeal, the trial court may not proceed in the cause as to such subject-matter until the appeal is heard and determined" (at p. 483).

In Far Out Music, supra the defendants were ordered by the trial court to answer interrogatories and respond to requests for production involving the merits of the case while an appeal was pending contesting in personam jurisdiction. In dicta, the court noted the argument made to allow the discovery of evidence which could be used to defeat the claim of lack of jurisdiction however, again, the court held that the trial court had a right to proceed with the cause but not to destroy the subject matter of the appeal. The above two cases relied on by the Hoffman LaRoche court involved discovery directed towards the merits of the case while appeals were pending on jurisdictional issues. This is clearly distinguishable from the issues and facts before the Second District court of Appeal.

Hoffman LaRoche also involved more than just jurisdictional discovery and the court stated:

Since, in the absence of a decision to overrule Far Out by the Court en banc, the present panel is bound by that previous case, see In Re Rule 9.331, 416 So. 2d 1127 (Fla. 1982), we uphold Hoffman's position solely on that authority.
(at p. 998)

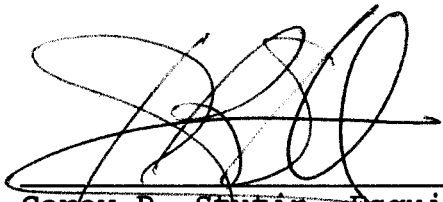
Thus, the Second District Court of Appeal's decision did not reject the holding or even criticize the holding but, rather, did what the Hoffman LaRoche court would have done under facts similar to those

before the Second District Court of Appeal. The Second District's decision now expands the procedural method of discovery of jurisdictional issues which the Third District's decisions allow while jurisdictional issues are pending at the lower court level. This is not a conflict between the districts.

CONCLUSION

The decisions of the Second and Third District Courts of Appeal, are not in conflict on whether jurisdictional discovery is available while the jurisdictional issue is still pending and not fully determined. Thus the petitioner has failed to demonstrate under Art. V section 3(b)(3), Fla Const. (1980); Fla. R. App. p. 9.030(a)(2)(A)(iv) that express and direct conflict exists between the decisions of the District Courts of Appeal. Accordingly, jurisdiction is lacking and the application for review should be denied.

Respectfully submitted,



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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 5th day of August, 1991.



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