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SUPREME COURT OF FLORIDA

ROBERT M. DANCE,

Petitioner,

vs.

RAY TATUM,

Respondent.
_____/

Case No. 80,721

District Court of Appeal,
5th District - No. 91-1098

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# RESPONDENT'S ANSWER BRIEF

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John V. Baum, Esquire
Florida Bar No: 135940
PANICO & BAUM
111 South Maitland Avenue
Maitland, Florida 32751
(407) 647-7200
Attorneys for Respondent

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## STATEMENT OF THE FACTS

Broleman and Rapp owned, until 1975, a large tract of unimproved land lying appurtenant and immediately to the West of U.S. Highway 17-92 in Seminole County, Florida. (ROA Page 134)

In 1967, county authorities acquired the right by condemnation to excavate fill dirt from the northern portion of that land for a period of two years. The man-made pit resulting from that excavation, commonly called a "borrow pit", thereafter served as point of collection for storm waters draining from other lands to which it was adjacent. (ROA Page 134)

In 1975, Broleman and Rapp sold the southerly portion of the land described above to Dance. The instrument of conveyance did not grant an easement to Dance for storm water drainage to the borrow pit situate on the northerly portion of such lands, which lands were retained by Broleman and Rapp until 1984. (ROA Page 134)

Dance's contract to acquire the southern portion of the Broleman and Rapp property was negotiated by an intermediary. (ROA Page 28) While it was Dance's apparent intention to construct an automobile dealership on that property when he bought it, formal plans for the development or drainage of that property were not complete when Dance acquired title thereto. (ROA Page 28)

Rapp, an architect, was apparently engaged by Dance following the conclusion of negotiations for the purchase of such lands to design those improvements which were ultimately constructed thereon, although the evidence before the court below is unclear on whether Rapp was involved in the development of a drainage plan for that property as well. (ROA Pages 28 through 30) Rapp apparently did allow, however, the use of additional fill from the borrow pit to the north by Dance to fill in low areas on the land purchased by him. (ROA Page 22)

As improved, virtually all of the land acquired by Dance was paved, its surface thereby being rendered incapable of absorbing rain water of any kind or quantity. (ROA Page 35) To permit the drainage of water which would otherwise accumulate on-site during a rainstorm. Dance installed a drain centered in the paved area of his lands, which led to an underground pipe exiting the Dance property at the approximate point of its northern boundary with the property retained by Rapp and Broleman, and on which the borrow pit was situate. (ROA Page 256) From the common boundary of the two parcels of land, the natural grade of the property to the north directed the flow of waters coming from the pipe to that borrow pit.

In 1984, the remainder of the Broleman and Rapp property was sold to Tatum by Broleman's estate. The instrument of conveyance makes no reference to any pre-existing easement or license in favor of Dance for storm water drainage. (ROA Page 135)

In 1987, Tatum sold the property he acquired from Broleman and Rapp in 1984 to Dance, at which point Dance became the owner of all of the lands that had originally belonged to Broleman and Rapp. (ROA Page 135) In conjunction with that sale, Dance executed a purchase money note and mortgage in Tatum's favor encumbering the northern parcel on which the borrow pit was situate. That mortgage does not refer to, or attempt to reserve, an easement for storm water drainage for the benefit of the southern parcel originally acquired by Dance from Broleman and Rapp. (ROA Pages 135, 145)

Following an admitted default by Dance in making those payments required of him under the note, Tatum initiated foreclosure proceedings. In those proceeding, Dance sought a determination from the trial court that (1) he had acquired an easement for storm water drainage from Broleman and Rapp in 1975, and (2) that such easement would survive the foreclosure process.

## STATEMENT OF THE CASE

The Statement of the Case set forth in the Petitioner's Brief is adopted by the Respondent.

## SUMMARY OF ARGUMENT

1, The Respondent was entitled to entry of a final judgment of foreclosure in the trial court, and a reversal of the trial court's determination that those lands foreclosed upon were subject to an easement will not affect the Respondent's rights to those benefits otherwise arising under the final judgment, nor will such a reversal require a retrial. Accordingly, the trial court did not err in refusing to dismiss the Respondent's appeal simply because a judicial sale of the property subject to the lien of the Respondent's mortgage took place during the pendency of his appeal.

2. The question of whether of not the Petitioner's license for stormwater drainage was revocable was addressed on appeal to the Fifth District and, to the extent that it was predicated upon an implied or equitable easement, was addressed at the time of trial as well.

3. This court should not vitiate the salutary purposes of the Statute of Frauds by making licenses in real property based upon oral agreements irrevocable.

4. Conditions precedent to the assertion of a claim are not affirmative defenses, and need not be plead as such.

## THIS DISTRICT COURT OF APPEAL WAS CORRECT IN REFUSING TO DISMISS TATUM'S APPEAL FROM THE TRIAL COURT

The final judgment of foreclosure entered by the court below (a) fixed and determined the amount due Respondent on the note and mortgage sued upon by him, (b) set a date on which the property subject to that mortgage would be at judicial sale, and (c) provided that the easement for stormwater drainage at issue on this appeal would survive the foreclosure process.

Tatum was the only bidder for the property at the time of its judicial sale.

Dance contends that, by permitting a judicial sale of the property, Tatum has accepted the benefits of the Final Judgment of Foreclosure and was precluded from pursuing an appeal to the Fifth District.

While it is ordinarily true that where a party recovering a judgment accepts the benefits thereof he is estopped from later seeking a reversal of the same judgment[1], there are exceptions to that rule in those cases (a) where the relief denied is separate and severable from the relief granted (Hunt v. First National Bank of Tampa, 381 So.2d 1194 {2d D.C.A. Fla. 1980}), and (b) where the Appellant was entitled in any event to at least the amount received (Kuharske v. Lake County Citrus Sales, 44 So.2d 641 {Fla. 1950}).

In determining whether the right to review a judgment has been lost be the acceptance of benefits under it, the test is sometimes said to be whether the appeal will result in a reversal of the judgment as a whole, leading to a general retrial. 4 Am.Jur.2d "Appeal and Error" §251. If the outcome of the appeal could have no effect on the Respondent's right to the benefit accepted, its acceptance does not preclude the appeal. Ibid, §253.

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[1]Weatherford v. Weatherford, 91 So.2d 1979 (Fla. 1957)

In the instant case, the Petitioner was admittedly in default in making those payments required of him on the note and mortgage sued upon, and the amounts owed upon the note and mortgage were not dependent, either in whole or in part, on whether the mortgaged property would remain subject to an easement following the conclusion of foreclosure proceedings. Thus, the question of whether any such easement existed as would survive the foreclosure process was "separate and severable" from those issues bearing upon the Respondent's right to foreclose or those sums admittedly due from the Petitioner.

The Respondent was entitled to entry of a final judgment of foreclosure in the court below, and a reversal of the trial court's determination that those lands foreclosed upon were subject to an easement will not affect the Respondent's rights to those benefits otherwise arising under the final judgment, nor will such a reversal require a retrial. Respondent suggests, therefore, that the case on appeal falls clearly within the exception to the general rule of estoppel announced in McMullen v. Fort Pierce Financing & Construction Co., 146 So. 567 (Fla. 1933) and should be denied.

The Petitioner has directed this Court to decisions arising from other jurisdictions in the cases of Male v. Harlan, 12 S.D. 627, 82 NW 179 (S.D. 1900), Stern v. Vert, 108 Ind. 232, ( NE 127 (Ind. 1886), and Mathis v. Litteral, 117 Ark. 481, 175 SW 398 (Ark. 1915) in support of his argument that this appeal should be dismissed.

Both the Male and Mathis decisions involved an attack by an Appellant on the priority of his mortgage against other lienholders. The Sterne decision involved an attempt by the mortgagee Appellant there to increase the quantity of land found by the trial court to be subject to the lien of his mortgage. Each of those decisions was reached in a bygone era, and the Petitioner has not disclosed whether the

jurisdictions from which they arose permit or allow any exceptions to the general principal announced in McMullen, supra.

In any event, and unlike those decisions relied upon by the Petitioner, this appeal did not involve, nor did it affect, the rights or interests of third persons, nor did it involve an effort on the part of the Respondent to subject an additional quantity of land to the lien of his mortgage. It sought only a determination on whether or not those lands foreclosed upon were burdened by an easement.

## THE DISTRICT COURT DID NOT ERR IN REVERSING THE TRIAL COURT'S CONCLUSION THAT THE LICENSE IT FOUND TO EXIST IN FAVOR OF DANCE WAS IRREVOCABLE

Dance suggests that the District Court of Appeal erred by concluding that the 'license" held by Dance was personal to him and could not be assigned or conveyed, because Tatum did not raise the issue of whether any such license was revocable at the time of trial or on appeal to the Fifth District.

In order to consider the merits of that suggestion, the following facts should be kept in mind:

1. Dance, in his Answer and Affirmative Defenses to Tatum's Amended Complaint (Appendix, Page 6), claim that he had acquired an easement for stormwater drainage from Tatum's predecessors in interest. The term "license" appears nowhere in that pleading.

2. No easement may be created or transferred except by a written instrument signed in the presence of two subscribing witnesses by the party creating, granting or conveying the easement. Florida Statute 689.01; Winters v. Alanco, Inc., 435 So.2d 326 (2nd D.C.A. Fla. 1983); Dorsey v. Behm, 356 So.2d 345 (1st D.C.A. Fla. 1978). In Tatum's Reply to Affirmative Defenses (Appendix, Page 14), he expressly denied that Dance had alleged facts sufficient to establish the existence of an easement by express grant.

3. Dance and Tatum jointly executed a Pre-Trial Stipulation upon which the claim asserted by Dance was heard by the trial court (Appendix, Page 8). No reference is made in that stipulation to Dance's assertion of a license, whether irrevocable or otherwise.

Those conditions precedent to the establishment of a legal right must be plead by the party asserting that right; and such conditions are not affirmative defenses.

See Trawick's Florida Practice and Procedure, §11.4 (1992 Edition). It was accordingly, to the extent that Dance intended to prove the existence of an easement, to allege those facts upon which the court might predicate such an easement including, if necessary, an allegation that his claim was founded upon a written instrument.

From the foregoing, it can be clearly see that the trial court, by defining Dance's claim to a right to drain stormwater as a "license", provided him with a benefit he had himself characterized as something else. Furthermore, by concluding that such a license was, under the facts presented, irrevocable, both the trial court and the District Court of Appeal were able to neatly side-step those problems with Dance's claimed easement attributable to both the lack of any absolutely any written instrument upon which Dance might predicate his claim, as well as the almost unavoidable effect that the doctrine of merger would have had upon his license had it been characterized, as he chose to characterize it, as an easement.

Tatum prepared his defense of Dance's claim of an easement upon the law as he understood it. The law at the time of trial, as will be discussed later in this brief, unequivocally required proof of a written instrument by one claiming an entitlement to an easement by express grant. Dance neither alleged nor proved the existence of such an easement, nor did he claim at the time of trial that he had been given a license which had thereafter "ripened" into an easement. He simply claimed that, in view of the oral arrangement he had previously reached with the parties' common grantor, it would be unjust to deprive him of an easement. It was the trial judge, and not Dance, who concluded that Dance had acquired an irrevocable easement by virtue of the license extended to him, and Tatum can hardly be faulted

for having failed to anticipate the fact that neither he nor Dance had anticipated the court's fashioning of a remedy envisioned by neither of them.[2]

[2]The revocability of that license, contrary to Dance's assertion, was thoroughly addressed in Tatum's brief to the District Court of Appeal (Appendix, Page 30)

## THIS COURT SHOULD NOT RECEDE FROM ITS HOLDING IN MOORINGS ASSOCIATION, INC V. TORTOISE ISLAND COMMUNITIES, INC. AND ALLOW ORAL LICENSES TO BECOME IRREVOCABLE.

This brief initially addresses the question of whether those lands originally owned by Tatum and encumbered by the mortgage foreclosed upon by him in the court below were ever been burdened by an easement for storm water drainage in favor of Dance.

An easement is an interest in land that must be created with the formalities required by law. In general, this means that no easement may be created or transferred except by a written instrument signed in the presence of two subscribing witnesses by the party creating, granting or conveying the easement. Florida Statute 689.01; Winters v. Alanco, Inc., 435 So.2d 326 (2nd D.C.A. Fla. 1983); Dorsey v. Behm, 356 So.2d 345 (1st D.C.A. Fla. 1978). Likewise, an agreement or contract for the sale of an easement, or some memorandum thereof, must also be in writing and signed by the party to be charged to be legally enforceable. Florida Statute 725.01.

While it is often stated that an easement may be created by express grant, by implication or by prescription, an "express grant" means a grant in writing made in accordance with these statutes. Ibid. See, also, the dissenting opinion of Judge Cowart in Moorings Association v. Tortoise Island Communities, Inc., 460 So.2d 961 (5th D.C.A. Fla. 1984). There is no proof in the instant case that the Dance acquired or reserved an easement of any kind by a written instrument meeting the requirements of either Florida Statute 689.01 or Florida Statute 725.01.

Easements created by prescription are created by operation of law as a result of statutes of limitation barring legal remedies for, and relief from, the wrongful user of land. Neither adverse possession nor prescription were alleged nor proven

by the Dance in the court below, and those concepts will not be discussed further in this memorandum.

Easements by implication arise where there is a (1) unity of title between the dominant and servient estate and a subsequent separation; (2) necessity that, before the separation takes place, the use which gives rise to the easement shall have been so long continued and obvious or manifest as to show that it was meant to be permanent; and (3) necessity that the easement be essential to the beneficial enjoyment of the land granted or retained. Kirma v. Norton, 102 So.2d 653, (2nd D.C.A. Fla. 1958).

Notwithstanding that fact, however, ownership rights in land, including easements, may not be created by implication arising from facts independent of a writing. As was stated by Judge Cowart in his dissenting opinion in Moorings Association v. Tortoise Island Communities, Inc., supra,

> Since an express promise to convey an interest in land is unenforceable if it is oral, obviously promises which are merely implied in fact from words and deeds being oral and not in writing, are also within the prohibition of the statute of frauds and constitute unenforceable agreements. Therefore, as to interests in land, including easements, and promises of grants and conveyances thereof, there are no enforceable contracts implied in facts not involving the writing, and any such writing giving rise to such rights, expressly or by implication, must comply with the statute of frauds.

Judge Cowart notes, however, there are two possible exceptions to the general principle set forth above.

Under the first of those exceptions, an easement may be implied from the existence of a duly executed writing. See Cannell v. Arcola Housing Corporation, 65 So.2d 849 (Fla. 1953). However, no deed, mortgage or other instrument introduced during the trial of this cause contains any language from which the existence of an easement may be implied. On the contrary, the only testimony

offered by Dance regarding the facts and circumstances giving rise to his claim of an easement was to the effect that (1) his grantor had designed the drainage system that was subsequently installed on Dance's lands and (2) that such individual must have accordingly known that water would flow from such lands to those lands now subject to the lien of Tatum's mortgage.

That testimony, even if true, does not provide a sufficient factual basis upon which to create an easement and shows nothing more than reliance upon a an assumption on his part that, since the Seller of those lands which he acquired designed the drainage system that was ultimately constructed on those lands, the Seller must be necessarily deemed to have assented to the drainage of storm water from the Dance property onto his own.

The enforcement of such an assumption, or implied promise, is clearly precluded by the terms of the statute of frauds and thus cannot be enforced directly or indirectly. Florida Statute 725.01. Moreover, if the deed which Dance received in 1975 did not mention such an easement in the description of the lands and property rights conveyed to him at that time, then to give any effect to oral promises in respect to other lands or rights therein would amount to an unauthorized reformation of the description in the deed. Browne, Statute of Frauds, 5th Edition, §441(c).

A second exception arises where an easement may be implied as a way of necessity as a matter of law. Judge Cowart notes in Moorings Association v. Tortoise Island Communities, Inc., supra, at page 971

> ...one cause of action to acquire an easement, and only one, crossed the line between a cause of action based on a promise implied in fact and into a cause of action implied by law from a particular factual situation and existing without regard to the actual intent, express or implied in fact, of the obligated party to be bound. This is the common law cause of action to establish an easement for a way of necessity and it can correctly be called the creation

> of an easement by implication... the elusive difference between an action based on a promise implied in fact (which is within the statute of frauds) and an action based on rights and obligations implied as a matter of law, saves this exceptional situation from the effect of the statutes (§§689.01 and 725.02, Fla.Stat.).

As previously indicated, in order to establish an easement by implication it must be shown, inter alia, that before the separation of the dominant and servient estates takes place, the use which gives rise to the easement shall have been so long continued and obvious and manifest as to show that it was meant to be permanent. In the instant case, no such easement could have arisen at the time those lands owned by Dance were acquired by him, because such lands were vacant and unimproved when the dominant and servient estates were severed.

The trial court reached the conclusion that Dance had acquired a license to drain storm water from his property to that retained by Broleman and Rapp rather than an easement, and that such a license did not constitute an interest in land and was accordingly not subject to the statute of frauds. The court below next concluded that such license "ripened" into an easement, and accordingly became irrevocable, upon Dance's expenditure of monies in reliance upon such license, relying on Dotson v. Wolfe, 391 So.2d 737 (5th D.C.A. Fla. 1980).

In that particular case, this Fifth District noted:

> There is a split among the jurisdictions as to whether a license may ever become irrevocable...Florida has sided with those jurisdictions which have allowed a license to become irrevocable to escape an inequitable situation which might be created by the requirements of the statute of frauds, or where money has been spent in reliance upon a license. Seaboard Air Line Railway Co. v. Dorsey, 111 Fla. 22, 149 So. 759 (1933); Albrecht v. Drake Lumber Co., 67 Fla. 310, 65 So.2d 98 (1914); The Florida Bar, **Florida Real Property Practice I**, Section 12.14 (1965).

Dance relied in the trial court on two reported decisions in support of his argument that those lands encumbered by the lien of Tatum's mortgage were subject to an easement for storm water drainage in his favor.

The first of those decisions was Wahl v. Lieber, 8 Fla. Supp. 107 (Cr. Ct. Dade Co. 1955).

Lieber was the owner of a house on lots 6 and 7 when he made a gift of the south 50 feet of lot 7 to his nephew. The eaves of the house and a small flight of steps entering that house situate on the property retained by Lieber protruded slightly into the 50 foot tract conveyed by Lieber to his nephew. After his death, Lieber's widow sold the house and lands in question, less the south 50 feet of lot 7, to a third party.

In an action for declaratory relief which subsequently ensued, a determination was sought on whether a subsequent owner of the tract previously conveyed to Lieber's nephew could interfere with the encroachment of the eaves and flight of stairs referred to above. The Court's opinion does not reflect the position taken by the owners of the lands originally conveyed to Lieber's nephew, nor does it cite any authorities for the conclusion which it ultimately reached. In any event, after concluding that when Lieber gave his nephew the land he did not intend to lay the basis for a cause of action against himself or his successors in title, the Court held:

> The circumstances revealed by the evidence impel the court to the conclusion that it would be inequitable and unconscionable to subject the plaintiffs, who are the present owners of the property on which the dwelling is located, to any penalty because of the protrusion of the eaves or the encroachment of the flight of steps, or to deny them the use of a way of ingress and egress from the mentioned south door of the building which they now occupy as their residence.

The facts presented to the trial court in Wahl v. Lieber are clearly distinguishable from those before this court. In Wahl v. Lieber, the improvements which encroached upon the land conveyed to Lieber's nephew were in existence at the time of that conveyance. Here, when those lands owned by Dance were conveyed to him by Broleman and Rapp they were not improved at all. As mentioned earlier

in this brief, it is the existence of the encroachment or use at the time of severance of the dominant and servient tenements that give rise to an easement by implication.

The second decision relied upon by Dance was Albrecht v. Drake Lumber Co., 65 So. 98 (Fla. 1914), a case perhaps more clearly on point.

In the Albrecht decision, the owner of a railroad had acquired a parcel of land from one C.W. Hill and, in conjunction with that acquisition, purchased in addition the right to operate its railroad over lands retained by Hill. Hill subsequently sold the retained lands, saving and reserving the right of way previously extended to the railroad, and the purchaser of those lands acquired them with full knowledge of that reservation, and with full knowledge that the railroad was actually in use at that time.

The issue in that case was not whether an oral license had been given or was enforceable, but whether such a license might be revoked at the will of the licensor when substantial expenditures had been made by the licensee in reliance thereon. The court held that it could not.

The facts in that case are again distinguishable from those before this court. In Albrecht, the improvements made by the licensee **were constructed upon the lands constituting the servient estate and belonging to the licensor**. In the case before this Court, the improvements made by Dance were constructed entirely upon lands owned by him.[3]

Dance claims here that he relied upon an oral grant, or a grant by implication, of the right to drain storm waters from those lands acquired by him to those lands owned by Broleman and Rapp. Even were such an agreement not barred by the statute of frauds, it seems to the undersigned that proof of such reliance here is

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[3]The drain pipe from Dance's property extends some two to five feet into Tatum's property.

sadly lacking.[4] While Dance offered testimony regarding the cost of those buildings and pavement he had constructed on his property shortly following its acquisition, and testimony as to the anticipated cost of constructing another means of storm water drainage, he offered no testimony of any kind as to those costs he originally incurred in constructing a drain from his property to the vicinity of the borrow pit. Nor did he offer any testimony to the effect that such costs could or would have been avoided had the license he relied on never been granted.

The fact of the matter is that Dance did not expend monies or make improvements in reliance upon such a grant; on the contrary, he **avoided** making expenditures that would have otherwise been required to provide for a more complex system of storm water drainage or on-site water retention.

The Fifth District, in an effort to achieve what it perceived to be an "equitable" result, provided Dance with a right to drain stormwater from his lands on to Tatum's. Yet, the equities of the situation in which Dance may presently find himself were not occasioned by any act on the part of Tatum's.[5] Dance **could** have protected himself from the situation in which he subsequently found himself by insisting upon a written agreement defining his rights of drainage in recordable form, and he **could** have exempted his drainage rights from the lien of Tatum's mortgage, but did neither. It is precisely because innocent persons may be subjected to burdens, claims or other demands affecting their property arising from

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[4]The effect of lack of proof of such expenditures is discussed in Merrill Stevens Dry Dock Co. v. G & J Investments Corp, Inc., 506 So.2d 30 (3rd D.C.A. Fla. 1987)

[5]It is suggested that Tatum should have known about Dance's "right" to drain storm water on to his property because a drainage pipe from the Dance property encroached some two feet onto his own, a heavily wooded parcel some eighteen acres in size. Whether Tatum's actual, or constructive, knowledge of that fact may have raised some duty to investigate on his part, or by itself precluded him from questioning Dance's entitlement to drain such water at a later date, was not addressed by the Fifth District

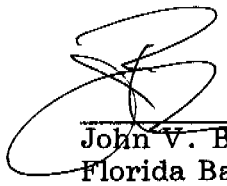
verbal and unrecorded agreements that may have never, in fact, been made that this court should not further vitiate the Statute of Frauds by receding from its decision in Moorings Association, Inc. v. Tortoise Island Communities, Inc., 460 So.2d 961 (5th DCA Fla. 1965), decision quashed, 489 So.2d 22 (Fla. 1986.)

## TATUM WAS NOT REQUIRED TO RAISE, BY REPLY TO DANCE'S ASSERTION OF AN EASEMENT BY WAY OF AFFIRMATIVE DEFENSE, THE APPLICABILITY OF THE STATUTE OF FRAUDS

Those conditions precedent to the establishment of a legal right must be plead by the party asserting that right; and such conditions are not affirmative defenses. See Trawick's Florida Practice and Procedure, §11.4 (1992 Edition). It was accordingly, to the extent that Dance intended to prove the existence of an easement, to allege those facts upon which the court might predicate such an easement including, if necessary, an allegation that his claim was founded upon a written instrument.

CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that a true and correct copy of the foregoing was mailed this 21st day of December, 1992, to John F. Bennett, Esquire, 170 East Washington Street, Orlando, Florida 32801, by United States Mail.



John V. Baum, Esquire
Florida Bar No: 135940
PANICO & BAUM
111 South Maitland Avenue
Maitland, Florida 32751
(407) 647-7200
Attorneys for Respondent