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

PETITIONER'S REPLY BRIEF

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ARGUMENT

I. THE DISTRICT COURT OF APPEAL SHOULD HAVE DISMISSED THE APPEAL FROM THE TRIAL COURT BECAUSE TATUM HAD ACCEPTED THE BENEFITS OF THE TRIAL COURT'S JUDGMENT OF FORECLOSURE.

Respondent's argument on this point avoids dealing with the facts of this case.

Specifically, what was sold to Respondent at the foreclosure sale was subject to an easement for Petitioner's drainage rights. If, as the Fifth District Court of Appeal has done, the "easement" is downgraded or reduced to a "license", then the quality of title to Parcel B has been upgraded. Respondent has received more than he bought.

Furthermore, if, as Respondent would have this Court do, all drainage rights are eliminated, then the quality of Parcel B has been enhanced even more.

No one can say with certainty that third parties would have participated in the bidding if what was auctioned by the Clerk was not subject to an easement but subject only to a license; nor can one say with certainty that the bidding might have gone otherwise if the drainage rights had been eliminated entirely; however, it is patently unfair to allow the Respondent to purchase what appears to have been an encumbered title and then allow him, without further competitive bidding, to eliminate or reduce that encumbrance by an appeal.

Fairness dictates, therefore, that the appeal should have been dismissed.

II. THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT, ERRED IN PARTIALLY REVERSING THE TRIAL COURT, BECAUSE SUCH PARTIAL REVERSAL WAS BASED UPON A MATTER NOT OBJECTED TO BY TATUM AT THE TRIAL COURT.

Respondent's approach to this issue is to point out that the Petitioner did not use the term "license" and therefore somehow Respondent is excused from having objected to the form of the final judgment.

Even if true, this ignores the point that one is not entitled to raise matters on an appeal which he did not raise below.

In order to be properly before a court of appeal, the Appellant must have given the trial judge an opportunity to correct the purported error. It is unfair to the trial judge to point out purported errors to the court of appeal which the Appellant never pointed out to the trial judge. Dober v. Worrell, 401 So.2d 1322 (Fla. 1981).

For this reason, the partial reversal by the Fifth District Court of Appeals was in error.

III. THE RULING IN ALBRECHT v. DRAKE LUMBER CO., 67 FLA. 310, 65 SO. 98 (1914) TO THE EFFECT THAT AN IRREVOCABLE LICENSE BECOMES AN EASEMENT BASED ON EQUITABLE ESTOPPEL, WAS NOT OVERRULED BY MOORINGS ASSOCIATION, INC. v. TORTOISE ISLAND COMMUNITIES, INC., 460 SO.2D 961 (FLA. 5TH DCA), DECISION QUASHED, 489 SO.2D 22 (FLA. 1986) (DISSENT APPROVED).

At page 13 of Respondent's brief, he specifically relies upon the fact that the enforcement of the subject easement or license is "clearly precluded by the terms of the Statute of Frauds and thus cannot be enforced directly or indirectly." As was pointed out under Point IV of Petitioner's Initial Brief on the Merits, Rule 1.110(d), Fla. Rules of Civil Procedure, specifically requires that the Statute of Frauds be affirmatively pled.

The Respondent did not raise the Statute of Frauds, therefore, such defense is waived.

Moreover, on pages 11 and 12 of his brief, Respondent argues that there was "no proof" that the Statute of Frauds was met. Again this ignores the fact that the burden was upon the Respondent to raise the Statute of Frauds. Had he done so, the original contract between Rapp and Dance might have been introduced at the trial. Respondent should not be heard to argue that such a document was not introduced into evidence where the burden was clearly upon him to plead the Statute of Frauds to put such matter in issue.

Finally, the Respondent suggests that the case of Moorings Association, Inc. v. Tortoise Island Communities, Inc., 460 So. 2d 961 (5th DCA 1984) should always be applied to preclude easements

or licenses where there is no evidence meeting the requirements of the Statute of Frauds.

If such an ironclad position is adopted by this Court, then, in theory, Rapp (the original owner of both parcels) could have designed the plans for a Parcel A, made the sale to Dance in reliance thereon, accepted his purchase price, allowed Dance to make the improvements, and then immediately thereafter demanded that the drainage over Parcel B stop. It is incomprehensible that by its adoption of Judge Cowart's dissent in the Moorings Association, Inc. v. Tortoise Island Communities, Inc., Supra, case, this Court intended such a result.

In conclusion, this Court should not adopt such an inflexible rule that would (in the words used in the case of Wahl v. Lieber, 8 Fla. Supp. 107 [Cir. Ct. Dade Cty 1955]) allow such an "inequitable and unconscionable" result.

Accordingly, the Moorings Association, Inc. v. Tortoise Island Communities, Inc., Supra, decision should be limited to its facts and should not be applied where, as here, the purchaser has expended substantial amounts of money in creating the improvements upon the easement area and used the easement for over fifteen years.

IV. ASSUMING ARGUENDO, THAT THE MOORING DISSENT (ADOPTED BY THE FLORIDA SUPREME COURT) OVERRULED ALBRECHT v. DRAKE LUMBER CO., SUPRA, AND REQUIRES COMPLIANCE WITH THE STATUTE OF FRAUDS, SUCH REQUIREMENT WAS WAIVED BECAUSE TATUM DID NOT RAISE THE STATUTE OF FRAUDS.

Respondent's argument on this point is that compliance with the Statute of Frauds is a "condition precedent to establishment of a legal right."

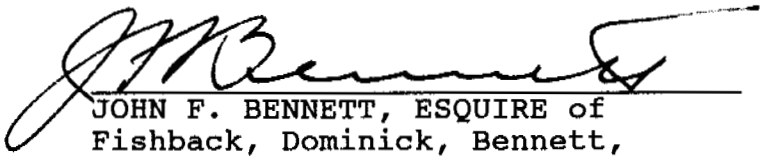
Such argument flies in the face of Rule 1.110(d), Fla. Rules of Civil Procedure, which specifically provides that the Statute of Frauds must be affirmatively pled.

CONCLUSION

Based upon any of the points raised herein, the District Court of Appeal, Fifth District, erred in modifying the Final Judgment of Foreclosure entered by the trial court.

It is submitted that this Court should vacate the decision of the District Court of Appeal and reinstate the judgment of the trial court.

Respectfully submitted,



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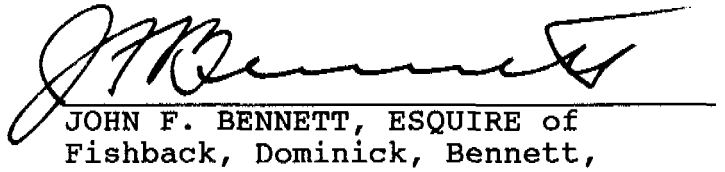
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing Reply Brief has been furnished by U. S. Mail to JOHN V. BAUM, ESQUIRE, 111 South Maitland Avenue, Maitland, Florida 32751 this 14th day of January, 1993.



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