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IN THE SUPREME COURT
STATE OF FLORIDA

FLANIGAN'S ENTERPRISES, INC.,

Case No:

Petitioner,

81,563

vs.

BARNETT BANK OF NAPLES,

Respondent.

_____ /

PETITIONER'S JURISDICTIONAL BRIEF

On review from the District Court of Appeal,
Fifth District, State of Florida

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in this case expressly and directly conflicts with
the decisions of the Fourth District Court of
Appeal in Ford Motor Credit Company v. Hanus, 491
So.2d 520 (Fla. 4th DCA 1986) and the Third
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STATEMENT OF THE CASE AND FACTS

The Petitioner, FLANIGAN'S ENTERPRISES, INC., brought an action against Respondent, BARNETT BANK OF NAPLES, for damages arising from its violation of § 818.01, Fla. Stat., based on the facts set forth below.

Level III of Orlando, Inc. leased space and purchased a liquor license from FLANIGAN'S for the operation of a nightclub. At all times the liquor license remained on the premises as required by Florida law. Consequently, FLANIGAN'S obtained by operation of law a landlord's lien on the liquor license pursuant to § 83.08, Fla. Stat.

Thereafter, BARNETT made a loan to an entity related to Level III and took back a security interest in the liquor license. BARNETT'S security interest was inferior to FLANIGAN'S landlord's lien because it attached at a later date. Upon the default of its borrower, BARNETT obtained the liquor license, placed it in escrow and sold it to a third party, Hickory Point Industries, Inc., without the written consent or knowledge of FLANIGAN'S.

Soon after the sale of the license, Hickory Point filed for protection under Chapter 11 of the United States Bankruptcy Code. The Bankruptcy Code provides that statutory liens for the payment of rent are avoidable. Therefore, FLANIGAN'S was unable to enforce its landlord's lien against Hickory Point in the bankruptcy case leaving an action against BARNETT as its only recourse for recovering its damages.

The trial court entered partial summary judgment in favor of FLANIGAN'S finding that BARNETT had violated § 818.01 by disposing of the liquor license without the written consent of FLANIGAN'S. After trial, the court entered final judgment in favor of BARNETT concluding that FLANIGAN'S was estopped from asserting its landlord's lien.

FLANIGAN'S filed an appeal to the Fifth District Court of Appeal to review the trial court's final order denying it recovery based on its finding of estoppel. BARNETT filed a cross-appeal to review the trial court's order finding that it had violated § 818.01.

The District Court held that the record supported the trial court's conclusion that FLANIGAN'S was estopped from asserting its landlord's lien. The Court further held that the written consent requirement of § 818.01 has been impliedly repealed by the Uniform Commercial Code and that, therefore, BARNETT'S actions in disposing of the liquor license could not subject it to liability under § 818.01. The District Court expressly acknowledged conflict with decisions from the Third and Fourth District Courts of Appeal.

Flanigan's timely filed its notice to invoke the discretionary jurisdiction of this Court on April 5, 1993.

SUMMARY OF ARGUMENT

In this case, the District Court of Appeal held that the written consent requirement of § 818.01 has been impliedly repealed by the remedy provisions encompassed in the Uniform Commercial Code (UCC) and that § 818.01 does not apply in the context of sales of collateral by either inferior or superior lienholders where such sales are permitted by the UCC. The decision of the district court cannot be reconciled with the previous decisions of the Third District Court of Appeal in Littman v. Commercial Bank & Trust Company, 425 So.2d 636 (Fla. 3d DCA 1983), wherein the Court expressly held that § 818.01 has not been impliedly repealed by § 679.311 or any other remedy provision encompassed in the UCC because no conflict between the statutes exists.

Additionally, the decision of the District Court is irreconcilable with the decision of Ford Motor Credit Company v. Hanus, 491 So.2d 520 (Fla. 4th DCA 1986), wherein the Fourth District Court of Appeal held that a purchaser of a truck at a sheriff's sale (the levying judgment creditor) was liable under § 818.01 to the secured creditor whose lien was duly noted on the title, when a third party to whom the creditor resold the truck vanished and absconded with the collateral. As the District Court clearly acknowledged in its opinion, its decision expressly and directly conflicts with decisions from the Third and Fourth District Courts of Appeal.

JURISDICTIONAL STATEMENT

The Florida Supreme Court has discretionary jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of appeal on the same question. Article V § 3(b)(3) Fla. Const. (1980); Fla. R. App. P. 9.030(a)(2)(A)(iv).

ARGUMENT

The decision of the District Court of Appeal in this case expressly and directly conflicts with the decisions of the Third District Court of Appeal in Littman v. Commercial Bank & Trust Company, 425 So.2d 636 (Fla. 3d DCA 1983), and the Fourth District Court of Appeal in Ford Motor Credit Company v. Hanus, 491 So.2d 520 (Fla. 4th DCA 1986).

FLANIGAN'S sued BARNETT to recover damages for violation of § 818.01, Fla. Stat., which provides, in pertinent part:

Whoever shall pledge, mortgage, sell or otherwise dispose of any personal property to him belonging, or which shall be in his possession, and which shall be subject to any written lien, or which shall be subject to any statutory lien, whether written or not...without the written consent of the person holding such liens...shall be guilty of a misdemeanor of the first degree, punishable as provided in § 775.082 or § 775.083.

Although it is a criminal statute, the courts have created a civil cause of action for its violation. Ford Motor Credit Company v. Hanus, 491 So.2d 520 (Fla. 4th DCA 1986).

The District Court of Appeal concluded that § 818.01 has been impliedly repealed by § 679.311 and other remedy provisions encompassed in the Uniform Commercial Code (UCC). The Court found that § 679.504(3) cannot be reconciled with § 818.01 in the context of sales of collateral by secured creditors. As explained below, the decision of the District Court conflicts with decisions of the Third and Fourth District Courts of Appeal. The petitioner respectfully submits that this Court can and should grant discretionary review to resolve the conflict by reversing the decision of the District Court.

In the decision of the District Court in Flanigan's Enterprises, Inc. v. Barnett Bank of Naples, 18 Fla. L. Weekly D643 (Fla. 5th DCA March 12, 1993), the trial court's determination that BARNETT violated § 818.01 by disposing of the liquor license was found to be erroneous. The Court expressly held that § 679.504(3) conflicts and cannot be reconciled with § 818.01 in the context of sales of collateral by secured parties. Accordingly, the court held that § 818.01 has been impliedly repealed by the remedy provisions of the UCC.

In its opinion, the district court discussed the cases of Littman v. Commercial Bank & Trust Co., 425 So. 2d 636 (Fla. 3d DCA 1983) and Ford Motor Credit Co. v. Hanus, supra, and expressly acknowledged that they conflict with its decision. In the Littman case, Commercial Bank brought an action for damages resulting from Park Lane Enterprises, Ltd.'s transfer of a fork lift which was subject to a security interest in favor of the bank.

Commercial Bank held a security interest in the fork lift under the UCC pursuant to an agreement with the debtor. After the debtor filed bankruptcy, the fork lift was sold at public auction to Park Lane subject to Commercial Bank's security interest. One month later, having received no payments under the security agreement, the bank demanded Park Lane to produce the fork lift. Park Lane advised the bank that the fork lift had been resold to a third party subject to the bank's lien. The bank was unable to locate either the alleged purchase or the forklift.

The bank filed suit against Park Lane seeking damages for violation of § 818.01, Fla. Stat. The trial court entered final judgment in favor of the bank finding that Park Lane had violated § 818.01 by selling the fork lift without obtaining the bank's written consent.

The Third District Court of Appeal rejected Park Lane's contention that § 818.01 was inconsistent with and was therefore repealed by enactment of § 679.311 of the UCC. The court further noted that to the extent of any conflict, the specific provisions of § 818.01 must prevail over the general terms of § 679.311.

Additionally, the appellate court observed that § 818.01 was amended after the adoption of the UCC demonstrating that the legislature found no conflict between the provisions. The court further noted that also subsequent to adoption of the UCC, the First District applied § 818.01 in a criminal setting in Helmig v. State, 330 So.2d 246 (Fla. 1st DCA 1976).

In Ford Motor Credit Company v. Hanus, 491 So.2d 570 (Fla. 4th DCA 1986), Ford Motor Credit Company (FMCC) brought an action against the buyer of a truck at a sheriff's sale for damages arising from violation of § 818.01, Fla. Stat. FMCC held a security interest in a truck owned by Bernard Hanus. Ocean City Lumber Company, a judgment creditor of Hanus, instructed the sheriff to levy on the truck and have it sold at a sheriff's sale. At the sale, Ocean City purchased the truck subject to FMCC's security interest. After the sale, Ocean City sold the truck to a third party who later disappeared with it.

The trial court denied FMCC relief under § 818.01 and the case was appealed. In reversing the trial court, the Fourth District rejected Ocean City's argument that § 818.01 was not intended to protect secured creditors in such cases. Unlike the Fifth District in the Flanigan's case, the Court held Ocean City liable for violating the clear and plain meaning of the statute and did not discuss whether the sale to the third party was done with the intent to deprive FMCC of its collateral.


The decision of the district court in this case is in conflict with the decisions of the Fourth District in Ford Motor Credit Company and the Third District in Littman to the extent that holds that the UCC impliedly repealed the written consent requirement of § 818.01 and that it should not be applied in the context of sales of collateral by either inferior or superior lienholders where such sales are permitted by the remedy provisions of the UCC. Petitioner submits that the District Court's decision was erroneous and this Court should accept discretionary jurisdiction to reverse the Court below.

CONCLUSION

This Court has discretionary jurisdiction to review the decision below, and the Court should exercise that jurisdiction to consider the merits of the petitioner's argument.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States regular mail to TUCKER H. BYRD, ESQUIRE, Post Office Box 1391, Orlando, Florida 32802, on this 15 day of April, 1993.



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