IN THE SUPREME COURT OF FLORIDA

CASE NO. 82,708

OCEAN VILLAGE CONDOMINIUM ASSOCIATION, INC.,

Petitioner,

v.

JON SCHUYLER BROOKS,

Respondent.

ON PETITION FOR REVIEW FROM THE
DISTRICT COURT OF APPEALS, THIRD DISTRICT
CASE NO. 93-00204

ANSWER BRIEF OF RESPONDENT ON THE MERITS

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- and -

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PRELIMINARY STATEMENT

JON BROOKS will be referred to in this brief by proper name or as Respondent, OCEAN VILLAGE CONDOMINIUM ASSOCIATION, INC. will be referred to by proper name ("OCEAN VILLAGE") or as Petitioner, and MARK E. FRIED, P.A. will be referred to by proper name or as Attorney for Respondent. "R. Ex." refers to exhibits in the "Appendix of Appellant," appearing after page 3 of the Record.

SUMMARY OF THE ARGUMENT

The Circuit Court improperly entered a default and default judgment against JON BROOKS and in favor of OCEAN VILLAGE, and subsequently improperly denied the motion of JON BROOKS to set aside that default and default judgment. The District Court of Appeals for the Third District reversed that denial and vacated the default and default judgment, holding that the Circuit Court lacked jurisdiction over the subject matter of the action under section 34.01 of the Florida Statutes. Brooks v. Ocean Village Condominium Ass'n, Inc., 625 So. 2d 111, 112 (Fla. 3d DCA 1993).

In the Third District, Appellant JON BROOKS (Respondent here) raised five independent bases upon which to vacate the default and default judgment issued by the Circuit Court. The impact of section 34.01 upon equity jurisdiction was only one.

Of the other four bases raised by JON BROOKS, the Third District stated, "[i]n our view some of the owner's alternative arguments for relief from the default have merit. Since the jurisdictional issue is dispositive, however, we need not reach the owner's alternative contentions." Brooks, 625 So. 2d at 112.

If the decision of this Court in Alexdex Corp. v. Nachon Enterprises, Inc., 19 Fla. L. Weekly 5417 (Fla. Sept. 1, 1994), stands for the proposition that the Circuit Court had jurisdiction under section 34.01, then the "alternative contentions" now must be reached. This Court may do so. See Fla. R. App. P. 9.040.[1]

First, the Circuit Court lacked jurisdiction over the subject matter of the action because OCEAN VILLAGE failed to make effective service upon JON BROOKS of a Notice of Lien prior to the commencement of its action. First, the Circuit Court lacked jurisdiction over the subject matter of the action because OCEAN VILLAGE failed to make effective service upon JON BROOKS of a Notice of Lien prior to the commencement of its action. Effective service of such a Notice is a jurisdictional prerequisite to the commencement and maintenance of a foreclosure action.

Second, even if the Circuit Court did have subject matter jurisdiction -- which is denied -- it nonetheless improperly entered a default. One day after receiving the Summons and Complaint, JON BROOKS sent a letter denying the allegations in the Complaint to Mr. James Dowd, Manager of OCEAN VILLAGE, with a copy to the office of MARK FRIED. This letter is an Answer under Florida law, and thus no default should have been entered.

Third, even if the letter does not constitute an Answer, it is a paper that was timely served upon OCEAN VILLAGE and MARK

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[1] On the assumption that Alexdex controls here, and on the further assumption that this Court may entertain the issues raised in the Third District, Respondent in this answer brief will not address the exclusivity issue. Should these assumptions be erroneous, however, Respondent respectfully reserves its rights to brief this discrete issue.

FRIED. Rule 1.500(b) of the Florida Rules of Civil Procedure therefore required that JON BROOKS receive notice of any application for entry of default a reasonable time prior to entry of default. JON BROOKS did not receive such "notice" any time prior to entry of default; in fact, the "notice" was not even ***mailed*** prior to entry of default. In such instances, Florida law requires that the default and resulting default judgment be vacated.

Additionally, OCEAN VILLAGE and MARK FRIED sought and secured entry of default in breach of an agreement with JON BROOKS not to proceed so as to permit settlement negotiations to be held. Florida law considers such acts unconscionable and requires that the default and resulting default judgment be set aside.

Thus, even if Alexdex removes the ratio decidendi of the Third District, it need not and should not disturb the judgment. This Court, therefore, should consider de novo the issues presented by JON BROOKS to the Third District. Alternatively, it should remand this matter to the Third District for further determination.[2]

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[2] Should this Court proceed de novo, Respondent respectfully requests reconsideration of that part of the September 2, 1994 Order of this Court dispensing with oral argument pursuant to Rule 9.320 of the Florida Rules of Appellate Procedure.

STATEMENT OF THE CASE AND OF THE FACTS

On July 2, 1992, Petitioner caused a Summons and Complaint to be served upon Respondent at his place of business in New York.[3] The Complaint alleges, among other things, that Respondent -- owner of Unit 2017 of OCEAN VILLAGE -- failed to tender payment of the assessment for the first quarter of 1992, that Petitioner had recorded a lien and sent Respondent notice of the same so as to secure that assessment, and that Petitioner now sought to foreclose upon that lien. R. Ex. 1.

In response to the Complaint, Respondent that same day telephoned the office of MARK FRIED and spoke with Julaine Taggart, Legal Assistant to Mr. Fried. Respondent explained to Ms. Taggart that there must be a mistake, that Respondent twice before had tendered payment of the assessment for the first quarter (one original check, one replacement check), and that Respondent never received any notice of lien (or anything else) supposedly sent by certified mail to indicate that the latter payment had not been received. Ms. Taggart admitted knowing that Respondent had not received the notice of lien because the return receipt came back to the office of MARK FRIED indicating that the notice had not been delivered. R. Ex. 7, ¶¶ 17-30.[4]

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[3] Appellant informed Appellee before January 15, 1992 that his then current residential address -- 426 West 22nd Street, New York, NY -- might not be valid much longer, and that for the sake of good order future assessment or other notices should be sent to his office address. R. Ex. 7, ¶¶ 7-8.

[4] The notice of lien apparently was sent to the former residential address of Appellant notwithstanding the information previously given to OCEAN VILLAGE.

On July 3, 1992, JON BROOKS wrote a letter denying the allegations of the Complaint and presenting alternative and additional facts to those set forth in the Complaint. R. Ex. 2. He then sent that letter to Mr. James Dowd, Manager of OCEAN VILLAGE, with a copy to the office of MARK FRIED. Id.; R. Ex. 7, ¶¶ 32-33. Included in that letter was yet another replacement check for the assessment for the first quarter of 1992. Thus, as of July 3, JON BROOKS was current on his account for 1992. R. Ex. 7, ¶¶ 34-35.[5]

Thereafter, as was known to MARK FRIED, JON BROOKS was out of the country on business. During that absence from his office early in the week of July 20, there arrived a July 15, 1992 letter from MARK FRIED acknowledging receipt of the July 3 letter and the enclosed check. That same letter indicated that there remained outstanding a three ($3) dollar deficiency in his 1992 assessment account -- one ($1) dollar per quarter; it also stated that if that "deficiency," the late charge (one hundred ($100) dollars) and the alleged attorney's fees -- one thousand three hundred seventy ($1,370) dollars -- were not paid by July 23, then OCEAN VILLAGE would proceed with its foreclosure action. R. Ex. 7, ¶¶ 36-37.[6]

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[5] JON BROOKS had made timely payments for the second and third quarters of 1992 prior to the commencement of the action. R. Ex. 7, ¶¶ 13-16 & 25-26 and exhibits referenced therein.

[6] As the July 15 letter makes clear, this action long ago ceased being an action to recover the assessment for the first quarter of 1992. Since at least that date, this action has been nothing more than one to recover ever-growing and never reasonable attorney's fees.

On July 23 -- the date he first saw the July 15 letter -- JON BROOKS telephoned and spoke with MARK FRIED in an effort to negotiate a settlement. MARK FRIED refused to discuss settlement, told JON BROOKS to speak with Mr. Dowd of OCEAN VILLAGE, and, begrudgingly, later gave him a one-week extension of the July 23 deadline in order to contact Mr. Dowd. R. Ex. 7, ¶¶ 37-40.

On July 24, JON BROOKS finally succeeded in contacting Mr. Dowd, and secured from him a promise not to proceed with the court action so that they could continue settlement negotiations.[7] Relying on this promise for his peace of mind, JON BROOKS then embarked on another overseas business trip that kept him out of the country until August 23, 1992. R. Ex. 7, ¶¶ 41-43.

Upon his return, JON BROOKS tried to contact Mr. Dowd to continue settlement negotiations. His efforts proved unsuccessful because Hurricane Andrew made it impossible to reach OCEAN VILLAGE by telephone. R. Ex. 7, ¶¶ 45-48.

On August 28, JON BROOKS received at his office two envelopes, each postmarked August 21, 1992. R. Ex. 8, ¶ 7 and exhibits E & F referenced therein. In one was an August 17 letter from MARK FRIED to the Circuit Court requesting entry of a default against JON BROOKS; in the other was the signed Order for Entry of Default, dated August 21. R. Exs. 3 & 4; R. Ex. 7 ¶ 49; R. Ex. 8, ¶¶ 3-6 and exhibits referenced therein.

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[7] Mr. Brooks and Mr. Dowd agree that such a conversation took place and that Mr. Brooks received from Mr. Dowd such a promise not to proceed. R. Ex. 7, ¶ 41; R. Ex. 9, ¶ 2. The two gentlemen, however, have different recollections as to the intended duration of the promise. See, infra, n.12 at 11-12.

Immediately, JON BROOKS attempted to speak with OCEAN VILLAGE and MARK FRIED, directly and indirectly, to understand why the default had been taken and to stop the escalation of the matter. R. Ex. 7, ¶¶ 50-54. Rebuked at every turn, JON BROOKS tried to reach the Circuit Court seeking its intervention in order to resolve the matter without further litigation. Id., ¶ 55.

On September 21, the Ciruit Court held a hearing on the Motion for Final Default Judgment. MARK FRIED presented arguments; JON BROOKS requested an adjournment so as to permit the parties to pursue settlement, having reached a partial settlement with OCEAN VILLAGE the previous evening. R. Ex. 7, ¶¶ 56-59. Ultimately, the Circuit Court granted the motion and signed the Final Default Judgment. Id., ¶ 60-61; R. Ex. 5.

Subsequently, JON BROOKS and OCEAN VILLAGE continued to discuss a comprehensive settlement. R. Ex. 7, ¶¶ 62-81. On December 16 -- with no settlement in place, and the foreclosure sale set for December 17, 1992 -- JON BROOKS served an Emergency Motion to Set Aside the Default and Default Judgment, and to Cancel the Foreclosure Sale. R. Ex. 6.

After the December 17 hearing the Circuit Court cancelled the sale, but otherwise denied the Motion. R. Exs. 10 & 11. An appeal was taken from the Order Denying the Motion. R. Ex. 12. The District Court of Appeals reversed the Order and vacated the default and default judgment.

ARGUMENT

THIS COURT MUST AFFIRM THE JUDGMENT OF THE DISTRICT COURT OF APPEALS AND REVERSE THE NON-FINAL ORDER DENYING THE MOTION OF RESPONDENT TO SET ASIDE THE DEFAULT AND DEFAULT JUDGMENT BECAUSE (1) THE TRIAL COURT LACKED SUBJECT MATTER JURISDICTION OVER THIS ACTION, (2) THE RESPONDENT FILED AN ANSWER, OR (3) PETITIONER FILED AN APPLICATION FOR ENTRY OF DEFAULT WITHOUT NOTICE TO RESPONDENT AND IN BREACH OF AN AGREEMENT WITH RESPONDENT NOT TO PROCEED.

ISSUE I

THE CIRCUIT COURT LACKED SUBJECT MATTER JURISDICTION BECAUSE PETITIONER FAILED TO SATISFY THE JURISDICTIONAL PREREQUISITE

An action to recover unpaid condominium assessments (through the foreclosure of a lien or otherwise) is an action to collect a debt. Prior to the commencement of such an action, an alleged debtor must actually receive notice of the debt. 15 U.S.C.A. § 1692(g)(a)(3); Higgins v. Capital Credit Serv., Inc., 762 F. Supp. 1128 (D. Del. 1991) (contents of required notice of debt must be conveyed effectively to the debtor).

Florida law, like federal law, requires the effective delivery of the notice of lien. Fla. Stat. Ann. § 718.116(6)(b) ("Notice must be given by delivery of a copy of it to the unit owner or by certified or registered mail, return receipt requested, addressed to the unit owner at his last known address . . ."). Of course, Florida law states also that, "upon mailing, the notice shall be deemed to have been given . . . ." Id.

This latter clause, however, does not relieve Petitioner of its obligation to make effective service, especially where -- as here -- Petitioner knows that the mailing will not be and has not

been received.[8] In such circumstances, service by certified mail is no better (and no different) than service by publication (or constructive service).

A plaintiff has not satisfied its requirement to give notice when it makes constructive service without first havinng made a reasonably diligent search to locate the defendant. McAlice v. Kirsch, 368 So.2d 401, 403-04 (Fla. 3d DCA 1979).

> When a complainant resorts to constructive service, he should make an honest and conscientious effort, reasonably appropriate to the circumstances, to acquire the information necessary to fully comply with the controlling statutes, to the end that the defendant, if it be reasonably possible, may be accorded notice of the suit. [The] full test of this principle is whether the complainant reasonably employed knowledge at his command in making the appropriate effort spoken of. . . . [N]otice of the suit must be mailed to such address as diligent search and inquiry may cause to be discovered. We note, parenthetically, the *strict compliance with these statutory procedures, at the peril of rendering the proceedings void, is rudimentary.*

McAlice, 368 So.2d at 403 (citations omitted) (emphasis added).

The McAlice appeal arose from an order denying a motion to vacate a default and default judgment in a foreclosure action. The District Court of Appeals reversed that order, and "remanded with directions to vacate the default judgment and to permit the Respondent to serve and file a responsive pleading. McAlice, 368 So. 2d at 404. In so doing, this Court stated that "it must be stressed that the notice and the complaint mailed to [defendant] to

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[8] MARK FRIED does not dispute that he knew that JON BROOKS never received the notice of lien; indeed, Ms. Julaine Taggart, Legal Assistant to MARK FRIED, admitted to JON BROOKS that she knew it because the return receipt indicated that the certified letter was "not picked up." R. Ex. 7, ¶ 24.

a post office box were patently inappropriate to make him aware that he was a named defendant in the cause; the record also fails to show that diligent search and inquiry was effectuated by the appellees in regard to [appellant's] address." Id.[9]

This demand for effective notice applies logically not only to service of the complaint, but also to all steps precedent thereto, including notice of the lien. Elsewise, as happened here, a plaintiff can deprive a defendant of his right and ability to act upon the lien and, simultaneously, a plaintiff's lawyer can amass disproportionately-large and unnecessary legal fees while keeping a named defendant in the dark.[10]

Petitioner failed to take the steps necessary to try to give notice of the lien to JON BROOKS, and therefore failed to satisfy the jurisdictional prerequisite to the commencement of this action. The jurisdictional prerequisite having not been satisfied, the circuit court lacked subject matter jurisdiction over this case. The default and default judgment entered by the circuit court therefore are nullities. Thus, the judgment of the Third District Court of Appeals (1) reversing the Order Denying the

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[9] OCEAN VILLAGE and MARK FRIED located JON BROOKS and served the Complaint -- but not the Notice of Lien -- upon him at his place of business rather than his former residence. OCEAN VILLAGE had long known his business address and telephone number and previously had sent correspondence there. Also, it was listed in his name in the Manhattan telephone directory.

[10] Furthermore, the knowing failure to deliver the notice of lien deprived JON BROOKS of his rights either to contest the lien, Fla. Stat. Ann. § 718.116(5)(a)-(b), or to preclude its enforcement through immediate satisfaction (and the avoidance thereby of the alleged attorney's fees subsequently incurred by OCEAN VILLAGE that have prevented the full resolution of this case). The doctrine of equitable estoppel thus precludes an action to enforce the lien.

Motion to Set Aside the Default and Default Judgment and (2) vacating the default and the default judgment should be affirmed.

ISSUE II

JON BROOKS SERVED UPON OCEAN VILLAGE AND MARK FRIED A TIMELY ANSWER TO THE COMPLAINT, THUS PRECLUDING DEFAULT AND DEFAULT JUDGMENT.

The circuit court found that JON BROOKS "wrote a letter on July 3, 1992 [one day after service of the Complaint], which was mailed to the Manager of [OCEAN VILLAGE] and to the legal assistant at Mark E. Fried, P.A." R. Ex. 11, ¶ 2 at 1. That July 3 letter denies the material allegations of the Complaint, sets forth facts alternative and additional to those alleged in the Complaint, and sets forth as well defenses to the Complaint. R. Ex. 2.

The July 3 letter is a pro se letter sent by a party defendant to the plaintiff and its counsel responding to the complaint within 20 days after service of said complaint. As such, it constitutes a timely-served pro se Answer to the Complaint. Fla. R. Civ. P. 1.140(a)(1); Zettler v. Ehrlich, 384 So. 2d 928, 930 (Fla. 3d DCA 1980); Terino Bros., Inc. v. Airey, 364 So. 2d 768, 770 (Fla. 2d DCA 1978) (approving the conclusion of the trial court that a letter was equivalent to an answer).

The timely service of an Answer necessarily precludes the entry of default and the consequent default judgment. Accordingly, the judgment of the Third District Court of Appeals (1) reversing the Order Denying the Motion to Set Aside the Default and Default Judgment and (2) vacating the default and the default judgment should be affirmed.

ISSUE III

OCEAN VILLAGE FAILED TO GIVE JON BROOKS NOTICE OF THE APPLICATION FOR DEFAULT.

Even if it is not an Answer, the July 3 letter is a paper served upon Petitioner and MARK FRIED within twenty (20) days of service of the Complaint and prior to the entry of default. As such, JON BROOKS was entitled to receive notice of the application for default. Fla. R. Civ. P. 1.500(b); Reichenbach v. Southeast Bank, N.A., 462 So. 2d 611, 612 (Fla. 3d DCA 1985) ("A paper served prior to the entry of default triggers the requirement that the party against whom a default is sought be served with notice of the application."); Crocker Investments, Inc. v. Statesmen L. Ins. Co., 515 So. 2d 1305, 1307 (Fla. 3d DCA 1987) ("A timely letter served by a defendant to a plaintiff constitutes a paper served within the meaning of Rule 1.500(b) and entitles the defendant to notice of default proceedings."); Beylund v. Gomez, 498 So. 2d 639, 640 (Fla. 3d DCA 1986) ("Appellant served letters on appellee's counsel in response to the complaint, thereby triggering the notice provision of Florida Rule Civil Procedure 1.500(b)").

It is well-settled law that "[a]ny paper served prior to the entry of a default requires the furnishing of notice." Reichenbach, 462 So. 2d at 612. The Reichenbach Court also rejected the argument that a "letter [is] insufficient to require notice because it [is] not a responsive pleading. The rule does not limit the type of paper to be served." Id.

The notice requirement of Rule 1.500(b) would be purposeless and meaningless unless the notice is given with

sufficient time to permit some meaningful action to be taken upon it after its receipt, such as filing a pleading before the default so as to preclude its being entered. Carson v. Lee, 450 So. 2d 930, 931 (Fla. 3d DCA 1984); Cohen v. Barnett Bank of South Florida, N.A., 433 So. 2d 1354, 1355 (Fla. 3d DCA 1983). "Fairly read, the rule therefore must be deemed to include that requirement." Cohen, 433 So. 2d at 1355.

In this case, JON BROOKS did not receive notice of the application for default until August 28 -- seven days *after* the default had been entered. R. Ex. 4; R. Ex. 7, ¶ 49; R. Ex. 8, ¶¶ 3-6. Petitioner did not even mail the notice until August 21 -- the same day the default was entered.[11] R. Ex. 8, ¶ 7 and exhibits referenced therein.

Furthermore, in a case such as this one where notice is served by mail, the party seeking a default must add five days to the "sufficient time" required by Rule 1.500(b). Fla. R. Civ. P. 1.090(e); Carson, 450 So. 2d at 931; Cohen, 433 So. 2d at 1355. In this case, there were not even five days between the August 17 letter from MARK FRIED to the Circuit Court submitting the Application for Default, and the August 21 Order for Entry of Default. R. Exs. 3 & 4.

OCEAN VILLAGE therefore failed to provide JON BROOKS with the notice required under Rule 1.500(b). "The failure of notice,

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[11] The Circuit Court found that notice had been mailed, but it did not make a finding as to a specific date. R. Ex. 11, ¶ 8. It failed to do so despite the undisputed and indisputable evidence presented that the notice was mailed August 21, 1992. R. Ex. 8, ¶ 7 and exhibits referenced therein.

alone, causes the entrance of default judgment to be improper." Kiaer v. Friendship, Inc., 376 So. 2d 919, 922 (Fla. 3d DCA 1979). "Where default judgments have been found to be improper because they were entered without providing parties with requisite notice, Florida courts have generally granted motions to set aside the defaults." Crocker Investments, Inc., 515 So. 2d at 1307. In cases factually similar to this one, courts uniformly have held that "[b]ecause appellant did not receive notice until after the default was signed, the default and resultant judgment must be set aside." Carson, 450 So. 2d at 931; Cohen, 433 So. 2d at 1354.

The Circuit Court therefore erred in denying the Motion to Set Aside the Default and Default Judgment. Accordingly, the judgment of the Third District Court of Appeals (1) reversing the Order Denying the Motion to Set Aside the Default and Default Judgment and (2) vacating the default and the default judgment should be affirmed.

ISSUE IV

OCEAN VILLAGE SOUGHT ENTRY OF A DEFAULT IN BREACH OF AN AGREEMENT NOT TO PROCEED.

OCEAN VILLAGE concedes that on or about July 24, it made an agreement with JON BROOKS -- because of his imminent departure for a business trip -- not to proceed with its foreclosure action.[12] R. Ex. 7, ¶ 41-42; R. Ex. 9, ¶ 2; R. Ex. 11, ¶ 6. The

[12] The parties disagree only over the intended duration of the agreement. Compare R. Ex. 7, ¶ 42 with R. Ex. 9, ¶¶ 2-3. Mr. James Dowd -- the Manager of OCEAN VILLAGE with whom the agreement was made -- asserts that the agreement expired on either August 3 or August 8 (it being impossible to decipher accurately his handwritten affidavit).

purpose of this agreement was to allow the parties a meaningful opportunity to explore a settlement and thereby obviate the need for the time and expense of litigation. R. Ex. 7, ¶ 41-42.

Notwithstanding this agreement, and in breach of it, OCEAN VILLAGE sought entry of a default.

> [W]hen the plaintiff has misled the defendant into believing it was unnecessary to file any responsive pleading because of on-going settlement negotiations between the parties[,] . . .
>
> . . .
>
> we believe it was unconscionable for the plaintiff to take advantage of the defendants' failure to file responsive pleadings by obtaining a default judgment without notice to the defendants. The law is well-settled that a party is estopped from asserting legal rights to the detriment of another party when to do so would be unconscionable.

Rubenstein v. Richard Fidlin Corp., 346 So. 2d 89, 89-91 (Fla. 3d

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It would have made little sense for JON BROOKS to agree to either date: at the time of the agreement, JON BROOKS knew and told Mr. Dowd that he would not return from his business trip before August 6 (and, at the request of this Court, JON BROOKS is prepared to submit his original airplane ticket so as to substantiate this fact); and August 8, 1992 was a Saturday, on day on which JON BROOKS does not pursue business matters.

Mr. Dowd swears that he would have "never agreed with Brooks to defer any action until he returned from Europe. With Brook's [sic] constant stories and travels, who could know how long such an extension would be." R. Ex. 8, ¶ 3. Notwithstanding this sworn statement, Mr. Dowd gave precisely such an extension again in October 1992, as evidenced by the October 16, 1992 letter from MARK FRIED to JON BROOKS: "Mr. Dowd related to me his conversation with you that *nothing further would be done while you were out of the country with regard to the sale*." (This letter does not appear in the Record; it will be added at the request of this Court.)

Thus, there exist multiple bases upon which to have reasonable doubt as to the "limited" duration of the July 24 agreement as alleged by Mr. Dowd. "Reasonable doubts are resolved in favor of granting the application [to vacate a default judgment] and permitting trial upon the merits." Reichenbach v. Southeast Bank, N.A., 462 So. 2d 611, 612 (Fla. 3d DCA 1985).

DCA 1977). OCEAN VILLAGE thus was estopped from seeking a default.

The Circuit Court therefore erred in entering a default, as well as in denying the Motion to Set Aside the Default and Default Judgment. Thus, the judgment of the Third District Court of Appeals (1) reversing the Order Denying the Motion to Set Aside the Default and Default Judgment and (2) vacating the default and the default judgment should be affirmed.

CONCLUSION

On July 2, 1992, JON BROOKS received actual notice that OCEAN VILLAGE had not yet received either of his previous payments of the assessment for the first quarter of 1992. On July 3, 1992, JON BROOKS again tendered payment of that assessment, and notified OCEAN VILLAGE in writing of his desire to settle the balance of its claim. Notwithstanding this immediate and comprehensive response to its Complaint, and ignoring its own subsequent agreement not to proceed with its foreclosure action, OCEAN VILLAGE sought and secured -- without proper notice to JON BROOKS -- a default.

Against this factual background, the application for and subsequent entry of the default were inconsistent with the well-recognized purpose of the default procedure.

> The true purpose of the entry of a default is to speed the cause thereby preventing a dilatory or procrastinating defendant from impeding the plaintiff in the establishment of his claim. It is not procedure intended to furnish an advantage to the plaintiff so that a defense may be defeated or a judgment reached without the difficulty that arises from a contest by the defendant.

Coggin v. Barfield, 8 So. 2d 9, 11 (Fla. 1942). OCEAN VILLAGE and MARK FRIED have used the default procedure in an impermissible way

and for an illegitimate purpose.

The Circuit Court lacked jurisdiction to enter the default or, alternatively, erred in entering the default because Respondent timely served an Answer, did not receive the requisite notice of the application for default, or was misled into believing he had no need at the time to serve a responsive pleading. The Circuit Court therefore erred in its Order Denying the Motion to Set Aside the Default and Default Judgment. The judgment of the Third District Court of Appeals (1) reversing the Order Denying the Motion to Set Aside the Default and Default Judgment and (2) vacating the default and the default judgment should be affirmed.

Respectfully submitted,

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- and -

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed this 21st day of October, 1994 to Mark Fried, Esq., 1001 S. Bayshore Drive, Suite 2706, Miami, Florida 33131.

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