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IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 82,708
DCA NO. 93-00204 THIRD DISTRICT
L.T. NO. 92-14357 CA 20 (DADE)
HONORABLE HAROLD SOLOMON

OCEAN VILLAGE CONDOMINIUM ASSOCIATION, INC., a Florida non-profit corporation,

Petitioner,

vs.

JON SCHUYLER BROOKS,

Respondent.

RESPONDENT'S AMENDED BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

JON BROOKS will be referred to in this brief by proper name or Respondent. OCEAN VILLAGE CONDOMINIUM ASSOCIATION, INC. will be referred to by proper name ("OCEAN VILLAGE") or Petitioner, and MARK E. FRIED, P.A. will be referred to by proper name or Attorney for Petitioner. Exhibits in the appendix will be cited as "App.Ex."

SUMMARY OF THE ARGUMENT

The opinion of the Third District Court of Appeal in the instant case does not expressly conflict with any other appellate decision. While decisions of other districts may hold that a lien foreclosure action affects title to real property, no other appellate decision holds that a lien foreclosure action does not affect the title and boundaries to real property. Therefore, no conflict exists.

Secondly, the Third District's opinion contains no express holding that a condominium (or any other) foreclosure action does not involve "the title and boundaries of real property." While such a holding may be implied, a conflict based on implication is not enough to invoke the conflict jurisdiction of the Supreme Court.

Third, the District Court in the instant case expressly stated that "some of the owner's alternative arguments for relief from the default have merit." Further review by this Court would therefore be entirely superfluous.

Finally, nothing within the written opinion of the Third

District Court of Appeal "expressly" affects a class of constitutional officers.

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. 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 Respondent now sought to foreclose upon that lien. App.Ex. 1.

On July 3, 1992, JON BROOKS wrote a letter to James Dowd, Manager of OCEAN VILLAGE denying the allegations of the Complaint and presented alternative and additional facts to those set forth in the Complaint. App.Ex. 2. A copy to the letter was sent to MARK FRIED. App.Ex. 7, ¶¶ 32-33.

On August 28, JON BROOKS received at his office two envelopes, each postmarked August 21, 1992. App.Ex. 8, ¶ 7 and exhibits E & F referenced therein. In one envelope 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. App.Exs. 3 & 4; App.Ex. 7 ¶ 49; App.Ex. 8, ¶¶ 3-6 and exhibits referenced therein.

On September 21, the Circuit Court held a hearing on the Motion for Final Default Judgment. 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. App.Ex. 7, ¶¶ 56-59. Ultimately, the Circuit Court granted the motion and signed the Final Default Judgment and ordered the foreclosure sale of JON BROOKS' condominium unit. Id., ¶ 60-61; App.Ex. 5.

Subsequently, JON BROOKS and OCEAN VILLAGE continued to discuss a comprehensive settlement. App.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. App.Ex. 6.

After the December 17 hearing, the Circuit Court postponed the foreclosure sale, but otherwise denied the Motion. App.Exs. 10 & 11. BROOKS appealed to the Third District Court of Appeal from the Order Denying the Motion to Set Aside the Default and Default Judgment. On October 12, 1993, the Third District Court of Appeal reversed, holding that the Circuit Court was without jurisdiction to enter the default and default judgment, citing Nachon Enterprises, Inc. v. Alexdex Corp., 615 So. 2d 245 (Fla. 3rd DCA 1993), review granted, No. 81,765 (Fla. 1993). App.Ex. 12. The Third District further held that BROOKS' "alternative arguments for relief from the default have merit." However, these alternative arguments were not decided as a result of the jurisdictional issue being dispositive.

ARGUMENT

I. THERE EXISTS NO DIRECT AND EXPRESS CONFLICT AMONG THE DISTRICTS ON THE SPECIFIC ISSUES OF LAW DECIDED BY THE THIRD DISTRICT IN THE INSTANT CAUSE

Article V, §3(b)(3) of the Florida Constitution vests the Supreme Court of Florida with jurisdiction to review an appellate decision where it contains a direct and express conflict with prior appellate decisions. The test for Supreme Court jurisdiction therefore contains two mandatory prongs. First, the conflict must be found within the District Court opinion. Second, there must exist prior appellate or Supreme Court opinions which directly or expressly conflict with the decision for which review is requested. Neither prong is satisfied here.

First, petitioner argues that there is express conflict between Nachon and appellate opinions of other Districts which hold that a lien foreclosure directly affects title to real property. Petitioner cites Publix Super Markets v. Cheesbro Roofing, Inc., 502 So. 2d 484 (Fla. 5th DCA 1987), In Re: Estate of Weiss, 106 So. 2d 411 (Fla. 1958) and Alternative Development, Inc., etc. v. St. Lucie Club and Apartment Homes Condominium Association, Inc., etc., 608 So. 2d 822 (Fla. 4th DCA 1992) as cases in conflict with Nachon. Contrary to Petitioner's assertion, however, Nachon does not challenge the holding of the other Districts that a mechanic's lien foreclosure action directly affects title to real property. Instead, Nachon held that a lien foreclosure action does not affect the title **and boundaries** to real property. Blackton, Inc. v. Chris E. Young, 18 Fla. L. Weekly D2624 (Fla. 5th DCA 1993). Nachon is

therefore consistent with <u>Blackton</u> and all cases cited by petitioner that a lien foreclosure action may affect the <u>title</u> to real property but not the title **<u>and boundaries</u>** of real property. In fact, <u>Blackton</u> now expressly holds that a mechanic's lien foreclosure action does <u>not</u> involve the boundaries of real property and therefore does not invoke the circuit court's jurisdiction under 26.012(2)(g), Florida Statutes. <u>Id</u>. at D2625. This Court is therefore without jurisdiction based on direct and express conflict between the Districts.

Secondly, the issue before the Third District Court of Appeal in the present case was whether adjudication of a <u>condominium</u> lien in the amount of $3,984.44 was within the jurisdiction of the circuit court. There exists no Florida appellate opinion which addresses subject matter jurisdiction of the circuit court over a condominium lien filed pursuant to section 718.116, Florida Statutes. Indeed, the instant case, as it pertains to condominium liens, is one of first impression. There can therefore be no conflict.

Finally, Petitioner's Brief argues that "The [District] Court . . . <u>implies</u> that the [condominium] foreclosure action is not an action involving 'the title and boundaries of real property' . . ." Such a holding is **implied** because the opinion contains no express holding that a <u>condominium</u> (or any other) foreclosure action does not involve "the title and boundaries of real property." A conflict based on implication is not enough to invoke the conflict jurisdiction of the Supreme Court. <u>See School Board of Pinellas</u>

County v. District Court of Appeal, 467 So. 2d 985 (Fla. 1985). In the case at bar, such a conflict can only be reached by implication and analogy to Nachon Enterprises, Inc. v. Alexdex Corp., 615 So. 2d 245 (Fla. 3d DCA 1993). Without an express holding creating a conflict, the instant case cannot be considered to conflict with the holding of another appellate opinion.

II. THERE EXISTS NO NECESSITY FOR ADJUDICATION

A. THE DEFAULT AND DEFAULT FINAL JUDGMENT ENTERED BY THE TRIAL COURT IN THE INSTANT CAUSE MUST BE VACATED ON GROUNDS OTHER THAN SUBJECT MATTER JURISDICTION.

The trial 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." App.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. App.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 precluded the entry of default and the subsequent default judgment.

In addition, 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); Crocker Investments, Inc. v. Statesmen L. Ins. Co., 515 So. 2d 1305, 1307 (Fla. 3d DCA 1987); Beylund v. Gomez, 498 So. 2d 639, 640 (Fla. 3d DCA 1986). 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. App.Ex. 4; App.Ex. 7, ¶ 49; App.Ex. 8, ¶¶ 3-6. Petitioner did not even mail the notice until August 21 --the same day the default was entered.[1] App.Ex. 8, ¶ 7 and exhibits referenced therein. In evaluating these arguments and others advanced by Respondent, the District Court expressly stated that "some of the owner's alternative arguments for relief from the default have merit," but declined to rule on the alternative arguments because its decision to reverse the final default judgment on jurisdictional grounds was dispositive. However, in order to deter further appeals, the Third District Court of Appeal clearly and unambiguously announced its position that Respondent's alternative arguments will result in a reversal of the trial court's final judgment notwithstanding the outcome of further

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

appeals based on subject matter jurisdiction. Further review by this Court would therefore be entirely superfluous and should be denied.

B. ALL ISSUES REGARDING SUBJECT MATTER JURISDICTION ARE ADDRESSED BY NACHON WHICH THIS COURT HAS AGREED TO REVIEW AND A REVIEW OF THE INSTANT CASE IS THEREFORE UNNECESSARY.

This Court has accepted review of Nachon Enterprises, Inc. v. Alexdex Corp., 615 So. 2d 245 (Fla. 3d DCA 1993), review granted, No. 81,765 (Fla. 1993). In the present case, the Third District Court of Appeal expressly stated that it saw "no way to distinguish the condominium lien foreclosure proceeding involved in the present case from the construction lien involved in Nachon." Nachon and the present case are therefore irreconcilable cases arising out of the same District. Having accepted review to decide issues related to subject matter jurisdiction of a lien foreclosure action not exceeding $15,000.00, there is clearly no necessity to adjudicate the identical issues prevalent in the instant case.

III. THE OPINION OF THE THIRD DISTRICT COURT OF APPEAL DOES NOT EXPRESSLY AFFECT A CLASS OF CONSTITUTIONAL OFFICERS.

Rule 9.030(2)(A)(3), Florida Rules of Appellate Procedure, vests the Florida Supreme Court with discretionary jurisdiction to review "decisions of district courts of appeal that . . . expressly affect a class of constitutional officers." The term "expressly" means within the written district court opinion. School Board of Pinellas County v. District Court of Appeal, 467 So. 2d 985 (Fla. 1985); See also Taylor v. Tampa Electric Co., 356 So. 2d 260 (Fla. 1978).

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In Taylor, the Supreme Court accepted jurisdiction of a case in which the District Court of Appeal, Second District, affirmed an order of the trial court requiring the Clerk of the Circuit Court for Hillsborough County to return a commission on funds disbursed from the court's registry. Taylor v. Tampa Electric, 335 So. 2d 349 (Fla. 2d DCA 1976). The Supreme Court accepted jurisdiction because the opinion of the Second District expressly affected Clerks of the Circuit Court which are constitutional officers. In contrast, the Supreme Court in School Board of Pinellas County v. District Court of Appeal, 467 So. 2d 985 (Fla. 1985) declined to accept jurisdiction to review School Board of Pinellas County v. Enterprise Building Corp., 462 So. 2d 1114 (Fla. 2d DCA 1984) because the decision of the Second District was a summary decision containing nothing "that affects other school board members as constitutional officers."

The instant case is similar to School Board of Pinellas County in that the opinion of the Third District contains nothing which expressly affects a constitutional officer. In its Brief on Jurisdiction, petitioner argues that clerks of the county and circuit court are affected. However, there is no mention of clerks in the Third District's opinion and they are therefore not expressly affected. Secondly, clerks of the court are ministerial officers who must accept documents without regard to whether they are properly filed. See Anthony Martin v. Circuit Court, Seventeenth Judicial Circuit, 18 Fla. L. Weekly D2631 (Fla. 4th DCA 1993). Clerks have no authority to decide whether to accept or

reject cases presented for filing and are therefore not affected by the Third District's opinion dealing with subject matter jurisdiction.

Finally, petitioner's argument that circuit and county court judges are affected by the Third District opinion must fail. Each and every opinion issued by the appellate courts of this state affect circuit and county judges and petitioner's argument would therefore vest the Florida Supreme Court with unlimited jurisdiction. Moreover, the text of the opinion in the instant case contains no express words affecting judges. See School Board of Pinellas County, 467 So. 2d 985, 986 (Fla. 1985); See also Jenkins v. State, 385 So. 2d 1356 (Fla. 1980).

CONCLUSION

All issues presented in this cause are already before the court in Nachon Enterprises, Inc. v. Alexdex Corp., 615 So. 2d 245 (Fla. 3d DCA 1993), review granted, No. 81,765 (Fla. 1993). In addition, whether or not this Court affirms the decision of the Third District to reverse on jurisdictional grounds, the final judgment entered by the trial court must be reversed due to procedural defects in obtaining the default and default final judgment. Finally, there exists no conflict among the District Courts of Appeal concerning jurisdiction of the Florida Supreme Court and the Third District opinion does not "expressly" affect a class of constitutional officers. This Court should therefore not accept jurisdiction over this cause.

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Respectfully submitted,

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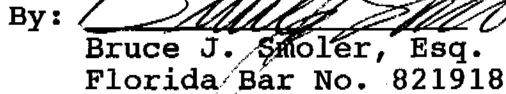
By: 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed this 12 day of January, 1994 to Mark E. Fried, Esq., 1135 Ingraham Building, 25 S.E. 2nd Avenue, Miami, Florida 33131.

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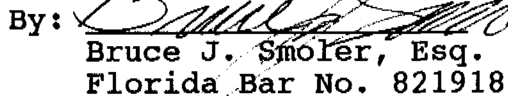
By: 
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