IN THE SUPREME COURT OF FLORIDA

CITIZENS NATIONAL BANK AND TRUST COMPANY, HENRY W. HANFF, MELVIN C. DRAFT, AUSTIN L. FILLMON, PANDURANG Z. KAMAT, LESTER MALLET, JAMES M. MARLOWE, DENNIS L. MURPHY, RALPH W. SHANNON, THOMAS D. STELNICKI, in their individual capacities and as directors,

Petitioners,

v.

LOUE E. STOCKWELL, JR., and CAMILLE L. LAROSE,

Respondents.
_____/

Case No. 85,923

Original

Discretionary Proceeding to Review Decision of the Second District Court o:

PETITIONERS' REPLY BRIEF ON THE MERITS

Gary L. Sasso
Florida Bar Number 622575
Sylvia H. Walbolt
Florida Bar Number 033604
Victor D. Berg
Florida Bar Number 901210
CARLTON, FIELDS, WARD, EMMANUEL, SMITH & CUTLER, P.A.
Barnett Tower
Post Office Box 2861
St. Petersburg, Florida 33731
(813) 821-7000
Counsel for Petitioners

T#387184.2

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

In this brief, Petitioners, Citizens National Bank and Trust Company ("Citizens National Bank" or "the Bank") and certain individual directors, Henry W. Hanff, Melvin C. Draft, Austin L. Fillmon, Pandurang Z. Kamat, Lester Mallet, James M. Marlowe, Dennis L. Murphy, Ralph W. Shannon, and Thomas D. Stelnicki, will be referred to collectively as "Defendants." Respondents, Loue E. Stockwell, Jr. ("Stockwell") and Camille L. LaRose ("LaRose"), will be referred to collectively as "Plaintiffs."

Petitioners' initial brief on the merits will be referred to as "P. Br. ___." Respondents' answer brief on the merits will be referred to as "R. Br. ___."

The material contained in the appendix which was attached to Petitioners' initial brief will be referred to as "P. App. ___." The materials contained in the appendix which was filed with Respondents' answer brief will be referred to as "R. App. ___, ___."

Section 24 (Fifth) of the National Bank Act, 12 U.S.C. § 24 (Fifth) (1989 & Supp. 1995) will be referred to as "Section 24 (Fifth)." Various materials referenced in this brief are reproduced in an accompanying appendix and are referred to as "App. ___."

All emphasis is supplied unless otherwise indicated.

ARGUMENT

1. In our initial brief, we showed that Section 24 (Fifth) bars any suit by a terminated officer of a national bank for damages arising from early termination of the officer's employment. Thus, a terminated officer may not sue for compensation that he would have received had he served out the balance of his contract term. As the court held in Copeland v. Melrose Nat'l Bank, 241 N.Y.S. 429, 430 (N.Y. App. Div.), aff'd, 173 N.E. 898 (N.Y. 1930), "[a] contract for a definite term which forbids . . . discharge except under penalty of paying compensation for the full term violates the statute, and is unenforceable."

In their answer brief, Plaintiffs concede this point. Specifically, Plaintiffs admit that "[t]he purpose of Section Fifth of the National Bank Act was to give national banks the discretion to terminate an officer without fear of liability for wrongful termination or breach of contract based upon early termination." (R. Br. 22). As Plaintiffs explain, "If a national bank entered into an employment agreement for a definite period, a discharged officer could bring such [contract] actions but for Section Fifth of the National Bank Act." Id. In short, Section 24 (Fifth) operates to override contract rights and to bar breach of contract actions for compensation that the terminated officer would have been paid had he been permitted to serve out the balance of his contract term.

We further demonstrated that courts have recognized for decades that it is against national banking policy, and it is

thus ultra vires, for national banks to contract with their officers to accomplish indirectly what cannot be done directly. Thus, just as national banks may not incur a contractual obligation to employ an officer for a definite term of years, enforceable by means of a damages award for unpaid compensation in the event of early termination, neither may a national bank agree to pay that compensation in the form of severance benefits in the event of early termination. This is "six of one, or half a dozen of the other."

As the court held in Rohde v. First Deposit Nat'l Bank, 497 A.2d 1214, 1216 (N.H. 1985), "To hold on the one hand that contracts for employment of national bank officers cannot provide for guaranteed salaries for fixed periods of time in contravention of the bank's right to immediately discharge the officer, and on the other hand that such contracts can provide as a condition precedent to discharge that an officer is entitled to 36 months' salary would be to elevate form over substance and render the language of 12 U.S.C. § 24, para. Fifth meaningless." On this basis, the Third District in Bennett squarely held that Section 24 (Fifth) precludes the enforcement of severance benefits, however structured, in a suit by a terminated national bank officer. International Bank of Miami v. Bennett, 513 So. 2d 1294 (Fla. 3d DCA 1987), cert. denied, 485 U.S. 988 (1988).

Plaintiffs in this case are seeking to accomplish exactly what these decisions forbid: they are suing to recover damages consisting of severance benefits equalling the compensation and benefits they would have earned if they had served out the

balance of their contract terms. These are the same damages that a bank officer might recover for early termination of an employment contract guaranteeing employment for a certain number of years. Indeed, Plaintiffs themselves concede that the severance provisions they are seeking to enforce provide "Stockwell & LaRose with compensation for the unexpired term consistent with their salary levels." (R. Br. 7).

Plaintiffs' only response to this point is merely to assert over and over again that "Stockwell & LaRose are not attempting to achieve indirectly what the National Bank Act prevents them from achieving directly" but, instead, they are seeking to enforce "freely negotiated contractual obligations." (E.g., R. Br. 7-8). Of course, the contractual obligations that Plaintiffs are seeking to enforce are those that they exacted as insiders at the Bank after they themselves "organized and formed" the Bank. [R. 54, 55]. More fundamentally, however, their argument simply makes no sense.

As Plaintiffs themselves have conceded, Section 24 (Fifth) overrides contract rights and preempts claims to enforce contract rights that would otherwise be enforceable. Contract rights for severance benefits have no greater stature than contract rights for a guaranteed salary for a specified employment term, and such contractual arrangements cannot be used as a device to accomplish indirectly what the law forbids national banks and national bank officers to do directly. As the courts have held in cases such as Copeland, Rohde, and Bennett, contract rights for guaranteed severance payments or guaranteed salary for a specified term are

functionally indistinguishable and thus interfere equally with the accomplishment of the national policy objectives that underlay Section 24 (Fifth).

Thus, Plaintiffs' argument utterly fails to meet the showing in our initial brief and the reasoning of Bennett. As the Third District there held:

> [W]e certainly agree that to deny Bennett the fruits of the severance clause is to deprive him of a benefit, and relieve the bank of a burden, for which they both freely bargained. But that is in the very nature of a ruling declaring a contract invalid and unenforceable as contrary to the public policy established by Congress or the legislature.

513 So. 2d at 1295.

2. Apart from Plaintiffs' claim that their state contract rights must take precedence over federal law, the "support" for their position consists of an OCC informal ruling, which the OCC has proposed to withdraw. See 60 Fed. Reg. 11924 (March 3, 1995). Plaintiffs' argument is legally untenable.

In order for the ruling of a federal agency to have the force and effect of law, it must be duly promulgated in a rulemaking proceeding after notice and an opportunity to comment are afforded to the public, 5 U.S.C. § 553 (1977), or the ruling must result from an adjudication and constitute binding precedent. E.g., FPC v. Texaco, Inc., 377 U.S. 33, 39-41, 44 (1964); SEC v. Chenery Corp., 332 U.S. 194, 202-03 (1947). General statements of agency policy that are not promulgated as regulations or issued after an adjudication are "not finally determinative of the issues or rights to which [they are] addressed." American Hospital Ass'n v. Bowen, 834 F.2d 1037,

1046 (D.C. Cir. 1987) (quoting Pacific Gas & Elec. Co. v. FPC, 506 F.2d 33, 38 (D.C. Cir. 1974)).

The OCC ruling at issue in this case was simply published in the Federal Register in the form it takes today without notice and comment or any other deliberative consideration. The OCC did not undertake to adopt this ruling as a substantive regulation. 36 Fed. Reg. 17000 (Aug. 26, 1971). Thus, either the OCC meant for this ruling to be applied in a manner that is consistent with pre-existing judicial interpretation of Section 24 (Fifth), including Copeland, or it sought to overrule such precedent without satisfying the requisite administrative procedures.

On its face, the OCC ruling contemplates merely that national banks may enter into contracts with bank officers that provide "reasonable" terms and conditions of employment. As we explained in our initial brief, most fairly understood this ruling addresses such employment terms as salary, vacation, and other benefits that apply during the period of the officer's employment. The ruling nowhere authorizes payments to an officer after his employment is terminated. This interpretation is completely consistent with precedent that prevailed for decades before the OCC published its informal ruling in 1971.

Nonetheless, Plaintiffs are so bold as to suggest that "[t]his 1971 regulation by the OCC was an attempt to restrict the draconian results of a broad reading of the National Bank Act," and that "[w]ithout the guidance of this regulation, the National Bank Act could be interpreted as disallowing any type of enforceable right under an employment agreement." (R. Br. 11).

Of course, the OCC has no authority to "restrict" the operation of a federal statute and is in no position to provide the courts with "guidance" about what Congress intended when it enacted legislation a century ago. In fact, there is no reasonable basis to conclude that the OCC has undertaken informally to overrule long-standing judicial interpretation of the National Bank Act and thus to usurp the proper role of the courts in interpreting legislation. To the contrary, the OCC has repeatedly made clear that its ruling is fully consistent with the long line of court decisions confirming that a national bank is not liable under unexpired contracts with terminated bank officers.

In an interpretive letter issued shortly after this ruling was first issued, Robert Bloom, then Chief Counsel of the OCC, explained that "I.R. 7.5220 can be reconciled with the express provisions of 12 U.S.C. §24, Paragraph Fifth, by reading the Interpretation [I.R. 7.5220] as approving the writing of contracts containing conditions of employment such as salary, expenses, vacations, etc., but not permitting a fixed term of employment." December 8, 1972 letter to [redacted] from Robert Bloom, p. 2. [App. 1]. Mr. Bloom's discussion of reasonable terms, which include salary, expenses, and vacations, did not include terms that would survive termination. The reason for that omission is obvious: Such terms would not be valid under Section 24 (Fifth) following the proper termination of an officer who had a contract that included such terms.

In the same vein, as discussed in our initial brief, the OCC made clear in 1988 that, under "12 U.S.C. § 24 (Fifth), the Board

of Directors of the Bank may dismiss officers employed under employment agreements at will any time during the contract term without liability for damages." December 23, 1988 letter to [redacted] from Kevin J. Bailey, Attorney, Securities & Corporate Practices Division, Comptroller of the Currency. [App. 2]. Plaintiffs noticeably omit any reference to this interpretive letter in their brief.

Indeed, as we further explained in our initial brief, in its notice announcing its intent to withdraw the informal ruling on which Plaintiffs rely, the OCC explained that the ruling was not intended to be permissive at all. Rather, it was intended to be restrictive by making clear that national banks were prohibited from entering into unreasonable employment contracts that might impair the safety and soundness of the banks. 60 Fed. Reg. 11924, 11930 (March 3, 1995). It is in this sense that the standard embodied in the informal ruling may continue to apply, due to the continued existence of other regulations that prohibit unsafe and unsound banking practices. As the OCC explained:

> Any employment contract that is excessive or unreasonable is unsafe and unsound. Therefore, the current "reasonable" standard is necessarily in effect, so it is unnecessary to reiterate the standard in this interpretive ruling.

Id.

Obviously, if the OCC considered its ruling to be a linchpin in a focused effort to overcome long-standing judicial precedent -- as distinguished from a reiteration of the well-accepted principle that banks may enter into only "reasonable" contract arrangements -- it would not have considered the ruling to be

"obsolete," id. at 11924, without a change in the underlying statute. Yet, in moving to withdraw its ruling, the OCC makes no mention of any such agenda.

For all these reasons, the OCC ruling on which Plaintiffs rely provides no support whatsoever to Plaintiffs' mistaken reading of Section 24 (Fifth), and it should not be relied on by this Court.

3. Plaintiffs are left, then, to rely on three cases that deferred to the OCC's ostensibly "clarifying" ruling, namely, First Nat'l Bank of Danville v. Reynolds, 491 N.E.2d 218 (Ind. App. 1986); Schmidt v. Park Ave. Bank, N.A., 558 N.Y.S.2d 779 (N.Y. Sup. Ct. 1990); and Ewert v. Drexel Nat'l Bank, 649 N.E.2d 487 (Ill. App. Ct. 1995). We demonstrated in our initial brief that these cases are either distinguishable (and in one instance not even authoritative in the court's own jurisdiction) or that they failed to consider or address the issues of statutory construction developed in such cases as Copeland, Rohde, and Bennett. Nothing Plaintiffs have said can change this. In Bennett, the Third District appropriately rejected the result reached in the decisions on which Plaintiffs rely based on sound statutory interpretation and better-reasoned authorities. For the reasons we have given, this Court should approve the Third District's conflicting decision in Bennett and reverse the Second District's decision on the question certified for this Court's review.

4. Finally, Plaintiffs ask this Court to review the Second District's rulings on Counts III, IV, VI, and VII of their

Amended Complaint. Despite Plaintiffs' valiant efforts to characterize these counts differently, these are all counts that challenge the termination of Plaintiffs' employment. Accordingly, the Second District held that the trial court correctly dismissed these counts under a long line of authority compelling this result. Because this decision was completely in accord with the Third District's decision in Bennett, the Second District did not certify a conflict as to these other counts. The court certified a conflict only insofar as the court "reverse[d] the [trial court's] order as it relates to Count I. . . ." (P. App. 7).

In these circumstances, it is clear that this Court would have no proper occasion to review the Second District's rulings on Counts III, IV, VI, and VII standing alone. Accordingly, this Court should decline Plaintiffs' request to review the rulings on those counts because of the happenstance of the Second District's certification as to Count I. See, e.g., Sanchez v. Wimpey, 409 So. 2d 20, 21 (Fla. 1982) (declining to consider merits of issue not in conflict with any decision of another district court of appeal since there was "no reason for us to allow petitioners a second appeal on this issue"). Further, there is no good reason for this Court to review the Second District's rulings on these other counts because the Second District's decision is in accord with well-reasoned state and federal authority around the country.

In any event, Plaintiffs' contentions are without merit. They have conceded that "[t]he purpose of Section Fifth of the

National Bank Act was to give national banks the discretion to terminate an officer without fear of liability for wrongful termination or breach of contract based upon early termination." (R. Br. 22). Yet Counts III, IV, VI, and VII represent a broad-side attack on this statutory mandate.

Count III is a count for "Tortious Interference" with Plaintiffs' employment agreements. Plaintiffs allege that directors who voted to terminate them caused the Bank to "breach[] the Agreements and terminate[] the employment of Stockwell and LaRose." (R. App. 1, p. 11). Count IV is a count for "Conspiracy" on the part of the voting directors "to interfere wrongfully with the employment of Stockwell and LaRose" by "forc[ing] Citizens to terminate the Agreements." (R. App. 1, p. 11-12).

Count VI purports to be a derivative claim for "Breach of Fiduciary Duty" consisting of a failure on the part of the Bank's directors "to exercise due care and reasonable judgment in the termination of Stockwell and LaRose." (R. App. 1, p. 14). In their prayer for relief in this count, Plaintiffs ask that "the decisions to terminate LaRose and Stockwell be declared null and void and that they be reinstated to their respective employment positions with reimbursement of all obligations due under their Agreements from the date of improper termination." (R. App. 1, p. 17). Finally, Count VII purports to be a derivative action for "Declaratory and Other Relief," challenging "[t]he defendants' actions in terminating the plaintiffs' employment relationship." (R. App. 1, p. 18). Again, Plaintiffs demand

reinstatement and their contractual compensation from the date of their termination. (R. App. 1, p. 20).

In view of these allegations, it is absolutely incredible that Plaintiffs assert that "Citizens repeatedly mischaracterizes the plaintiffs' claims as challenging the termination of Stockwell & LaRose" and that "Stockwell & LaRose's claims arise from various grounds, none of which challenge Citizens' right to terminate Stockwell & LaRose." (R. Br. 6). In point of fact, Plaintiffs have patently challenged their termination in these counts in every way their counsel could possibly imagine.

As the Third District held in Bennett -- this time with the complete concurrence of the Second District below -- the National Bank Act confers on the directors of a national bank the "untrammelled right to dismiss officers 'at pleasure.'" 513 So. 2d at 1295. In accordance with this principle, the courts have recognized that Section 24 (Fifth) preempts all state causes of action that are brought to challenge the termination of a national bank officer. The Act was intended to afford bank directors "the greatest latitude possible to hire and fire their chief operating officers, in order to maintain the public trust." Mackey v. Pioneer Nat'l Bank, 867 F.2d 520, 526 (9th Cir. 1989). The courts have recognized that, in order to effectuate this purpose, directors must be free to terminate and replace officers without fear of being sued under state law on any theory. Otherwise, the fulfillment of the policy of the National Bank Act would depend upon how artfully state-law claims could be pleaded against the directors.

In Mackey, the Ninth Circuit concluded that summary judgment was properly entered on all of the bank officer's claims -- whether contract or tort -- arising out of his termination. The court recognized that "it would make little sense to allow state tort claims to proceed, where a former bank officer's contract claims are barred by Section 24 (Fifth)." Id. As the court explained, "[t]he effect would be to substitute tort for contract claims." Id. Other courts have held to the same effect. E.g., Ambro v. American Nat'l Bank & Trust Co., 394 N.W.2d 46 (Mich. Ct. App. 1986); City Nat'l Bank v. Brown, 599 So. 2d 787, 790 (La. Ct. App. 1992), writ denied, 604 So. 2d 999 (La. 1992).

In one such case, Morast v. Lance, 631 F. Supp. 474 (N.D. Ga. 1986), aff'd, 807 F.2d 926 (11th Cir. 1987), a terminated national bank officer brought suit against the bank and its directors, alleging that he had been wrongfully terminated. The trial court dismissed the plaintiff's claims against the individual directors, ruling that the plaintiff could not avoid Section 24 (Fifth) by simply asserting state law tortious interference claims against the directors. 631 F. Supp. at 482. The Eleventh Circuit affirmed, noting that the plaintiff had "admitted in his complaint that [the bank] was under the control of the defendant bank board of directors"; "[t]herefore, . . . [i]t is difficult to perceive how the defendants could thus have acted as third parties in removing plaintiff from [his] position[] of employment." 807 F.2d at 933; cf. Muller v. Stromberg Carlson Corp., 427 So. 2d 266 (Fla. 2d DCA 1983) (claim

for tortious interference will not lie against corporate official for actions taken while performing corporate functions).[1/]

Plaintiffs contend, nonetheless, that they can prosecute these claims because Counts III and IV are brought against directors (who are also stockholders) and not the Bank, and Counts VI and VII are brought against the Bank and directors by Plaintiffs as stockholders, not officers. To give credence to these distinctions "would be to countenance a patent subterfuge designed to circumvent the law." Copeland v. Melrose Nat'l Bank, 241 N.Y.S. at 430. It would "elevate form over substance and render the language of 12 U.S.C. § 24, para. Fifth meaningless." Rohde v. First Deposit Nat'l Bank, 497 A.2d at 1216.

Section 24 (Fifth) confers upon a national bank the right to dismiss officers at will "by its board of directors." 12 U.S.C. § 24 (Fifth) (1989 & Supp. 1995); see, e.g., Mackey v. Pioneer

---

[1/] Plaintiffs rely heavily on Kozlowsky v. Westminster Nat'l Bank, 86 Cal. Rptr. 52, 55 (Ct. App. 1970) and on a single decision that followed Kozlowsky, namely, Kemper v. Worcester, 435 N.E.2d 827, 830-31 (Ill. App. Ct. 1982), in support of their contention that they should be permitted to prosecute their claims for tortious interference. Plaintiffs' reliance on these cases is misplaced.

As the Ninth Circuit recognized in Mackey, supra at 526, those cases involved the extraordinary situation -- not present here -- where there was a "showing that [the defendant] director acted without board authority in firing [the plaintiff] officer." In this case, by contrast, Plaintiffs concede that they were terminated "at a special meeting of the Board of Directors." (R. App. 1, p. 7). Moreover, Kozlowsky has now been discredited even in its own jurisdiction, based upon the growing recognition among state and federal courts that Section 24 (Fifth) must be read to preempt tort claims as well as contract claims in order to effectuate the purposes of the Act. Other divisions of the same appellate court have declined to follow Kozlowsky, observing that it is "not persuasive authority" on the preemption issue. E.g., Schillinger v. Wells Fargo Bank, N.A., 268 Cal. Rptr. 368, 373 (Ct. App. 1990).

Nat'l Bank, supra; Morast v. Lance, supra. Further, under the National Bank Act "[e]very director must own in his or her own right either shares of the capital stock of the association of which he or she is a director . . . [or] in any company which has control over such association." 12 U.S.C. § 72 (1989 & Supp. 1995). The National Bank Act also requires that "[t]he president of the bank shall be a member of the board . . . " 12 U.S.C. § 76 (1989 & Supp. 1995).

It is evident, then, that the Bank could have terminated Plaintiffs only by action of the directors whom Plaintiffs seek to sue in these Counts. These directors, moreover, had to be shareholders in order to qualify to hold office under the express terms of the National Bank Act. If Plaintiffs were permitted to sue the voting directors as "directors" or "shareholders," Section 24 (Fifth) would be rendered nugatory. It would afford no practical protection whatsoever to a board exercising its statutory prerogative under that section to terminate officers "at pleasure." It is precisely this kind of subterfuge that the courts prohibit.

By the same token, if Plaintiffs were permitted to challenge their termination and seek reinstatement in the guise of prosecuting a shareholder derivative suit, then every inside director (namely, a director who is also an officer) would be able to challenge the termination of his or her employment by this means. This would stand Section 24 (Fifth) on its head.

Sensitive to these concerns, the Second District had no difficulty seeing through counsel's artful pleading to recognize

that Counts III, IV, VI, and VII of the Amended Complaint are all blatant and improper challenges to Plaintiffs' terminations as officers. Consistent with all available precedent from Florida and the Eleventh Circuit, the Court properly upheld the dismissal of these counts with prejudice.

CONCLUSION

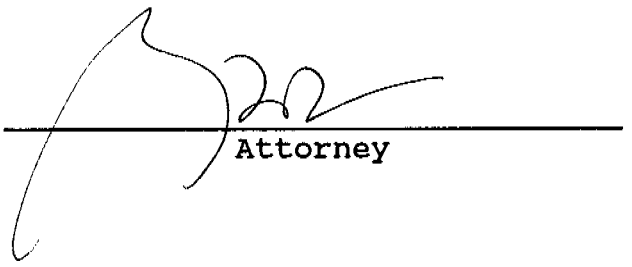
For the foregoing reasons, this Court should reverse the Second District's ruling as to Count I of the Amended Complaint and remand this case for entry of judgment in Defendants' favor. The Court should decline to review the Second District's other rulings or, alternatively, affirm them.

Respectfully submitted,

Gary L. Sasso
Florida Bar Number 622575
Sylvia H. Walbolt
Florida Bar Number 033604
Victor D. Berg
Florida Bar Number 901210
CARLTON, FIELDS, WARD, EMMANUEL,
SMITH & CUTLER, P.A.
Barnett Tower
Post Office Box 2861
St. Petersburg, Florida 33731
(813) 821-7000
Counsel for Petitioners

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Petitioners' Reply Brief on the Merits and the accompanying Appendix has been furnished by U.S. Mail to F. Wallace Pope, Jr., Esquire and Duane A. Daiker, Esquire of Johnson, Blakely, Pope, Bokor, Ruppel & Burns, P.A., P.O. Box 1368, Clearwater, Florida 34617, this 7th day of September, 1995.



Attorney

INDEX TO APPENDIX

TAB