IN THE SUPREME COURT
STATE OF FLORIDA

MEDICAL FACILITIES DEVELOPMENT, INC., a Florida corporation,

Petitioner,

v. CASE NO. 94-1662

LITTLE ARCH CREEK PROPERTIES, INC., a Florida corporation,

Respondent.

APPLICATION FOR DISCRETIONARY REVIEW OF A DECISION OF THE DISTRICT COURT OF APPEAL, THIRD DISTRICT OF FLORIDA

AMENDED BRIEF OF PETITIONER ON JURISDICTION

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PREFACE

This is Petitioner Medical Facilities Development, Inc.'s petition under Florida Rule of Appellate Procedure 9.120 for review of a decision of the Third District Court of Appeal which conflicts with a decision of this Court and with decisions of other Florida district courts of appeal.

Petitioner Medical Facilities Development, Inc., will be referred to as "MFDI."

Respondent Little Arch Creek Properties, Inc., will be referred to as "LACPI."

MFDI's Appendix will be cited as "A. ___."

CITATION OF AUTHORITIES

Other Authorities

STATEMENT OF THE CASE AND OF THE FACTS

Based on its Complaint for specific performance of a contract for the purchase and sale of a parcel of real property in Dade County, Florida ("Property"), MFDI recorded a Lis Pendens in Dade County's real property records to protect itself against the possibility of loss of the Property to another purchaser before the conclusion of the litigation. A. 1, 2. After LACPI, the owner of the Property, was unsuccessful in seeking discharge of the Lis Pendens, it filed its Motion to Require Plaintiff to Post a Bond and Supporting Memorandum ("Bond Motion"), demanding that MFDI post a bond in excess of $2.5 million. A. 3.

On June 10, 1994, the trial court considered LACPI's Bond Motion. A. 4. LACPI presented evidence of the monetary damage it claimed it would suffer from the placement of the Lis Pendens on its Property but presented no evidence of irreparable harm. The alleged monetary damage consisted of the difference between MFDI's contract price and the contract price of another potential purchaser. MFDI argued that it should not be required to post a bond because the controlling case law required a showing of irreparable harm before a lis pendens bond could be required and LACPI had not met its burden of proof.

On June 16, 1994, the trial court entered its Order Directing Plaintiff to Post a Bond ("Bond Order"). A. 5. In the Order, the trial court found that no showing of irreparable harm was necessary and that LACPI's potential monetary damage was $1 million, the difference between the prices offered by MFDI and its competitor for LACPI's Property. MFDI thereafter filed its Lis Pendens bond and appealed the Order to the Third District Court of Appeal. A. 6, 7. On appeal, MFDI again argued that *Chiusolo v. Kennedy,* 614 So. 2d 491, 492-93 (Fla. 1993), and various cases from Florida's intermediate appellate courts require that the opponent of a lis pendens show irreparable

harm before the lis pendens proponent may be required to post a bond. LACPI again claimed no showing of irreparable harm is necessary.

On March 15, 1995, the Third District filed its Opinion affirming the Bond Order. A. 8. The Opinion holds that a lis pendens bond is required in every case where the action involving the lis pendens is not founded on a recorded instrument or mechanic's lien. However, the Opinion also recognizes that Florida's other district courts of appeal take different approaches on the issue and specifically delineates three distinct approaches. With respect to *Chiusolo,* the Opinion finds that this Court's language regarding the requirement of irreparable harm is dicta which it is not bound to follow.

MFDI now seeks this Court's discretionary review on the basis of the express and direct conflict recognized in the Opinion.

QUESTION PRESENTED

Whether a lis pendens bond is required in all cases where a party files a lis pendens and the underlying law suit is not founded upon a duly recorded instrument or construction lien, notwithstanding the absence of any showing of irreparable harm by the party against whose property the lis pendens is filed.

SUMMARY OF ARGUMENT

The Opinion of the Third District in this case conflicts with this Court's opinion in *Chiusolo v. Kennedy,* 614 So. 2d 491 (Fla. 1993), on the same issue of law. In the Opinion, the Third District held that a lis pendens bond is mandatory in all cases involving a lis pendens not founded on a recorded instrument or mechanic's lien. In *Chiusolo*, 614 So. 2d at 492-93, however, the Court noted that the proponent of a lis pendens is required to file a lis pendens bond in "appropriate" cases to protect the property owner from irreparable harm.

The Opinion also conflicts with opinions of Florida's other district courts on the standard for requiring a lis pendens bond. It cites 15 cases from the Second, Third, Fourth, and Fifth District Courts of Appeal which establish three distinct approaches to the lis pendens bond issue. The first approach is to require a lis pendens bond only if the property owner makes a showing of irreparable harm. The second approach is to make a bond discretionary with the court but advisable where a lis pendens results in a cloud on the title of the affected real property. The third approach, that followed by the Third District, is to require a bond in all circumstances.

In the face of the conflict recognized by the Third District, this Court has discretionary jurisdiction pursuant to Article V, Florida Constitution, and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv). Because of the importance of the issue involved, and the lack of consistent treatment by Florida's courts, this Court should exercise its discretionary jurisdiction to resolve the conflict.

ARGUMENT

I. THE THIRD DISTRICT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT AND OF OTHER FLORIDA DISTRICT COURTS ON THE SAME ISSUE OF LAW.

In its Opinion, the Third District held that the proponent of a lis pendens not based on a duly recorded instrument or mechanic's lien **must** post a lis pendens bond in every case whether or not the party against whose property the lis pendens is filed has shown irreparable harm. A. 8, p.7. In contrast to the holding of the Third District, this Court has stated that the opponent of a lis pendens not founded on a recorded instrument or mechanic's lien must demonstrate irreparable harm before the proponent of the lis pendens may be required to post a bond. *Chiusolo v. Kennedy*, 614 So. 2d 491, 493 (Fla. 1993). In *Chiusolo,* the Court commented:

> We agree with the observation in Sparks [v. Charles Wayne Group, 568 So. 2d 512, 517 (Fla. 5th DCA 1990)], . . . that the statutory reference to injunctions exists merely to permit property holders to ask **in an appropriate case** that the plaintiff post a bond **where needed** to protect the former from irreparable harm.

Chiusolo, 614 So. 2d at 492-93 (emphases added). In *Sparks v. Charles Wayne Group,* 568 So. 2d 512, 517 (Fla. 5th DCA 1990), the court unequivocally held that a showing of irreparable harm is a prerequisite to a lis pendens bond:

> [B]efore a bond is required, the landowner must show that he will suffer irreparable harm in the event the lis pendens is unjustified, and also "the value of the properly encumbered by the lis pendens." C.W. Bailey v. Rolling Meadows Ranch, Inc., 566 So. 2d 63 (Fla. 5th DCA 1990); see also Feinstein v. Dolene, Inc, 455 So. 2d 1126 (Fla. 4th DCA 1984).

Sparks, 568 So. 2d at 517. The two cases cited by *Sparks, Bailey*, 566 So. 2d at 65, and *Feinstein*, 455 So. 2d at 1128, also explicitly require that the property owner show irreparable harm before the lis pendens proponent may be required to post a bond.

If this Court's phrases "in an appropriate case" and "where needed to protect . . . from irreparable harm" are given their plain English meanings, then there must also be cases in which lis pendens bonds are not appropriate. According to the Third District, however, every case involving a lis pendens founded on an unrecorded instrument is necessarily an "appropriate case" since every case requires a lis pendens bond. Furthermore, the Third District's Opinion reads the phrase "where needed to protect . . . from irreparable harm" out of *Chiusolo* since it concludes there is no need to show irreparable harm. The Third District's Opinion is impossible to reconcile with *Chiusolo*.

While the Third District recognizes the disparity between its decision and the language in *Chiusolo*, it dismissed the *Chiusolo* language as "persuasive, non-binding authority." A. 8, p.9. Even if the *Chiusolo* language is dicta, however, the Third District did not accord it the great respect and weight to which it is entitled in the absence of prior contrary authority from the highest court of this State. *Continental Assurance Co. v. Carroll,* 485 So. 2d 406, 408 (Fla. 1986); *Horton v. Unigard Insurance Co.,* 355 So. 2d 154, 155 (Fla. 4th DCA 1978), *cert. dismissed,* 373 So. 2d 459 (Fla. 1979). Since there is no prior contrary authority, the Third District should have ruled in accordance with *Chiusolo,* even if it disagreed, and then certified the question to this Court for resolution. Despite the absence of certification, however, and even if the *Chiusolo* language is dicta, this Court has jurisdiction to resolve the conflict between its statement in *Chiusolo* and the Third District's Opinion. *See, e.g., Griffin v. Speidel,* 179 So. 2d 569 (Fla. 1965) (dicta sufficient to establish conflict jurisdiction); *State v. Estate of Moore,* 153 So. 2d 819 (Fla. 1963) (same); *Scott v. National Airlines, Inc.,* 150 So. 2d 237 (Fla. 1963) (same).

The Opinion also notes a conflict between its treatment of the lis pendens bond issue and that of other Florida district courts: "[T]he caselaw in the District Courts of Appeal reflects three different approaches to determining whether a lis pendens bond is appropriate when the action

underlying the lis pendens is not founded upon a duly recorded instrument or construction lien." A. 8, p. 5. The Third District explained the three approaches as follows:

The Fourth and Fifth Districts have required that the party requesting a bond make a showing that the bond is necessary to prevent irreparable harm. For that view, the Third District cites *Sparks v. Charles Wayne Group,* 568 So. 2d 512, 517 (Fla. 5th DCA 1990); *Feinstein v. Dolene,* 455 So. 2d 1126, 1128 (Fla. 4th DCA 1984); *Florida Communities Hutchinson Island v. Arabia,* 452 So. 2d 1131, 1132 (Fla. 4th DCA 1984); *Glusman v. Warren,* 413 So. 2d 857, 858 (Fla. 4th DCA 1982). A. 8, p. 5.

The Second, Fourth, and Fifth Districts have held that the requirement of a bond is within the court's discretion but that the court's discretion should be exercised in favor of a bond if the lis pendens places a cloud on the title that does not exist without it. For that view, the Third District cites *Bailey v. Rolling Meadow Ranch, Inc.,* 566 So. 2d 63, 65 (Fla. 5th DCA 1990); *Andre Pirio Associates, Inc. v. Parkmount Properties, Inc., N.V.,* 453 So. 2d 1184, 1186 (Fla. 2d DCA 1984); *Mohican Valley, Inc. v. MacDonald,* 443 So. 2d 479, 481 (Fla. 5th DCA 1984); *CAM Corporation of Broward v. Goldberger,* 368 So. 2d 56, 57 (Fla. 4th DCA), *cert. denied,* 378 So. 2d 343 (Fla. 1979). A. 8, pp. 5-6.

The Second, Third, and Fifth Districts have held that a lis pendens bond is mandatory notwithstanding the absence of any showing of irreparable harm. For that view, the Third District cites *Porter Homes, Inc. v. Soda*, 540 So. 2d 195, 196 (Fla. 2d DCA 1989); *Machado v. Foreign Trade, Inc.,* 537 So. 2d 607, 607 n.1 (Fla. 3d DCA 1988); *Munilla v. Espinosa*, 533 So. 2d 895 (Fla. 3d DCA 1988); *Nero v. Nero,* 475 So. 2d 1361, 1361-62 (Fla. 5th DCA 1985); *Sunrise Point, Inc. v. Foss*, 373 So. 2d 438, 439 (Fla. 3d DCA), *cert. denied,* 374 So. 2d 99 (Fla. 1979). A. 8, pp. 6-7.

Based on the Third District's recognition that Florida's district courts have taken dramatically different approaches in deciding when a lis pendens bond is required, this Court's language in *Chiusolo,* and the obvious confusion and lack of consistency throughout this State regarding the lis pendens bond standards, this Court has the discretion to accept conflict jurisdiction under Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv).

The conflict should be resolved. There is no reason to permit Florida trial courts to apply the distinct and unreconcilable standards dictated by the various district courts in deciding whether or not a lis pendens bond should be posted in cases where the lis pendens is not based on a duly recorded instrument or mechanic's lien. In the Third District, a party who brings suit on a contract for purchase and sale of real property and posts a lis pendens is now required to post a lis pendens bond even if the opponent of the lis pendens makes no showing whatsoever. In contrast, in the Second, Fourth, and Fifth districts, the same suit may be brought and the same lis pendens filed without the necessity to post a lis pendens bond unless the property owner carries the burden of showing irreparable harm. The result of the conflict is that the citizens of Florida have no clear and unambiguous expression of the guidelines regarding the requirement for lis pendens bonds and are not afforded equal treatment under Florida law. MFDI urges the Court to exercise its discretionary jurisdiction and clarify the requirements for a lis pendens bond.

CONCLUSION

Petitioner, Medical Facilities Development, Inc., seeks review of the decision of the District Court of Appeal, Third District, that is in express and direct conflict with the language of this Court in *Chiusolo v. Kennedy*, 614 So. 2d 491 (Fla. 1993), and with the decisions of the Fifth District in *Sparks v. Charles Wayne Group*, 568 So. 2d 512 (Fla. 5th DCA 1990), the Fourth District in *Feinstein v. Dolene, Inc.*, 455 So. 2d 1126, 1128 (Fla. 4th DCA 1984), and the Second District in *Andre Pirio Associates, Inc. v. Parkmount Properties, Inc., N.V.*, 453 So. 2d 1184 (Fla. 2d DCA 1984).

The Petitioner, therefore, requests this Court to accept jurisdiction in this matter and resolve the conflict.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the above and foregoing was furnished by U.S. Mail to Stanley A. Beily, Esq., Stuzin and Camner, P.A., Attorneys for LACPI, 1221 Brickell Avenue, 25th Floor, Miami, Florida 33131, Barry L. Meadow, Esq., Podhurst, Orseck, Josefsberg, Eaton, Meadow, Olin & Perwin, P.A., 25 West Flagler Street, Suite 800, Miami, Florida 33130, and to Michael B. Chesal, Esq., Kluger, Peretz, Kaplan & Berlin, P.A., Attorneys for Trustee, 201 South Biscayne Boulevard, Suite 1970, Miami, Florida 33131, this 14 day of September, 1995.

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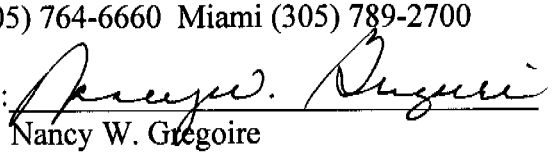
By: 
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