

IN THE SUPREME COURT
OF FLORIDA

FILED

SIGRID J. WHITE

SEP 29 1995

CLERK, SUPREME COURT

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MEDICAL FACILITIES DEVELOPMENT,
INC., a Florida corporation

Petitioner,

v.

CASE NO. 86,392
DCA-3 94-1662

LITTLE ARCH CREEK PROPERTIES,
INC., a Florida corporation

Respondent.

BRIEF OF RESPONDENT ON JURISDICTION

Stanley A. Bailey
STUZIN AND CAMNER, P.A.
Attorneys for Respondent
1221 Brickell Ave., 25th Floor
Miami, Florida 33131
(305) 577-0600
Florida Bar No. 004848

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PREFACE

This is Respondent Little Arch Creek Properties, Inc.'s Brief on Jurisdiction in Opposition to the Petition for Review filed by Petitioner. The parties will be referred to as follows:

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

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

"A" followed by a number will refer to a page in Medical's Appendix to its jurisdictional brief.

STATEMENT OF THE CASE AND FACTS

In March, 1994 Petitioner Medical sued LACP in the Dade County Circuit Court for specific performance of an alleged contract to purchase a medical office building. A1. The alleged contract was unrecorded and was based on an exchange of two letters. The existence of the contract was disputed by LACP. Medical filed a lis pendens against the office building property when it filed its specific performance complaint. A2.

LACP moved the trial court to require Medical to post a lis pendens bond. A3. Following an evidentiary hearing, the trial court entered an Order directing Medical to post a \$1.0 million lis pendens bond.¹ A5. Medical posted the bond and appealed the Bond Order to the Third District Court of Appeal.² A7.

On appeal, Medical argued that Chiusolo v. Kennedy, 641 So.2d 491, 492-93 (Fla. 1993), and certain other district court decisions require a property owner to show irreparable harm in the form of non-monetary damages in order to obtain a monetary bond from the proponent of the lis pendens .

¹In its Amended Brief on Jurisdiction, Medical states that the trial court found in the bond order that no showing of irreparable harm was necessary. Brief 1. The bond order makes no such finding. A5.

²The case on the merits was tried before a jury during the week of January 30, 1995 and the jury returned a verdict in favor of LACP finding that Medical did not have a specifically enforceable contract to purchase the medical office building. A final judgment in favor of LACP was entered pursuant to the jury verdict which Medical appealed to the Third District. The appeal is presently pending.

LACP argued in part that such a requirement makes no sense as a property owner would first have to prove the lis pendens caused solely non-monetary damages and then quantify the non-monetary damages in order to fix the amount of the lis pendens bond.

The Third District affirmed the trial court's bond order. A8. Medical timely filed a motion for rehearing, a motion for rehearing en banc with a request for oral argument and the suggestion that the Third District certify the case to this Court as of great public importance. On August 2, 1995, the Third District denied the motions. A9.

Medical then filed its Notice to Invoke Discretionary Jurisdiction seeking to persuade this Court to find the express and direct conflict which the Third District implicitly rejected.

QUESTION PRESENTED

Whether the decision of the Third District which required a \$1.0 million lis pendens bond where the lis pendens prevented the sale of a medical office building for \$1.0 million more than the Plaintiff's offer expressly and directly conflicts with a decision of another district court of appeal or of the Supreme Court.

SUMMARY OF ARGUMENT

There is no decision of this Court or of another district court of appeal on the same question of law which directly conflicts with the Third District's decision in this case.

Although the opinion below recognizes that there are different approaches used by courts in requiring lis pendens bonds where the lis pendens filer is proceeding on unrecorded instruments, the results in the cases were the same. Bonds were required. All of the cases cited in support of Medical's claim of conflict jurisdiction found the requisite showing for a lis pendens bond even though the approach used to arrive at this conclusion varied. Not one cited decision rejected a property owner's request for a lis pendens bond because the damages caused by a lis pendens were monetary and quantifiable.

In light of the lack of a decision which expressly and directly conflicts with the challenged district court decision, this Court should decline to exercise its discretionary jurisdiction.

STANDARD FOR INVOKING DISCRETIONARY JURISDICTION

In order to invoke the discretionary jurisdiction of this Court under Article V, Sect. 4(2), Fla. Const., antagonistic principles of law must have been announced in a case or cases based on practically the same facts. Trustees of Internal Improvement Fund v. Lobeau, 127 So.2d 98, 100-01 (Fla. 1961). The conflict must be obvious and patent and must result from an application of law to facts which are in essence on all fours. Id.; Kegan v. Biltmore Terrace Associates, 154 So.2d 825, 827, dissent. opp. (Fla. 1963) (writ of certiorari discharged and cause dismissed). The Court must look at the decision, rather than a conflict in the opinion, to find that it has jurisdiction. Niemann v. Niemann, 312 So.2d 733, 734 (Fla. 1975) (writ discharged and petition dismissed).

ARGUMENT

I. THERE IS NO CONFLICT BETWEEN THE DECISION OF THE THIRD DISTRICT AND THIS COURT SUFFICIENT TO INVOKE DISCRETIONARY JURISDICTION.

Petitioner argues that this Court's obiter dictum in Chiusolo v. Kennedy, 614 So.2d 491, 493 (Fla. 1993), conflicts with the Third District's decision in this case sufficiently to invoke discretionary jurisdiction. Even a cursory analysis reveals the contrary.

This Court in Chiusolo did state, "we agree with the observation in Sparks ... 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 at 493. By this statement, the Court expressed agreement with a statement in Sparks v. Charles Wayne Group, 568 So.2d 512 (Fla. 5th DCA 1990), regarding the purpose behind the legislature's inclusion of language with respect to injunctions in the lis pendens statute. It did not affirm the holding in Sparks and even if it had, there would not be a sufficient basis for conflict jurisdiction because the facts and issues in Sparks, as in Chiusolo, are significantly different from the facts and issues in this case.³

The issue of entitlement to a lis pendens bond was not before the Court in Chiusolo. The issue in Chiusolo was which party

³The issue before the court in Sparks was whether the pleadings and the record established a basis for a claim of an equitable lien sufficient to support the lis pendens. 568 So.2d 512 (Fla. 5th DCA 1990).

should have the burden of proof to sustain a lis pendens and what should be the quantum of proof. The Court's language about bonds being a vehicle to protect property owners was gratuitous, although correct, since the Plaintiff's right to maintain a lis pendens had not yet been established.

The issue before the Third District in this case was whether the trial court properly required the posting of a bond and whether the court abused its discretion in setting the amount of the bond at \$1.0 million. See, Medical Facilities Development, Inc. v. Arch Creek Properties, Inc., 656 So.2d 1300 (Fla. 3d DCA 1995). The Third District held that where a lis pendens is not based upon a lawsuit involving a recorded instrument, such as here, a bond should be posted and that, based on the evidence presented, the trial court did not abuse its discretion in setting the bond at \$1.0 million.⁴

Therefore, no conflict exists between Chiusolo and the Third District's decision sufficient to invoke discretionary jurisdiction because the facts and issues in the two cases are different and the issue of law decided is not the same.

II. THERE IS NO CONFLICT BETWEEN THE DECISION OF THE THIRD DISTRICT AND OTHER DISTRICT COURTS OF APPEAL SUFFICIENT TO INVOKE DISCRETIONARY JURISDICTION.

The Third District's decision recognizes three different judicial approaches to cases involving lis pendens bonds. What is

⁴ Medical's lis pendens prevented the sale of the medical office building to Mt. Sinai Hospital which had a valid contract for \$1.0 million more than Medical was offering.

important is that none of the cited cases involve the denial of a lis pendens bond in a case involving real property which is not founded on a recorded instrument because the property owner's damages were monetary as opposed to non-monetary. Medical's lis pendens prevented LACP from consummating a sale for a \$1.0 million higher price. No appellate decision has denied a lis pendens bond on these facts.

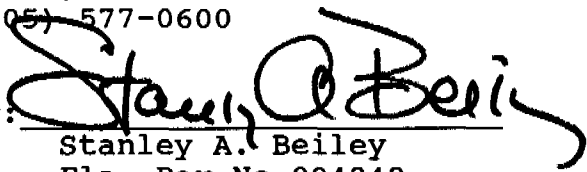
Although different approaches to requiring lis pendens bonds have been used, the same result follows. A lis pendens proponent who sues on the basis of an unrecorded instrument has to post a bond in order to protect the property owner. That makes sense and is the law in Florida. Different approaches which lead to the same result are insufficient to activate this Court's discretionary jurisdiction.

CONCLUSION

Respondent requests the Court to decline to accept discretionary jurisdiction.

Respectfully submitted,
STUZIN AND CAMNER, P.A.
Attorneys for Respondent
1221 Brickell Ave., 25th Floor
Miami, Florida 33131
(305) 577-0600

By:


Stanley A. Bailey
Fla. Bar No. 004848

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was furnished by U.S. Mail to Nancy W. Gregoire , Esq., Ruden, Barnett, McClosky, Smith, Schuster & Russel, P.A., Attorneys for Medical, 15th Floor, 200 East Broward Boulevard, Fort Lauderdale, Florida 33302, 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 28 day of September, 1995.



Stanley A. Bailey
Fla. Bar No. 004848

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