SUPREME COURT OF FLORIDA

CV REIT, INC., a Delaware corporation f/k/a CENVILL INVESTORS, INC., and H. IRWIN LEVY,

Petitioners,

vs.

TGI DEVELOPMENT, INC.,

Respondent.
_____/

CASE NO. 87,282
District Court of Appeal
4th District - No. 94-2749

PETITIONERS' REPLY BRIEF ON THE MERITS BY CV REIT, INC. f/k/a CENVILL INVESTORS, INC. AND H. IRWIN LEVY

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CERTIFICATE OF INTERESTED PERSONS

Counsel for Petitioners, CV Reit, Inc., a Delaware corporation f/k/a Cenvill Investors, Inc., and H. Irwin Levy, certifies that the following persons and entities have or may have an interest in the outcome of this case.

1. John Beranek
   (counsel for Petitioners)

2. J. Michael Burman
   (counsel for Petitioners)

3. CV Reit, Inc. f/k/a Cenvill Investors, Inc.
   (Petitioner)

4. Joel D. Eaton
   (counsel for Respondent)

5. John Gundlach
   (counsel for Respondent)

6. H. Irwin Levy
   (Petitioner)

7. Searcy Denney Scarola Barnhart & Shipley, P.A.
   (counsel for Respondent)

8. TGI Development, Inc.
   (Respondent)

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STATEMENT OF THE CASE AND FACTS

This is a reply brief by CV Reit, Inc., formally known as Cenvill Investors, Inc. and Mr. H. Irwin Levy. This brief is directed to the respondent's brief on the merits which was served in this certified question case on May 10, 1996. The case before the Fourth District Court of Appeal resulted in an opinion adopting the dissents from Woodson v. Martin, 663 So. 2d 1327 (Fla. 2d DCA 1995), and certifying conflict with the Woodson majority. The Fourth District's opinion contained absolutely no analysis about what this case was actually about and more importantly, what it was not about. The plaintiff had formally abandoned all claims for lost profits and all claims for damages growing out of loans which the plaintiff/corporation received and never repaid. Somehow, the corporate plaintiff contends it was defrauded by receiving the loans which it did not repay.

There are six cases certified to this Court on the general subject of the Economic Loss Rule and the subject matter of each is here listed.

1. Woodson v. Martin, 663 So. 2d 1327 (Fla. 2d DCA 1995); Sale of a home.
2. Raymond James & Associates, Inc. v. PK Ventures, Inc., 666 So. 2d 174 (Fla. 2d DCA 1995); Sale of a lime rock mine.
3. Linn-Well Development Corporation v. Preston & Farely, Inc., 666 So. 2d 558 (Fla. 2d DCA 1996); Sale of commercial property.
4. HTP, Ltd. v. Lineas Aereas Costarricenses, S.A., 661 So. 2d 1221 (Fla. 3d DCA 1995); Litigation settlement.
5. Jarmco, Inc. v. Polygard, Inc., 663 So. 2d 300 (Fla. 4th DCA 1996); Defective resin in boat.
6. TGI Development, Inc. v. CV Reit, Inc., 665 So. 2d 366 (Fla. 4th DCA 1996). Failure of extended multi-contract commercial relationship.

The opposing brief is long on sarcasm and righteousness, but very short on analysis of what this case is actually all about. The lack of analysis is also apparent in the District Court's treatment. Petitioners respectfully suggest that no matter how Woodson turns out, this case is a reversal and is not remotely similar to Woodson.

The statement of the case and facts by respondent starts off by criticizing the petitioners' factual statement because it supposedly contains "extraneous" materials, then because it omits "much that is relevant" and further because it is "simply inaccurate". Frankly, these are false and silly arguments. The factual statement in the petitioners' brief constituted a verbatim restatement of respondent's/plaintiff's complaint. Petitioner left out nothing and added nothing, and certainly stated nothing inaccurately. For counsel to make such an argument is apparently merely the standard first line of most briefs in counsel's arsenal.

In short, we stated the facts by quoting the plaintiff's complaint and plaintiff's appellate counsel cannot now complain or change those facts. Plaintiff's trial counsel filed and asserted a count for breach of contract which the trial court held stated a cause of action. Plaintiff now tries to pretend that there really was no valid contract claim. Plaintiff's brief also never addresses all the damages which plaintiff specifically abandoned in the trial court, including all lost profits and loan damages.[1]

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[1]We have never understood how plaintiff was damaged by receiving over $6 million in loans which plaintiff never repaid, but this is what was alleged, but has since been abandoned.

Indeed, in the initial brief we also described in detail the post-summary judgment stipulations which plaintiff's trial counsel agreed to. Now, appellate counsel tries to totally re-posture the case as to what actually went on before the trial court regarding damages and argues he does not have to say what the damages are, despite all the waivers of damages below.

Appellate counsel is guilty of misrepresentations in regard to the reason for the trial court's summary judgment. Throughout the brief, plaintiff argues that the only reason for the summary judgment was the poor pleadings of the plaintiff. The plaintiff's brief urges that based on one sentence from defense counsel during the summary judgment hearing, that the defendants were contending that the complaint was inartfully drafted "and that they were entitled to win [summary judgment] for that reason alone" and that this was "the only thing they argued to the trial court". (Br.46). Respondent cannot really be serious. The fact that defense counsel comments once on the inartful nature of the plaintiff's pleading while arguing at length the application of the Economic Loss Rule to the trial judge, does not mean that that is the "only thing" argued, nor does it mean that that was the only reason why the trial court granted the motion for summary judgment. Again, these kinds of arguments do not help this Court decide this rather complex case. There was absolutely no summary judgment granted against plaintiff because of plaintiff's inartful pleadings.

In short, defense counsel argued orally and in writing, that defendants were entitled to a summary judgment because of the Casa

Clara Condominium Assn., Inc. v. Charley Toppino & Sons, Inc., 620 So. 2d 1244 (Fla. 1993) decision and the Economic Loss Rule. In passing, he commented on the inartful nature of the plaintiff's complaint, which, of course, the trial court had already held stated a cause of action.

SUMMARY OF THE ARGUMENT

Whether the Woodson case was wrongly or rightly decided, it is simply not controlling here. The Economic Loss Rule and its application to commercial transactions between sophisticated business negotiators should not be governed by a rule or law that merely states that the loss rule can never bar a claim for fraud in the inducement. There is more to a claim for fraud in the inducement than merely putting that title at the top of the page. Without question, clarification is necessary in this area of the law.

CV Reit has made various suggestions on how the law should be clarified which we are hopeful will be helpful to this Court in the overall problem. However, this case requires only that this court decide and hold that in a purely commercial contract setting, the Economic Loss Rule does bar a claim for alleged common law fraud in the inducement when the facts of the fraud are also the same facts which form the basis for a valid cause of action for breach of contract and where precisely the same compensatory damages are available and claimed through the contract cause of action. The respondent/plaintiff does not even suggest that this is an improper application of the Economic Loss Rule.

In addition, the trial court, rather than the District Court of Appeal has the discretion to decide whether a complaint may be amended. The District Court also erred in this regard.

ARGUMENT

I. THIS COURT SHOULD HOLD THAT IN A PURELY COMMERCIAL CONTRACT SETTING, THE ECONOMIC LOSS RULE BARS A CLAIM FOR ALLEGED COMMON LAW FRAUD WHEN THE FACTS OF THE FRAUD ALSO FORM THE BASIS FOR A VALID CAUSE OF ACTION FOR BREACH OF CONTRACT AND WHERE PRECISELY THE SAME CLAIMED COMPENSATORY DAMAGES ARE AVAILABLE THROUGH THE CONTRACT CLAIM.

In the initial brief we argued that this CV Reit case was totally different from the Woodson case and indeed from any of the other certified cases pending before this Court. This is a long-term business relationship between sophisticated business corporations involving multiple contracts. We previously argued and again reargue that the one sentence rule--fraud in the inducement is never barred by the Economic Loss Rule--is at best a substantial over-simplification. We suggested that this Court needed to clarify the law and that a substantially more thorough analysis with definitions of these concepts was necessary. We went forward with an entire section in the petitioners' brief on alternative approaches which this Court might adopt in clarifying the law and provided a section on the Economic Loss Rule on a case-by-case basis. We suggested a list of factors which this Court might include in an opinion giving guidance to the bench and bar on when the Economic Loss Rule should be applied in contractual/tort matters. This list of factors, drawn from other cases around the country, was as follows:

1. Whether a direct contract exists between the plaintiff and defendant, that is, whether direct privity applies;
2. Adequacy or inadequacy of a contract remedy;
3. The type of relationship between the parties: commercial or consumer relationships;

4. Whether the facts of the contract/fraud dispute are intertwined and whether the damages are distinct or the same;
5. Whether the matter involves the sale of goods, products or real estate;
6. Equality of bargaining positions;
7. Whether the alleged fraud is also a specific statutory violation; and
8. Whether the contract itself negates reliance on a later fraud in the inducement theory.

It is apparent that the respondent read the petitioners' brief very quickly because they[2] do not even note the suggestion that this Court adopt a case-by-case approach to the Economic Loss Rule. It is also hard to believe that the respondent now suggests that there is no case law governing situations where the tort theory and the contract theory are factually intertwined. The language concerning intertwined and inextricable facts was taken directly from Leisure Founders, Inc. v. CUC Intern, Inc., 833 F.Supp. 1562 (S.D. Fla. 1993) and John Brown Automation, Inc. v. Nobles, 537 So. 2d 614 (Fla. 2d DCA 1988). The respondent's position is that there is no case law whatsoever holding that the Economic Loss Rule bars a fraud in the inducement claim when the facts are inextricably intertwined. The respondent is simply wrong on this and we invite the Court to read pages 30, 31, and 32 of our initial brief and the case law quoted there.

What Happened to the Breach of Contract?

The day after Judge Alvarez granted a summary judgment on

[2]The undersigned counsel recognizes that there is only one respondent and one appellate attorney, but for unknown reasons the entire respondent's brief is written in terms of "we". Counsel tells this Court repeatedly what "we" think. Thus, singular or plural becomes completely confused.

Count I, Common Law Fraud, the plaintiff still had pending its Count III for Breach of Contract. Precisely the same facts were the basis for the breach of contract count and the alleged fraud count. Now, on appeal, the plaintiff has fallen into its own trap and argues more than once that the allegations of the complaint showed fraud in the form of "an ongoing scheme to defraud the plaintiff of substantial sums of money over a lengthy period of time". (Br.30). There is no question about the lengthy period of time, the alleged fraud was specifically and carefully alleged in the third amended complaint to include the defendants' conduct on numerous different dates and finally in having a receiver appointed in 1988.

This point is worth repeating. At page 28 of the brief respondent says that the fraud in this case was "an ongoing scheme to defraud the plaintiff of substantial sums of money over a lengthy period of time". The brief states that the fraud was designed to "to induce the plaintiff to enter into a contract with CV Reit; and then by taking subsequent actions totally inconsistent with the facts as initially represented, actions which amounted to a breach of the implied [contract] condition of good faith contained in the fraudulently-induced contract." As argued in the initial brief and not countered by the respondent, the alleged fraud occurred long after the allegedly fraudulently induced contract.

Again, we wonder just what happened on this appeal to the breach of contract Count. The plaintiff now writes a brief from

which it sounds like there really never was a breach of contract. However, the defendants moved to dismiss the breach of contract count and the trial court denied the motion and the case was even scheduled for trial at plaintiff's request. The complaint had been amended three times, was set for trial, but then not reached. Plaintiff could have tried the breach of contract case, but chose not to and instead stipulated to a judgment on the merits against itself. Now, before this court, one can read the entire respondent's brief and still not have the vaguest idea what the breach of contract was. It is not up to the petitioner to explain to this Court the vagaries of the breach of contract count. The plaintiff plead a cause of action for breach of contract based upon breach of the duty of good faith concerning the long commercial contractual relationship between these parties. This cause of action was sustained before the trial court and the plaintiff could have gone to trial on it.

Now, on review, the plaintiff in effect contends; we never really had a breach of contract action. Despite agreeing that they would not try to bolster their case on appeal by urging the absence of a contract remedy, the plaintiff has done just that.

Just what was the contract between these parties? Again, we look directly to the language in the opposing brief which we are sure counsel will suggest was a mere "slip of the pen".[3] At page 18, respondent says: "The contract between the plaintiff and CV

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[3]In footnote 8, counsel even says his own complaint was a mere "slip of the pen" and that certain allegations should be disregarded as "inartfully-pleaded surplusage".

Reit was a simple promise by CV Reit to loan $800,000.00 to the plaintiff (which was performed), and a reciprocal promise by the plaintiff (secured by a mortgage) to repay that loan." This is the contract in question, and there is simply no doubt that CV Reit did loan the $800,000.00 to TGI. TGI took the $800,000.00 and never repaid one cent. TGI stipulated to a judgment on the merits for the $800,000.00 plus interest amounting to $1.1 million dollars in total. Frankly, we cannot understand, and the opposing brief does not explain, how loaning $800,000.00, which was never repaid, was a breach of contract by CV Reit, nor do we understand how this could possibly have been fraud in the inducement.

The Abandoned Claims for Damages

From the beginning in this case, we have asked the plaintiff to tell us what damages it seeks for fraud. We have been told only that the damages for fraud and the damages for breach of contract are exactly the same. This was furnished in answers to interrogatories. (T.11-20). In the District Court briefs we dared the plaintiff to tell the court what the damages were which were being claimed for fraud. They did not respond. In this Court, we have again dared them to tell us what damages they seek. This time they respond by telling us that they don't have to say what their damages are. Normally, this might be an appropriate response, but it is entirely inappropriate in this case because of the fact that the plaintiff had already formerly abandoned almost every conceivable form of compensatory damages. In the trial court (before appellate counsel appeared) plaintiff's trial lawyer filed

a formal abandonment of all claims for lost profits. In addition, trial counsel formally abandoned all claims for damages initially claimed as growing out of the $4-5 million dollar loan which TGI received to purchase the additional real estate under the option. (T.53, R.795). In addition, TGI has abandoned all of its claims for damages initially claimed as growing out of the $800,000.00 loan from CV Reit to TGI. In addition, all forms of statutory lender liability which were alleged in the complaints and all damages growing out of previously alleged usery, have been formerly abandoned by the dismissal of those other counts.

If the plaintiff has damages arising from fraud, it could have and should have told the District Court of Appeal or this Court what those damages are. Indeed, during the oral argument before the Fourth District Court of Appeal, Judge Farmer spoke up and suggested that what the plaintiff might have in mind would be nominal compensatory damages as a basis to support their claim for punitive damages for fraud. That is unquestionably what this case is all about, punitive damages. This Court should not sanction such an approach to tort litigation. Plaintiffs had at most a contract remedy and they have tried to convince this Court that that remedy really does not exist. On page 26 of the brief they say that "the defendants may well have been correct" in arguing that there was no real cause of action for breach of contract. Further, on the same page, they suggest "it might ultimately be concluded that the breach of contract action was not viable at all". Again, on page 27, they suggest that the "plaintiff's

pleadings [the complaint] may be wrong on one count", the breach of contract.

Plaintiff simply cannot make this argument due to their agreement on the trial level, and further because the plaintiff stated a contract cause of action according to the trial court's ruling on the motion to dismiss. Under Casa Clara, contract principles govern over tort principles. Here, there was at least one contract, and in fact, there was a longstanding contractual relationship between sophisticated businessmen who could and should have put their complete agreements in writing. If TGI omitted a contract term, it is a contract problem, not a tort.

H. Irwin Levy

If the plaintiff corporation wanted to sue Mr. H. Irwin Levy for fraud on an individual basis, it could have done so. It did not do so. Mr. Levy has been sued as a corporate officer acting in the course of his employment in this overall contractual business relationship. Now, before this court, plaintiff seems to assert that what they really had was an individual fraud claim against Mr. Levy personally. This complaint has already been amended three times and this litigation had gone on for four years before the summary judgment was entered. It is a little late to now decide that they should have simply sued Mr. Levy personally for fraud and that this case has nothing to do with the contract. The plaintiff had already abandoned all of its claims against the Boca Grove Plantation, against the bank that loaned plaintiff the $4-5 million dollars and against CV Reit growing out of the $800,000.00 loan.

What is left? There is obviously some reason why respondent has not or cannot answer these questions? Plaintiff even formally abandoned lost profits as a claim.

II. THIS COURT SHOULD HOLD THAT THE DISTRICT COURT ERRED IN GRANTING LEAVE TO AMEND THE FRAUD COUNT WHERE THERE HAD BEEN ABSOLUTELY NO REQUEST TO AMEND IN THE TRIAL COURT AND THE ARGUMENT RESULTING IN THE RIGHT TO AMEND WAS RAISED FOR THE FIRST TIME ON APPEAL. DOBER V. WORRELL, 401 SO. 2D 1322 (FLA. 1981) REQUIRES A REVERSAL.

The plaintiff should not be given a free pass to amend this complaint before the trial court even if the case is remanded. At the very least, the trial court should view any request to amend as a matter of discretion. This issue was not before the Fourth District Court of Appeal, and the District Court committed serious error in ordering the trial judge to allow the plaintiff to amend if it wanted to. What happened to the discretionary standard by which trial court's grant or deny motions to amend? A very strong argument can be made that the plaintiff had already abused any right to amend this complaint any further. The plaintiff will do violence to all of the post-judgment stipulations if it amends further. Plaintiff certainly should not be allowed to amend further to change their claims to a personal claim against Mr. Levy.

None of these arguments were ever made to the District Court, and of course, none of them were ever made to the trial court because this issue simply did not exist. The Fourth District Court of Appeal was in substantial error in ordering an amendment. The opposing brief even argues that the case will now be governed by

the Rules of Civil Procedure on amendments. The Rules of Civil Procedure however allow the trial court to deny a motion to amend as well as grant a motion to amend. Here, the trial court will have no choice and no discretion; amendments must be allowed even though trial counsel never asked to amend and instead stuck by his "inartful" complaint.

The Fourth District Court, without adequate information or consideration, simply decided to let the plaintiff off the hook of its own inartfully worded complaint.

CONCLUSION

The opinion of the Fourth District Court of Appeal should be reversed. Woodson, no matter how decided, is not applicable to the facts of this case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to **Searcy Denney Scarola Barnhart & Shipley, P.A.**, 2139 Palm Beach Lakes Blvd., West Palm Beach, Florida 33409, **Joel D. Eaton**, Podhurst, Orseck, Josefsberg, Eaton, Meadow, Olin & Perwin, P.A., 25 West Flagler Street, Suite 800, Miami, Florida 33130, and **John Gundlach**, Fleming, Hale, Shaw & Gundlach, 11760 U.S. Highway One, Suite 300, Golden Bear Plaza, North Palm Beach, Florida 44408, dated this 11th day of June, 1996.

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