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SID J. WHITE
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IN THE SUPREME COURT OF FLORIDA

CASE NO. 89,311
THIRD DCA CASE NO. 94-2166

BELLSOUTH ADVERTISING & PUBLISHING CORPORATION,

Plaintiff/Petitioner

vs.

SECURITY BANK, N.A.

Defendant/Respondent.
_____/

RESPONDENT'S BRIEF ON JURISDICTION

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INTRODUCTION

The Respondent, SECURITY BANK, N.A., was the Garnishee below. The Petitioner, BELLSOUTH ADVERTISING & PUBLISHING CORPORATION, was the Plaintiff below. References will be made to Petitioner's Appendix by use of the symbol "A" and to the Third District Court of Appeal's opinion below published in the Southern Reporter at 679 So. 2d 795 (Fla. 3d DCA 1996).

STATEMENT OF THE CASE AND THE FACTS

BellSouth Advertising sued Garfield & Associates, P.A. and a judgment was entered in favor of BellSouth for $36,576. (Al). BellSouth served a writ of garnishment on Security Bank. (A2-A3). Security Bank did not timely answer the writ. Without notice to the Bank, a final judgment was entered against it for $36,576. (A5). Security Bank moved to set aside the final judgment on the grounds that its failure to timely answer was based on excusable neglect. The court denied the motion. (A6-A7). The Answer then filed indicated that the Bank held only $374.21 belonging to Garfield, Security Bank, 679 So, 2d 795, 801 (Fla. 3d DCA 1996).

Security Bank then appealed this judgment to the Third District Court of Appeal. (A10). The Third District held that the trial court did not err in failing to set aside the default judgment against Security Bank. (Al 1-A35). However, the Third District also held that the trial court erred in its entry ofjudgment on damages. Id. It stated that BellSouth's garnishment claim was for unliquidated damages and that the Bank has a due process entitlement to notice and opportunity to be heard on the issue of damages. Id. The Third District also held that a judgment cannot be entered against the Bank in excess of what Garfield could get from it. Id.

Security Bank moved for attorney's fees and costs. The Third District granted this motion in part by allowing fees for preparation of a supplemental brief required by the district court. BellSouth moved for a review of this order. (A39-A41). That motion was denied. (A41).

BellSouth has now filed a notice to invoke discretionary jurisdiction and a brief on jurisdiction alleging that the Third District's opinion and order are in conflict with decisions of other district courts of appeal, (A42). Security Bank respectfully requests that this court deny the petition for writ of certiorari because no conflict exists.

SUMMARY OF ARGUMENT

Petitioner, BellSouth Advertising, has filed a petition for writ of certiorari in this case arguing that the Third District Court of Appeal's decision below is in express and direct conflict with the decisions of other districts, The petition should be denied because there is no conflict with any of Petitioner's cited cases.

Petitioner first argues that the order granting Respondent attorney's fees directly conflicts with a decision of the Fourth District. However, the Fourth District case cited is a short per curiam opinion which is limited to its own facts and circumstances and is inapplicable to the instant case decision.

Petitioner next argues that the Third District opinion conflicts with the Fifth District's analysis of liquidated damages. Yet, the Third District expressly adopted the holding and rationale of the Fifth District on this point and determined that the sum in question in the instant case involves unliquidated damages.

Finally, Petitioner argues that the Third District's interpretation of Fla. Stat. 77.081(2) is at odds with decisions of other districts. However, the Third District clearly and explicitly distinguished these same cases. They are not in conflict with the Third District opinion because they did not directly interpret subsection 77.08 1(2) but merely touched upon it tangentially and its treatment was inconsequential to their holdings.

Therefore, Respondent respectfully requests that the petition be denied because the requisite express and direct conflict on the same point of law is lacking.

ARGUMENT

The Florida Rules of Appellate Procedure prescribe the discretionary jurisdiction of the supreme court, Fla. R. App. P. 9.030(a)(2)(A)(iv) provides that the discretionary jurisdiction of the supreme court may be sought to review district court of appeal decisions that "expressly and directly conflict" with the decision of another district court of appeal or the supreme court on the same questions of law.

Petitioner, BellSouth, argues that the order granting attorney's fees to Respondent, Security Bank, and the decision of the Third District Court of Appeal in this case expressly and directly conflict with the holdings of other district courts in Florida. However, a close analysis of the case cited by the Petitioner indicate that either there is no express and direct conflict or that the cases do not treat the same question of law as required by Fla. R. App. P. 9.030.

I. THE THIRD DISTRICT'S ORDER GRANTING RESPONDENT ATTORNEY'S FEES DOES NOT DIRECTLY AND EXPRESSLY CONFLICT WITH A FOURTH DISTRICT HOLDING BECAUSE THAT WAS A PER CURIAM OPINION WHICH DID NOT ELABORATE UPON ITS FACTS AND IS THUS CONFINED TO ITS OWN RECORD.

On August 7, 1996, the Third District granted Respondent's motion for attorney's fees. Petitioner argues that this order expressly and directly conflicts with the Fourth District's decision in All-American Semi-Conductor. Inc. v. Ellison Graphics Corp., 594 So. 2d 342 (Fla. 4th DCA 1992).

All-American Semi-Conductor was a short, per curiam opinion in which the Fourth District remanded an undisclosed attorney's fee award and directed the trial judge to restrict the

garnishee's attorney's fees to $100. Id. Petitioner argues that All-American Semi-Conductor stands for the proposition that an award of attorney's fees to a garnishee is limited to the $100 deposit of the garnishor. Moreover, Petitioner argues that the All-American Semi-Conductor opinion and the Third District's decision in this case are in "clear, express, and direct conflict."(Petition for writ of certiorari, p.5). Petitioner overstates the holding in All-American Semi-Conductor.

A direct and express conflict requires some factual similarity and the same question of law to be treated. All-American Semi-Conductor merely held, in a very brief per curiam opinion, that the attorney's fee award in that case should not exceed the $100 statutory deposit. Id. It did not state or elaborate upon the conduct of the parties or the facts underlying the dispute. It is well-established that courts have wide latitude in awarding attorney's fees. In this instance, the award of fees was limited to the preparation of a supplemental brief requested by the district court. The All-American Semi-Conductor case does not create an express and direct conflict and thus can not be the basis to obtain discretionary jurisdiction.

Petitioner also contends that the order granting attorney's fees conflicts with Ebsary Foundation Co. v. Barnett Bank of South Florida. N.A., 569 So. 2d 806 (Fla. 3d DCA 1990). This contention is meritless. Fla. R. App. P. 9.030(a)(2)(iv) expressly provides that the conflict must exist with "a decision of **another** district court of appeal." Ebsary is irrelevant to the question ofjurisdiction in this instance. In re Estate of Carlton, 378 So. 2d 1212 (Fla. 1979), cert. denied, 100 S. Ct. 3013,447 U.S. 922, 65 L.Ed. 2d 1114.

II. THE THIRD DISTRICT'S OPINION IN THIS CASE DOES NOT CONFLICT WITH THE FIFTH DISTRICT'S HOLDING ON LIQUIDATED DAMAGES BECAUSE THE THIRD DISTRICT EXPLICITLY ADOPTED THE RATIONALE AND INQUIRY OF THE FIFTH DISTRICT IN REGARD TO LIQUIDATED DAMAGES.

Petitioner argues that the decision of the Third District in this case expressly and directly conflicts with the Fifth District's decision in Bowman v. Kingsland Development, Inc., 432 So. 2d 660 (Fla. 5th DCA 1983). In Bowman, the appellant executed a promissory note which recited that upon default the maker would pay "all costs of collection, including attorney's fees." Id. at 662. Subsequently, the appellee defaulted in payment. Id. Appellant filed an action on the note and then moved for a default when the appellee did not answer. Id. The trial court entered a default against appellee and without further notice entered final judgment for damages and attorney's fees. Id.

Nine months later, the appellee moved to set aside the final judgment alleging that the award of attorney's fees was unreasonable. Id. The trial court granted the motion and reduced the attorney's fees award. Id. The issue on appeal to the Fifth District was whether the claim for attorney's fees was for liquidated or unliquidated damages. Id.

The Fifth District asserted that a default admits a plaintiffs entitlement to liquidated damages. Id. It does not entitle a plaintiff to unliquidated damages. Id. The Fifth District defined liquidated damages as those that can be determined with exactness from the cause of action as pleaded. Id. Unliquidated damages, it stated, are those where the "exact sum requires the taking of testimony to ascertain facts upon which to base a value judgment." Id. at 663.

Therefore, the Fifth District held, an item of damages for a reasonable attorney's fee is not

liquidated. Id. Consequently, it held that the appellee has a due process entitlement to notice and opportunity to be heard as to the presentation and evaluation of evidence necessary to a judicial determination of the amount of unliquidated damages. Id.

The Third District's holding in this case is consistent with the Fifth District's holding in Bowman. In this case the Third District explicitly stated that "[c]learly BellSouth's claim against the Bank was for an unliquidated sum, not a liquidated sum." Security Bank v. BellSouth Advertising & Publishing Corn., 679 So. 2d 795, 799 (Fla. 3d DCA 1996). It also cited the Bowman case as support for its holding and quoted it extensively. Id. at 800.

Moreover, the Third District's holding is consistent with Bowman because it arrived at the determination that the damages in question were unliquidated through the same inquiry employed by the Fifth District. The Third District maintained that the writ of garnishment in this case was an unliquidated sum because "plaintiff BellSouth sought to obtain from the Bank whatever money Garfield, the bank customer, had on deposit there." Id. at 798. A garnishment action against a bank must typically involve unliquidated sums because the amount the customer has in the bank can not be ascertained without "ascertain[ing] facts upon which to base a value judgment" as Bowman indicates. Bowman, 432 So. 2d at 663.

The Fifth District in Bowman accurately stated the distinction between liquidated and unliquidated damages. The Third District's opinion in this case is consistent with that analysis and applies that holding. Clearly, there is no express and direct conflict with the Bowman case.

III. THE THIRD DISTRICT'S OPINION DOES NOT CONFLICT WITH OTHER DISTRICT'S INTERPRETATION OF FLA. STAT. 77.081(2) BECAUSE THESE CASES HAVE NOT EXPRESSLY INTERPRETED THE STATUTE BUT HAVE ONLY TREATED IT TANGENTIALLY.

Petitioner next argues that the Third District's opinion directly and expressly conflicts with three other districts in the interpretations of Fla. Stat. 77.08 1(2). Petitioner argues that the Third District's statutory interpretation is in conflict with International Travel Card, Inc. v. R.C. Hasler, Inc., 411 So. 2d 275 (Fla. 1st DCA 1982); Sentry Indemnity Co. v. Hendricks Enterprises, 371 So. 2d 1105 (Fla. 4th DCA 1979); and Hauser v. Dr. Chatalier's Plant Food Co., 350 So. 2d 548 (Fla. 2d DCA 1977).

In this case, the Third District held that Fla. Stat. 77.081(2) applies "by its plain words" to a prejudgment writ of garnishment. Security Bank, 679 So. 2d at 80 1. The Third District noted that applying that statute to this case would lead to the absurd result of imposing hundredfold liability on the Bank and it urged that the subsection must be read "in pari materia" with the other garnishment statutes. Id. Specifically, Fla. Stat. 77.06(1) provides that the garnishee is only liable for debts due by the garnishee to the defendant which is in possession of the garnishee.

The Third District specifically cited these cases which Petitioner now relies on and distinguished them by asserting that these cases "assume, without discussion, that subsection 77.081(2) applies to post judgment garnishment" but "there is no indication that in these cases that the inapplicability of subsection 77.08 1(2) was called to the attention of the court." Id. Indeed, neither of the three cases cited by Petitioner are factually similar or legally on point with the facts and law in this case. Those, now-dated cases, tangentially touched upon subsection 77.081(2) but were argued and decided upon different legal issues.

The Hauser case did not apply or interpret subsection 77.081(2), it merely mentioned it. Moreover, the holding in that case is exactly the same as the holding in this case. A default judgement against a garnishee was vacated because no notice had been given. The Hauser court held that that statutory subsection must be read in "pari materia" with other statutory provisions. It held that notice is necessary for a determination of damages in a garnishment proceeding just as the Third District maintained.

Sentry Indemnity involved a claim for liquidated damages and spoke to the trial court's error in entering a judgment in excess of the liquidated damages specified in the writ. In that case the writ specifically identified the amount to be garnished. The facts in that case is are quite different from the facts in this case in that the damages sought were liquidated and the court did not interpret subsection 77.081(2). In Sentry Indemnity the amount to be garnished was less than the underlying judgment and was exactly the amount held by the garnishee.

International Travel Card exclusively treated the time period in which a judgment debtor must be given notice of a writ of garnishment. It focussed upon whether a judgment debtor's motion to dissolve a postjudgment writ of garnishment was timely. The facts and legal issues in that case are not on point with this case's facts or issues. None of the cases cited by Petitioner expressly or directly interpreted subsection 77.081(2) and therefore no conflict exists.

The Supreme Court does not have jurisdiction over this dispute because the Third District's opinion in this case does not conflict with the decision of any other district court of appeal. Accordingly, the petition for writ of certiorari should be denied.

CONCLUSION

Petitioner's writ of certiorari should be denied because the Third District's opinion in this case does not create an express and direct conflict with any other district court of appeal. The cases cited by Petitioner do not conflict with the Third District's holding in this opinion and consequently the supreme court does not have jurisdiction over this dispute. Accordingly, Respondent respectfully requests this court deny the petition.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was served by mail on December 13, 1996 to: Howard W. Mazloff, Esq., Attorney for Petitioner, Dadeland Towers, Suite 3 10, 9300 South Dadeland Boulevard, Miami, FL 33 156.

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