OA 6-5-97

FILED
SID J. WHITE
MAY 5 1997
CLERK, SUPREME COURT
By ____________
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

CASE NO, 89,311
3d DCA CASE NO. 94-2166

BELLSOUTH ADVERTISING &
PUBLISHING CORPORATION,

Plaintiff/Petitioner,

vs.

SECURITY BANK, N.A.,

Defendant/Respondent.
_______________________________/

ON PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, THIRD DISTRICT OF FLORIDA

PETITIONER'S REPLY BRIEF ON THE MERITS

Law Offices of Howard W. Mazloff, P.A.
Dadeland Towers, Suite 3 10
9300 S. Dadeland Blvd.
Miami, Florida 33 156
Tel.: (305) 670-6760
Fax.: (305) 670-6799
Fla. Bar No.: 138107

TABLE OF CONTENTS

Table of Authorities ii

Argument 1-5

Certificate of Service 6

Exhibit "A" 7

TABLE OF AUTHORITIES

	Page
All American Semiconductor Inc., v. Elisan Graphics Cornoration 594 So. 2d 342 (Fla 4th DCA 1992).	5
Carpenter v. Benson, 478 So. 2d 353 (Fla. 5th DCA 1985)	4
Ebsary Foundation Co. v. Barnett Bank of South Florida N.A., 569 So. 2d 806 (Fla. 3d DCA 1990)	5
Hauser v. Dr. Chatelier's Plant Food Co., 350 So. 2d 548 (Fla. 2d DCA, 1977)	1, 2
International Travel Card v. Hasler. Inc., 411 So. 2d 215 (Fla.1st DCA 1982)	1
Sentry Indemnity Co. v. Hendricks Enterprises, 371 So. 2d 1105 (Fla. 4th DCA 1979)	1

PETITIONER'S REPLY BRIEF ON THE MERITS

Sentry Indemnity holds that a Default Garnishment Judgment may be entered without regard to the garnishee's liability to the Judgment Debtor

Respondent's argument in Section I-A of the Answer Brief that the garnishment statute provides that the garnishee's liability to the judgment creditor cannot exceed the garnishee's liability to the judgment debtor ignores the case of Sentry Indemnity Co. v. Hendricks Enterprises, 371 So. 2d 1105 (Fla. 4th DCA 1979). In that case, the appellate court ordered a default judgment against the garnishee for $1 $00.00 as specified in the writ of garnishment without regard to the garnishees's liability to the judgment debtor. Respondent states in the Answer Brief that $1,800.00 was "exactly the amount held by the garnishee." Nowhere in Sentry is this stated. In fact, that amount was not considered. All that the Fourth District considered in Sentry Indemnity Co. v. Hendricks Enterprises was the sum of $1,800.00 "as that sought by the garnishor from the garnishee." 371 So 2d at 1106. In the case at bar, Plaintiff sought $36, 576.00 from the garnishee.

Section 77.081 Florida statutes applies to post-judgment garnishment

Three cases, Sentry, International Travel Card v. Hasler, Inc., 411 So. 2d 215 (Fla. 1st DCA, 1982) and Hauser V. Dr. Chatelier's Plant Food Co.. Inc., 350 So. 2d 548 (Fla.2d DCA 1977) so hold. By deciding these three cases and applying Section 77.081, Florida Statutes to each case, these courts held that Section 77.081, Florida Statutes applies to post-judgment garnishment. Each case concerned post-judgment rather than pre-judgment garnishment.

In Sentry Indemnity Co. v. Hendrick-s Enterprises, 371 So.2d 1105, (Fla 4th DCA 1979) the Fourth District stated the following:

> "Under these circumstances we hold that $1,800.00 was " the amount of the plaintiffs claim" as that term is used in Section 77.08 1, Florida Statutes (1977)."

Thus the Sentry court applied Section 77.081 to a post-judgment garnishment in that case.

In Hauser v. Dr. Chatelier's Plant Food Co.. Inc., 350 So. 2d 548 (Fla. 2d DCA 1977) the court stated the following:

> "Appellee attempts to sustain the judgment against Hauser on the basis of Section 77.081, Florida Statutes, which provides;
>
>> Default judgment (1) If the garnishee fails to answer as required, a default shall be entered against him (2) On the entry of judgment for plaintiff, a final judgment shall be entered against the garnishee for the amount of plaintiffs claim with interest and costs. No final judgments against a garnishee shall be entered before the entry of, or in excess of, the final judgment against the original defendant with interest and costs,"
>
> "We think that Section 77.081 and Rule 1 .500 (e) do not conflict but rather must be read in pari materia to afford the required due process of law to a defendant whose property is vulnerable to judgment entered by the court' If we did perceive a conflict between the rule and the statute, we would hold that the statute must defer to the rule on this procedural matter. Article V, Section 2 (a), Florida Constitution; Section 25.371, Florida Statutes."

If Section 77.08 1 did not apply to the post judgment garnishment in Hauser v. Dr. Chatelier's Plant Food Co. Inc., the Second District would have said so.

In International Travel Card, the First District begins its opinion with the following statement:

> "This appeal involves the procedural aspects of post-judgment writs of garnishment."

The court continues to state the statutory procedure for post-judgment garnishments in the following manner:

> "The statutory procedure for post-judgment garnishment involves primarily the judgment creditor (described in the statute as the "plaintiff') and the garnishee. The judgment debtor (or "defendant") plays a very limited role in the proceeding. Under ordinary circumstances, the writ is served on the garnishee, the garnishee answers, and the plaintiff replies §77.04 ; 77.061. If no reply is filed, judgment of garnishment may be entered on the garnishee's answer. § 77.083. A default judgment may be awarded if the garnishee fails to answer.§77.08 1 .(emphasis supplied)

As the foregoing clearly demonstrates, each of these cases applied Section 77.08 1 to a post judgment garnishment.

The Damages Were Liquidated

With respect to the damages being liquidated, the Conejos case clearly held that a judgment against the principal debtor liquidates the sum claimed from a garnishee in a writ of garnishment. This is so regardless of the "entirely different statutory scheme" refered to by Respondent. The Conejos court clearly held the following:

> Appellant argues that the default judgment entered against it is void because the amount was unliquidated and was granted without proof. Sec. 21-1-(55) (e), N.M.S.A. 1953. This argument must fail. The amount had been fixed by operation of law when the judgment against the principal debtor Jack Elder was entered prior to the issuance of the writ of garnishment against appellant. It was a liquidated amount. See Thomas v. Barber's Super Markets, Inc. 74 N.M. 720), 398 P 2d 5 1 (1965).

It is also curious that Respondent does not even mention, much less attempt to distinguish 18 other cases cited by Petitioner in its initial brief,

The case of Carpenter v. Benson, 478 So. 2d 353 (Fla. 5th DCA 1985) is the reverse of the case at bar and therefor inapplicable. In that case, the default was set aside by the trial court and the judgment creditor appealed. The Fifth District in affirming the lower court made the due process statements cited by Respondent.

In this case, the garnishee failed to offer any record evidence of excusable neglect, as Judge Jergensen stated, "due to either misfeasance of counsel or the unavailability of such evidence." As a result, the trial court correctly refused to vacate the default and default judgment. To give relief to the garnishee despite its recalcitrance and failure to establish grounds to vacate would reduce the sanction of default in a garnishment proceeding to a nullity.

This was an Anneal of a Non-Final Order

The garnishee states on page 18 of the Answer Brief the following:

> "The Bank presented the appeal to the Court of Appeal as an appeal from a final judgment pursuant to Rule 9.110, Fla. R.Civ.P. The Notice of Appeal appealed an Order rendered August 10, 1994 in which hnal judgment was entered against the Bank for $36,576.00."

This is a blatant misrepresentation to this court. The Order rendered on August 12, 1994, not August 10, is the Order Denying Motion to Set Aside Final Judgment (R. 14). The Final Judgment against Garnishee for $36,576.00 (R 8) was rendered on May 18, 1994 and is not mentioned in the Notice of Appeal (R 12). The Notice of Appeal is attached to this Reply Brief for the information of this court. Now, as it suits their position, Respondent tries to convince this court that it appealed the Final Judgment against Garnishee. when, in fact, the Notice of Appeal states concerning the order on appeal that "the Order is one which denies the setting aside of a

Default Judgment entered on a Writ of Garnishment against Garnishee/Appellant." As a result, this case was not an appeal from a final judgment but from the denial of a Rule 1 .540 (b) motion.

The Garnishee was Acting for Itself

The garnishee in this case was acting on its own behalf to try to extricate itself from a Final Judgment against it for $36,576.00 that Respondent describes on Page 18 of the Answer Brief as a penalty against the garnishee. This is not the innocent stakeholder described by the cases. An innocent stakeholder is a garnishee holding a fund owed to the judgment debtor for the benefit of the judgment creditor. The garnishee did not appeal this case to the District Court of Appeal for the benefit of anyone other than itself. As a result, it would be legally incorrect to award the garnishee attorney's fees in connection with that appeal based on the cases of Ebsary Foundation Co. v. Barnett Bank of South Florida. N.A., 569 So. 2d 806 (Fla. 3d DCA 1990) and All American Semiconductor.Inc. v. Ellison Graphics Cornoration, 594 So, 2d 342 (Fla. 4th DCA 1992).

Briefs\Bapco.SecurityBank.Reply.wpd

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mialed to J. MICHAEL FITZGERALD, ESQ. LAW OFFICES OF FITZGERALD & PORTUONDO, 2665 South Bayshore Drive, Suite M- 103, Coconut Grove, Florida 33 133 this 2 day of May, 1997.

LAW OFFICES OF HOWARD W. MAZLOFF, P.A.
Dadeland Towers Suite 3 10
9300 S. Dadeland Blvd.
Miami, Florida 33156
(305) 670-6760

By: ______________________
HOWARD W. MAZLOFF
Florida Bar No. 138 107

BELL SOUTH ADVERTISING & [illegible]BLISHING CORPORATION,

Plaintiff,

v.

GARFIELD & ASSOCIATES, P.A.
a Florida corporation,

Defendant,

and

SECURITY BANK, N.A.

Garnishee.

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

CASE NO. 93-12673 CA 32

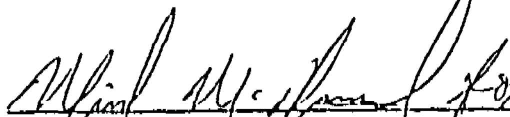
NOTICE OF APPEAL

NOTICE IS GIVEN that SECURITY BANK, N.A., Garnishee/Appellant, appeals to the District Court of Appeal for the Third District of Florida, the Order of this Court rendered August 10, 1994. The Order is one which denies the setting aside of a Default [illegible]dgment entered on a Writ of Garnishment against Garnishee/Appellant.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent to: Howard Mazloff, Esq., 9300 So. Dadeland Blvd., Suite 607, Miami, FL 33156 and Alan Goodman, Esq., 3500 No. State Rd. 7, Suite 4104, Tamarac, FL 33319 on September 2, 1994.

FITZGERALD & PORTUONDO, P.A.
International Place, Suite 2600
100 S.E. 2nd Street
Miami, Florida 33131
(305) 372-9255 Fax: (305) 577-3574

By: 
J. Michael Fitzgerald, FL Bar No. 127103

5306.1\NOTOFAPP.MMH

EXHIBIT "A"