

ORIGINAL
SUPREME COURT OF FLORIDA

FILED

CID J. WHITE

AUG 6 1971

CAREERS USA, INC., a
Pennsylvania corporation,

Appellant,

vs.

SANCTUARY OF BOCA, INC.,
a Florida corporation,

Appellee.

CASE NO. 90,579

District Court of Appeal,
4th District - Case No. 96-02357

APPELLANT'S REPLY BRIEF

Appeal from the Fourth
District Court of Appeal

GEOFFREY C. BENNETT, [✓] ESQUIRE
Florida Bar No. 0703095
SWEETAPPLE, BROEKER & VARKAS
Attorneys for Appellant
465 East Palmetto Park Road
Boca Raton, FL 33432
Telephone: (561) 392-1230

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PREFACE

Appellant, CAREERS USA, INC., will be referred to as "CAREERS."

Appellee, SANCTUARY OF BOCA, INC., will be referred to as "SANCTUARY."

References to the Answer Brief of the Appellant are cited as "(A.B. page number(s))."

ARGUMENT

In this appeal, CAREERS contends that a party seeking a favorable interpretation of a lease provision by way of a declaratory judgment action has not brought an action to "enforce" the lease for purposes of awarding attorneys' fees if during the pendency of the claims the parties fully performed the lease and there was no allegation of breach or non-performance. In its Answer Brief, SANCTUARY argues CAREERS' position is in direct conflict with the decisions in Casarella, Inc. v. Zarembo Coconut Creek Parkway Corn., 595 So.2d 162 (Fla. 4th DCA 1992) and Silver Blue Lake Apts. No.3, Inc. v. Manson, 334 So.2d 48 (Fla. 3d DCA 1976). (A.B. 1). In response, CAREERS contends that its position does not conflict with either Casarella or Silver Blue Lake. Casarella is clearly distinguishable and not controlling and the holding in Silver Blue Lake, if not distinguishable, is of little significance in light of subsequent Third District decisions. Neither cases provide a basis for the Fourth District's reversal of the Trial Court's decision rendered below.

The Fourth District's reasoning in Casarella was correct. The cause of action brought by the tenant in Casarella clearly involved "enforcement" of the lease justifying an award of attorneys' fees. In addition to suing for declaratory relief, the Casarella tenant sued for Breach of Contract and Fraud in the Inducement. Both of these causes of action involved enforcement of the lease so attorneys' fees were properly awarded to the prevailing landlord. The result in Casarella would have been the same had the Fourth

District substituted and applied the reasoning of any of the leading cases cited by either CAREERS or SANCTUARY in this Appeal. Where there is an allegation of breach or non-performance, even a declaratory judgment action is "enforcement" for purpose of awarding attorneys' fees.

CAREERS' position is not in conflict with Casarella because Casarella is distinguishable on the facts. n i f i c a n t difference between a claim for declaratory relief, Breach of Contract and Fraud in the Inducement and one that merely seeks declaratory relief. CAREERS did not contend SANCTUARY breached the lease nor did CAREERS seek a rescission of the lease or damages based on fraud. CAREERS sought a favorable interpretation of the lease and continued to perform during pendency of the suit. Under these facts, it is not "playing semantics" to distinguish Casarella on the facts. There is a substantive difference in the relief sought by the Casarella tenant and the relief sought by CAREERS.

In its Answer Brief, SANCTUARY notes the Casarella tenants' voluntary dismissal of its claim on the eve of trial. (A.B. 2). CAREERS voluntarily dismissal of the remaining issue in the case after entry of summary judgment is irrelevant to this appeal. If SANCTUARY is not entitled to the recovery of attorneys' fees under the lease provision, then the voluntary dismissal by CAREERS does not give rise to an attorneys fee entitlement.

The decision in Silver Blue Lake is of limited value because the opinion does not set forth the material facts. The Fourth District acknowledges that it is unclear whether or not the Silver

Blue Lake tenant continued to perform during the pendency of the case. In any event, if the tenant performed during the pendency of the claim and there were no allegations of nonperformance, the Third District's decision in Silver Blue Lake conflicts with later Third District decisions in Martin L. Robbins, M.D., P.A. v. I.R.E. Real Estate Fund, Ltd., 608 So.2d 844 (Fla. 3d DCA 1992), and Sky Lake Gardens Recreation, Inc. v. Sky Lake Gardens, 574 So.2d 1135 (Fla. 3d DCA 1991), and should be disregarded.

SANCTUARY's reliance on Dinn v. Edmondson, 428 So.2d 286 (Fla. 4th DCA 1983) is misplaced. (A.B. 3). The Dinn decision is consistent with prevailing case law relied upon by CAREERS and is a correct decision. In Dinn, both the tenant and landlord filed declaratory judgment actions. In awarding attorneys' fees, the Dinn Court relied correctly on the fact that the tenant failed to pay rent due. When the tenant finally did tender payment, the landlord wrongfully refused to accept the tender of payment. The Dinn Court concluded "appellant should have accepted the tender and allowed the tenancy to go forward." Dinn at 288. Clearly, the Court based its decision to award fees on the existence of the alleged nonperformance.

SANCTUARY's reliance on Dade Savings & Loan Ass'n v Broks Center, Ltd., 529 So.2d 775 (Fla. 3d DCA 1988), is also misplaced. (A.B. 4). The Dade Savings Court correctly based its denial of attorneys' fees on the fact that there was no breach alleged and neither party was in violation of the lease. Citing the decision

in Ocala Warehouse Investors, Ltd. v. Bison Co., 416 So.2d 1269

(Fla. 5th DCA 1982), the Dade Savings Court held:

"We agree with Dade Savings' contention that the declaratory judgment proceeding instituted by Broks Center cannot be construed as an action to enforce the contract of sale. The Complaint did not allege a breach of contract. Neither party was in violation of any contractual provision at the time Broks Center sought to resolve the question or the proper method of appraisal."

Dade Savings, at 776.

It is after the aforementioned holding, in dicta, that the Dade Savings Court discusses the "ancillary matters" which provide the basis for the "test" asserted by SANCTUARY in its Answer Brief.

(A.B. 5). SANCTUARY's "test" provides that declaratory judgment actions affecting "ancillary matters" are not actions involving "enforcement" for purposes of awarding attorneys' fees. However, declaratory judgment actions affecting "specific" lease terms are "enforcement" actions and attorneys' fees should be awarded.

This Court should reject the SANCTUARY "test." First, SANCTUARY's interpretation of the Dade Savings Court's "ancillary matters" discussion is inconsistent with the case's holding. The holding in Dade Savings is based on the Fifth District decision in Ocala Warehouse. Therefore, whatever the Dade Savings Court meant by "ancillary matters", it is clear those terms may not be interpreted in a way inconsistent with the holding in Ocala Warehouse. In Ocala Warehouse, a declaratory judgment action affecting payment of rent -- a specific lease term -- was not deemed "enforcement" for purposes of awarding attorneys' fees.

Therefore, the Ocala Warehouse holding, relied on by the Court in Dade Savings, is inconsistent with SANCTUARY's "test." SANCTUARY's Answer Brief does not account for this inconsistency.

Also absent from SANCTUARY's analysis is a discussion of the Third District decision in Sky Lake Gardens. The tenants declaratory relief claim in Sky Lake Gardens concerned rent escalation provisions in the lease. Notwithstanding the litigation of "specific" lease terms, the Third District held that the declaratory relief claim was not an action seeking "enforcement" of the lease. The Court concluded:

"[a]s to the fees incurred in defending the lessee's declaratory action, as long as lessee continued to perform during this litigation, neither enforcement nor failure of performance came into play."

Sky Lake Gardens, at 1138. The significance of ~~Silver Blue Lake~~ and Dade Savings should be assessed only after considering the Third District's later decision in Sky Lake Gardens.

Finally, the "test" proposed by SANCTUARY would be burdensome and difficult to apply. Attorneys would be required to assess when a declaratory relief claim affected "specific" lease terms and when it affected only "ancillary" terms. This would be potentially difficult because every declaratory relief claim to some degree affects lease terms. For example, even the Estate Real and Dade Savings cases noted by SANCTUARY as cases affecting "ancillary matters" required an analysis of "specific" lease terms. Therefore, the question should not be whether an action affects "specific" lease terms or "ancillary" lease terms. Rather, the question should


be whether "enforcement" is involved as that term has been defined in Ocala Warehouse, I.R.E. Real Estate and Sky Lake Gardens. Linking the definition of "enforcement" to an analysis of whether an action involves "specific" or "ancillary" lease matters, as SANCTUARY proposes, unnecessarily complicates an otherwise straightforward analysis.

CONCLUSION

The holdings in Ocala Warehouse, I.R.E. Real Estate and Sky Lake Gardens should be adopted by the Supreme Court. The decisions in Casarella and Silver Blue Lake are distinguishable and, therefore, not controlling. Finally, the Court should reject the "specific/ancillary" test proposed by SANCTUARY in its Answer Brief.

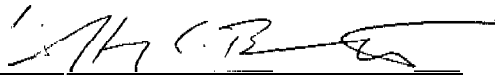
Respectfully submitted,

SWEETAPPLE, BROERER & VARKAS
Attorneys for Appellee
465 East Palmetto Park Road
Boca Raton, FL 33432
Telephone: (561) 392-1230

By: 
GEOFFREY C. BENNETT
Florida Bar No. 0703095

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by U.S. Mail on day5thof August, 1997 to: Edward B. Cohen, Esquire, SCHWARTZ, GOLD, COHEN, **ZAKARIN & KOTLER**, P.A. 54 S.W. **Boca Raton** Blvd., **Boca Raton**, FL 33432 (Telephone: 561-361-9600).

By: 
GEOFFREY C. BENNETT
Florida Bar No. 0703095

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