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IN THE SUPREME COURT OF FLORIDA
CASE NO.: 91,164
FROM THE
ELEVENTH CIRCUIT COURT OF APPEALS NO: 96-3075

GONZALO AGUILAR, M.D., DOROTEO C. AUDIJE, M.D.; DOROTEO M. BARNES, M.D.; JUAN BAUER, M. D.; LEONARDO DEL ROSARIO, M.D.; GONZALO A. C. ESPINO, JR., M.D.; HORTENCIA H. ESPINO, M.D.; FRANK LIN, M.D.; SAM NAJJAR, M. D.; ERLINDA. PEREZ, M.D.; and CERES ROXAS, M.D.

Appellants,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION as Receiver for Southeast Bank N.A., a national banking association, formerly known as First Federal Savings and Loan Association of Jacksonville

Appellee.

On Certification from the United States Court of Appeal for the Eleventh Circuit to the Supreme Court of Florida Pursuant to Article 5, Section 3(b) (6) of the Florida Constitution.

REPLY BRIEF OF APPELLANTS ON CERTIFIED QUESTION

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PRELIMINARY STATEMENT

All references in this brief to Plaintiffs/Appellants will be “the Doctors,” “Plaintiffs,” or “Appellants.” All references to Defendant/Appellee, Southeast Bank, N..A., will be “SEB,” “Defendant,” or “Appellee.”

Appellants include all of the Plaintiffs who brought the Complaint in the lower trial court with the exception of St. Jude Medical Center Pharmacy, Inc., Home Health Systems, Inc. and Morteza Yavari, M.D., in that the Final Summary Judgment did not preclude the claims of those Plaintiffs.

The Plaintiffs/Appellants now before this Court on the certified question are Gonzalo Aguilar, M.D., Doroteo C. Audije, M.D., Doroteo M. Barnes, M.D., Juan Bauer, M.D., Leonard Del Rosario, M.D., Gonzalo A. C. Espino, Jr., M.D., Hortencia H. Espino, M.D., Frank Lin, M. D., Sam Najjar, M.D., Erlinda A. Perez, M.D., and Ceres Roxas, M.D.

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ARGUMENT

Appellants will not belabor the arguments made in their initial brief here. Rather, in keeping with Fla.R.App.P. 9.210(d), appellants shall respond to the arguments presented by the FDIC in its answer brief.

I. THE SETTLEMENT AGREEMENT BETWEEN SEB AND GIPP SHOULD NOT AFFECT APPELLANTS' RIGHTS.

The FDIC's statement of facts paints a distorted picture of the prior proceedings. The FDIC points out that the bank and GIPP settled during the jury trial "based upon the posture of the case." Answer brief at 6. The FDIC also says the "very same facts were litigated" in this prior case. *Id.*

These comments seem designed to taint this Court's view of the counterclaims involved in this case. The FDIC insinuates that Southeast Bank ("SEB") had an airtight foreclosure case and that GIPP crumbled when the day of reckoning arrived.

The reality is quite different. SEB paid a substantial sum to GIPP (the amount cannot be disclosed because SEB insisted on a confidential settlement) to settle the prior case. The GIPP partnership felt they were adequately compensated through the settlement, and they merely agreed to the judgment of foreclosure as part of the *quid pro quo* of settlement. Needless to say, this private agreement--to which appellants were not even parties--should not be detrimental to appellants' rights.

The FDIC's comment that the same issues were *litigated* in the prior case is accurate. However, it is not complete. The issues were litigated, but they were not *adjudicated.* No fact-finder ever decided SEB was entitled to foreclose against GIPP. GIPP's agreement to a foreclosure judgment was simply one component of a settlement agreement.

In the same vein, the FDIC refers to appellants as the "foreclosed Plaintiffs." The FDIC tries to create the impression that the appellants litigated the foreclosure against SEB and lost.

This is not so. The appellants had nothing more than a remote, colorable interest in the foreclosed property under certain Deposit Receipt and Purchase and Sale Agreements. They had little or nothing at stake in the foreclosure. SEB added them as defendants in the foreclosure simply to wipe the slate clean for that property.

In the foreclosure judgment, the only relief granted to SEB was a declaration that the appellants' interest in the property was inferior to SEB's lien. This was never seriously in dispute. Furthermore, it has nothing to do with the issue in this case: whether SEB tortiously interfered with the business relationship among appellants and GIPP.

II. THE FDIC'S BROAD INTERPRETATION OF THE LOGICAL RELATIONSHIP TEST IS CONTRARY TO THE CASE LAW.

A. The FDIC's broad interpretation of the logical relationship test is contrary to the case law.

The FDIC repeatedly cites to the logical relationship test in its answer brief. Appellants agree that the logical relationship test controls under Florida law.

However, appellants respectfully disagree with the FDIC's arguments based on the logical relationship test. The FDIC wants this Court to interpret "logical relationship" in a vacuum. The FDIC cobbles together catch phrases from several cases (*i.e.*, "broad and realistic interpretation," "aggregate of operative facts,") to create the impression that the logical relationship is quite broad.

What the FDIC fails to do, however, is factually analyze the Florida cases and describe how those phrases are actually *interpreted.* This is not surprising, because the recent Florida cases simply have not adopted the broad interpretation of the FDIC. Londono v. Turkey Creek, 609 So.2d 14 (Fla. 1992), Whigum v. Heileg Myers Furniture, Inc., 682 So.2d 643 (Fla. 1st DCA 1996), and Cordero v. Capital Bank, 693

So.2d 720 (Fla. 3d DCA 1997), all declined to find counterclaims compulsory under facts comparable to those here.[1]

Nonetheless, the FDIC argues that the Florida and Federal cases have "historically" taken a broad view of the compulsory counterclaim test. In making this argument, the FDIC relies on several cases which are factually distinguishable. Crutcher v. Aetna Life Insurance Co., 746 F. 2d 1076 (5th Cir. 1984) (loan guarantee case where there was privity between the parties); Yost v. American National Bank, 570 So. 2d 350 (Fla. 1st DCA 1990) (case where there was privity between borrower, guarantors and a bank); City of Mascotte v. Florida Municipal Liability Self Insurers Program, 444 So. 2d 965 (Fla. 5th DCA 1983) (case between insurer and insured in privity with one another); Kinney v. Allied Home Builders, Inc., 403 So. 2d 440 (Fla. 2d DCA 1981) (contractual privity between a building contractor and its customer); Stone v. Pembroke Lakes Trailer Park, Inc., 268 So. 2d 400 (Fla. 4th DCA 1972) (contractual privity between a real estate broker and deposit customer).

Obviously, the common thread running through these cases is privity among the parties. There is no privity among the parties in this case. Thus, the cases do not support the FDIC's overly broad argument here.

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[1]Each case is discussed in appellants' initial brief at pp. 20-24 and 26-29, so appellants will not discuss them again here.

B. This Court is not bound by the Eleventh Circuit's interpretation of the logical relationship test.

The FDIC urges this Court to follow the Eleventh Circuit and find a logical relationship between the tortious interference claims and the foreclosure. As the appellants' pointed out in their initial brief, the Eleventh Circuit's certified question is broad. The certified question is:

> WHETHER A DEFENDANT WHO IS NOT AN OBLIGOR ON THE ORIGINAL NOTE AND MORTGAGE IN AN *IN REM* FORECLOSURE ACTION IS REQUIRED TO BRING, AS A COMPULSORY COUNTERCLAIM, TORT CLAIMS ARISING OUT OF THE SAME OPERATIVE FACTS AS THOSE OF THE FORECLOSURE ACTION.

As framed, this question does not preclude a finding by this Court that there is no logical relationship.

Perhaps more importantly, this Court is not bound by the Eleventh Circuit's finding. Only decisions of the United States Supreme Court are binding on the courts of Florida. Pignato v. Great Western Bank, 664 So.2d 1011, 1015 (Fla. 4th DCA 1995); Donald & Co. Securities, Inc. v. Mid-Florida Community Services, Inc., 620 So.2d 192, 193-94 (Fla. 2d DCA 1993); Brown v. City of Jacksonville, 236 So.2d 141 (Fla. 1st DCA 1970). When an issue of state law rather than federal law is involved, the federal court's decision should not carry great weight. Pignato at 1015 (state courts

not "duty bound to follow a federal circuit precedent, particularly when it construes Florida law"). This court may use its independent judgment in deciding this case.

III. THERE ARE SOUND POLICY REASONS FOR CREATING AN EXCEPTION TO THE COMPULSORY COUNTERCLAIM RULE FOR FORECLOSURE CASES LIKE THIS ONE.

In their initial brief, appellants explained that tort counterclaims will almost always have to be tried separately from foreclosures. This is true, as appellants further explained, because of the conflict between jury and non-jury trial rights. *See* initial brief at 17-20.

In response, the FDIC points out that this conflict can be resolved by severing the counterclaims for trial. This is exactly the point. When the cases are severed, as they must be in a situation like this, there will necessarily be two trials. As appellants explained in their initial brief, this undercuts the judicial efficiency the compulsory counterclaim rule is supposed to promote.

The FDIC responds on this point by asserting that the claim and counterclaim can be unified for purposes of pleading and discovery. Appellants agree that judicial efficiency is promoted by this practice. Furthermore, appellants are not arguing, as the FDIC would have this Court believe, that two entirely separate cases would be more

judicially efficient than one case resulting in two trials. *See* answer brief at p. 27. This is an unwarranted distortion of appellants' arguments.

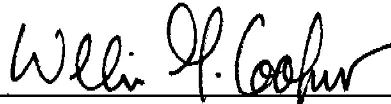
Nevertheless, the fact remains that trials will always have to be held separately when counterclaims are involved. Judicial oversight and involvement in a case is greatest during trial, not during pleading and discovery. Therefore, appellants' argument that judicial efficiency will be substantially undercut because of the separate trials cannot be seriously disputed. Appellants stand by their argument.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. mail to Juan A. Gonzalez, Esq. and Timothy Crutchfield, Esq., Haley, Sinagra & Perez, P.A., 100 S. Biscayne Boulevard, Suite 800, Miami, Florida 33131 on this 9th day of December, 1997.

Respectfully submitted,

TOOLE, BEALE & COOPER, P.A.



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