IN THE SUPREME COURT OF FLORIDA

CASE NO. 93,549
3 DCA CASE NO. 97-03068
L.T. CASE NO. 97-14980 CA 20

GEORGE R. CAPLE and CAPLE ENTERPRISES, INC.,

Appellants,

v.

TUTTLE'S DESIGN-BUILD, INC.,

Appellee.
_____/

REPLY BRIEF OF APPELLANTS

LYNN & HANSON, P.A.
48 N.E. 15th Street
Homestead, FL 33030
Telephone: (305) 246-1600

COOPER & WOLFE, P.A.
200 South Biscayne Boulevard
Suite 3580
Miami, FL 33131-2316
Telephone: (305) 371-1597

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Authorities

CLARIFICATION OF THE CASE AND FACTS

Tuttle's convinced the Third District and now tries to convince this Court that it is the poor victim of an unconstitutional law. That is just not so. Tuttle's had possession and control of a $17,000,000 business until it filed for bankruptcy.[1/] Tuttle's kept the property even though it had not paid a dime in principal and interest since well before Caple initiated foreclosure proceedings. If there is a victim here, it is Caple. Caple is the person the challenged statute was intended to protect. And Tuttle's action of having cake and eating it too was precisely the type of debtor's action the Legislature tried to eliminate when it enacted Fla.Stat. § 702.10(2).

Tuttle's has misrepresented several facts that require a reply. Tuttle's claims in its brief at 3 that it argued to the trial court that the entire $6,700,000 owed on the purchase money mortgages was in dispute. It never did so. Rather, Brian Tuttle claimed "known" losses in excess of $1,400,000 and anticipated losses "to exceed $3,000,000.00." (A. 190-191 ¶ 8). Tuttle's counsel reiterated this at the hearing. (A. 244). Tuttle's did not correct the trial court when it noted that of $6,700,000 owed,

---

[1/] Interestingly, Tuttle's filed for bankruptcy almost immediately after the trial court granted Caple's motion for summary judgment on Tuttle's defenses. In re Tuttle's Design Build, Inc., Case No. 98-33662-BKC-SHF (Bankr.S.D.Fla.). The bankruptcy court granted Caple relief from the automatic stay so Caple could pursue this appeal.

only $3,000,000 was in dispute. (A. 244).

In a similar attempt to misconstrue the facts, Tuttle's claims in its brief at 3 that the trial court ordered it to make principal payments under the notes. That is not correct either. In fact, the trial court specifically stated during the hearing that Tuttle's could not make the principal payments; they were in dispute. (A. 244). The trial court's order only required Tuttle's "to make interest payments to [Caple] at intervals and in the amounts provided under the terms of the two promissory notes involved in this action." (A. 249). Obviously, the $2,400,000 in principal payments due June 1, 1998 were not covered by the order. Contrary to Tuttle's arguments, if the foreclosure lasted 16 months, Tuttle's would have paid under $1 million, far less than the sum Tuttle's owed which was not in dispute. Quite simply, Tuttle's payments to Caple were not at risk.

ARGUMENT

I. THE THIRD DISTRICT SHOULD NOT HAVE ADDRESSED SUBSTANTIAL CONSTITUTIONAL QUESTIONS WHICH WERE NOT PROPERLY RAISED IN THE TRIAL COURT.

Tuttle's argues in its brief at 21 that it preserved its constitutional challenges. It also claims those issues could be raised for the first time on appeal. Tuttle's is wrong.

Tuttle's relies on Zabel v. Pinellas County Water & Navigation Control Auth., 154 So.2d 181 (Fla. 2d DCA 1963), to support its argument that a constitutional issue is preserved if it is

merely mentioned. Tuttle's reliance is misplaced. Zabel addressed allegations that a party was barred from raising a constitutional challenge under the doctrine of election of remedies. It did not concern the sufficiency of the challenge. In fact, the subject of constitutionality was directly raised in the trial court. 154 So.2d at 186. Zabel is simply inapposite.[2/]

Northwest Fla. Home Health Agency v. Merrill, 469 So.2d 893 (Fla. 1st DCA 1995) does not support Tuttle's either. In Merrill, the issue was whether a post trial motion for a directed verdict contained sufficient allegations to comply with the specificity requirements of the Rules of Civil Procedure and to permit appellate review. Significantly, unlike this case, the trial court had addressed and ruled on the matter. And the Second District ruled the error was fundamental; it could be heard for the first time on appeal. Merrill is distinguishable.

Tuttle's argues that even if it failed to raise its constitutional challenges to the trial court, the Third District properly addressed them. Tuttle's is wrong. This Court has long held that constitutional challenges can be waived unless raised in the trial court. Trushin v. State, 425 So.2d 1126 (Fla. 1983); Sanford v. Rubin, 237 So.2d 134, 137 (Fla. 1970). See also Caple's initial

---

[2/] Tuttle's reliance on Zabel is also misplaced because this Court quashed the Second District's decision, albeit on other grounds, in Zabel v. Pinellas County Water and Nav. Control Authority, 171 So.2d 376 (Fla. 1965).

brief at 14 and the cases cited there. This is particularly true when a party claims a statute is unconstitutional as applied. State v. Johnson, 616 So.2d 1, 3 (Fla. 1993)(constitutional application of statute to particular set of facts must be raised at trial level); Cantor v. Davis, 489 So.2d 18, 20 (Fla. 1986)(same). Tuttle's argues here that the statute is unconstitutional as applied because the trial court denied its request for an evidentiary hearing. However, Tuttle's never requested an evidentiary hearing. In fact, Brian Tuttle did not attend the hearing; Tuttle's did not attempt to present witnesses; and Tuttle's attorney did no more than complain about the shortness of the 20 minute hearing in the middle of the hearing. (A. 242). In short, Tuttle's waived its right to challenge the statute as applied.

Similarly, Tuttle's failed to raise its facial challenges to the constitutionality of § 702.10(2) before the trial court. As a result, it waived its right to raise them. This is because "[a] facial challenge to a statute's constitutional validity may be raised for the first time on appeal only if the error is fundamental." Johnson, 616 So.2d at 3; Sanford, 237 So.2d 134. Tuttle's alleged errors were not fundamental to this foreclosure proceeding. An error is fundamental only if it goes to the merits or foundation of the case. Johnson, 616 So.2d at 3. In other words, "for an error to be so fundamental that it can be raised for the first time on appeal, the error must be basic to the judicial

decision under review and equivalent to a denial of due process." Id. In a mortgage foreclosure proceeding, the merits of the case involve the ownership of a mortgage, existence of indebtedness and whether a default occurred. Standler v. Cherry Hill Developers, Inc., 150 So.2d 468 (Fla. 2d DCA 1963). None of Tuttle's constitutional challenges involved these issues. Consequently, they should not have been raised and considered for the first time on appeal. See Johnson, 616 So.2d at 3 (this Court refused to consider constitutionality of statute covering attorneys fees raised for the first time on appeal because the merits of the case involved employment retention and compensation).

II. FLA.STAT. § 702.10(2) IS NOT UNCONSTITUTIONAL ON ITS FACE.

Even if Tuttle's did not waive its constitutional challenges, the Third District erred in finding the statute unconstitutional. Tuttle's argued in the Third District and argues here that § 702.10(2) is unconstitutional on its face for three reasons: it does not require a creditor's bond; it fails to protect the debtor's payments; and the borrower's bond required in lieu of payments is punitive. The Third District agreed with Tuttle's first argument, approved the second in dicta and did not address the third. Caple addressed the first two issues in its initial brief. Nothing in Tuttle's brief warrants additional argument.[3/]

[3/] Caple also stands on its initial brief and the discussion and authorities cited there to address Tuttle's argument at 19 that

Tuttle's complains in its brief at 9 that the bond option of subsection (2)(d) "seems palpably punitive." Tuttle's is wrong. The legislature allows a debtor who wants to avoid making mortgage payments an option under subsection (2)(d): the debtor can stop making payments, and retain possession of the property, if it posts bond for the outstanding balance due. Nevertheless, Tuttle's accuses the legislature of making the bond "calculated to be unattainable" to force the borrower to either pay interest or summarily lose the property. This theory is unsupported by anything. The borrower's bond does not offend due process.

Tuttle's tries to compare the borrower's bond to the landlord tenant provision that allows the tenant to pay rent into the court registry. But that landlord tenant provision is comparable to § 702.10(2)'s provision that the borrower pay interest to the lender during the foreclosure proceedings. The more apt comparison is to the landlord tenant provision which states that the tenant loses possession of the premises if he does not pay rent either to the landlord or the court registry. Fla.Stat. § 83.60; K.D. Lewis Enter. Corp., Inc. v. Smith, 445 So.2d 1032, 1035 (Fla. 5th Cir. 1984). Or the bond provision could be compared to Fla.Stat.§ 77.24, which permits a garnishee to secure release of its property at any time before entry of judgement by posting a bond "[i]n at

---

Fla.Stat. § 702.10(2) unconstitutionally infringes on this Court's rule-making authority. No additional reply is necessary.

least double the amount claimed in the complaint with interest and costs or if the value of the property garnished is less than this amount, then double the value . . . ." Or the bond provision could be compared to Fla.Stat. § 78.068 which permits a replevin defendant to obtain release of the property seized under a pre-judgment writ by posting bond of one and a quarter times the amount owing. Tuttle's' analogy does not withstand scrutiny.

The fact that a debtor may have difficulty posting a bond in the amount due under the mortgage does not make the statute facially unconstitutional.

> The fact that [an Act] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid . . . . In other words, a facial challenge to a statute should fail if the statute has a constitutional application

United States v. Salerno, 481 U.S. 739, 745, 107 S.Ct. 2095, 2100 (1987). "[N]o factual showing of unconstitutional applications can render a law unconstitutional if it has any constitutional applications." Women's Medical Professional Corp. v. Voinovich, 130 F.3d 187, 194 (6th Cir. 1997).

In any event, the bond is not a requirement. It is merely an alternative the legislature offered debtors who do not want to abide by their contracts during the litigated foreclosure. No one required Tuttle's to post such a bond. It has no standing to raise this issue. See cases cited in Caple's initial brief at 17.

Tuttle's claims such a bond makes no practical or economic

sense. Nonsense. If Caple cannot obtain interest or possession of the property, then Tuttle's must provide an adequate substitute. Tuttle's would have this Court believe that it is the victim in this foreclosure proceeding, that § 702.10(2) is not fair to debtors. That is absurd. When Tuttle's appealed to the Third District it had possession of this property. It was earning income from the use of the property. In fact, Tuttle's claimed it was doing very well. (A. 191). Yet it failed to pay Caple a dime of the interest it owed since June 1997. (A. 147-49). It had free use of this income-producing property for over eight months. If a debtor such as Tuttle's is not required to pay interest or post bond it will continue to have free use for the duration of the foreclosure proceedings. That is not fair. Where is the creditor's security for the interest lost during these proceedings if the debtor does not have to pay interest or post bond? Why should the creditor have to forego what the debtor owes it under the terms of their agreement when it has complied with its side of the bargain.[4/] What guaranty does the creditor have that it will be able to recoup the entire amount owing on the mortgage and the interest payments lost during the contested foreclosure if not for the ordered payments or the bond? What assurances are there that the debtor's actions will not depreciate the value of the property

[4/] In this case, if Tuttle's did, in fact, have a claim against Caple, why did it wait until Caple initiated the foreclosure proceedings to raise it?

during these proceedings? Until the conclusion of the proceedings, what proof is there that the debtor has not filed frivolous defenses to the foreclosure simply to retain possession of the property and earn income from it for as long as possible? What guarantees would any creditor – the true victim in a foreclosure – have against these possibilities absent the requirement of payments, posting bond, or temporarily losing the right to possession of the property? That is the purpose behind § 702.10(2). It is very practical. It is very economical.

In sum, Fla.Stat. § 702.10(2) more than adequately complies with the requirements for procedural due process. It provides a predeprivation hearing to the debtor with more than adequate notice and opportunity to be heard. The statute, and other Florida law, provides more than adequate postdeprivation remedies. Tuttle's arguments about creditor's bonds and borrower's bonds are simply inappropriate challenges to this statute.

III. FLA. STAT § 702.10(2) IS NOT UNCONSTITUTIONALLY VAGUE OR AMBIGUOUS.

Nothing in this statute is vague or ambiguous.[5/] Certainly, the alleged problems Tuttle's points out in its brief cannot invalidate the statute. Those alleged problems do not have anything to do with this case. As previously noted, Tuttle's mentioned none of these problems at or before the hearing in the trial court. The

[5/] Tuttle's raised this issue in the Third District. The Third District did not address the matter.

alleged ambiguities simply do not affect Tuttle's; it has no standing. This Court should reject Tuttle's arguments.

First, Tuttle's criticizes the manner in which the statute refers to the application for a show cause order -- as a "request" in the first paragraph of subsection (2) and as a "motion filed hereunder" in subsection (2)(e). This criticism is difficult to fathom. The use of these words is not inconsistent. In fact, Tuttle's real complaint about inconsistency here is that there is an alleged inconsistency between the statute's alleged lack of a requirement that the documents be served on the defendant and the requirements of Fla.R.Civ.P. 1.080(a) and 1.100(b) that all motions should be served on the adverse party. But the statute <u>does</u> require the mortgagee to serve the show cause order, either together with the complaint and summons or, if the complaint has already been served subsequently on the mortgagor. And Tuttle's ignores the fact that the trial court did not have a show cause hearing in this case until Caple filed, and served, an amended complaint and an amended show cause order on that amended complaint and the show cause hearing was re-scheduled.

Second, Tuttle's points to an alleged inconsistency regarding the conduct of the "probable validity" hearing. Subsection (2)(d) states in pertinent part:

> [T]he court shall, at the hearing on the order to show cause, consider the affidavits and <u>other showings made by the parties appearing</u> and make a determination of the prob-

> ably validity of the underlying claim . . . .

Subsection (2)(a)3 states that the show cause order shall

> State that the defendant has the right to file affidavits or other papers at the time of the hearing and may appear personally or by way of an attorney at the hearing.

Tuttle's claims these provisions are inconsistent because the latter provision does not specifically tell the borrower/defendant that he can call non-party witnesses, although the former provision indicates the parties can make any showing for the trial court's consideration. The first reaction to this argument is: So what? In this case, Tuttle's submitted an affidavit before the hearing. Despite a clear opportunity to do so, Brian Tuttle elected not to attend the hearing. Tuttle's never asked the trial court for the opportunity to present testimony from a non-party witness. There is no indication in this record that any such witness even existed. In any event, the two provisions are not necessarily inconsistent. One provision only sets out the basic information to be contained in the order, which merely gives notice of the hearing. The other provision describes what the trial court can actually consider when it rules. This latter provision is quite broad. It obviously permits whatever evidence a party may wish to offer.[6/] The language is not "slushy" and Tuttle's attempt

---

[6/] Tuttle's also muses about whether a right of cross examination would be implied from the reference to "showings made by the parties." This is ridiculous. Statutes do not have to detail the nature of an evidentiary showing.

to suggest that the statute be rewritten in the language of the replevin statute is simply of no legal significance.

Third, Tuttle's claims the statute is ambiguous in the manner in which it deals with the effect of the interim payments on the ultimate judgment. In other words, it claims the statute's failure to address the possibility of a refund of interim payments somehow renders the statute unconstitutionally vague. This is just another piece of nonsense. First, subsection 702.10(2)(g) specifically provides: "All amounts paid pursuant to this section shall be credited against the mortgage obligation in accordance with the terms of the loan documents. . . ." In any event, logic would dictate that any borrower who pays interest over the course of the proceedings would be entitled to a credit for that payment. Statutes do not have to spell out every contingency. Courts are presumed capable of applying a statute in a reasonable and equitable manner without be told how to do so. See Florida Dep't Hous. & Rehab. Serv. v. Cox, 627 So.2d 1210, 1213 (Fla. 2d DCA 1993)(citations omitted), quashed in part on other grounds, 656 So.2d 902 (Fla. 1995); Scudder v. Greenbrier Condominium Ass'n, Inc., 663 So.2d 1362 (Fla. 4th DCA 1995).

Fourth, Tuttle's complains about the alleged impropriety of a sentence in the statute which, it admits, "did not make its way into the order under review." This sentence allows the mortgagee to "take all appropriate steps to secure the premises during the

foreclosure action." Tuttle's likens this provision to a taking without a bond. Since the trial court did not provide for this action in its order, there is no reason why this Court should address this provision.

"Statutes are presumptively valid and constitutional, and will be given effect if possible. All doubts will be resolved in favor of constitutionality. Acts of the Legislature are presumed valid and an act will not be declared unconstitutional unless it is determined to be invalid beyond a reasonable doubt." A.B.A. Indus., Inc. v. Pinellas Park, 366 So.2d 761, 762 (Fla. 1979)(citations omitted). This Court must find the statute constitutional if it can do so by applying ordinary logic and common understanding. Scudder, 663 So.2d at 1367; State v. Hodges, 614 So.2d 653 (Fla. 5th DCA 1993).

Section 702.10(2) conveys a clear understanding of what is required. It is not subject to numerous interpretations; as Tuttle's admits, the legislative intent is clear.

> The legislature need not define every word in a statute to survive a vagueness challenge. It is merely necessary for the legislature to give adequate notice of what conduct is prohibited by the statute and to provide clarity sufficient to avoid arbitrary and discriminatory enforcement.

Cox, 627 So.2d at 1213 (citations omitted).

As illustrated, § 702.10(2) is capable of proper construction. Tuttle's admits the statute can be construed so as to over-

come a due process challenge. It nonetheless urges the Court to find the statute unconstitutional. This Court should not do so.

> When the constitutionality of a statute is assailed, if the statute is reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other it would be valid, it is the duty of the court to adopt that construction which will save the statute from constitutional infirmity.

Leeman v. Florida, 357 So.2d 703 (Fla. 1978)(citations omitted).[7/] The legislature enacted § 702.10(2) over four years ago. The fact that there have been no constitutional challenges during that time belies Tuttle's argument that the statute is vague, ambiguous and incapable of judicial interpretation. See Cox, 627 So.2d 1210 (court reversed trial court's finding statute unconstitutionally vague when there had been no challenges for vagueness during the 15 years since enactment and no attempts to amend because of ambiguity). It certainly cannot be said this is because there have been very few litigated foreclosures since 1993. Fla.Stat. § 702.10(2) is not unconstitutionally vague or ambiguous.

CONCLUSION

For the foregoing reasons and the reasons stated in the initial brief, Appellees GEORGE R. CAPLE and CAPLE ENTERPRISES,

---

[7/] Tuttle's cites Shevin v. Int'l Investors, Inc., 353 So.2d 89 (Fla. 1977) for the proposition that "sloppy draftsmanship" can reach a level where it denies due process. But the statute in that case is not comparable to the statute at issue here, particularly in its failure to rationally relate to the legislature's intended purpose.

INC., respectfully request this Court to quash the Third District's decision, find Fla.Stat. § 702.10(2) constitutional and remand with directions that Tuttle's be required to make the interest payments as ordered.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed this _____ day of December, 1998 to: Vance E. Salter, Esq., COLL DAVIDSON, et al., Counsel for Tuttle's, 3200 Miami Center, 201 S. Biscayne Blvd., Miami, FL 33131-2312; Gary A. Woodfield, Esq., EDWARDS & ANGELL, Counsel for DFW, 250 Royal Palm Way, Palm Beach, FL 33480-4309; Robert M. Quinn, Esq., CARLTON FIELDS, et al., Counsel for BNY, P.O. Box 3239, Tampa, FL 33601; Philip J. Sheehe, Esq., SIMONS, HART & SHEEHE, P.A., Co-Counsel for Caple, One Biscayne Tower, Suite 1684, Two South Biscayne Boulevard, Miami, FL 33131 and Virginia Townes, Esq., AKERMAN, SENTERFITT, et al., Counsel for Amicus/Fla. Bankers Ass'n, 255 South Orange Avenue, Box 231, Orlando, FL 32801.

Respectfully submitted,

LYNN & HANSON, P.A.
48 N.E. 15th Street
Homestead, FL 33030
Telephone: (305) 246-1600

COOPER & WOLFE, P.A.
200 S. Biscayne Blvd., #3580
Miami, FL 33131-2316
Telephone: (305) 371-1597

By:_____
SHARON L. WOLFE
Fla. Bar No. 222291

By:_____
NANCY C. CIAMPA

Fla. Bar No. 118109