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IN THE SUPREME COURT OF THE STATE OF FLORIDA

SC01-1507

DISTRICT COURT CASE NO.: 99-627

BEACON PROPERTY MANAGEMENT
a Florida corporation and
ERNEST W.WILLIS, individually,

Appellants,

vs.

PNR, INC., a Florida corporation,

Appellee.

Petitioner's ~~APPELLEE'S~~ BRIEF ON JURISDICTION

Submitted by:

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CERTIFICATE OF INTERESTED PERSONS

PNR OF BOCA RATON, INC. f/k/a PNR, INC., a Florida corporation, d/b/a GOODFELLAS RESTAURANT, Plaintiff/Appellee

OCEAN ONE NORTH, INC., a Florida corporation;
Defendant

BEACON PROPERTY MANAGEMENT, INC., a Florida corporation
Defendant/Appellant

MATTHEW J. GIACOMINO, individually
Defendant

ERNEST W. WILLIS, individually
Defendant/Appellant

THE HONORABLE MOSES BAKER
Trial Judge

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STATEMENT OF THE CASE AND FACTS

A. Proceedings Below

Plaintiff/Appellee tried its case against Defendant/Appellants Beacon Property Management, Inc. (Beacon) and Ernest W. Willis (Willis) to a jury in the Circuit Court of Palm Beach County, the Honorable Moses Baker, Jr. presiding. The jury trial, including the punitive damages phase, lasted eight (8) days. On December 17, 1998 the jury returned an award of $1,200,000.00 against Willis individually and $540,000.00 in damages against Beacon.

Following the trial court's denial of Beacon and Willis' (collectively Appellants) post trial motions, an appeal was taken to the Fourth District Court of Appeals. On April 4, 2001, the Court of Appeals reversed both the compensatory and punitive damages awards which were based upon fraud, deceptive and unfair trade practices, tortious interference and wrongful eviction. On June 5, 2001 the Court of Appeals denied Appellee's motions for rehearing, rehearing en banc and request for certification of conflict. On July 5, 2001, Appellee filed its notice to invoke the discretionary jurisdiction of this Court. Appellee only seeks review of the District Court's decision as it relates to the application of Florida's Deceptive and Unfair Trade Practices Act (DUTPA or Act) Fla. Stat. § 501.201 et seq. (1993).

B. Statement of Facts

In September 1994 PNR purchased of Goodfellas Italian restaurant and acquired a long-term lease for the restaurant premises. (T-431). When PNR purchased Goodfellas it was a well established going concern with the same chef for four (4) years. (T-426, 406-07). Goodfellas was located on the third floor of a building owned by Ocean One North, Inc. (Ocean One) in a very desirable beachfront location on the corner of Palmetto Park Road and State Road A1A in Boca Raton, Florida. (T-395-96). Ocean One was owned equally by Willis and Matthew Giacomino. Willis is also the owner and principal officer of Beacon. (T-784, 1408).

PNR's decision to purchase Goodfellas was based, in large part, on the statements and representations of Giacomino and Willis regarding a planned renovation of the building. (T-412). Giacomino showed PNR's president, James Robinson (Robinson) an artist's rendering which depicted what the building would look like once the renovations were complete. (T-412-413, PX 60A-R-1275). He also told Robinson that the renovations would cost approximately three hundred thousand dollars ($300,000.00). (T-417).

After his meeting with Giacomino, Robinson met with Willis to verify and confirm what Giacomino told him. (T-419-20). Willis verified everything that Giacomino said regarding the improvements and assured Robinson that he would

not be responsible for any CAM charges resulting from the improvements. (T-421).

Ocean One hired Beacon, as the management company, and it was responsible for all aspects of the daily maintenance, repair and upkeep of the property. (T-791-93, 798). Beacon actually performed these obligations during the beginning of its contract term. (T-801, 1030-31). Shortly after Beacon took over the management and maintenance of the property the building began to receive code violations from the City of Boca Raton. The building continuously received code violations while under Beacon management and control. (T-801). A city representative testified that, the building amassed some $280,400.00 in fines from code violations, more than any building in the history of Boca Raton. (T-755).

Following PNR's purchase of Goodfellas, the renovations Giacomino and Willis told Robinson about, never began. (T-441). In fact the condition of the property was deteriorating rapidly. (T-442) During diner hours, when the restaurant was busy, PNR would experience frequent water leaks through the ceiling, tar leaks through the air-conditioning vents, blackouts, elevator failures, power failures and other adverse conditions. (T-443-448). PNR repeatedly notified the owners of the building including Giacomino, Willis, Ocean One and Beacon verbally and in writing about these deplorable conditions and failures. (T-

449-451). Giacomino told Robinson to put his complaints in writing to Beacon since it was responsible the maintenance of the building. (T-452).

On July 1, 1995, as a result of years of neglect by Beacon and dilapidation the north wall of the building collapsed. (T-T-455, 727-8, 792-3, 798-802, 1299, 1305-6). Willis testified to having actual knowledge of the deterioration before the collapse. (T-1465, 1481, 653). The collapse caused the city to shut the building down and declare it an unsafe structure. This resulted in a more than seven month eviction and closure of Goodfellas from which it never recovered. (T-1188-89, 1206)

Important evidence was adduced at trial evidence that Willis' engaged in self dealing and other *ultra vires* acts which were not for the benefit of the corporation. (T-863, 865-69). Giacomino himself sued Willis for self dealing and attempting to freeze him out of Ocean One. Willis ulterior motive was to foreclose the first mortgage he purchased, without Giacomino's consent, in order to freeze Giacomino out of the corporation. (T-866-69, 879-80). Willis was also motivated to extinguish all of the tenants leases on the building since he wanted to sell the property and it was worth more with the building vacant. Willis admitted to Giacomino that it was his desire to keep the building shut down following the

collapse in order to extinguish PNR's lease which would facilitate the sale of the property. (T-847).

SUMMARY OF THE ARGUMENT

It is respectfully submitted that the Fourth District Court of Appeals erroneously held that in order to support a damages award under the DUTPA a plaintiff must prove that the unfair or deceptive acts or practices were the defendants "regular systematic way of competition or a habitual or customary action or way of doing something". This holding places an extremely onerous burden on claimants under the DUTPA which neither the statute nor the interpretive case law contemplate.

ARGUMENT

THE DISTRICT COURT ERRED IN HOLDING THAT A SINGLE DECEPTIVE ACT OR PRACTICE IS INSUFFICIENT TO SUPPORT A DAMAGES AWARD THE DUTPA

A. The Court's Decision Conflicts With Other District Court Decisions

The District Court held that in order to prevail on a claim under DUTPA, a claimant must show that the unfair act or practice was the defendants "regular and systematic way of competition", or "a habitual or customary action or way of doing something." (Opinion p. 2).[1] That is, PNR was required to prove that it was

[1] This was not Appellants argument on appeal. Their entire argument was that the DUTPA should not be applied to a commercial lease transaction.

Beacon and Willis' regular and systematic practice or habitual or customary action to neglect the properties it maintained. This holding expressly and directly conflicts with the decisions of other district courts of appeal.

In Suris v. Gilmore Liquidating, Inc., 651 So. 2d 1282 (Fla. 3d DCA 1995), an automobile buyer sued a dealer for fraud and violations of the DUTPA in connection with a single car purchase. The Third District Court of Appeals, reversing the trial court, concluded that sufficient evidence existed to create a jury question precluding directed verdict under the DUTPA.. Nowhere did the court opine that more than a single car purchase or a single aggrieved consumer is required to maintain an action under the DUTPA.. Nor did the Court hold that the plaintiff was required to prove that the defendants deceptive or unfair acts and practices were "regular and systematic" or "habitual and customary".

In Nieman v. Dryclean USA Franchise Company, Inc., 178 F.3d 1126 (11th Cir. 1999), the Eleventh Circuit Court of Appeals held that a single franchise purchaser could sue a Florida franchiser under the DUTPA for violating the FTC's Franchise Rule in connection with a single franchise purchase.

In Sarkis v. Pafford Oil Company, Inc., 697 So. 2d 524 (Fla. 1st DCA 1997), gas station lessees sued a gasoline company and its sales representative alleging that the company conspired to supply lessees with inferior grades of gasoline at higher grade prices. The lessees sued for, among other things, violations of the

DUTPA. The Court held "a party who asserts a claim under the statute must prove the existence of an unfair or deceptive act or practice." Id. at 528 (emphasis added). In so holding the First District Court of Appeals noted that "the purpose of the statute is not merely to provide a remedy for an individual but to protect consumers at large from unfair trade practices." Id. Speaking in the singular, the Court expressly acknowledged that an single individual is afforded remedies by the DUTPA. It follows that the same is true for a single transaction.

In Fort Lauderdale Lincoln Mercury, Inc. v. Corgnati, 715 So.2d 311 (Fla. 4th DCA 1998), the Fourth District itself held that an individual automobile purchaser was entitled to damages under the DUTPA resulting from the dealer's false representations in connection with a single transaction. The purchaser was not required to prove that it was the dealer regular or customary practice to commit deceptive and unfair acts in connection with its automobile sales.

In Rollins, Inc. vs. Heller, 454 So.2d 580 (Fla. 3d DCA 1984), it was held that homeowners could recover actual damages against a burglar alarm company for violations of the DUTPA in connection with a single purchase of a home alarm system. Again, this was a single transaction and the Plaintiff was not required to prove that the defendant's deceptive and unfair acts were "regular and systematic" or "habitual and customary".

See also Department of Legal Affairs v. Father and Son Moving and Storage, Inc., 643 So. 2d 22 (Fla. 4th DCA 1994) (a specific rule or regulation is not necessary to the determination of what constitutes and unfair or deceptive practice); Anden v. Litinsky, 472 So. 2d 825 (Fla. 4th DCA 1985) (corporation and it principal held liable for damages under DUTPA in connection with a single residential real estate transaction); Delgado v. J.W. Courtesy Pontiac JMC – Truck, Inc., 693 So.2d 602 (Fla. 2nd DCA 1997) (single automobile purchaser's damages claim against dealer under DUTPA is not barred by economic loss rule).

B. The Court's Decision is Contrary to the Stated Legislative Intent.

The Fourth District has read the Act quite narrowly which is contrary to the clear legislative intent, as expressed in the Act's liberal rule of construction. In 1993, in order to expand the application of the Act, the legislature broadened the definitions of "consumer" and "trade or commerce". Consistent with this legislative mandate, district courts have applied the Act expansively.

The District Court's holding places an extremely heavy burden on potential claimants which the DUTPA does not require. Pursuant to the Court's ruling it is no longer enough for an aggrieved consumer to prove that they were the victim of an unfair method of competition, or unconscionable, deceptive or unfair trade practice. Consumers must now prove that the defendant's unfair, deceptive or unconscionable acts or practices are "regular and systematic" or "habitual and

customary". The limiting affect this will have on consumers rights under the Act is obvious.

The Fourth District's ruling is also contrary to the stated purposes of the Act which are:

(1) "to simplify, clarify, and modernized the law governing consumer protection..." (2) "intended to protect the consuming public and legitimate business enterprises from those who engage in unfair methods of competition, or unconscionable , deceptive, or unfair acts or practices in the conduct of any trade or commerce." § 501.202 Fla. Stat. (1993). The Court's ruling is confusing at best and its reasoning is at odds with that of other District Courts of Appeals as well and its own prior opinions. Requiring claimant's to show a pattern of behavior by the defendant, beyond their own transaction, frustrates and severely limits the purpose of the act and consumer's rights. The effect of the Court's holding will be to eviscerate the very protections the statute is intended to provide. Appellee is aware of no Florida case which has held that a claimant is required to prove habitual, regular or systematic unfair or deceptive acts. Accordingly, it is respectfully submitted that this Court's decision is in clear direct conflict with the cases cited herein and the legislative intent of the Act.

CONCLUSION

For the forgoing reasons Appellee respectfully requests that the Supreme Court exercise its discretionary jurisdiction in this case, pursuant to Florida Rules of Appellate Procedure 9.030(a)(2)(A)(iv) and 9.120 and reverse the Fourth District Court's decision and/or clarify the conflict it crates with other district courts' decisions.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via regular mail on Harry J. Ross, Esquire, Law Office of Harry J. Ross, 6100 Glades Road, Suite 211, Boca Raton, Florida 33434, David Maher, Esquire, Harke & Clasby, LLP, Miami Center, Suite 1050, 201 South Biscayne Boulevard, Miami, Florida 33131 this 16 day of July, 2001.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the rules relating to font size contained in Fla.R.App.P. 9.210.