IN THE SUPREME COURT OF FLORIDA

VINCENT P. CRAVERO, et al.,

Petitioners,

v.

LLP MORTGAGE LTD., f/k/a LOAN PARTICIPANT PARTNERS, LTD., a TEXAS LIMITED PARTNERSHIP,

Respondent,
_____/

BY DISCRETIONARY JURISDICTION FROM THE FOURTH DISTRICT COURT OF APPEAL

Case No.: SC03-1671
Lower Tribunal No.: 4D02-2443

PETITIONERS' BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND OF THE FACTS

A. Nature of the Case.

This is a mortgage foreclosure case in which the Plaintiff seeks to foreclose two residential mortgages on Defendants' homestead property. The subject mortgages were collateral of guarantees executed by Defendants. The guarantees assured the payment of promissory notes executed by a business. The guarantees are not enforceable by virtue of the applicable statute of limitations.

In 1992, as a consequence of Hurricane Andrew, Cravero Brothers Produce Company ("Cravero Brothers") accepted two Small Business Administration ("SBA") loans, and, accordingly, executed promissory notes evidencing such obligations. Defendants Vincent Cravero and Dorothy Cravero, husband and wife, executed guarantees of the loans and executed mortgages on their homestead property as collateral for the guarantees. Cravero Brothers ceased conducting business and defaulted on the loans. The Notes were accelerated in 1995. SBA thereafter assigned the loans to the Plaintiff, a Texas limited partnership, which ultimately brought a foreclosure action against Defendants after expiration of the period permitted for real property foreclosures under the applicable Florida statute of limitations.

B. Course of the Proceedings.

Plaintiff brought an action for foreclosure. Defendants sought and obtained

summary judgment in the trial court. Plaintiff appealed, and Defendants advanced four arguments as to why the Fourth District Court of Appeal should affirm the decision of the trial court. Any of the four arguments was sufficient to affirm the trial court decision. The Fourth District entered a decision reversing the trial court in which the Fourth District explicitly discussed and rejected one of the four arguments of Petitioner and failed to discuss the remaining arguments.

The issue addressed explicitly by the Fourth District was whether the assignee of a mortgage from an agency of the federal government is subject to any statute of limitations in its right to foreclose the mortgage. The Fourth District held that no state statute of limitations applied to the non-public transferee of the mortgage, and it reversed the trial court without examining the questions of (i) whether the relevant federal Statute preempted Florida's statute of limitations regarding foreclosure, and (ii) whether the application of the federal statute of limitations for any particular cause is dependent on the Florida law regarding the availability of the remedy sought.

C. Disposition in the Lower Tribunal.

This is an appeal from the Fourth District Court of Appeal of a mortgage foreclosure case in which the trial court granted summary judgment in favor of the defendant property owners. The mortgagee appealed, and the Fourth District reversed. The decision of the Fourth District is appended to this Brief.

SUMMARY OF ARGUMENT

This Court has jurisdiction of this matter because the Fourth District's decision expressly and directly conflicts with decisions of other courts of appeal. Furthermore, the decision expressly and directly conflicts with decisions of federal courts addressing the federal questions raised in this matter.

The Fourth District Court of Appeal held, in relevant part, that the federal government and its transferee has an unlimited period for foreclosure of real property, because the federal statute of limitations does not apply to actions to establish title to real property and state statutes of limitation are inapplicable due to sovereign immunity. However, this decision is contrary to (i) the well-settled proposition enunciated in a First District Court of Appeal decision that a private assignee of a government claim is not entitled to rely on the government's sovereign immunity to the statute of limitations where the private assignee intends to enforce the claim for its private benefit, and (ii) at least one decision in the Fifth District Court of Appeal, which requires an analysis of whether the state statute of limitations is preempted by a federal statute before discarding the state statute. None of the three factors for preemption was even arguably present in this case.

The Fourth District's decision also required application of the federal statute of limitations without regard to whether the remedy sought, foreclosure, was then

available under Florida law. This Court, as well as at least one district court of appeal, has held that a remedy must first be available under Florida law before the applicable federal statute of limitations applies. Because, in this case, the collateral to be foreclosed is not collateral of notes, but collateral of unenforceable guarantees, the remedy of foreclosure is not available under Florida law, so the issue of the applicability of the federal statute of limitations is never raised. In failing to find the unenforceability of the guaranty as a bar to the foreclosure of the guaranty's collateral, the Fourth District expressly and directly conflicts with the decision of this Court and of at least one district court of appeal.

ARGUMENT

The Fourth District Court of Appeal held, in relevant part, that "the federal statute of limitations does not apply to actions to establish title to real property," resulting in an unlimited period for foreclosure of real property by both the federal government and its transferees. *LLP Mortgage, Ltd. v. Cravero*, 851 So.2d 897 (Fla. 4th DCA 2003). The Court's decision also provided that the holder of a real property mortgage that is collateral of an unenforceable guaranty of a legally uncollectible note can foreclose the mortgage, even though the federal statute of limitations admittedly operates to prevent the note-holder from suing on the guaranty. *Id.* All of these aspects of the decision are contrary to decisions of other courts of appeal.

A. Standard of review.

> This Court has conflict jurisdiction pursuant to article V, section 3(b)(3) of the Florida Constitution when a district court applies a rule to produce a decision conflicting with that reached in another decision involving substantially the same controlling facts.

Smith v. Jack Eckerd Corporation, 577 So.2d 1321 (Fla. 1991) (citations omitted).

B. Conflict regarding whether a private assignee of a government claim is entitled to rely on the government's sovereign immunity to the statute of limitations when the private assignee intends to enforce the claim for its private benefit.

The First District Court of Appeal has held, in a venerable case cited in a number of other jurisdictions, that a private assignee attempting to enforce a claim that

it received from the government may not rely on the government's immunity from the statute of limitations:

> The general rule that both the United States and a state are immune from the operation of a statute of limitations is applicable where the government is the real party in interest. The right to assert sovereign immunity from the operation of the statute of limitations does not extend, however, to its assignee or transferee where the suit is brought for the private benefit, and to enforce the rights of a private person. . . . Plaintiff seeks to enforce rights which it holds purely for its private benefit. The sovereign has no further interest. . . . Limitation will not operate to deprive the sovereign of title to land but it will operate against its grantee who holds the land in a purely private capacity.

Lovey v. Escambia County, 141 So.2d 761, 764-65 (Fla. 1st DCA 1962), *cert. denied* 147 So.2d 530 (Fla. 1962). "The law appears to be well-settled, however, that an assignee of a government claim may not rely upon the government's immunity to the statute of limitations where it is intended to enforce the claim for private benefit." *McCloskey & Company, Inc. v. Wright*, 363 F. Supp. 223 (E.D. Va. 1973), citing *Lovey*.

Respondent in the instant case seeks foreclosure for its own benefit, not the benefit of the government. Therefore, the decision below is in direct conflict with the First District decision in *Lovey*. Whether transferees of property rights from both the state and federal government have the right to rely on applicable statutes of limitations is an important question that should not vary from district to district. Accordingly, because the of the conflict between the districts, this Court should accept jurisdiction.

C. Conflict regarding whether a court must apply a preemption analysis prior to disregarding the state statute of limitations applicable to foreclosure of the collateral of a federal loan.

The decision below directly conflicts with the decision in *WRH Mortgage, Inc. v. Butler*, 684 So.2d 325 (Fla. 5th DCA 1996). *WRH* involved the statute of limitations applicable to a mortgage foreclosure by an assignee of the Resolution Trust Corporation, an agency of the federal government. The Fifth District cited *United States v. Summerlin*, 310 U.S. 414 (1940), also cited below, for the proposition that, when the government is the mortgagee, state statutes of limitation are generally preempted by federal statutes of limitation. The Fifth District then engaged in an analysis of the basis for preemption of the state statute of limitations as a prerequisite to determining whether the state statute was applicable.

In *WRH*, the Court cited *Chatham Steel Corp. v. Brown*, 585 F. Supp. 1130 (N.D. Fla. 1994), in order to clarify the basis for preemption, as follows:

> Under the supremacy clause, a state law can be preempted by federal law in three ways:
> (1) when Congress expressly states that a federal law supersedes relevant state law;
> (2) where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress left no room for supplementing state regulation; and
> (3) when state law actually conflicts with federal law and compliance with both federal and state law is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

WRH Mortgage, supra, at 327. The *WRH* court found an explicit, applicable, six-year federal statute of limitations for such loans and held that the state statute of limitations would not apply, unless it were longer. *Id.*

The present case conflicts with *WRH* in that the Fourth District failed to engage in the preemption analysis required in *WRH*. Furthermore, the Fourth District's decision that the state statue of limitations is inapplicable does not fall within any of the bases for preemption stated in *WRH* and *Chatham Steel.*

The applicable federal statute that discusses the statute of limitations is 28 U.S.C. § 2415(c), which is cited by the Fourth District and provides as follows:

> Nothing herein shall be deemed to limit the time for bringing an action to establish the title to, or right of possession of, real or personal property.

This Statute does fulfill any of the prerequisites for preemption cited in *WRH*. It does not explicitly state that it supersedes any state law; it explicitly is not part of a comprehensive federal regulatory scheme leaving no room for supplementary state regulation; and it does not conflict with any state law. In fact, it explicitly states that it is <u>not</u> to be deemed a limitation; therefore, it cannot be construed to create a conflict with or to supersede state laws in the area of title to or possession of property.

The Fourth District's assertion in the present case that "there is no statute of limitations which applies to foreclosure," *Cravero* at 897, conflicts with *WRH* in that,

(i) *WRH* requires a preemption analysis before determining whether a state statute of limitations applies in a foreclosure case, and (ii) without finding preemption, it nevertheless finds the Florida statute of limitations on mortgages not to be a bar to the foreclosure action. *WRH* required the finding of an applicable federal statute of limitations to preempt the state statute. Because of this conflict, this Court should accept jurisdiction of this case.

D. Conflict regarding whether the application of the federal statute of limitations for any particular cause is dependent on the Florida law regarding the availability of the remedy sought.

In *Dove v. McCormick*, 698 So.2d 585 (Fla. 5th DCA 1997), a mortgage foreclosure case in which the defendant asserted truth-in-lending defenses, the Fifth District Court of Appeal relied on the principal that the application of the federal statute of limitations for any particular cause is dependent on whether that particular cause or remedy is available to the claimant under Florida law. The *Dove* court cited the holding in *Beach v. Great Western Bank*, 692 So.2d 146 (Fla. 1997), that "under Florida law, an action for statutory right of rescission pursuant to *15 U.S.C. § 1635* may not be revived as a defense in recoupment beyond the three year expiration period contained in Section 1635(f). *Beach v. Great Western Bank*, 692 So.2d at 153." *Dove* at 588. Because foreclosure is not available to Plaintiff as a remedy under *Florida Statutes* Section 95.281, no determination of the application of a federal statute of

limitations is required.

Despite being fully briefed, the Fourth District in its decision in the instant case never discussed the important distinction that the collateral to be foreclosed is not collateral of a note, but is collateral of an unenforceable guaranty. The guaranty is unenforceable because it is beyond the limitations period under both federal and Florida law. Under *Dove*, if the remedy of foreclosure is not available under Florida law, then the issue of an applicable statute of limitations is never raised. In failing to find the unenforceability of the guaranty as a bar to the foreclosure of the guaranty's collateral, the Fourth District expressly and directly conflicts with *Dove* and, implicitly, *Beach*. This Court should accept jurisdiction in order to rectify this conflict.

CONCLUSION

Due to the conflict between the decision by the Fourth District Court of Appeal in the present case and the other cited cases, and for all the foregoing reasons, this Court should accept jurisdiction of this matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by facsimile transmission and by U.S. mail to Anne S. Mason, Esquire, Mason Law, 17757 U.S. 19 N., Suite 500, Clearwater, Florida 33764, this _____ day of _____, 20____.

_____

E. SCOTT GOLDEN, ESQUIRE

CERTIFICATE OF COMPLIANCE WITH RULE 9.210(A)(2)

I HEREBY CERTIFY that the font size used in this Brief is Times New Roman 14 point in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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E. SCOTT GOLDEN, ESQUIRE

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