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
Court of Appeal Case No.: 4D02-2443

RESPONDENT'S BRIEF ON JURISDICTION

Anne S. Mason
Florida Bar No. 472689
Laurie A. Dart
Florida Bar No. 546798
17757 U.S. 19 N., Suite 500
Clearwater, FL 33764
(727) 538-3800
Attorneys for Respondent

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STATEMENT OF THE CASE AND FACTS

This case arises out of an action to foreclose two mortgages. The original lender and holder of the mortgages was the Small Business Administration ("SBA"), which accelerated the monetary obligations in 1995 but did not take action to foreclose the mortgages. In 2001, the SBA assigned the mortgages to LLP Mortgage, Ltd. ("LLP") which commenced this foreclosure case.

The trial court granted the petitioners' motion for summary judgment holding that the suit was barred by Florida's five-year period of limitations found in § 95.11(c)(2), Florida Statutes, on the basis that the cause of action accrued upon acceleration in 1995. LLP appealed that finding asserting among other grounds that, as assignee of the mortgages originally given to the federal government, it was not subject to the statute of limitations under Florida law by virtue of 28 U.S.C. § 2415(c). The court below agreed and reversed the trial court's decision in LLP Mortgage Ltd., v. Cravero, 851 So.2d 897 (Fla. 4th DCA 2003) ("Cravero"). Petitioners now seek further review in this court.

JURISDICTIONAL ISSUE

Whether the Fourth District's decision in this case expressly and directly conflicts with Lovey v. Escambia County, 141 So.2d 761 (Fla. 1st DCA 1962) (Fla. 1962), and/or WRH Mortgage, Inc. v. Butler, 684 So.2d 325 (Fla. 5th DCA 1996); and/or Dove v. McCormick, 698 So.2d 585 (Fla. 5th DCA 1997) so as to invoke the discretionary jurisdiction of this court.

SUMMARY OF THE ARGUMENT

This court lacks jurisdiction to consider this case because Cravero does not

expressly and directly conflict with Lovey, WRH, or Dove. Those cases address a different rule of law and involve different statutes. Moreover, the facts of those cases are materially different from Cravero, thereby creating no express and direct conflict within the meaning of Fla.R.App.P. 9.030(2)(iv).

ARGUMENT

I. THERE CAN BE NO EXPRESS AND DIRECT CONFLICT WHERE, AS HERE, THE RULES OF LAW AND FACTS OF THE CASES ARE DIFFERENT.

The Florida Constitution provides that the supreme court "[m]ay review any decision of a district court of appeal . . . that expressly and directly conflicts with a decision of another district court of appeal or of the Supreme Court *on the same question of law*." Art. V, § 3(b)(3), Fla. Const. (emphasis added); Fla.R.App.P. 9.030(2)(iv). The general rule is that "conflict jurisdiction" is appropriate: "(1) where an announced rule of law conflicts with other appellate expressions of law, or (2) where a rule of law is applied to produce a different result in a case which involves 'substantially the same facts as a prior case.'" City of Jacksonville v. Florida First National Bank of Jacksonville, 339 So.2d 632, 633 (Fla. 1976) (*quoting*, Nielsen v. City of Sarasota, 117 So.2d 731, 734 (Fla. 1960)). See, also, Adams v. Seaboard Coastline RR, 296 So.2d 1 (Fla. 1974); Kyle v. Kyle, 139 So.2d 885, 887 (Fla. 1962). As the following demonstrates, neither of the factors necessary for discretionary review is present here because the cases relied upon by petitioners to invoke discretionary jurisdiction address different legal issues and the facts are not the same.

A. The rule of law and facts of *Lovey* are entirely different.

Petitioners first contend that Cravero directly conflicts with Lovey because Cravero allows the enforcement of a private interest under the auspices of sovereign immunity, something Lovey prohibits. Petitioners' Brief at 6 (herein "Br. __"). Lovey involves the analysis of § 337.31, Florida Statutes, which provides that when a county constructs and maintains a road for a period of four years, there is a conclusive presumption that the road has been dedicated to the public. The appellants in Lovey were the owners of the property upon which the road was constructed, who argued that the property, which had previously been owned by the federal government, was not subject to a claim for a prescriptive easement or adverse possession because the doctrine of adverse possession does not apply to the sovereign. 141 So.2d at 763. The Lovey court concluded that § 337.31, Florida Statutes, is not "one of prescription or adverse possession" but rather is a statute relating to the formal dedication of an easement. Id. at 764-765.

The rule of law announced in Lovey, therefore, involves the statutory criteria for declaring a public easement, something not remotely at issue in Cravero. In its analysis of the appellants' defense, the Lovey court discussed the proposition that one cannot acquire rights in land owned by the government by virtue of adverse possession or prescription and further discussed the origin and purpose of sovereign immunity. 141 So.2d at 764. Thus, the decisional point of law dispositive in Lovey is entirely different from the point of law announced in Cravero -- "an assignee stands in the shoes of the assignor." Cravero, 851 So.2d at

898.

Not only are the rules of law announced in the respective cases different, the factual background of the two cases are not "substantially the same." See, City of Jacksonville, at 633. Indeed, the two cases have absolutely no facts in common. Lovey involves ownership of real property, the criteria for a public easement, interprets § 337.31, Florida Statutes, and discusses generally the doctrine of sovereign immunity and its effect on statutes of limitations. Cravero, on the other hand, involves a mortgage foreclosure, the effect of an assignment of commercial paper and interprets 28 U.S.C. § 2415(c).[1] There is, as a result, simply no direct and express conflict between the two cases that confers jurisdiction upon this court.

B. *WRH* also does not conflict with *Cravero* because the law and facts differ.

Petitioners next contend that there is a conflict between Cravero and WRH, because the Cravero court neglected to examine preemption when reaching its conclusion that Florida's statute of limitations does not apply to LLP's foreclosure action. Br. at 7. In WRH, as in Cravero, the court held that the private assignee of a mortgage originally given to the Resolution Trust Corporation (deemed an agent of the United States when acting as a receiver of a failed financial institution), was not subject to Florida's five-year statute of limitations in which to commence its foreclosure action. In so holding, the WRH court concluded that 12 U.S.C. § 1821 preempts § 95.281, Florida Statutes.

Petitioners reason that Cravero's silence on the preemption issue therefore conflicts with WRH. Florida's constitution, however, requires that conflict jurisdiction be predicated on a "direct" and "express" conflict, which by definition, cannot occur when a court is silent . Moreover, a court's failure to analyze a case on particular grounds or its failure to approach an issue the same manner as another court does not create a conflict with a case for jurisdictional purposes and petitioners have cited no authority for the proposition that it does.

Further, the reason that the Cravero court did not engage in a preemption analysis is that such an analysis was not necessary to its holding. In WRH, the court interpreted 12 U.S.C. § 1821(d)(14)(a) which provides in relevant part: "[T]he applicable statute of limitations with regard to any action brought by the Corporation . . . shall be . . .

the longer of . . . six-year period beginning on the date the claim accrues; or . . . the period applicable under State law." Id. Thus, the federal statute in question in WRH expressly directs that the *statute of limitations* under state law applies if the period is longer than the period allowed under the federal statute.

Significant here, the trial court in WRH had reasoned that the mortgage foreclosure action was barred by § 95.281, Florida Statutes, which it characterized as a statute of repose and *not* a statute of limitations which is expressly preempted by the federal statute. WRH at 325. The trial court apparently concluded that the federal statute would only preempt a state statute of limitations. Id. at 326. The Fifth District in WRH, however, noted that it was not necessary to categorize Florida's statute as a statute of repose or a statute of limitations because "regardless of the designation given the statute, the provisions of the statute are preempted by 12 U.S.C. § 1821." Id. In sum, the only reason that the WRH court analyzed preemption principles at all is because the trial court had misapplied the law relating to preemption not, as petitioners allege, because a preemption analysis is required each time a court determines whether a state or federal statute of limitations applies to foreclosure actions. Br. at 9.

The statute at issue in Cravero (28 U.S.C. § 2415(c)) does not require the court to look at the applicable statute of limitations under state law and compare it to federal law and then choose the longer of the two. Consistent with this, the scope of the preemption doctrine was not the basis of the trial court decision in

Cravero and accordingly was not an issue addressed by the Fourth District.[2] The federal government can foreclose a mortgage irrespective of the statute of limitations for such actions applicable within the state in which the property is located, and the Fourth District was not required to analyze the issue again. See, United States of America v. Begin, 160 F.3d 1319, 1321 (11th Cir. 1998) (citing U.S. v. Alvarado, 5 F.3d 1425, 1427 (11th Cir. 1993) which specifically recognized cases in several other jurisdictions that relied on 28 U.S.C. § 2415(c) to conclude foreclosure actions cannot be time-barred).

Finally, the facts of WRH differ from those in Cravero inasmuch as WRH involved a note which had matured, as opposed to having been accelerated, involved a different federal agency and different federal and state statutes. Given these differences in fact and law, there can be no conflict jurisdiction, especially since the holdings of the two cases are harmonious -- each of the courts concluded that the statute of limitations applicable to the federal government inured to the benefit of the private entity upon assignment.

C. *Dove* also differs from *Cravero* in its facts and law.

The Fifth District's Dove decision does not confer discretionary jurisdiction upon this court either. Dove involved the viability of a borrower's rescission rights under 15 U.S.C. § 1635. When examining that issue, the Dove court did not address the rights of a private assignee to foreclose a mortgage assigned to it by the federal government as is the case in Cravero, nor did it address the remedy of foreclosure

where the mortgage secures a time barred obligation. Dove also did not turn on the applicable statute of limitations in a foreclosure action. The facts and law dealt with in Dove and Cravero, then, are entirely different and as a result there is no conflict jurisdiction.

II. ANY CONFLICT BETWEEN APPELLATE DECISIONS MUST APPEAR ON THE FOUR CORNERS OF THE DECISION.

Lastly, petitioners argue that there is a conflict between Cravero and Dove because, according to the petitioners, Dove teaches that the limitation analysis is effectively irrelevant if the underlying remedy of foreclosure is not available, and the Cravero court ignored whether the underlying obligation secured by the mortgage was enforceable. Br. at 9-10. While respondent showed below why the petitioners' argument is without merit,[3] this court may only address the four corners of the decision below in determining whether there is a conflict which could invoke its discretionary jurisdiction under Art. V, § 3(b)(3), Fla. Const. See, Reeves, 485 So.2d at 829-830. Because matters that are not addressed below cannot be the subject of appellate scrutiny, the petitioners' request for discretionary review should be denied.

CONCLUSION

As the facts and issues of law in Lovey, WRH, and Dove are substantially different, and this court may not determine questions not appearing from the face

of the decision below, there is no express and direct conflict and this court should deny review.

MASON LAW, a
Professional Association

_____

Anne S. Mason
Fla. Bar No.: 472689
Laurie A. Dart
Fla. Bar No.: 546798
Mangrove Bay Office Centre
17757 U.S. 19 N., Suite 500
Clearwater, FL 33764
(727) 538-3800
Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the Answer Brief on Jurisdiction has been served via First Class U.S. Mail this 6th day of November, 2003, upon E. Scott Golden, and Donielle Mason, 644 S.E. Fourth Avenue, Ft. Lauderdale, FL 33301, attorneys for Vincent and Dorothy Cravero.

_____
Laurie A. Dart

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

I hereby certify that the font type and size used in this brief is Times New Roman 14 point and that this complies with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

_____
Laurie A. Dart

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APPENDIX TO RESPONDENT'S BRIEF ON JURISDICTION

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17757 U.S. 19 N., Suite 500
Clearwater, FL 33764
(727) 538-3800
Attorneys for Respondent

APPENDIX CONTENTS

[1] Petitioners contend that the rule of law announced in Lovey is that a private assignee of a government claim may not rely upon the government's immunity from the statute of limitations where it is intended to enforce the claim for private benefit. Br. at 6. While this general proposition appears as dicta in the case, petitioners' quote from Lovey illustrates how general principles of law are distorted when applied in a different context. It is for this reason that there is a requirement that the law be applied to "substantially the same facts." City of Jacksonville at 633. Further, the Lovey court expressly distinguishes between (1) a grantee with respect to real property (Lovey) and the assignee of the sovereign's rights (Cravero) and (2) the offensive and defensive use of the statute of limitations. Lovey at 764-765.

[2] As set forth in Section II herein, issues not addressed by the Fourth District cannot be the basis of conflict jurisdiction under the "four corners" rule set forth in Reeves v. State, 485 So.2d 829, 830 (Fla. 1986).

[3] It is well settled that a suit to foreclosure a mortgage is a separate and independent remedy from a suit to enforce the underlying obligation secured by the mortgage and that a mortgage foreclosure action survives even if a suit on the underlying debt is time barred. See, Alvarado, at 1428-29; Swanson v. Bennett, 25 So. 2d 207, 209 (Fla. 1946).