IN THE SUPREME COURT OF FLORIDA

Case No.: SC04-774

COLBY MATERIALS, INC.,

Petitioner,

vs.

CALDWELL CONSTRUCTION, INC.,

Respondent.

_____

AMENDED JURISDICTIONAL BRIEF OF PETITIONER

CLIFFORD M. TRAVIS, ESQ.
107 North Apopka Avenue
Post Office Box 523
Inverness, Florida 34451
(352) 344-2664
FL Bar No.: 358266
Attorney for Petitioner
Colby Materials, Inc.

TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF THE CASE AND FACTS

This dispute arose over litigation involving a purported overpayment on a construction project. The respondent CALDWELL (plaintiff in the trial court below) filed an action against the petitioner on August 12th, 2002. On August 21, 2002, the return of service in the court file was shown as "unserved." Eighteen days later on September 9, 2002, Scott A. Adams, as president of the petitioner, COLBY, filed and served a Motion to Strike for Sham and a Motion to Dismiss on behalf of COLBY. On September 19, 2002, the respondent, through counsel, filed a Motion to Strike and a Motion for Default against the petioner because Adams was not a member of the Florida Bar and was not permitted to represent his company, the petitioner herein.

Immediately upon receipt of the respondent's motion in the trial court, Adams began his search for counsel for COLBY. The petioner retained an attorney who filed a Notice of Appearance on October 3, 2002. Counsel thereafter filed on October 18, 2002, a "Reponse to Plaintiff's Motion to Strike and Motion to Default" which sought to withdraw the motions filed by Adams. He further asserted that the petitioner had made a good-faith effort to timely respond to plaintiff's complaint and should not be penalized with a default and further sought a brief, but reasonable, period of time in which, through counsel, to answer the complaint.

The trial court conducted a hearing on October 22, 2002, upon the Motion to Strike and for a Default, at which hearing Colby appeared with counsel. The Circuit Court, Honorable Richard Howard, entered default against the petitioner concluding that a proper responsive pleading had not been timely filed, the papers filed by Adams where nullities, and the corporation had failed to establish excusable neglect. The court provided no opportunity for counsel to file an answer and entered Final Judgment on November 6th, 2002, in the amount of $21, 883.00.

The petitioner thereafter sought review in the District Court of Appeal, Fifth District of Florida. The issues were briefed and the Fifth District, by written opinion dated 20th day of February 2004, affirmed the decision in the trial court. The petitioner seeks to review the lower proceeding by invoking the discretionary jurisdiction of this Court.

SUMMARY OF ARGUMENT

In the District Court the Respondent relied upon the case of Joe-Lin, Inc. vs. LRG Restaurant Group, Inc., 696 So.2d 539 (Fla. App. 5th DCA 1997), wherein the Fifth District held a pleading signed by a non-lawyer corporate officer was a legal nullity. The Fifth District in Joe-Lin noted that those Appellees were what the Court described as grossly negligent. The instant case is clearly distinguishable on the facts in the trial court and the reliance of the Respondent and the Fifth District was perhaps misplaced. Since that time, this Court has spoken to the issue in Torrey vs. Leesburg Regional Medical Center, 769 So.2d 1040 (Fla. 2000). The case law relied upon by the Respondent in the Fifth District has been eroded by subsequent cases within the Fifth District and squarely contrary to this Court’s opinion in Torrey.

ARGUMENT

The Fifth District Court of Appeal, in its' opinion filed February 20, 2004 (made final after denial of rehearing), upheld the default final judgment entered against the petitioner in the trial court below. It is uncontroverted that the responsive pleadings were timely filed by petitioner (defendant in the trial court) and the dispute finding it's way to this Court centers around the fact that the pleadings were filed pro-se by the president of the petitioner, Colby Materials, Inc., and not by a licensed Florida attorney.

In its' brief in the Fifth District, the respondent, Caldwell Construction, Inc., relied upon the case of Joe-Lin, Inc. v LRG Restaurant Group, Inc., 696 So. 2d 539 (Fla.App.5thDCA 1997). In this case the Fifth District held a pleading signed by corporate officer who is not a licensed attorney was a nullity and has no legal effect. The Fifth District held in this case that the appellees had failed to establish excusable neglect. In fact, the Fifth District noted in this case that those appellees "were not only negligent but grossly negligent" Joe-Lin, at page 541, and also pointed out that "the law requires a party to exercise due diligence to protect it's interests." As to these facts, this case is distinguishable from the instant case in that the petitioner acted to retain licensed counsel simply upon the filing of the motion attacking it's pleadings. Counsel attended with the petitioner the first hearing conducted by the trial court and in doing so thus swiftly took necessary steps to cure any defect in it's timely responsive pleadings.

As to the law, this Court addressed the issue several years after the Fifth District in Joe -Lin Inc. In a case also coming from the Fifth District this Court accepted conflict jurisdiction to review Torrey v Leesburg Regional Medical Center 731 So. 2d 748 (Fla. 5th DCA 1999) and the case of Szteinbaum v Kaes Inversionese y Valores, C.A., 476 So. 2nd 247 (Fla. 3rd DCA 1985). The issue before this Court in Torrey was whether a complaint filed and signed by a non-Florida attorney was a nullity or simply an amendable defect. In this Court's opinion in Torrey, the approach of the third District in Szteinbaum was approved, thereby confirming that such defective pleading was not a nullity. Although in Torrey the pleading was signed a Michigan attorney who was not a member of Florida Bar and in the instant case the pleading was filed and served by a pro-se corporate officer, the principle and the legal reasoning are the same.

In this Court's analysis it was pointed out that the Fifth District had again considered the issue in Moreno Construction, Inc. v Clancy & Theys Construction Co., 722 So. 2nd 976 (Fla. App.5th DCA 1999). Moreno is factually very similar to this case in that the answer to the complaint was filed by the non-attorney corporate president on it's behalf. In Moreno the Fifth District reversed the trial court, finding excusable neglect where the corporate president indicated that he was not aware the corporation required representation by counsel in the circuit court and the corporation immediately hired counsel to represent it. In it's opinion in Moreno the Fifth District noted that: "in reaching this conclusion we have considered Florida's common law rule that pleadings filed by a non-lawyer on behalf of another are a nullity. The rule is the product of the policy against the unauthorized practice of law. However, under the facts of this case, to mechanically apply the rule to prohibit a finding of excusable neglect places form over substance and fails to serve the underlying policy. See Szteinbaum v Kaes Inversionese y Valores, C.A. 476 So.2nd 247 (Fla.3rd DCA 1985). In this case, Florida's policy that cases should be tried on their merits whenever possible prevails."

Moreno at pg. 978.

This Court thereafter noted that the approach of the Third District of Szteinbaum "could not be similarly reconciled with that of the Fifth District in Torrey." Torrey, at page 1004.

This Court's opinion in Torrey has only been cited in a reported decision twice in the four years since this Court's ruling. The first was in the rehearing proceedings in the Fifth District where the case was dismissed on other grounds. Torrey v. Leesburg Regional Medical Center, 796 So.2d 544 (Fla. at 5th DCA 2001). The other citation to Torrey arose (also out of the Fifth District) and was cited with approval in the context with approval in the context of a criminal case in Pura v. State, 789 So.2d 436 (Fla. at 5th DCA 2001).

In the instant case, this Court has spoken as to the status of the law in Torrey v. Leesburg Regional Medical Center. 769 So.2d 1040 (Fla. 2000). The opinion of the Fifth District Court of Appeal in this case is contrary to established law and should be overturned.

CONCLUSION

It cannot be said to be harmless error that the trial court entered default judgment against Petitioner for a sum in excess of $20,000.00 without allowing the Petitioner its day in court upon the merits. The District Court magnified the injustice to the Petitioner by not following this Court's guidance in Torrey and by

allowing the default final judgment to stand. The opinion of the District Court in this case is contrary to this Court's opinion in Torrey and should be overturned. This Court should accept jurisdiction to review this cause and thereafter overturn the opinion of the Fifth District herein and enter an Order requiring the Fifth District to return these proceedings to the trial court with instructions to vacate and set aside the default final judgment and conduct further proceedings consistent with this Court's opinion in Torrey vs. Leesburg Medical Center, 769 So.2d 1040 (Fla. 2000).

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Jurisdiction Brief has been prepared in compliance with the font requirements of Florida Rules of Appellate Procedure 9.210.

_____

CLIFFORD M. TRAVIS, ESQUIRE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to CHRIS POLAK, ESQ., 500 NE 8th Ave., Ocala, FL 34470, this _____ day of June, 2004.

_____
CLIFFORD M. TRAVIS, ESQUIRE