IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. SC07-1397

PRO-ART DENTAL LAB, INC.

Petitioner,

v.

V-STRATEGIC GROUP, LLC

Respondent.

RESPONDENT V-STRATEGIC GROUP, LLC'S BRIEF ON JURISDICTION

ON DISCRETIONARY REVIEW FROM A DECISION OF THE
FOURTH DISTRICT COURT OF APPEAL

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STATEMENT OF THE CASE AND FACTS

In this landlord-tenant action, Respondent V-Strategic Group, LLC ("V-Strategic"), as landlord, filed a complaint against Petitioner Pro-Art Dental Lab, Inc. ("Pro-Art"), as tenant, to recover possession of leased premises. (A-1). V-Strategic commenced the action in Broward County Court as a summary proceeding under Chapter 51, Florida Statutes. (A-1). Contrary to the provisions of Section 51.011(1), Florida Statutes (2006) -- which require that a defendant shall file an answer containing all defenses of law or fact within five (5) days of service of process -- Pro-Art filed only a motion to dismiss for lack of subject matter jurisdiction without timely filing an answer. (A-1). At a hearing on the motion to dismiss, the county court denied the motion and V-Strategic orally moved for a default. (A-1). Prior to ruling on V-Strategic's motion for default, but after expiration of the five (5) day limitation contained in Section 51.011(1), Pro-Art filed belatedly its answer and affirmative defenses. (A-1). The county court ultimately granted V-Strategic's motion for default three days later and entered a final judgment of possession. (A-1).

Pro-Art appealed the matter to the appellate division of the circuit court, which affirmed the county court's decision. In a well-reasoned opinion, the circuit court found that "section 51.011, Florida Statutes (2006), contemplated that a defendant have only one opportunity to present all available defenses, within five

days from the date of service, and thus the trial court was correct not to consider the tenant's untimely answer and affirmative defenses." (A-2). On certiorari, the Fourth District denied Pro-Art's petition. (A-2). On rehearing, the Fourth District again denied Pro-Art's motion for rehearing, but certified conflict with *Crocker v. Diland Corp.*, 593 So. 2d 1096 (Fla. 5th DCA 1992), which also involved untimely asserted defenses in a case governed by Chapter 51, Florida Statutes. The opinion provided, in pertinent part that:

> If *Crocker* and rule 1.500(c) controlled the case, then we would be required to grant the writ; after the court disposed of its defensive motions, but before the entry of a default, Pro-Art filed an answer. *Crocker* allows an untimely answer, filed outside the time limits of section 51.011, to preclude the entry of a default. However, we read section 51.011 as allowing the entry of a default once the time to answer has expired and the court has disposed of timely-filed defensive motions.

(A-1).

For the reasons set forth below, however, the holding in *Crocker* is consistent with the decision of the Fourth District. Both holdings contemplate only one opportunity to assert defenses of law or fact within the context of a Chapter 51 summary proceeding.

SUMMARY OF ARGUMENT

There is no direct conflict to warrant the Court's discretionary review. *Crocker* stand and this case both for the proposition that a defendant in a case subject to summary procedure only has one opportunity -- within five (5) days of the filing of the complaint -- to assert all defenses of law or fact. Under *Crocker*, once the 5 (five) day period expires, no additional defenses may be asserted. Here, the county court provided Pro Art with that one opportunity. Pro Art filed a motion to dismiss for lack of subject matter jurisdiction within the five (5) day period, which the county court denied. After the expiration of the five (5) day period and contrary to Section 51.011, Pro Art attempted to file an answer asserting additional defenses. Consistent with *Crocker*, once the county court denied the motion to dismiss, it was required to enter a default and final judgment against Pro-Art because there were no further defenses requiring trial.

JURISDICTIONAL STATEMENT

Although under Article V, Section 3(b)(4) of the Florida Constitution, this Court "may review any decision of a district court of appeal that . . . is certified by it to be in *direct* conflict with a decision of another district court of appeal", this jurisdiction is discretionary and not mandatory. Art. V, § (3)(b)(4), Fla. Const. (emphasis added); *see also Univ. of Miami v. Ruiz*, 948 So. 2d 723 (Fla. 2007) (declining to exercise jurisdiction after certification by district court because the two cases "address different situations that are not in conflict."); *Summit Claims Manag. v. Lawyers Express Trucking, Inc.*, 944 So. 2d 339 (Fla. 2006) (discharging jurisdiction where conflict had been certified because no actual conflict existed). "The so-called 'conflict jurisdiction' was not conveyed to the Supreme Court merely to convert it into a 'court of selected errors' whereby the Justices of this Court could whimsically select cases for review in order to satisfy some notion that the case would be of such importance as to justify the interest or attention of this Court." *Nielsen v. City of Sarasota*, 117 So. 2d 731, 734 (Fla. 1960). "In order to assert our power to set aside the decision of a Court of Appeal on the conflict theory we must find in that decision a real, live and vital conflict . . . ." *Id*.

ARGUMENT

THERE IS NO DIRECT CONFLICT BETWEEN THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IN THIS CASE AND THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL IN *CROCKER V. DILAND CORP*.

Upon careful analysis, the decision of the Fifth District Court of Appeal in *Crocker* is consistent with the decision of the Fourth District Court of Appeal. Both courts recognize that Florida's summary procedure, Chapter 51, Florida Statutes, permits only a single opportunity to raise defenses. The cases differ in result only because of the nature of the "defenses" asserted in the respective motions to dismiss. In *Crocker*, the defendant counterclaimed against the plaintiff for unlawful entry under Chapter 82, Florida Statutes and invoked the summary procedure under Section 51.011. *Crocker*, 593 So. 2d at 1098. The plaintiff filed a motion to dismiss, asserting failure to state a cause of action upon which relief could be granted, but did not file any answer. *Id*. The defendant contended that it was entitled to a default because the plaintiff had failed to file an answer setting forth all defenses of law or fact within five (5) days of service pursuant to Section 51.011. The lower tribunal denied the motion for default. On certiorari, the Fifth District Court of Appeal denied the petition, treating the motion to dismiss as a defective answer that precluded the entry of a default. The *Crocker* court,

however, made clear that the only defenses that could be considered were those that were contained in the motion to dismiss:

> [T]he procedural scheme set forth in section 51.011 seems straightforward. All defenses of law or fact must be filed in an answer within five days. There is no option to file certain defenses by motion as is authorized by rule 1.140; *all* defenses (which would necessarily include defense of failure to state a cause of action, see rule 1.140) *must* be filed within *five* days.

Id. at 1099.

The Fifth District explained that the plaintiff "was obliged to file all of its defenses, including failure to state a cause of action, within five days and by failing to do so was exposed to entry of a default." *Id*. at 1100. In that case, the plaintiff "barely met the requirement of rule 1.500(c) to plead or otherwise defend before entry of the default," by filing a motion to dismiss asserting failure to state a cause of action. *Id*. In so doing, the court determined that:

> Although what was filed was denominated a "motion to dismiss," not an answer, it did contain the statement of a defense of law or fact. In essence, [the plaintiff] filed a defective answer . . . . Unless given leave to amend by the trial court, however, <u>it would be that single statement of defenses on which [the plaintiff] would be obliged to defend at the expedited trial</u>."

Id. (emphasis added).

Here, the sole timely "defense" asserted by way of Pro-Art's motion to dismiss was that the county court lacked jurisdiction to hear the case. After the

county court correctly rejected this argument, there simply were no further defenses that had been timely asserted for which trial was necessary.

This matter and *Crocker* reinforce the essential principle in a summary proceeding that there is only one opportunity to assert all defenses of law and fact within five (5) days of service under Fla. Stat. § 51.011. Neither court would permit additional defenses after the five (5) day deadline. As such, *Crocker* can be reconciled with the Fourth District's holding that section 51.011 allows the entry of default once the time to answer has expired and the court has disposed of timely filed defensive motions.

CONCLUSION

Based on the foregoing reasons and because no direct conflict exists between this case and *Crocker*, this Court should decline to exercise its discretionary jurisdiction here.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this Respondent's V-Strategic Group LLCC's Brief on Jurisdiction was mailed on **David H. Charlip, Esq.**, CHARLIP LAW, LC, Harrison Executive Centre, 1930 Harrison Street, Suite 208, Hollywood, Florida, 33020, this _____ day of August, 2007.

_____

Craig S. Barnett

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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Craig S. Barnett

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