IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC07-1397

PRO-ART DENTAL LAB, INC.,
A Florida Corporation,

Petitioner/Defendant,

v.

V-STRATEGIC GROUP, LLC,
A Florida Corporation,

Respondent/Plaintiff.

An Appeal from The District Court of Appeal of The State of Florida
Fourth District
Case No.: 4D06-5016

PETITIONER'S BRIEF ON JURISDICTION

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Statement Of The Case And Facts

On April 4, 2006, Respondent commenced an action in the County Court in and for Broward County, Florida. The Complaint was titled "Complaint For Ejectment" and contained a single count seeking Ejectment. The Complaint neither sought relief for violation of any provision of the existing lease agreement between the parties nor any remedy pursuant to Chapter 83, Part I, Florida Statutes ("Nonresidential Tenancies"). Respondent asserted that the proceeding was governed by the Summary Procedure statute, Section 51.011, Florida Statutes[1], and on April 10, 2006 served the Petitioner with a five-day summons. On April 7, 2006, Respondent filed a Notice of Filing "a copy of the letter dated October 13, 2005 as Exhibit '2' to its Complaint for Ejectment."

On April 10, 2006, Petitioner filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction plainly stating in the first paragraph that the County Court lacked subject matter jurisdiction under § 26.012.[2] On April 28, 2006, a hearing was held on the Petitioner's Motion to Dismiss and the County Court entered an order denying the Motion to Dismiss. The County Court noted the entry of new

[1] Respondent has never offered the legal basis for the application of § 51.011 other than Respondent sought possession of the subject property. Petitioner continuously argued that § 51.011 did not apply to the proceedings. The statutory remedy of Ejectment does not provide for the applicability of § 51.011 to those proceedings and the express language of § 51.011 states "The procedure in this section applies only to those actions specified by statute or rule."

[2] An Amended Motion to Dismiss was rejected for filing by the Clerk of the Court.

counsel in the proceedings and, on its own initiative, scheduled a hearing for the following Monday, May 1, 2006 to consider the Respondent's *ore tenus* motion for default. On April 28, 2006, the Petitioner filed its Answer and Affirmative Defenses to the Complaint. At the hearing on May 1, 2006, the County Court rejected the Petitioner's Answer, announced a default against the Petitioner, and simultaneously entered a Final Judgment for Possession, specifically ruling that "V-Strategic Group is entitled to the immediate entry of Final Judgment on Count I of Plaintiff's Complaint.", to-wit, Ejectment. The County Court simultaneously directed the issuance of a Writ of Possession "forthwith". On May 3, 2006, the Petitioner sought to obtain a stay in the County Court, however the case file was "closed" on the same day the Judgment of Possession was entered and the Clerk of the County Court refused to accept the Petitioner's stay request. On May 3, 2006, the Petitioner was involuntarily dispossessed.

Petitioner appealed to the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida where the Judgment was affirmed. A subsequent Petition for Writ of Certiorari to the Fourth District Court of Appeal was denied, however as part of the denial of a Motion for Rehearing, the Fourth District Court of Appeal certified direct conflict and this timely appeal ensued.

Summary Of Argument

The Fourth District Court of Appeal has certified conflict with the Fifth District's Opinion in Crocker v Diland Corporation, 593 So. 2d 1096 (Fla. 5th DCA 1992). Interestingly, while both the Fourth and the Fifth District Courts of Appeal recognize and note the significance of the language in § 51.011, Florida Statutes, stating that "all defenses of law and fact shall be contained in defendant's answer which shall be filed within 5 days after service of process", they diverge as to the immediate effect of the failure of the defendant to file an answer.

Applying the provisions of Rule 1.500(c), Fla.R.Civ.P., the Fifth District Court of Appeal looks to the status of the pleadings at the time of the hearing on the motion for default. Under the provisions of Rule 1.500(c), the filing of any answer or otherwise defending prior to the hearing makes the entry of a default improper. Accordingly, the Fifth District does not construe § 51.011 as abrogating Rule 1.500(c).

The Fourth District has essentially held that § 51.011, Florida Statutes, has abrogated Rule 1.500(c), Fla.R.Civ.P. Thus, under the Fourth District's construction of § 51.011, Florida Statutes, failure of file an answer is the equivalent of an *eo instante* default, without motion and hearing.

Assuming, *arguendo*, that this Court exercises it discretionary jurisdiction to resolve the conflict between these decisions, the Petitioner's Merits Brief will

demonstrate that (1) by enacting § 51.011, Florida Statutes, the Florida Legislature never intended to nor could it abrogate Rule 1.500(c), (2) to create an *eo instante* default for failure to file an answer is inconsistent with the language of § 51.011, Florida Statutes, and contrary to the applicable rules of procedure, and (3) the facts of this case are consistent with the holding in Crocker and that the entry of the default against the Petitioner was clearly contrary to established law, notwithstanding the provisions of § 51.011.

ARGUMENT

I
Jurisdiction

This Court may exercise its jurisdiction to 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." *art. V, § 3(b)(4), Fla.Const.* "district court opinions accepted [for review as certified conflict cases under article V, section 3(b)(4) of the Florida Constitution] . . . almost uniformly meet two requirements: they use the word 'certify' or some variation of the root word 'certif.-' in connection with the word 'conflict;' and, they indicate a decision from another district court upon which the conflict is based." Harry Lee Anstead, Gerald Kogan, Thomas D. Hall, & Robert Craig Waters, *The Operation and Jurisdiction of the Supreme Court of Florida*, 29 NOVA L. REV. 431, 529 (2005) (footnote

omitted)." See also State v. Vickery, Nos. SC04-605, SC04-1810, SC05-82 (Fla. July 5, 2007).

Here, the opinion of the Fourth District Court of Appeal on the Petitioner's Motion for Rehearing meets both of those criteria in the opening sentence.

II
This Court Should Exercise Its Discretionary Jurisdiction To Resolve The Direct Conflict Certified By The Fourth District Court Of Appeal

In Crocker, a claim for unlawful entry under Chapter 82, Florida Statutes, was included as part of a counterclaim to a suit for declaratory relief. When the counter-defendant failed to answer eighteen (18) days after service, the counter-plaintiff moved for default and set the motion for hearing thirty-three (33) days later. On the date of the hearing, the counter-defendant filed a motion to dismiss. The county court denied the motion for default holding that Rule 1.140, Fla.R.Civ.P. tolled the time for filing an answer. On appeal, the Fifth District observed that the application of ordinary Rule 1.140 motion practice to summary proceedings "largely emasculates the summary procedure. By the mere expediency of filing a motion to dismiss, [counter-defendant] Diland effectively neutralized the principal expediting feature of 51.011." Crocker at 1099. The Fifth District held that "Diland was wrong in relying on its motion to dismiss to toll the time to file its answer" and "by failing to do so was exposed to entry of a default." Crocker at 1100. Notwithstanding the foregoing, the Fifth District went

on to hold that the counter-defendant's failure to file an answer did not end the analysis because "the ultimate issue is Crocker's entitlement to a default." Crocker at 1100. Applying the provisions of Rule 1.500(c), Fla.R.Civ.P., the Fifth District determined that pleading or otherwise defending "before hearing on the motion for default" precludes entry of a default. Id.

The Fifth District's ruling in Crocker is in direct conflict with the Fourth District's ruling in this case. As noted herein above, while both District Courts of Appeal agree that § 51.011, Florida Statutes, removed motion practice from cases governed by the Rules of Summary Procedure, the Fourth District has expanded that language well beyond the removal of motion practice to the supplantation of the remaining Florida Rules of Civil Procedure, particularly, Rule 1.500(c). Moreover, the Fourth District's construction of § 51.011, Florida Statutes, impacts both on the public's constitutional right of access to the Courts as well as the legislature's power to make and/or alter rules of court.

Further, the decision of the Fourth District Court of Appeal runs contrary to a long line of cases from Lake Towers, Inc. v. Axlerod, 216 So.2d 86 (Fla.4th DCA 1968) through TLC Trust v. Sender, 757 So.2d 570 (Fla.4th DCA 2000) holding that the entry of a default after the filing of an answer is improper.

Finally, there is a compelling public policy interest in reconciling the conflict between these two cases. It is imperative that parties to proceedings

governed by § 51.011 have a clear understanding of the effect of filing motions directed to matters other than "defenses of law and fact." Defendants making a challenge to jurisdiction or service of process are entitled to a clear enunciation of the effect of not filing an answer within the five day period set forth in §51.011. As noted above, the construction provided in the rulings and opinions of the Lower Tribunals in these proceedings are the equivalent of an *eo instante* default, while the construction provided in Crocker relies on the decades-long line of cases holding that a default may not properly be entered subsequent to the filing of an answer. Given the already expedited process available under the law and the ability of a plaintiff to set a matter for trial on an expedited time table, the potential consequences for untimely filing of an answer, preceding entry of default, is clearly a denial of access to the courts.

Conclusion

The opinion of the Fourth District Court of Appeal certifying conflict between its decision in this case and Crocker v Diland Corporation, 593 So.2d 1096 (Fla. 5th DCA 1992) provides this Court with discretionary jurisdiction to resolve the conflict. While the two District Courts do not construe a defendant's pleading responsibility under the language of § 51.011 differently, they do arrive at distinctively different constructions of the effect of failure to file an answer within the five day statutory period.

Given the number of actions to which § 51.011 is applicable, the resolution of the certified conflict is important to a clear understanding of the statute and represents a significant public policy interest to the citizens of Florida.

Accordingly, Petitioner requests that this Honorable Court exercise its discretionary jurisdiction in this case.

Respectfully submitted this _____ day of August, 2007.

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Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Petitioner's Brief on Jurisdiction was served, via United States Mail, Postage Prepaid, on Craig S. Barnett, Esq. and Cory W. Eichhorn, Esq., Greenberg Traurig, P.A., 401 East Las Olas Boulevard, Suite 2000, Fort Lauderdale, Florida 33301 this _____ day of August, 2007.

_____

David H. Charlip, Esq.

Certification – Rule 9.210(A)(2)

Pursuant to Rule 9.210(a)(2), I hereby certify that the preceding computer-generated Petitioner's Brief on Jurisdiction has been prepared in Times New Roman 14-point font.

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David H. Charlip, Esq.