

SUPREME COURT OF FLORIDA

DYCK-O'NEAL, INC.,

Petitioner,

Case No.: SC17-975

DCA Case No.: 1D16-1624

v.

Circuit Court (Trial Court) Case No.:
2014-CA-000438

HEATHER LANHAM,

Respondent.

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RESPONDENT'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

The Petitioner, DYCK-O'NEAL, INC., hereafter referred to as "Petitioner" or "Dyck," requests this Court to impose its discretionary jurisdiction to review a decision entered by the First District Court of Appeal. In this Brief on Jurisdiction, the Respondent, HEATHER LANHAM, shall be referred to as "Lanham." As mandated by the Florida Rules of Appellate Procedure, briefs on jurisdiction shall be limited solely to the issue of the Supreme Court's jurisdiction.¹ Fla. R. App. P. 9.120(b).

STATEMENT OF THE CASE AND FACTS

The instant matter arose from a mortgage loan made to Lanham by Compass Bank at the pinnacle of Florida's real-estate bubble in 2007. The note was assigned to another entity, which instituted a foreclosure action against Lanham resulting in 2010 in an *in rem* judgment of foreclosure with an express reservation of jurisdiction to enter a deficiency pursuant to the plaintiff's request. That judgment was assigned prior to the judicial sale to an entity that purchased foreclosed collateral and then assigned its rights under the judgment to Dyck. On May 27, 2014, Petitioner initiated a new and separate lawsuit for deficiency before a different court, which the First District Court of Appeal determined lacked

¹ Dyck failed to comply with rule limiting the scope of a jurisdictional brief by arguing the merits and implications of the decision under consideration. Such noncompliance has been typical of Dyck's conduct to date.

jurisdiction in a *per curiam* opinion citing little more than a single authority: *Higgins v. Dyck-O'Neal, Inc.*, 201 So. 3d 157 (Fla. 1st DCA 2016), certifying conflict with *Garcia v. Dyck-O'Neal, Inc.*, 178 So. 3d 433 (Fla. 3d DCA 2015); *Dyck-O'Neal, Inc. v. Hendrick*, 200 So. 3d 181 (Fla. 5th DCA 2016); *Gdovin v. Dyck-O'Neal, Inc.*, 198 So. 3d 986 (Fla. 2d DCA 2016); and *Dyck-O'Neal, Inc. v. McKenna*, 198 So. 3d 1038 (Fla. 4th DCA 2016). The substantive legal issue to be decided is a narrow issue of law regarding whether a foreclosing creditor can commence new action, with a new judge, utilizing the jurisdiction of a new court, to commence a separate deficiency action, after having requested a judgment from the original foreclosure court to reserve jurisdiction to enter a deficiency, and successfully convincing the original foreclosure court to grant such request.

This Court can take judicial notice that Dyck is a party to each of the cases in which this issue of law has arisen, including the *Higgins* case, represented by the same counsel in that case as in this case. This Court can also take judicial notice that, in this case, Dyck failed to disclose adverse binding authority to the District Court of Appeal, and Dyck failed to make any argument, file a reply brief, or otherwise address the substantive legal issue that Dyck is now asking this Court to accept jurisdiction to decide. Petitioner could have appealed the issue in the *Higgins* case itself, but chose not to. Petitioner could have—and should have—

raised this issue in the proceedings below, but chose not to.² Despite having failed to raise this issue, file a reply in response, or otherwise respond to this issue in any way in the First District Court of Appeal, Petitioner nevertheless is asking (improperly) for this Court to accept jurisdiction and consider all of its arguments for the first time, after having failed to raise any of them in the proceedings below.

SUMMARY OF ARGUMENT

The First District Court of Appeal did not elaborate on the reasoning behind its *per curiam* opinion beyond citations to cases to which Dyck is a party throughout Florida, none of which are pending review. It is inappropriate, or at a minimum unfavorable, to accept discretionary jurisdiction to review a decision of such little analysis.

Moreover, Dyck's conduct throughout these proceedings should not be rewarded by this Court accepting jurisdiction of this case. Dyck should be deemed to have waived all of its potential arguments because it failed to disclose to the First District Court of Appeal that there was binding authority directly adverse to

² In particular, Petitioner's counsel failed to apprise the First District Court of Appeal that there was binding case law holding that the trial court lacked jurisdiction to enter a deficiency judgment in this case, even though *Higgins* is directly on point, and counsel had an ethical obligation to disclose it. *See* Rule 4-3.3(a)(3), Rules Regulating the Florida Bar; *Boca Burger, Inc. v. Forum*, 912 So. 2d 561, 571-72 (2005). Counsel had to have known about *Higgins*, since counsel was also counsel of record for Dyck in *Higgins*.

Dyck, and because it chose not to make any argument, file a reply brief, or otherwise address the issue after it was brought to light by Lanham.

Finally, the conflict that Dyck asserts was created by *Higgins* involves an obscure issue of law regarding the reservation of jurisdiction of a mortgage deficiency action, which is unlikely to adversely affect any substantial number of Florida citizens. It is not a coincidence that Dyck is party to every case in which this issue has been addressed on appeal, as Dyck is one of very few, if not the only, entity that will be affected by this decision.

Under the circumstances, this Court should decline to exercise discretionary jurisdiction of this case.

ARGUMENT

I. The First District Court of Appeal Decision is Too Limited in Analysis to Invoke Discretionary Jurisdiction for Review.

The Florida Constitution grants this Court discretionary jurisdiction to review a decision of a district court of appeal that is certified to be in direct conflict with a decision from another district court of appeal. Fla Const., Art V, s. 3(b)(4). The grant of this elective review, however, is not intended to demote a district court of appeal to an intermediate court, but rather to preserve the Supreme Court's supervisory role and relieve its overburdened caseload. *See Jackson v. State*, 926 So. 2d 1262, 1265-1266 (Fla. 2006). In preserving this practical purpose, this Court has determined that its discretionary review jurisdiction does not extend to four

types of cases: (1) a *per curiam* affirmances without an opinion, (2) a *per curiam* affirmance with a citation to (i) a case not pending review or a case that has not been quashed or reviewed by this Court, (ii) a rule of procedure, or (iii) a statute; (3) a *per curiam* or other unelaborated denial of relief rendered without a written opinion; and (4) a *per curiam* or other unelaborated denial of relief with a citation to (i) a case not pending review or a case that has not been quashed or reviewed by this Court, (ii) a rule of procedure, or (iii) a statute. *See Wells v. State*, 132 So.3d 1110, 1113 (Fla. 2014) (summarizing the jurisprudence on lack of discretionary jurisdiction to review unexplained *per curiam* opinions).

This case involves the type of unelaborated, *per curiam* opinion over which this Court has indicated it lacks jurisdiction. *See id.* In this case, the First District Court of Appeal decision that Petitioner asks this Court to review is a *per curiam* opinion consisting of a single substantive sentence and citation to a prior case not pending review or been reviewed by this Court.³ Even though the district court of appeal certified conflict with its sister courts as to this citation, the omission of any substantive discussion for consideration imposes an impractical handicap upon an appellate body, which this Court explained in *Wells* impedes its ability to accept

³ It is noteworthy that the Petitioner was the appellant in *Higgins*, the case cited by the First District Court of Appeal, and could have, but did not, petition this Court to review that decision.

discretionary jurisdiction. For such reason, this Court should decline jurisdiction to review the district court of appeal decision.

II. Petitioner Should Be Deemed to Have Waived Its Arguments by Failing to Disclose to the District Court Adverse Binding Precedent, and by Failing to Make Any Argument on the Issue in the District Court

Throughout the trial court proceedings and continuing on appeal, Dyck has engaged in improper litigation practices and improper conduct.⁴ At the beginning of the case, Dyck’s counsel improperly filed a motion for default (“Motion for Default”), even though it knew Lanham was represented by counsel, and Lanham’s counsel had appeared in the case and filed a notice of Dyck’s noncompliance of applicable statutes.

Dyck then went one step further to actively ensure that Lanham’s counsel intentionally was not given notice of the Motion for Default by affirmatively electing not to have the electronic filing system serve the pleading on Lanham’s counsel, instead mailing the motion to Lanham personally and causing her counsel not to receive notice of Dyck’s court activity, all of which violated the Florida Rules of Civil Procedure and Rule 2.516 of the Florida Rules of Judicial Administration (collectively, “Rules”).

This type of misbehavior and noncompliance with the rules continued throughout this entire proceeding. Dyck never submitted any legal argument or

⁴ This Court can take judicial notice of the proceedings below.

evidence controverting Lanham's Motion for Summary Judgment prior to the hearing in the trial court; it was only after Dyck lost the summary judgment hearing that Dyck then filed a Motion for Rehearing, raising all of its arguments for the first time.

On appeal, Dyck raised for the first time still more arguments that it had never submitted to the trial court in connection with either the Motion for Summary Judgment or the Motion for Rehearing. Incredibly, Dyck also failed to disclose to the court adverse binding precedent (i.e., *Higgins*), holding that the trial court lacked jurisdiction to enter judgment in this case, even though Dyck was required to do so by Rule 4-3.3(a)(3), Rules Regulating the Florida Bar, and the principles explained in *Boca Burger, Inc. v. Forum*, 912 So.2d 561, 571-72 (2005).

After Lanham raised the jurisdictional issue in its Answer Brief in the proceeding below, Dyck did nothing. Dyck failed to file a reply brief or otherwise respond in any way to Lanham's jurisdictional arguments. Dyck will be making all of its arguments for the first time in this Court, even though Dyck had multiple opportunities to raise them with the First District Court of Appeal. Dyck could have asked the district court of appeal to reconsider its position, or to hold an *en banc* hearing. Instead, Dyck did nothing, filed no reply, and did not otherwise make any argument of record in this case, even after Dyck's failure to disclose

binding precedent was brought to light. Under these circumstances, Dyck should be deemed to have waived any arguments it may have on the jurisdictional issue. *Cf. Dade County School Bd. v. Radio Station WQBA*, 731 So. 2d 638, 644 (Fla. 1999) (explaining that “[g]enerally, if a claim is not raised in the trial court, it will not be considered on appeal”).

This Court should not reward Dyck’s conduct by accepting jurisdiction. Dyck’s conduct and litigation tactics weigh heavily against this Court exercising its discretion to accept jurisdiction of this case.

III. The Issue to Be Decided Is Obscure and Only Important to the Non-Citizen Dyck

As Dyck indicates in its Brief on Jurisdiction, its business consists of the collection of post-foreclosure deficiencies against Florida citizens arising from the Florida real estate collapse as assigned to it by the original lender, or a secondary, tertiary, or even quaternary creditor, as in the case at bar.⁵ Dyck, which is not a Florida citizen, argues that the issue to be decided in this case is significant and suggests it would affect borrowers and lenders throughout the state. Petitioner’s Brief on Jurisdiction at 3. However, the lack of significance of the issue is demonstrated by the fact (of which this Court may take judicial notice) that all of

⁵ Dyck has asserted its business practice only in its appellate briefs, the evidence of which in the record is solely the purchase and assignment of the foreclosure judgment against Lanham and deficiency rights arising therefrom. Nevertheless, since Dyck has opened the door, this Court should also consider Dyck’s business practices and the nature of its business.

the cases in which this issue has been raised have all involved Dyck. Indeed, it appears Dyck may be the only entity that is affected by *Higgins*, and as the financial collapse and mortgage foreclosure crisis have abated, any significance to the issue to be decided diminishes. Furthermore, it does not appear that this issue is even that important to Dyck, since Dyck was a party to the *Higgins* case and could have appealed that decision, but chose not to.

Moreover, the nature of Dyck's business belies its primary argument that the results of *Higgins* are that "borrowers in the First District will receive a windfall and lenders will lose the bargained-for benefit of their secured lending transactions." Petitioner's Brief on Jurisdiction at 3. Dyck's own Brief on Jurisdiction makes clear that it is **not** a "lender", as it is not an entity from which something is borrowed. *See Blacks Law Dictionary* 921 (8th ed. 2004). Dyck is a vulture capital firm that purchased unknown sums of speculative, unliquidated deficiency debt and is now pursuing that debt against financially distressed Florida consumers. Dyck, as the common alleged creditor in the conflicting cases (cited above), only acquired its interest *after* a foreclosure judgment is entered, and after the collateral is sold at a foreclosure sale. As such, the actual secured lenders have already received the benefit of their "secured" lending transactions, while Dyck chose to purchase the stale, unsecured, and unliquidated mortgage deficiency debt for pennies on the dollar. The reality is that, if anyone is receiving a windfall in

these circumstances, it is Dyck and not the financially distressed consumers whom it is pursuing.

For the foregoing reasons, this Court should exercise its discretion and decline to accept jurisdiction in this case.

CONCLUSION

Dyck's conduct weighs against accepting jurisdiction of this case, as does the limited impact the underlying issue in this case will have on the citizens of Florida. Accordingly, this Court should exercise its discretion and decline to accept jurisdiction in this case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of July, 2017, a true and correct copy of the foregoing has been provided electronically to the following: David M. Snyder, Esq., Susan B. Morrison, Esq., and Joshua Moore, Esq.

/s/ Rick A. Savage
RICK A. SAVAGE
Florida Bar No. 0026965

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Answer Brief complies with the requirements set forth in Rule 9.210, Florida Rules of Appellate Procedure.

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