

IN THE SUPREME COURT OF
THE STATE OF FLORIDA

CASE NO.: 67,770

FRANCISCO J. MANRIQUE,
INVERSIONES CONTINENTALES,
N.V., a foreign corporation
and ARGOVILLE CORPORATON, N.V.,
a foreign corporation,

Appellants,

vs.

GIORGIO FABBRI,

Appellee.

FILED

SID J. WHITE

NOV 12 1985

CLERK, SUPREME COURT

By _____

Chief Deputy Clerk

APPEAL FROM THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA, THIRD DISTRICT

APPELLEE'S BRIEF UPON JURISDICTION

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OF FLORIDA

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FILED

SID J. VANCE

DEC 2 1985

CLERK, SUPREME COURT

By _____
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NOTICE OF CORRECTION TO
APPELLEE'S BRIEF UPON JURISDICTION

COMES NOW the Appellee, GIORGIO FABBRI and respectfully notifies this Court that an incorrect citation was cited by Appellee in its Brief. The proper citation should be Pena v. Tampa Federal Savings and Loan Association, 385 So.2d 1370 (Fla. 1980).

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been served by mail this 25th day of November, 1985 to: AGUSTIN DE GOYTISOLO, ESQ., Trenam, Simmons, Kemker, Scharf, Barkin, Frye & O'Neill, P.A., Suite 1000 DuPont Building, 169 East Flagler Street, Miami, Florida 33131.

Respectfully submitted,

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By _____

MANUEL A. REBOSO

TABLE OF CITATIONS

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SUMMARY OF ARGUMENT

THE SUPREME COURT

CLERK

In order for the Supreme Court to exercise its discretionary jurisdiction to review this case, the Appellant must establish a direct conflict of decisions between the districts as required by the Florida Constitution. Appellants have failed to establish any such conflict in that the cases cited in Appellants' Brief as setting forth the basis for the conflict do not concern the same factual or legal issue that is currently before the Court. Furthermore, in its Opinion the Third District did not rely, but in fact expressly rejected, the invitation to apply any of the cases cited by Appellants as giving rise to the required conflict.

STATEMENT OF THE CASE

Appellee GIORGIO FABBRI (hereinafter "FABBRI"), filed a Complaint against Appellants FRANCISCO J. MANRIQUE (hereinafter "MANRIQUE"), INVERSIONES CONTINENTALES (hereinafter "CONTINENTALES") and ARGOVILLE CORPORATION, N.V. (hereinafter "ARGOVILLE"). The Complaint contains five Counts. Count I seeks a declaratory judgment regarding the rights and other relationships of the parties to a stockholders' settlement agreement and stock option and the addendum thereto (hereinafter "option agreement"). Count II seeks specific performance on the part of Appellants regarding FABBRI's exercise of the option. Count III seeks an injunction prohibiting Appellants from selling or conveying real property owned by ARGOVILLE without giving notice to or obtaining consent from FABBRI. Count IV seeks an accounting of all business transactions entered into by ARGOVILLE. Count V alleges a breach of the agreement.

MANRIQUE, CONTINENTALES and ARGOVILLE filed a Motion to Dismiss FABBRI's Complaint for lack of subject matter jurisdiction. The Motion to Dismiss for lack of subject matter jurisdiction was grounded upon Paragraph Four of the option agreement which provides:

"... the laws of the Netherlands Antilles shall control in case of any such conflict or dispute between the parties to this agreement, who submit themselves to that jurisdiction...."

The trial court denied Appellants' Motion to Dismiss by Order rendered April 8, 1985. Appellants subsequently filed an

Appeal to the District Court of Appeal, Third District. The order of the trial court was affirmed by the Third District in its opinion of August 6, 1985, a copy of which is contained in the appendix to Appellants' Brief Upon Jurisdiction (hereinafter "A-1"). Appellants' Motion for Clarification of the Opinion was denied by Order dated September 17, 1985. This Appeal ensued.

STATEMENT OF THE FACTS

ARGOVILLE Corporation is a Netherlands Antilles corporation authorized and doing business in the State of Florida. Prior to August, 1981, FABBRI and CONTINENTALES each owned 50% of the outstanding shares of ARGOVILLE. ARGOVILLE's principal asset is a parcel of real property located in Dade County, Florida with a value in excess of \$4,000,000.00 (Four Million Dollars).

On August 31, 1981, FABBRI entered into an agreement with CONTINENTALES through its nominee representative, FRANCISCO J. MANRIQUE. This agreement was executed in Miami, Florida. The agreement provided:

1. FABBRI sold his 50% interest in ARGOVILLE to CONTINENTALES.
2. FABBRI was given an option to repurchase the same amount of stock.
3. FABBRI was given the proxy to vote 50% of the stock of ARGOVILLE.
4. FABBRI was given a seat on the three person board of directors during the option period.

5. FABBRI was entitled to receive 50% of the proceeds from any loans made to ARGOVILLE.

6. FABBRI's exercise of the option would entitle him to receive a credit toward the repurchase price of the stock equal to 50% of the amount of loans made to ARGOVILLE. The amounts were to be paid by ARGOVILLE directly to CONTINENTALES.

The option was to run for a period of one year from August 31, 1981, and could be renewed or extended for a second year at FABBRI's discretion. On February 21, 1982, FABBRI and CONTINENTALES and MANRIQUE executed an addendum to the option agreement of August 31, 1981. The addendum provided inter-alia, that the option period would run for three years thus allowing the option to be exercised on or before December 15, 1984.

On December 14, 1981, ARGOVILLE executed a mortgage in favor of Flagship National Bank of Miami on the real property owned by ARGOVILLE. The mortgage was given as security for the issuance of a letter of credit by Flagship for the benefit of MANRIQUE. MANRIQUE used the letter of credit to purchase stock in Gold Coast National Bank. FABBRI approved this two million six hundred thousand dollar (\$2,600,000.00) transaction when he executed the addendum to the option agreement referred to above. The addendum provided that MANRIQUE as principal debtor, personally guarantee repayment to Flagship.

On December 22, 1983, ARGOVILLE encumbered the property by pledging it as security for a loan from Capital Bank in the amount of \$5,120,000.00. The proceeds from this loan were

applied to satisfy the Flagship Bank loan referred to above. The remainder of the loan proceeds were paid to or for the benefit of MANRIQUE. FABBRI did not receive any portion of the loan proceeds as required under the terms of the option agreement.

On October 13, 1984, ARGOVILLE again encumbered the property by pledging it as security for a loan in the amount of \$6,600,000.00 from Bank Mercantil Venezolano, N.V. The proceeds of the loan were applied as follows:

1. Approximately \$250,000.00 was used to pay off the existing first mortgage on the real property owned by ARGOVILLE and located in Dade County, which mortgage was held by Biscayne National Corporation.

2. Approximately \$650,000.00 was used to satisfy personal indebtedness of MANRIQUE to Commerce Bank.

3. A portion of the \$6,600,000.00 was used to satisfy the Capital Bank loan referred to above. The remainder was paid to or for the benefit of MANRIQUE.

FABBRI did not receive any portion of these loan proceeds as required under the terms of the agreement.

On December 7, 1984, FABBRI exercised his option to repurchase and sought to apply the loan proceeds from the loans described above as a credit toward the repurchase price of the stock pursuant to the terms of the option agreement and addendum. Defendants refused to accept FABBRI's exercise of his option. In addition, Defendants refused to apply the proceeds

from the loans against the repurchase price of the stock or to convey the stock.

FABBRI filed this action.

ARGUMENT

ISSUE ON APPEAL

DOES THE OPINION FILED AUGUST 6, 1985, EXPRESSLY AND DIRECTLY CONFLICT WITH A DECISION OF ANOTHER DISTRICT COURT OF APPEAL ON THE SAME QUESTION OF LAW?

Appellants have requested the Supreme Court to invoke its discretionary jurisdiction pursuant to Rule 9.030(a)(2)(A)(iv), Rules of Appellate Procedure. In so doing Appellants have alleged that the opinion entered by the Third District on August 6, 1985, expressly and directly conflicts with Maritime Ltd. Partnership v. Greenman Advertising Associates, Inc., 455 So.2d 1121 (Fla. 4th DCA 1984). In so doing, they point out the conflict between Maritime and the Third District's decision in Zurich Insurance Company v. Allen, 436 So.2d 1094 (Fla. 3d DCA 1983).

The issue currently before the Supreme Court is not that which has been cited by either of the aforementioned cases. In their argument before the Third District, Appellants made reference to both Maritime and Zurich, and invited the court to recede from its holding in Zurich, and other decisions and adopt the rationale of the Fourth District. The Third District held in its opinion that the issue before the court was different than that addressed in either Zurich or Maritime and refused to apply either of these cases in its reasoning and stated in its opinion:

Because we conclude that the language of the contract as quoted above merely establishes which law governs in the event of a dispute we decline Appellants' invitation. There is no question that the parties are free to include a choice of law clause in a contract without violating any public policy. The phrase "who submit themselves to that jurisdiction" cannot reasonably be interpreted to require that all disputes arising under the contract be resolved in the Netherland Antilles. In no event can it be construed to oust Florida of subject matter jurisdiction. Citations omitted.

The scope of review by the Supreme Court of a decision of a Court of Appeal is extremely limited when the ground asserting jurisdiction is an alleged conflict of such decision with the decision of another appellate court on the same point of law. For this Court to interfere with the judgment of a District Court of Appeal, on the ground mentioned, it must appear the Court of Appeal has, in the decision challenged, made a pronouncement of a point of law which the bench and bar and future litigants may fairly regard as an authoritative precedent which is in direct conflict with the pronouncement on the same point of law in a decision or decisions of the Supreme Court or another District Court of Appeal. South Florida Hospital Corporation v. McCrea, 118 So.2d 25 (Fla. 1960). A simple reference to another District Court of Appeal case is insufficient basis for an appeal founded under conflict. Pena v. Tampa Federal Savings & Loan Association, 383 So.2d 1378 (Fla. 1980), if the cases claimed to be in conflict are distinguishable on their facts, or on the rule of law as applied to the facts, review by certiorari on the ground of conflict will not lie. Wilson v. Southern Bell Telephone and Telegraph, Co., 327 So.2d 220 (Fla. 1976).

The Third District's determination that the issue before it was different than the issue addressed by Zurich and Maritime and its refusal to base its decision on either of said cases, clearly removes the matter currently before the Supreme Court from any conflict that may exist between the Districts with regards to Zurich and Maritime. Therefore, Appellants failed to establish a direct conflict of decisions as required by the Florida Constitution. Fla. Const. Art. V, Section 3(b)(3).

CONCLUSION

The facts and the rule of law as applied to the facts in the Third District's Opinion of August 6, 1985, are distinguishable from the decision of the District Court of Appeal, Fourth District in Maritime and the decision of the District Court of Appeal, Third District in Zurich, and therefore there is no direct conflict between the decisions of the District Courts of Appeal with respect to the matter before this Court. The Supreme Court should therefore decline to exercise its discretionary jurisdiction in this case.

Respectfully submitted,

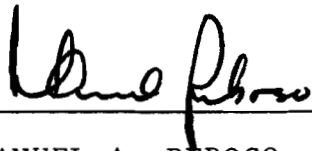
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BY: _____


MANUEL A REBOSO

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Appellee's Brief Upon Jurisdiction has been served by mail this 6th day of November, 1985, to: AGUSTINE DE GOYTISOLO, ESQ., Trenan, Simmons, Kemker, Scharf, Barkin, Frye & O'Neill, P.A., Suite 100 DuPont Building, 169 East Flagler Street, Miami, Florida 33131.

BY: 
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