IN THE SUPREME COURT OF THE

STATE OF FLORIDA

CASE NO. 70,464

BLAISE PICCHI,

Petitioner,

vs.

BARNETT BANK OF SOUTH FLORIDA, N.A.,
et al.,

Respondent.

RESPONDENT'S BRIEF

On Appeal from the District Court of Appeals
of the State of Florida, Fourth District

Case No. 86-1523

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RULES OF CIVIL PROCEDURE

Rule 1.500 Florida Rules of Civil Procedure

Rule 1.090(e) Florida Rules of Civil Procedure

Rule 55(b)(2) Federal Rules of Civil Procedure

PREFACE

This reply brief is submitted on behalf of Respondent, BARNETT BANK OF SOUTH FLORIDA, N.A. The following symbol will be used:

R - Record on Appeal

STATEMENT OF THE CASE AND FACTS

Petitioner, BLAISE PICCHI, sued the Respondent, BARNETT BANK OF SOUTH FLORIDA, N. A., and CREDIT BUREAU, INC., in Circuit Court for Broward County, Florida (R 5-13). The claim against Respondent, BARNETT BANK, is an action for damages pursuant to Florida Statute 559.77 and an action for libel (R 9-11). The Respondent, BARNETT BANK, was served on December 31, 1985 (R-5). A Notice of Appearance on behalf of Respondent, BARNETT BANK, was mailed to the attorney for the Petitioner, on January 16, 1986, and the original was mailed to the Court on that date (R-14).

Thereafter, a Motion for Default against Respondent, BARNETT BANK, was mailed by the attorney for the Petitioner on January 27, 1986, but apparently was not filed with the Clerk until March 26, 1986 (R-15). A Notice of Hearing on the Motion for Default was never served, received, nor filed with the Court.

However, simultaneously with the receipt of the Motion for Default, Respondent, BARNETT BANK, did receive a Notice of Hearing from the attorney for the Petitioner setting by special appointment on February 5, 1986, a hearing on a Motion to Dismiss of Credit Bureau, Inc. (R-17). Shortly thereafter, the undersigned received a Notice of Taking Deposition of the Petitioner, BLAISE PICCHI, which was set for February 5, 1986, at 3:15 P.M., from the attorney for the Co-Respondent, CREDIT BUREAU (R-18).

Thereafter, on February 3, 1986, Respondent, BARNETT BANK, received telephone notice from the office of the attorney

for the Petitioner indicating that the Motion to Dismiss previously set for February 5, 1986, was being cancelled and would be re-noticed and that the deposition of the Petitioner, BLAISE PICCHI, would be re-scheduled by the attorney for CREDIT BUREAU, the Co-Respondent (R 43-44). Five minutes later, Respondent, BARNETT BANK, received a call from the secretary of the attorney for CREDIT BUREAU, indicating that the deposition was cancelled and that it would be re-noticed (R 43-44). AT NO TIME WAS THE UNDERSIGNED, AS ATTORNEY FOR BARNETT BANK, OR HIS LAW OFFICE, ADVISED THAT A HEARING EITHER WAS HELD OR WOULD BE HELD ON FEBRUARY 3, 1986, ON PETITIONER'S MOTION FOR DEFAULT. In addition, the undersigned NEVER received a copy of the entry of the Order of Default dated February 3, 1986 (R-30). The attorney for the Petitioner admitted in open court that neither a Notice of Hearing on the Motion for Default nor a copy of the Order Granting the Default were ever served (R 26 & 30).

On April 1, 1986, Respondent, BARNETT BANK, served a Motion to Dismiss and a Notice of Hearing, setting the Hearing on the Motion to Dismiss for April 10, 1986 (R 21-23). At the hearing, after the presentation of the argument on the Motion to Dismiss, Respondent, BARNETT BANK, was informed for the first time in open court that a Default had been entered on February 3, (R-26). After some discussion (R 26-38), an Order was entered by the Court indicating that the Motion to Dismiss was moot since a Default has been taken and that Respondent, BARNETT BANK, had 20 days to file a Motion to Vacate the Default that was entered on February 3, 1986 (R-40).

The Motion to Vacate the Default was timely filed on April 29, 1986, and a Hearing was scheduled for May 12, 1986 (R 41-42,46). The Court rendered an Order on June 6, 1986, denying the Motion to Vacate Default (R 1-3). Respondent, BARNETT BANK, filed an appeal (R-4) to the Fourth District Court of Appeal, which reversed the trial Court, but certified the issue to be of great public importance. Petitioner filed a Motion to Invoke Discretionary Jurisdiction on or about April 24, 1987.

POINT INVOLVED

I

DOES FLORIDA RULE OF CIVIL PROCEDURE 1.500(b) REQUIRE A NOTICE OF HEARING BEFORE ENTRY OF A DEFAULT FOLLOWING FILING OF A NOTICE OF APPEARANCE?

SUMMARY OF ARGUMENT

The basic issue in this case is whether a default should be entered upon ex-parte application against the party who has filed a Notice of Appearance. Essentially, Petitioner is relying upon Fierro v. Lewis, infra, and subsequent cases decided by the Fifth District Court of Appeals, which hold that Rule 1.500(b) RCP only requires that a copy of the application for default be served upon a party who was filed or served a paper in an action, but does not require a noticed hearing for entry of an Order of Default against that party.

The Fourth District Court of Appeals specifically recognized and rejected the argument espoused in Fierro, and in Okeechobee Ins. Agency v. Barnett Bank, infra, indicated that it did not understand why a litigant would need to receive notice of an application for default unless he is allowed to do something after receiving that notice. In addition, the Third District Court of Appeals in Cohen v. Barnett Bank of South Florida, N.A., infra, indicated that the "notice of application" provided by 1.500(b) would be purposeless unless given in sufficient time to permit some meaningful action to be taken upon it after its receipt.

The Rules of Civil Procedure do not prohibit the use of a "Notice of Appearance" and they extract no penalty for its use as a practical way of placing counsel's name and address on the

record to avoid Court action on some extra-ordinary early application by the Plaintiff. While the use of that procedure would give Defendants additional time within which to respond to a complaint, the amount of time could be minimized by Plaintiff's counsel filing a Motion for Default and serving said Motion and Notice of Hearing upon Defendant's counsel. This procedure would be consistent with both expediting the progress of litigation and the resolution of litigation on the merits rather than upon technical pleading rules. All of this could be accomplished without the necessity of burdening the Courts with needless hearings. The adoption and uniform application of the decisions of the Third and Fourth Districts Courts of Appeals on this issue would help promote those desired goals.

ARGUMENT

POINT INVOLVED

FLORIDA RULE OF CIVIL PROCEDURE 1.500(b), DOES REQUIRE A NOTICE OF HEARING BEFORE ENTRY OF A DEFAULT FOLLOWING FILING OF A NOTICE OF APPEARANCE.

The legal issue in this case is extremely clear and has been decided by the District Courts of Appeal on numerous occasions, to-wit: whether a default should be entered upon ex-parte application against a party who has filed a Notice of Appearance. The trial court below entered a default on February 3, 1986, against Respondent, BARNETT BANK, without a Notice of Hearing ever being sent to Respondent, BARNETT BANK, on authority of Fierro v. Lewis, 388 So. 2d 1361 (Fla. 5th DCA 1980). However, the Fourth District in Okeechobee Insurance v. Barnett Bank, 434 So. 2d 334 (Fla. 4th DCA 1983) questioned the interpretation of the Fifth District Court of Appeals with reference to Rule 1.500(b) and held that where parties have filed an appearance, default should not be routinely entered upon ex parte applications and that the failure to set aside such a default was an abuse of discretion. That position was reaffirmed by the Fourth District Court in Bloom v. Palmetto Federal Savings and Loan Association, 477 S. 2d 48 (Fla. 4th DCA 1985), and again in the instant case.

The Third District has noted and expressed doubt concerning the wisdom of some of the notice and filing aspects of Fla. R. Civ. P. 1.500(b) and the "Notice of Appearance" ploy they have engendered, but indicated that counsel have the right to rely upon and the Court has the duty to apply these provisions as they now exist. See Cohen v. Barnett Bank of South Florida, N.A., 433 So. 2d 1354 (Fla 3rd DCA. 1983). The Court in Cohen indicated that the "notice of application" provided by 1.500(b) would be purposeless unless given in sufficient time to permit some meaningful action to be taken upon it after its receipt - to file a pleading before the default so as to preclude its being entered.

Petitioner is asking this Court to adopt the holding of the Fifth District in Fierro and apply it to the instant case. In his brief he suggests that a "Notice of Appearance" is not allowed by the Florida Civil Rules and that there are strong policy arguments in favor of construing "pleading" as contained in 1.500(a)(b) to exclude a "Notice of Appearance". Although a "Notice of Appearance" is not specifically enunciated in the Florida Rules, it has been recognized by the Third District as "an entirely neutral and innocuous piece of paper, which indicates no acknowledgment of the Court's authority, contains no request for the assistance of its process, and, most important, reflects no submission to its jurisdiction. . ." See Weatherhead Co. v. Coletti 392 So. 2d 1342 (Fla 3rd DCA 1980).

In Public Gas Co. v. Weatherhead Co., 409 So. 2d 1026 (Fla 1982), this Court agreed with the holding and rationale of

the Third District that the filing of a "Notice of Appearance" by a corporation's counsel did not waive its right to claim lack of jurisdiction over its person. In so doing this Court neither indicated that "Notice of Appearance" was not permitted by the rules nor did it condemn its use. The Supreme Court opinion that quoted that portion of the District Court's reasoning espousing the Courts' philosophy that ". . .as far as is consistent with orderly procedure, the rights of parties be decided on the merits of their positions."

In preparing this brief, the undersigned was evermindful of the Fourth District Court's condemnation of the misuse of the Florida Rules of Civil Procedure in Leon Shaffer Golnick Advertising v. Cedar, 423 So. 2d 1015 (Fla. 4th DCA 1982). The undersigned admits the commission of an act that this and other appellate courts would like to see terminated; namely, the filing of only a Notice of Appearance within 20 days of service of process on his client. If this Court feels that the undersigned should be rebuked or reprimanded for this particular act, it would be accepted by the undersigned within the context it was given. However, the sin of the transgressor should not be attributed to the client and the client should not be deprived of its substantive right to defend itself because of its attorney's misguided action.

In Leon Shaffer, the Fourth District took the time to comment upon the misuse of the Florida Rules of Civil Procedure because it believed it to be "other than isolated misuse" and

urged the amendment of RCP 1.500 by eliminating the word "paper" and substituting the words "motion or responsive pleading." For reasons unknown to the undersigned, the rule has not been amended; however, the abuse has escalated to the point that it has become or appears to have become a common practice. That does not make it right, but it does make it a fact that practitioners have to deal with on an every day basis. Perhaps it is indicative of the lack of professionalism and common courtesy that seems to be permeating the legal community of Broward County the past ten to fifteen years.

In today's society, more than ever before, time is at a premium. Even the most organized workaholic will at times find himself unable to meet all of the time constraints imposed upon him. As this Court is aware, there are various legitimate reasons and circumstances which prevent a responsive pleading to be filed to a complaint within the 20 days prescribed by the Rules. Perhaps a way to address this problem would be to file a Motion for Extension of Time, setting forth the reasons that a response cannot be filed and setting a hearing on the Motion at the earliest practical date. Unfortunately, that procedure, which is more time-consuming, could also be subject to abuse. If the motions were actually heard and the Courts began denying some of them for lack of good cause, judging from past history, many attorneys would then file their responsive pleadings before the hearing was held thus creating the same misuse scenario that exists with reference to the filing of Notices of Appearance.

The Federal Courts have apparently solved this problem by requiring written notice of the application for judgment at least 3 days prior to the hearing on such application. See Rule 55(b)(2), Federal Rules of Civil Procedure. The Federal Courts have liberally construed that rule to the extent that notice would be required where the attorney had entered into settlement negotiations even though an appearance had not been filed with the Court. See Muniz v. Vidal, 739 F2d 699 (USCA 1st Cir. 1984).

The rationale behind the liberal construction of the appearance provision of Rule 55(b)(2) was explained in H.F. Livermore Corp. v. Aktiengesellschaft Gebruder L., 432 F 2d 689, 691 (USCA D.C., 1970). That Court reiterated its policy of construing the rules in order to afford litigants a fair opportunity to have their disputes settled by reference to the merits and said:

> "Given this approach, the default judgment must normally be viewed as available only when the adversary process has been halted because of an essentially unresponsive party. In that instance, the diligent party must be protected lest he be faced with interminable delay and continued uncertainty as to his rights. The default judgment remedy serves as such a protection. Furthermore, the possibility of a default is a deterrent to those parties who choose delay as part of their litigative strategy. The notice requirement contained in Rule 55(b)(2) is, however, a device intended to protect those parties who, although delaying in a formal sense by failing to file pleadings within the twenty-day period, have otherwise indicated to the moving party a clear purpose to defend the suit."

The Third District in Cohen, supra, has in effect taken this approach by construing Fla R. Civ. P. 1.090(e) together with

1.500(b) to require five days notice when service of the motion for default is made by mail. The formal adoption or approval of this approach could solve the problem.

In years past, if one member of the legal fraternity needed a few extra days to respond to a complaint, it could usually be done by telephone and quite often there was no need to confirm it in writing. Unfortunately, because of past abuses, that procedure has become the exception rather than the rule. Now, it has become a common practice for attorneys to file notices of appearance and then file an answer prior to a noticed hearing on a motion for default. If this "common abuse" of the rules was uniformly applied, perhaps the inordinate amount of wasted time and unnecessary judicial labor devoted to the subject of vacating defaults would be reduced. Litigation would not be unduly delayed, the movant could move the case along by filing the motion for default and serving a notice of hearing, and the parties would know their rights and responsibilities.

The frustration expressed by the Court below in its Order when it stated, "It would appear that Barnett Bank is going to demand the rights it has acquired in the immediately aforestated case and ignore the problems which the Fourth DCA decries in Golnick v. Cedar, supra," is quite understandable (R-2). The Court has had to waste its valuable time on at least two hearings that should never have taken place and on another that was unnecessarily prolonged. First there was the ex parte hearing on February 3, 1986, at which the lower Court was apparently pre-

sented with the Fierro case. Then another hearing was held on April 10, 1986, when the Court was reminded of its ruling of February 3, 1986, and indicated that, "it may be the law but it sure isn't fair," (R33) but felt duty bound to adhere to the ruling of the Fifth Appellate Court (R-36). Finally, a third hearing was held on May 12, 1986, and the instant order under appeal was subsequently entered. All of this could have been avoided with the use of a little common courtesy or by a uniform application of Rule 1.500(b).

At the hearing on April 10, 1986, counsel for the Petitioner stated, "I think that the evil that you're trying to correct is dilatory pleading" (R-33). If that be the case, wouldn't it have been easier for counsel to give notice of a hearing on the Motion for Default at the same time that he set the hearing on the Co-Respondent's Motion to Dismiss, which would have been February 5, 1986, or fifteen days after the answer was due? What purpose was served by counsel contacting the office of the undersigned on February 3, 1986, the date the default was entered, and not mentioning the default or suggesting that an answer should be filed? What purpose was served by counsel not providing the Respondent, BARNETT BANK, with a copy of the Order of Default? Why wasn't the Motion for Default that was served on January 27, 1986, not filed with the Clerk's office until March 26, 1986? Finally, if counsel is so concerned with dilatory pleading and anxious to get this case to trial on its merits, why hasn't the Motion to Dismiss of the Co-Respondent,

CREDIT BUREAU, been re-noticed for hearing as of this date? Perhaps because the complaint on its face is insufficient and may have to be amended to allege facts to support the conclusions therein. If that were to occur, it might also necessitate the vacating of the Default against Barnett. See Brumly v. City of Clearwater, 149 So. 204 (Fla 1933).

Petitioner argues that Respondent, Barnett, served the Notice of Appearance in contravention of the intent of Rule 1.500(a) and (b) for the sole purpose of delaying the resolution of the action. Assuming arguendo that that was the reason (which it was not), it has been Petitioner's own inaction that has delayed the orderly process of this case. If Petitioner had scheduled a hearing in accordance with the law as it existed in the Fourth District, the two month delay he complains about would never have occurred.

A substantial portion of Petitioner's brief is devoted to argument over whether excusable neglect and a meritorious defense were shown in conjunction with the Motion to Vacate. The issue in this case, whether a noticed hearing is required for the entry of a default against a party who has filed a notice of appearance, makes it unnecessary to traverse the myriad of cases discussing the general rules for setting aside defaults. Where an order of default is erroneous or invalid a defendant need not show a meritorious defense in order to be entitled to a setting aside of the default. Hyman v. Canter, 359 So. 2d 322 (Fla. 3rd DCA 1980); Reicheinbach v. Southeast Bank, N. A., 462 So. 2d 611

(Fla. 3rd DCA 1985); and Mo-Con Properties, Inc. v. American Mechanical, Inc., 289 So. 2d 744 (Fla. 4th DCA 1974).

Although Respondent, Barnett Bank, has alleged the existence of a meritorious defense (R-45), it is the Respondent's position that once the Notice of Appearance was filed, the entry of a Default ex-parte without notice of a hearing to the Respondent was erroneous and the Default should have been set aside.

When all is said and done, the most important aspect of any lawsuit is the ultimate right of the litigants to have a fair and impartial trial on the issues that form the basis of their dispute. If all of the members of the Bar would keep this in mind and make a conscious effort to achieve that result the judiciary would be able to devote more of its time to resolving the more important substantive issues and perhaps even reduce the number of clogged court calendars.

CONCLUSION

For the reasons set forth above, the decision of the Fourth District Court of Appeal herein should be affirmed.

Respectfully submitted,

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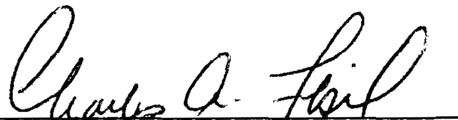
By: 

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