IN THE SUPREME COURT

OF THE STATE OF FLORIDA

FILED
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JUL 6 1987
CLERK, SUPREME COURT
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BLAISE PICCHI, *

Petitioner, *

vs. *

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

****

Case No.: 70,464
Fourth District Court
of Appeal No. 86-1523

PETITIONER'S REPLY BRIEF

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PRELIMINARY STATEMENT

Redspondent, BARNETT BANK OF SOUTH FLORIDA, N.A., will be referred to herein as Respondent; Petitioner, BLAISE PICCHI, will be referred to herein as Petitioner.

References to the Record will be designated as ("R"), and followed by the appropriate page number.

STATEMENT OF THE FACTS AND CASE

Petitioner relies on its Statement of Fact and Case as contained in his main Brief.

POINTS INVOLVED

I

DID THE TRIAL COURT ACT WITHIN ITS SOUND DISCRETION BY REFUSING TO SET ASIDE THE DEFAULT?

II

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? (CERTIFIED QUESTION)

ARGUMENTS I and II

Respondent argues that a "Notice of Appearance" may not be provided for by the rules of civil procedure; however, it is not precluded by the rules, and has been given some de facto justification by the courts. Respondent cites Public Gas Company vs. Weatherhead Company, 402 S. 2d 1026 (Fla. 1982). In Weatherhead, the corporate counsel filed a Notice of Appearance before filing a Motion to Dismiss, which was denied. The issue involved in Weatherhead was **whether the filing of a Notice of Appearance subjected the party to the Court's jurisdiction.** This Court, perhaps acknowledging that a Notice of Appearance has absolutely no basis or existence in law, ruled that the "... filing of a Notice of Appearance [by Weatherhead] did not waive its right to claim lack of jurisdiction over its person,..." This Court, accordingly, ruled that the filing of a paper not provided for by the Rules of Civil Procedure was nothing. As such, Weatherhead supports Petitioner's position herein.

Respondent argues that a "Notice of Application" would be purposeless, unless given in ample time to permit some meaningful action to be taken upon its receipt. See Cohen v. Barnet Bank of South Florida, N.A., 433 So 2d 1354 (Fla. 3rd DCA 1983). In the case

at bar, Respondent was given ample time to take some meaningful action in as much as it was served with Petitioner's Motion for Default on January 27th, 1986. A Default was entered on February 3rd, 1986. Without question, Respondent could have filed its Motion to Dismiss, or other responsive pleading, within five (5) days of service of the Motion; it had an opportunity to take meaningful action, but chose to ignore the rules. In Cohen, the Appellate Court stated at page 1355 that "... five days must be added to the time in which responsive action is permitted or required when ... service is by mail." It should be noted that Cohen expressly provides that five days or more is ample; Cohen did not decide the issue of whether a hearing and notice are required in an application for Default. See Cohen, 433 So 2d at 1355, footnote 4.

Respondent's position was to waste valuable time and resources of the Court, and the respective parties. What other reason could there be?

The District Court of Appeal in Leon Shaffer Golmich Advertising, Inc. vs. Cedar, 423 So 2d 1015 (Fla. 4 DCA 1982), condemned the use of a Notice of Appearance when it stated at page 1016:

> "... the misuse was that of Appellant's attorney by filing a Notice of Appearance admittedly because he knew the Clerk could not enter a default with the Notice in the Court file and doing so for the purpose of getting additional time in which to plead. We believe this practice is used often by others, and we condemn it."

Yet the sole reason Respondent only filed a Notice of Appearance was, "You can't enter a default without calling up for a Hearing after a Notice of Appearance is filed" (R26).

Respondent had a number of alternatives open. One was to telephone opposing counsel, and ask for a reasonable extension. If that was not agreeable, then Respondent could, second, file a Motion for Extension of Time. Third, it could have filed its Motion to Dismiss soon after receiving the Motion for Default. None of the above options were done; instead, without cause, Respondent waited more than two months until it served a responsive pleading.

Respondent argues with some force that all Petitioner had to do was send out a noticed hearing on its Motion for Default after only a Notice of Appearance was filed; and that the failure to do so has caused the trial Court in Broward County to expend much time, resources, and energy considering the instant matter, including the attendance at several hearings. Then, there is the appellate process

in the District Court of Appeal; and finally, this high Court's attention to the matter. In essence, it argues that Petitioner has prolonged the matter. Respondent's argument misses the point. As a matter of policy, the legal system often times incorporates rules to deter future misconduct. For example, although there is merit to both sides of the issue of whether the exclusionary rule in criminal cases does, in fact, deter future police misconduct, it is clear that that was, and still is, a basis for excluding relevant evidence if police improperly conduct a search of a criminal defendant's property. See generally Mapp v. Ohio, 367 U.S. 643 (1961), Stone v. Powell, 428 U.S. 465 (1976).

In entering a default, the Trial Court was following the law, that is, Fierro v. Lewis, 388 So 2d 1361 (Fla. 5th DCA 1980), and in essence, placing all parties on notice that: (1) It would not tolerate dilatory tactics and procrastination in litigation; (2) The Court would not condone a piece of paper called a Notice of Appearance, and that it would, and could, disregard its existence when not provided for by the rules.

Respondent argues that Co-Respondent, Credit Bureau's, Motion to Dismiss, has not been considered as of the date of the service of Respondent's Brief. There is nothing in the record to

support that conclusion.

It was held that a failure by a party to an appeal to provide necessary documents in an appeal may result in an affirmance. Steinhauer v. Steinhauer, 336 So 2d 665 (Fla. 4th DCA 1976); and others. Furthermore, those particular documents were never considered by the Trial Court before its denial of Respondent's Motion to Vacate, and to consider them for the first time in this high Court would be improper. See Seashole v. F & H Jacksonville, Inc., 258 So 2d 316 (Fla. 1st DCA 1972).

This Court has the opportunity to decide an issue that has been considered and condemned by the Appellate Courts of the State for a number of years. Is a noticed hearing required before the entry of a Default following the filing of a Notice of Appearance?

This Court should adopt the holding of the Court in Fierro, and apply it to the instant case. This Court should reverse the District Court of Appeal, Fourth District, and affirm the Trial Court

CONCLUSION

Based upon the foregoing arguments contained in this Brief, this Court should affirm the Trial Court, and reverse the District Court of Appeal, Fourth District.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was served by mail, this 2nd day of July, 1987, on:

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