

FILED

SID J. WHITE

IN THE SUPREME COURT OF FLORIDA

DEC 2 1988

CASE NO. 72,295

CLERK, SUPREME COURT

Parker Tampa Two, Inc.,

By _____
Deputy Clerk

Petitioner

vs.

Somerset Development Corporation,

Respondent

AMICUS CURIAE BRIEF OF CENTRUST SAVINGS BANK

On Appeal From The Second District Court Of
Appeal, Case Nos. 87-892 and 87-1554

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INTEREST OF AMICUS CURIAE

Centrust Savings Bank ("Centrust") is presently involved in litigation upon which this Court's decision on the question certified by the Second District Court of Appeal will have a direct impact.¹ On May 1, 1987, Centrust filed a Complaint for Temporary and Permanent Injunction and Specific Performance seeking to enjoin City National Bank of Miami, as trustee for I.R.E. Financial Corp., ("I.R.E.") from interfering in the maintenance of signs which Centrust had placed on an office building in Miami known as the New World Tower.² In the alternative, Centrust sought to enjoin I.R.E. the owner of the building, from constructively evicting Centrust from the New World Tower by preventing access to the roof.

On June 10, 1987, the trial court issued a Mandatory Temporary Injunction adopting a stipulation entered into between the parties in which the parties agreed that Centrust's signs may be maintained on the New World Tower pending the litigation and allowing Centrust to maintain and light these signs. Thereafter,

¹/ Centrust Savings Bank v. City National Bank of Miami, (11th Jud. Cir. Ct., Case No. 87-19173 CA 18).

²/ Dade Savings and Loan Association, now known as Centrust Savings Bank entered into a written Lease Agreement with New World Tower Associates, Ltd. Under the terms of the Lease, New World Tower Associates, Ltd., agreed to permit unspecified portions of the roof of the New World Tower to be used by Dade Savings and Loan Association or its successor for the purpose of erecting and maintaining not more than four signs on New World Tower. I.R.E. subsequently purchased New World Tower from New World Tower Associates, Ltd. and is the beneficial owner of the building.

on June 24, 1987, I.R.E. filed a Motion to Dismiss and Motion to Dissolve Mandatory Temporary Injunction. This motion was denied on July 28, 1987. In its order of denial, however, the trial court required Centrust to post a bond into the registry of the court in the amount of \$100,000. (App. 1-2)³. The court's order contained the following language:

The amount of this bond is not intended to and shall not limit the right of Defendants [I.R.E.] to recover damages in excess of \$100,000.00 against Plaintiff [Centrust] in the event it is subsequently determined that the injunction was wrongfully issued or in the event Defendants suffer damages in excess of that amount . . .

(App. 2).

In Centrust Savings Bank v. City National Bank of Miami, 530 So.2d 317 (Fla. 3d DCA 1988), the Third District struck down that part of the order which did not limit damages to the amount of the bond, expressly stating:

The amount of the bond fixes the amount of damages that can be recovered for wrongful injunction.

(App. 3).

The litigation surrounding issuance of the injunction is still pending and Centrust will be directly affected by the Court's decision on the question certified by the Second District Court of Appeal.

^{3/} The designations (App.____) will refer to Amicus Curiae Centrust Savings Bank's appendix which is annexed to this brief.

SUMMARY OF ARGUMENT

The Second District Court of Appeal has certified the following question to the Court:

ARE THE DAMAGES WHICH ARE RECOVERABLE FOR
WRONGFULLY OBTAINING AN INJUNCTION LIMITED TO
THE AMOUNT OF THE INJUNCTION BOND.

The majority view in this country is that nothing in excess of the face amount of an injunction bond is recoverable by way of damages. The majority rule has been followed uniformly in Florida, and is contained in Section 60.07, Florida Statutes, which deals with assessment of damages after dissolution.

This rule has not only been adopted by the Second District Court of Appeal in the case below, but also expressly approved by the Third District Court of Appeal in Centrust Savings Bank v. City National Bank of Miami, 530 So.2d 317 (Fla. 3d DCA 1988). Analogous case law in Florida also adopts the majority view. See Florida Transportation Co. v. Dixie Sightseeing Tours, Inc., 139 So.2d 175 (Fla. 3d DCA 1962); Travelers Indemnity Co. v. Askew, 280 So.2d 469 (Fla. 1st DCA 1973). The certified question should be answered in the affirmative.

ARGUMENT

DAMAGES ARE NOT RECOVERABLE IN EXCESS OF THE FACE AMOUNT OF THE INJUNCTION BOND IN THE EVENT THE INJUNCTION IS RULED IMPROPER.

An injunctive bond is not a general declaration of liability for all damages and costs which may arise after granting the injunction. R. A. Vorhof Construction Co. v. Black Jack Fire Protection District, 454 S.W.2d 588 (Mo. App. 1970); see 43A C.J.S. Injunctions § 315. When an action or proceeding is upon the bond issued in an injunction case, the almost universal rule is that nothing in excess of the face amount of the bond is recoverable by way of damages.⁴ Wyoming Bancorporation v. Bonham, 563 P.2d 1382 (Wyo. 1977). If an enjoined party believes that the bond constitutes insufficient security for the damages which might be incurred in consequence of the injunction, it is that party's duty to obtain, by order of the court, a sufficient bond.⁵ Having failed to so

^{4/} Only Arizona, Indiana, Louisiana, Texas and Vermont have adopted the minority view that an improperly enjoined party may recover damages in excess of the injunction bond.

^{5/} It should be noted that in the pending case Parker did have an opportunity to move to increase the injunction bond and was provided with a hearing for this purpose. (R. 48, 253, 257, 148-150)

Amicus Curiae Soffer, Aventura Country Club et al, argue that this Court, in State v. Beeler, 13 F.L.W. 565 (Fla. September 22, 1988). held that a motion to increase the injunction bond waives all rights to challenge any procedural defects in the injunction. The Beeler ruling, however, only

Footnote continued on next page.

to so obtain a sufficient bond, that party cannot afterwards recover upon the bond to an extent beyond the measure of the obligation. Broome v. Hattiesburg Building & Trades Council, 206 So.2d 184 (Miss. 1967).

Public policy encouraging ready access to the courts outweighs concern for defendants facing inadequate bonds upon the termination of a wrongful restraint. Tracy v. Capozzi, 98 Nev. 120, 642 P.2d 591 (1982). The good-faith pursuit of legal and equitable remedies must be zealously protected from a deterrent certain to be posed by unknown liability for mistake in bringing suit. Id. Moreover, the restrained party is not without recourse in the event the bond proves to be inadequate during the

Footnote continued from previous page.

applies to attacks on injunctions based on improper notice, the Court stating:

After a trial court issues a temporary injunction, a defendant has two options. He may question the lack of prior notice by immediately appealing the injunctive order pursuant to Florida Rule of Appellate Procedure 9.130(a)(3)(B), or he may file a motion to dissolve with the trial court. With the latter option the notice become irrelevant because the defendant is present once the opposing party has received the benefit of notice and an opportunity to be heard at a hearing in the motion to dissolve, any issues regarding prior to notice is moot

. . .

Id.

A motion to increase the bond does not automatically waive the right to appeal the injunction. Only the issue of improper notice is rendered moot by a court appearance on a motion to dissolve the injunction.

period of the restraint and the litigation, since he may move for an increase in the amount of the bond. Id. Thus, the federal courts⁶ as well as an overwhelming majority of the state courts⁷ hold that recovery for wrongful injunction is limited to the amount of the bond unless malicious prosecution is shown. Smith v. Coronado Foothills Estates Homeowners Assoc., Inc., 117 Ariz. 171, 571 P.2d 668 (1977); see 11 Wright & Miller, Federal Practice & Procedure §2973.

^{6/} See, e.g., Philips Business Systems, Inc. v. Executive Communications Systems, Inc., 744 F.2d 287 (2d Cir. 1984); Coyne-Delany Co., Inc. v. Capital Development Bd., 717 F.2d 385 (7th Cir. 1983); Adolph Coors Co. v. A & S Wholesalers, Inc., 561 F.2d 807 (10th Cir. 1977); First-Citizens Bank & Trust Co. v. Camp, 432 F.2d 481 (4th Cir. 1970); United Motor Service v. Tropic-Aire, Inc., 57 F.2d 479 (8th Cir. 1932).

Florida Rule of Civil Procedure 1.610(b), which requires the posting of an injunction bond, is virtually the same as Federal Rule of Civil Procedure 65(c).

^{7/} See, e.g., Allen v. Pitchess, 36 Cal. App. 3d 321 (1973); Lawton v. Herrick, 83 Conn. 417, 76 A. 986 (1910); Idaho Gold Dredging Corp. v. Boise Payette Lumber Co., 62 Idaho 683, 115 P.2d 401 (1941); United Mail Order v. Montgomery Ward & Co., 9 Ill. 2d 101, 137 N.E. 2d 47 (1956); Strong v. Duff, 228 Ky. 615, 15 S.W.2d 517 (1929); Levy v. Taylor, 24 Md. 282 (1866); Broome v. Hattiesburg Building & Trades Council, 206 So.2d 184 (Miss. 1967); R.A. Vorhof Const. Co. v. Black Jack Fire Protection Dist., 454 S.W.2d 588 (Mo. App. 1970); Tracy v. Capozzi, 642 P.2d 591 (Nev. 1982); Rogers v. Clough, 76 N.H. 272, 81 A. 1075 (1911); Apfelberg v. East 56th Plaza, Inc., 447 N.Y.S.2d 635 (1982); McAden v. Watkins, 191 N.C. 105, 131 S.E. 375 (1926); Eqge v. Lane County, 276 Or. 889, 557 P.2d 1372 (1976); Hyler v. Wheeler, 240 S.C. 386, 126 S.E.2d 173 (1962); Shanks v. Pyne, 180 Tenn. 708, 174 S.W. 2d 461 (1943); Mountain States Tel. & Tel. Co. v. Atkin, 681 P.2d 1258 (Utah 1984); Venegas v. United Farm Workers Union, 15 Wash. App. 858, 552 P.2d 210 (1976); Weber v. Johnston Fuel Liners, Inc., 540 P.2d 535 (Wyo. 1975).

In Florida, both the Second District Court of Appeal, in the case below, and the Third District Court of Appeal in Centrust Savings Bank v. City National Bank of Miami, 530 So.2d 317 (Fla. 3d DCA 1988), have expressly adopted the majority view. In Centrust, the court answered the question now certified to this court and struck down a provision in an injunction order which did not limit the amount of recoverable damages to the face value of the bond. The court stated:

The amount of the bond fixes the amount of damages that can be recovered for wrongful injunction.⁸

Id.

Furthermore, Section 60.07, Florida Statutes specifically states that "on dissolution, the Court may hear evidence and assess damages to which any defendant may be entitled under any injunction bond . . . (emphasis added). Therefore, there is both statutory and case law support in Florida for the limitation of damages to the injunction bond itself.⁹

^{8/} The court noted the availability to the enjoined party of a motion to increase the amount of the bond.

^{9/} Amicus Soffer cites the language in Lake Worth Broadcasting Corp. v. Hispanic Broadcasting, Inc., 495 So.2d 1234 (Fla. 3d DCA 1986) that a defendant is entitled to any damages sustained as a result of a wrongfully issued temporary injunction including reasonable attorney's fees. However, in Lake Worth, the Third District also noted that these damages, including attorney's fees, are precisely the damages the injunction bond was intended to cover. Id. at 1235.

There is also analogous case law in Florida to support adopting the majority view limiting recovery to the amount of the bond. This law relates to both attachment bonds and surety bonds.

In Florida Transportation Co. v. Dixie Sightseeing Tours, Inc., 139 So.2d 175 (Fla. 2d DCA 1962), two buses were attached and attachment bonds were made to the defendant, as obligee, as required by Florida Statutes Section 76.12.¹⁰ In a suit brought to recover damages on the attachment bonds, the amount recoverable was limited by the amounts of the bonds. Id. at 176.

Likewise, in Travelers Indemnity Co. v. Askew, 280 So.2d 469 (Fla. 1st DCA 1973), defendant First Mortgage Company qualified to do business as a mortgage broker. In order to exercise its license, First Mortgage procured from Travelers and filed with the Florida Department of Banking and Finance a surety bond in the amount of \$5,000 as required by the mortgage brokerage act.¹¹ This bond ran to the state for the benefit of any person injured by the wrongful act, default, fraud or misrepresentation of the mortgage broker. The plaintiff filed suit, alleging losses in the amount of \$8,211.45. However, as

^{10/} As the court noted, §76.12 required an adequate bond, conditioned to pay all costs and damages which the defendant may have sustained in consequence of the plaintiff's improperly suing out said attachment.

^{11/} Florida Statutes Ch. 494

the court noted, the general rule recognized by the almost unanimous weight of authority in this country is that recovery on a penal bond is limited to the amount of the penalty named in the bond. Id. at 471. The only exception to the general rule is in those instances where the wording of the bond or the statute pursuant to which it was given indicates an intention to extend the liability of the bond beyond the maximum sum stated therein. Id.

The rule applied in these cases is applicable to the issue of whether damages may be awarded in excess of the amount of an injunction bond. These cases undoubtedly show that Florida courts now adopt the view, adopted by the vast majority of state courts in this country, that in injunction cases, nothing in excess of the face amount of the bond is recoverable by way of damages.

Federal courts also have followed the majority rule. Coyne-Delany Co., Inc. v. Capital Development Board of Illinois, 717 F.2d 385 (7th Cir. 1983); Buddy Systems, Inc. v. Exer-Genie, Inc., 545 F.2d 1164 (9th Cir. 1976). In fact, the United States Supreme Court recently has confirmed that there is no principle that permits an individual damaged by an injunction to obtain damages beyond an action on the bond. W.R. Grace and Co. v. Local Union 759, International Union of Rubber Workers, 461 U.S. 757, 103 S.Ct. 2177, 76 L.Ed 2d 298 (1983); see also Coyne-Delany, 717 F.2d at 393; Buddy Systems, Inc., 545 F.2d at 1167-68. Thus, at least in federal courts, it is well settled

that no underlying duty to recompense the victim of wrongful provisional relief independent of the security instrument exists.¹²

The public policy served by the federal and majority rule is, of course, well founded in American common law:

Rightly or wrongly, American common law, state and federal, does not attempt to make the winner of a lawsuit whole by making the loser reimburse the winner's full legal expenses, even when the winner is the defendant, who unlike a prevailing plaintiff does not have the consolation of a damage recovery. In noninjunctive suits, except those brought (or defended) in bad faith, the winner can recover only his statutory costs, invariably but a small fraction of his expenses of suit. It would be incongruous if a prevailing defendant could obtain the full, and potentially the staggering, consequential damages caused by a preliminary injunction. . . . It might be a very great boon to the legal system of this country to discourage injunction suits by putting plaintiffs at such risk, but we do not see how such an approach can be squared with the general attitude toward litigation implied by the American rule attorney's fees . . . A right to injunction damages potentially unlimited in amount would be in one sense a more extreme remedy against a losing litigant than allowing the winner to have his attorney's fees reimbursed. Not only would the amounts involved be much greater in some cases (though appropriately greater: the costs of the litigation would be greater to the defendant than if no injunction had been

^{12/}

Two exceptions to this general rule exists: (1) where the defendant sues for malicious prosecution and (2) where the defendant sues on a theory of unjust enrichment (restitution). Coyne-Delany, 717 F.2d at 393; Buddy Systems, Inc., 545 F.2d at 1167-68; 11 C. Wright & A. Miller, Federal Practice and Procedure §2973 at 652 (1973).

issued) but the burden of the rule would fall entirely on plaintiffs; the English and Continental rule, which requires the loser to reimburse the winner's attorney's fees, benefits prevailing plaintiffs as well as prevailing defendants. Of course, having to post a bond is also a deterrent just to plaintiffs. But if the plaintiff's damages are limited to the amount of the bond, at least he knows just what his exposure is when the bond is set by the district court. It is not unlimited. If the bond is too high he can drop the suit.

Coyne-Delany, 717 F.2d at 393-94. (emphasis added).

The Court should now approve this public policy statement and adopt the majority rule as its own.

CONCLUSION

For all of the above and foregoing reasons, the question certified by the Second District Court of Appeal should be answered affirmatively.

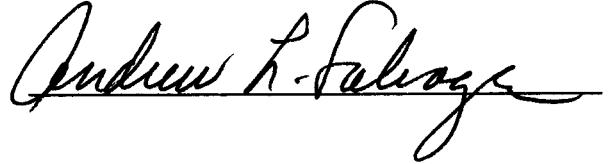
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by mail this 1st day of December, 1988 to JOHN H. RAINS, III, ESQ., Annis Mitchell, Cockey Edwards and Roehn, P.A., Attorneys for Petitioner, One Tampa Center, #2100, Tampa, Florida 33682, SAMUEL R. MANDELBAUM, ESQ., Smith and Williams, P.A., Attorneys for Respondent, 100 South Ashley Drive, Suite 1170, Tampa, Florida 33602 and GLEN RAFKIN, ESQ., Young Stern & Tannenbaum, Attorneys for Amicus Curiae Soffer, et al., 17071 West Dixie Highway, North Miami Beach, Florida 33160.



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