

IN THE SUPREME COURT OF FLORIDA

CATHERINE RIGGINS,

Petitioner,

CASE NO.: SC06-205

vs.

L.T. NO.: 3D04-2620

AMERICAN EXPRESS CENTURION
BANK,

Respondent.

ON NOTICE TO INVOKE DISCRETIONARY JURISDICTION
FROM THE THIRD DISTRICT COURT OF APPEAL

CIVIL ACTION

PETITIONER'S BRIEF ON JURISDICTION

Respectfully Submitted by:

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STATEMENT OF THE CASE AND OF THE FACTS

Petitioner, CATHERINE RIGGINS (“RIGGINS”), entered into a credit agreement with Respondent, AMERICAN EXPRESS CENTURION BANK (“AMEX”), which allowed RIGGINS to pay-off the balance over time, in minimum monthly payments. (App. 1 at 3.) The credit agreement obligated AMEX to send RIGGINS a statement each month, so long as there was any balance on the account. (*Id.*) In April 2002, AMEX sent RIGGINS a statement of her account, reflecting a minimum payment due in the amount of \$1,372.81 by April 22, 2002, with a principal balance of \$17,348.50. (*Id.*)¹ The April 2002 statement did not demand payment of the principal balance. (App. 1 at 4.) RIGGINS paid AMEX the minimum payment of 1,372.81 by April 22, 2002. (App. 1 at 3.)

After the April 2002 statement, AMEX did not send RIGGINS any further statements on her account. (App. 1 at 3.) In May 2002 and June 2002 respectively, RIGGINS sent AMEX two written requests to resume sending her statements on her account, as required by the credit agreement. (*Id.*) AMEX failed to respond. (*Id.*)

¹ The figures here are different from those in the opinion, but the figures here are the exact figures from the April 2002 statement. There were three statements of account attached to AMEX’s Complaint, so RIGGINS believes that the figures in the opinion inadvertently included figures from either the February or March 2002 statement instead of the April 2002 statement.

In December 2002, AMEX filed a lawsuit against RIGGINS, accelerating the credit card debt for the first time. (App. 1 at 3.) RIGGINS asserted the affirmative defense of payment and further responded that the acceleration was improper because her April 2002 payment brought her account current, and that the account remained current in December 2002 because AMEX failed to send any monthly statements after April 2002, thus no minimum payments became due after April 2002. (*Id.*) In reply, AMEX did not dispute that the account was current in December 2002, but argued that AMEX could accelerate the debt at any time once there was any default, regardless of whether the default was cured. (App. 1 at 4.)

AMEX and RIGGINS both sought summary judgment. The trial court entered summary judgment in favor of AMEX, in the amount of \$15,975.69. RIGGINS appealed to the Third District Court of Appeal on the grounds that her account was current at the time AMEX first sought to accelerate the debt by filing the lawsuit, and, therefore, the acceleration was improper.

The Third District affirmed the summary judgment on the ground that RIGGINS was “admittedly” in default at the time AMEX filed its lawsuit against her (App. 1 at 1), despite the fact that AMEX never disputed that RIGGINS was current at the time the lawsuit was filed. RIGGINS never

admitted that she was in default at the time AMEX filed its lawsuit against her, because she was not. Instead, RIGGINS consistently argued that she was current at the time of AMEX's filing of the lawsuit, not in default. The fact that RIGGINS was not in default was the basis for her arguments in the trial court and in the Third District. Chief Judge Cope of the Third District agreed with RIGGINS and dissented with an opinion concluding that AMEX's acceleration was improper and in violation of the law, and, therefore, summary judgment for AMEX should have been reversed. (App. 1 at 4.)

RIGGINS' motion for rehearing, rehearing *en banc*, and for certification was denied, with Chief Judge Cope expressing that he would have granted rehearing and certification and with Chief Judge Cope and Judge Ramirez dissenting on the denial of rehearing *en banc*. (App. 2.)

JURISDICTIONAL STATEMENT

The Supreme Court of Florida has discretionary jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with a decision of the Florida Supreme Court or another district court of appeal on the same point of law. Art. V, § 3b(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(iv). On the facts of this case, this Court has discretionary jurisdiction to review a decision of the Third District Court of Appeal that

expressly and directly conflicts with a decision of this Court and with decisions of other district courts of appeal on the same point of law. Specifically, *Riggins v. American Express Centurion Bank*, 30 Fla. L. Weekly D 1432 (Fla. 3d DCA June 8, 2005) expressly and directly conflicts with *River Holding Co. v. Nickel*, 62 So. 2d 702 (Fla. 1952); *Pici v. First Union Nat'l Bank*, 621 So. 2d 732 (Fla. 2d DCA 1993); and *Parise v. Citizens Nat'l Bank*, 438 So. 2d 1040 (Fla. 5th DCA 1983) on the issue of whether a creditor may accelerate a debt that is current at the time of acceleration.

SUMMARY OF ARGUMENT

Respectfully, the Third District's clearly erroneous finding of fact that RIGGINS was "admittedly" in default, which was never a disputed issue of fact for the Third District to decide, has allowed the Third District to render a decision on the law that, in reality, expressly and directly conflicts with a decision from this Court and decisions of other district courts of appeal, all of which hold that acceleration of a debt is improper when the debt is current at the time the creditor exercises its option to accelerate.

Respectfully, the Third District's decision also violates public policy because the decision gives creditors a carte blanche to capitalize on a previously cured default and to accelerate on current debt. For example,

innocent mortgagors who may have had difficulty in making a timely payment in the past, or may have simply forgotten to make a payment because nobody's perfect, but have since cured the default and brought the debt current, may find themselves in foreclosure without recourse except to pay the lump sum principal that they believed they had an agreement to pay over time. Similarly, that's exactly what AMEX did to RIGGINS, with the blessings of the Third District. For public policy reasons, this Court should not allow that to become the prevailing law in the Third District, and should accept jurisdiction to resolve the conflict.

ARGUMENT

I. THE THIRD DISTRICT'S DECISION IS IN EXPRESS AND DIRECT CONFLICT WITH *RIVER HOLDING*, A DECISION OF THIS COURT

In *River Holding*, this Court held that, after a timely tender of arrears, there is no longer any default. *River Holding*, 62 So. 2d at 704. When payment is tendered before the option to accelerate is exercised, the option to accelerate is defeated. *Id.* at 703-04 accord *Delandro v. America's Mortgage Servicing, Inc.*, 674 So. 2d 184, 185 (Fla. 3d DCA 1996). In *River Holding*, this Court explained the reasoning for barring acceleration after tender of payment as follows:

[T]he prevailing rule is to the effect that a tender of arrears due on a mortgage containing an acceleration clause, made before the holder of the mortgage has exercised his option to declare the entire amount of the debt due, prevents the exercise of such option. This is true whether the default was in relation to principal, interest, or taxes. The basis of the rule is said to be that after a tender there is no longer any default which is the foundation of the right to exercise the option.

River Holding, 62 So. 2d at 704. RIGGINS' timely payment on April 22, 2002 cured any prior default and defeated AMEX's option to accelerate.

River Holding, 62 So. 2d at 704. Under *River Holding*, RIGGINS was entitled to summary judgment, not AMEX. Accordingly, the Third District's decision to affirm summary judgment in favor of AMEX is in express and direct conflict with *River Holding*.

II. THE THIRD DISTRICT'S DECISION IS IN EXPRESS AND DIRECT CONFLICT WITH *PICI*, A DECISION OF THE SECOND DISTRICT. FURTHERMORE, THE DECISION VIOLATES PUBLIC POLICY.

Absent an existing default at the time the plaintiff files their complaint for acceleration of a debt, the plaintiff's option to exercise their contractual right to accelerate cannot be enforced. *Pici*, 621 So. 2d at 732. In *Pici*, on October 26, 1992, the plaintiff notified the defendant that his payments were late, and demanded a payment of \$855.40 to bring the account current. *Pici*, 621 So. 2d at 733. On November 9, 1992, believing that he would cure the default and bring the account current, the *Pici* defendant paid the \$855.40

and received a receipt for the payment. *Id.* On November 13, 1992, the *Pici* plaintiff filed a complaint against the defendant, attempting to accelerate the debt by demanding the balance on the note, which was \$18,009.53. *Id.* The *Pici* defendant did not become aware of the plaintiff's option to accelerate until after he was served with the complaint. *Id.* The *Pici* Court found that the defendant's account was current at the time of the lawsuit, and, therefore, the plaintiff was barred from accelerating the debt. *Id.* at 734. The *Pici* Court stated, "It also appears that First Union has attempted to contract away any reliance *Pici* might have upon the equitable principle that tender by the mortgagor of past due payments prior to acceleration defeats the mortgagee's right to accelerate." *Id.* at 733.

Similar to the defendant in *Pici*, RIGGINS received a statement from AMEX in April 2002, requiring RIGGINS to pay a minimum payment of \$1,372.81 by April 22, 2002. RIGGINS timely made the minimum payment of \$1,372.81 by the due date, believing that she would cure a prior default and bring the account current, and received a canceled check as proof of payment. To RIGGINS' surprise, eight months later in December 2002, AMEX filed a Complaint against RIGGINS accelerating the debt. It is undisputed, as between AMEX and RIGGINS, that the account was current at the time AMEX filed its Complaint in December 2002. Under *Pici*,

AMEX's acceleration attempt was barred. Accordingly, the Third District's decision to affirm summary judgment in favor of AMEX, rather than reverse the judgment, is in express and direct conflict with *Pici*.

Additionally, the public policy concerns raised in the *Pici* decision regarding the debtor's apparent attempt to disregard the equitable principle that tender of past due payments prior to acceleration defeats the right to accelerate, is also a concern in this case, and should not be overlooked.

III. THE THIRD DISTRICT'S DECISION IS IN EXPRESS AND DIRECT CONFLICT WITH *PARISI*, A DECISION OF THE FIFTH DISTRICT

In *Parisi*, a summary judgment in favor of the creditor was reversed on grounds that there was an issue of fact as to whether the debtor paid all past due amounts before acceleration. *Parisi*, 438 So. 2d at 1021-32. The *Parisi* court held, "acceleration may be set in motion by filing a pleading on the full indebtedness. Or it may be activated by a demand and express notice to the debtor. But if the delinquent payments are tendered before either occurrence, the right to accelerate is defeated." *Id.* at 1022 (citations omitted).

It is undisputed that AMEX's Complaint is the first notice that RIGGINS received regarding AMEX's decision to accelerate the debt. It is undisputed that RIGGINS tendered all delinquent payments before AMEX

filed its Complaint against RIGGINS for the full indebtedness. Notwithstanding, the Third District affirmed summary judgment in favor of AMEX. Accordingly, the Third District's decision to affirm summary judgment in favor of AMEX is in express and direct conflict with *Parisi*.

CONCLUSION

This Court should accept conflicts jurisdiction.

Dated February 9, 2006.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner’s Brief on Jurisdiction was mailed via U.S. mail this **9th** day of February, 2006 to:

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies, in accordance with Fla. R. App. P. 9.210(a)(2), that the foregoing Petitioner’s Brief on Jurisdiction has been prepared in Times New Roman 14-point font.

By: _____
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