

IN THE SUPREME COURT
FOR THE STATE OF FLORIDA

CASE NO. SC06-2226

DELTA FIRE SPRINKLERS, INC.,

Petitioner,

v.

SOUTHTRUST BANK, N.A.,

Respondent.

**RESPONDENT SOUTHTRUST BANK, N.A.'S
RESPONSE BRIEF ON JURISDICTION**

On Appeal from the Fifth District Court of Appeal

Case No. 5D05-3317

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STANDARD OF REVIEW

The Court must determine whether the decision below expressly and directly conflicts with a decision of this Court or of another Florida district court of appeal on the same question of law. Fla. Const. Art. V, § 3(c)(3); Fla. R. App. P. 9.030(a)(2)(A)(4).

STATEMENT OF THE CASE AND FACTS

This Petition seeks permission to appeal an opinion of the Fifth District filed on September 8, 2006, affirming a final judgment by the Circuit Court awarding attorneys' fees to Respondent, SouthTrust Bank, N.A. Delta Fire Sprinklers, Inc. v. SouthTrust Bank, N.A., 940 So. 2d 1164 (Fla. 5th DCA 2006). Petitioner's Motion for Rehearing, Rehearing En Banc or Clarification was denied on October 27, 2006.

The Final Judgment for Attorneys' Fees and Costs for SouthTrust ("Final Judgment") in the amount of \$10,123 was issued by the trial court on August 29, 2005. The Final Judgment followed an Order issued on March 8, 2005, determining that SouthTrust was entitled to reasonable attorneys' fees, but reserving jurisdiction to determine the amount to be awarded.

Attorneys' fees were awarded after the trial court on June 30, 2004, dismissed with prejudice Petitioner's Amended Complaint asserting a negligence claim against SouthTrust. The negligence claim was based on alleged violations of the construction lien law, Chapter 713, Florida Statutes. The trial court had previously granted summary judgment on all claims brought against SouthTrust under Chapter 713.

Respondent's motion for attorneys' fees was served on July 1, 2004, and filed in Circuit Court on August 7, 2004. The motion was granted on March 8, 2005, and the amount of

fees was assessed on August 29, 2005. The Final Judgment apportioned the fees 50 percent against Petitioner and 50 percent against Petitioner's counsel, Rosemary Hayes.

The Fifth District determined the Amended Complaint lacked merit and the award of attorneys' fees was warranted. The Fifth District held that the Amended Complaint suffered from the same fatal deficiencies as the original Complaint, and that Petitioner was "merely attempting to re-litigate a claim that had already been rejected by the court in its order granting summary judgment." Delta Fire Sprinklers, 940 So. 2d at 1165.

A Notice to Invoke Discretionary Jurisdiction of Supreme Court was filed on November 8, 2006. The Fifth District stayed issuance of the mandate pending a decision by this Court on whether to accept jurisdiction of this case.

SUMMARY OF ARGUMENT

The Court can accept this case pursuant to its discretionary jurisdiction only if the decision below expressly and directly conflicts with a decision of this Court or of another Florida district court of appeal on the same question of law. The decision must on its face collide with a prior decision so as to create conflicting precedents.

The instant case does not conflict with Boca Burger, Inc. v. Forum, 912 So. 2d 561 (Fla. 2005) or with Read v. Taylor,

832 So. 2d 219 (Fla. 4th DCA 2002). Petitioner asserts that a conflict exists because attorneys' fees were awarded without a finding that the amended complaint was not supported by the material facts or by existing law. (Juris. Brief, p. 4). However, such a finding relates to the standard applied to the trial court, not to the reviewing appellate court. The Fifth District found that the record supported the trial court's findings. Petitioner is improperly arguing the merits of the appeal, which is beyond the scope of a petition for jurisdiction. Whether or not Petitioner agrees with the Fifth District opinion, it does not conflict with Boca Burger or Taylor.

Taylor is not a conflicting precedent because it involves a statute that created a duty that would support a negligence claim. 832 So. 2d at 223. Fla. Stat. § 475.278 imposed certain obligations upon Realtors that were in dispute. The construction lien statute in the instant case provided no obligation on the part of SouthTrust, as a lender, toward Delta, a sub-subcontractor.

The opinion below does not conflict with O'Daniel v. Board of County Commissioners, 916 So. 2d 40 (Fla. 3rd DCA 2005). Petitioner made no attempt to withdraw its Amended Complaint after being served with the motion for attorneys' fees more than 21 days prior to the filing of the motion.

Rather, Petitioner continued to litigate the frivolous claim, through an unsuccessful appeal. At no time did Petitioner pursue the safe harbor provision of Fla. Stat. § 57.105(4).

Delta, at 1164-65.

None of the cases cited by Petitioner conflict with the Fifth District's opinion in this case. For these reasons, Delta's petition to invoke discretionary jurisdiction should be denied.

ARGUMENT

I. THIS COURT HAS NO DISCRETIONARY JURISDICTION BECAUSE THE DECISION RENDERED BY THE APPELLATE COURT BELOW DOES NOT CONFLICT WITH A DECISION BY THIS COURT OR OF ANOTHER FLORIDA DISTRICT COURT OF APPEAL ON THE SAME QUESTION OF LAW.

In order to invoke this Court's discretionary jurisdiction, Petitioner must establish that the decision below "expressly and directly conflicts" with a decision of this Court or of another Florida district court of appeal on the same question of law. Fla. Const. Art. V, § 3(c)(3); Fla. R. App. P. 9.030(a)(2)(A)(4). The measure of jurisdiction in determining a conflict is not whether the Supreme Court would have arrived at a conclusion different from the district court. Rather, the measure is whether the decision of the district court on its face collides with a prior decision so as to create an inconsistency or conflict among precedents. Kincaid v. World Ins. Co., 157 So. 2d 517 (Fla. 1963).

Jurisdiction cannot be invoked without an express conflict, even if this Court disagrees with the determination below or would have made a different factual determination. See Mancini v. State, 312 So. 2d 732 (Fla. 1975). This Court must make a preliminary determination that the decision by the district court, if permitted to stand, would be out of harmony with prior decisions on the same point, and therefore, as a precedent, would generate confusion and instability. Kyle v. Kyle, 139 So. 2d 885, 887 (Fla. 1962). The two decisions must be irreconcilable. Aravena v. Miami-Dade County, 928 So. 2d 1163 (Fla. 2006).

Petitioner argues that the decision by the Fifth District conflicts with Boca Burger, Inc. v. Forum, 912 So. 2d 561 (Fla. 2005), and Read v. Taylor, 832 So. 2d 219 (Fla. 4th DCA 2002). Petitioner bases the alleged conflict on the fact that sanctions were imposed after one amendment to the complaint following summary judgment. Petitioner claims the trial court failed to state in the sanction Order and Final Judgment that the losing party or its attorney knew or should have known that the negligence claims were not supported by the material facts or by an application of the existing law. (Juris. Brief, p. 4). However, nothing in the opinion below, however, conflicts with Boca Burger or Taylor.

The requirements in Fla. Stat. § 57.105(1) are directed to the trial court, not to the appellate court reviewing the order for sanctions. The trial court findings, which are not only reflected in the Final Judgment, but also in statements made from the bench during the attorneys' fees hearing set forth sufficient reasons for awarding attorneys' fees in compliance with § 57.105(a). However, the purpose of a petition for jurisdiction is not to review the record to make a determination on the merits of the trial court's decision. Such a review exceeds the scope of a petition for jurisdiction. Fla. R. App. P. 9.120, Committee Notes (1977 Amend.) ("It is not appropriate to argue the merits of the substantive issues involved in the case or discuss any matters not relevant to the threshold jurisdictional issue").

Boca Burger allowed the plaintiff to amend a complaint once before a responsive pleading was served. Id. at 564-65. The instant case is consistent with Boca Burger, since Petitioner was allowed to amend its complaint, even after summary judgment was granted in favor of SouthTrust. The right to amend a pleading does not prohibit a court from dismissing an amended complaint that fails to state a claim. See Fla. R. Civ. P. 1.190 and 1.420(b). Petitioner was not denied the right to amend; only the right to prosecute a claim completely lacking in merit. Petitioner compares the opinion

below to cases where amended complaints were permitted by courts. (Juris. Brief, pp. 4-7). The fact that some courts allowed amendments and others did not does not *per se* create a conflict. Whether a court dismisses an amended complaint is determined by the legal sufficiency of the claims, and not merely on the number of amendments by a party. Davidson v. Iona McGregor Fire Protection and Rescue District, 674 So. 2d 858 (Fla. 2d DCA 1996).

Boca Burger does not stand for the proposition that a complaint should not be dismissed unless the plaintiff has more than one opportunity to amend. Therefore, that argument has no basis in law. Furthermore, the argument is improper because it was never raised or argued during the appeal. Appellate courts are prohibited from deciding issues that were not presented to the lower courts, and therefore, were not preserved in the record. Applegate v. Barnett Bank, 377 So. 2d 1150 (Fla. 1979).

Petitioner also asserts that the opinion below conflicts with Read v. Taylor, 832 So. 2d at 222-24. Taylor involved a Realtor who sued for breach of contract and negligence. Id. at 220. An attorneys' fees award was reversed because the appeal court determined that the negligence claim was not completely lacking in merit. Id. at 223.

Petitioner is again arguing the merits of the appeal, rather than the jurisdictional issue. Nothing in the opinion below addresses these issues argued by Petitioner. Again, reviewing the record to make a determination on the merits would exceed the scope of a petition for jurisdiction. Fla. R. App. P. 9.120.

Moreover, Taylor is distinguished from the instant case because the negligence claim in Taylor is based on statutory authority that created a duty on the part of the opposing party. Authority for the negligence claim was provided by Fla. Stat. § 475.278, which imposed certain obligations on Realtors. Id. The construction lien statute in the instant case, on the other hand, provided no obligation on the part of a lender toward a sub-subcontractor or subcontractor. Petitioner had no cause of action against SouthTrust under Chapter 713, Florida Statutes, and should have known that a negligence claim could not be asserted based on a violation of the same statutes.

The opinion below does not hold that merely winning summary judgment entitles a party to fees under Fla. Stat. § 57.105, as argued by Petitioner. (Juris. Brief, p. 5). Nor does the opinion hold that failure to state a cause of action is an automatic ground for sanctions, as Delta further alleges. (Juris. Brief, p. 5). Nowhere does the Fifth

District state or even imply that there was no claim Delta could have asserted that would not have been dismissed. This Court has no basis to accept jurisdiction of this appeal on the basis of a conflict among appellate courts.

II. THE OPINION BELOW DOES NOT CONFLICT WITH THE NOTICE REQUIREMENT OF O'DANIEL V. BOARD OF COUNTY COMMISSIONERS.

The opinion below does not conflict with the holding in O'Daniel v. Board of County Commissioners, 916 So. 2d 40 (Fla. 3rd DCA 2005). Delta claims that it was not afforded sufficient notice to withdraw its Amended Complaint because SouthTrust's motion for attorneys' fees pursuant to Fla. Stat. § 57.105 was served the day after the order dismissing Delta's Amended Complaint. (Juris. Brief, p. 9). Delta failed to utilize the safe harbor provision of § 57.105, and retract its frivolous pleading before SouthTrust filed the motion for fees on August 7, 2004. Instead, Delta filed a motion for rehearing after the order of dismissal. "Delta continued to pursue its meritless claim by filing a motion for rehearing and propounding a discovery request upon SouthTrust." Delta Fire Sprinklers, Inc. v. SouthTrust Bank, N.A., 940 So. 2d 1164, 1165 (Fla. 5th DCA 2006). Delta did not abandon the frivolous claims in the Amended Complaint after it was dismissed with prejudice, but continued to exhaust every procedure available in the court system to keep the claim

alive. Following denial of the motion for rehearing and the discovery requests, Delta pursued the dismissal through the appellate court. (App. Case No. 5D04-3052). The Fifth District affirmed the dismissal per curiam and awarded SouthTrust attorneys' fees for having to defend the frivolous appeal. (App. Case No. 5D05-3052). Delta's motion for rehearing, rehearing en banc or for an opinion was denied by the Fifth District, which issued its mandate on October 26, 2006. Delta had ample time to withdraw the frivolous Amended Complaint before the motion for attorneys' fees was filed, but refused to do so.

Petitioner mistakenly speculates that any amended complaint filed after summary judgment would have been dismissed by the trial court. (Juris. Brief, p. 6). The trial court, however, did not prohibit Delta from filing an amended complaint after summary judgment was entered. In fact, the trial court specifically granted Delta leave to file an amended complaint after summary judgment was entered on the original Complaint.

The cases cited by Delta regarding amended complaints are inapplicable. Amended complaints that involve justifiable issues arguably supported by material facts and existing law may be allowed. Latin America Cafeteria v. Zales Meats Distributors, Inc., 921 So. 2d 768, 771 (Fla. 3rd DCA 2006);

Cowgill v. Bank of America, 831 So. 2d 241 (Fla. 2d DCA 2002); Read v. Taylor, 832 So. 2d at 220. Delta's Amended Complaint did not present a justifiable issue supported by material facts and existing law. Sanctions against Delta were not imposed merely because the Amended Complaint failed to state a cause of action. Rather, attorneys' fees were assessed because Delta ignored the trial court's order granting summary judgment and attempted to file essentially the same claims a second time, forcing the parties re-litigate the same legal arguments and the same statutes that the trial court had already rejected.

CONCLUSION

Because the opinion by the Fifth District does not conflict with any prior opinions of this Court or of Florida district courts, this Court has no basis to invoke discretionary jurisdiction, and Delta's petition for jurisdiction should be DENIED.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that Respondent's Jurisdictional Response Brief fully complies with the formatting requirements prescribed by Florida Rule of Appellate Procedure 9.210.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. mail to Rosemary H. Hayes, Esquire, Hayes & Caraballo, P.L., 830 Lucerne Terrace (32801) P. O. Box 547248, Orlando, FL 32854-7248; William L. Grant, Attorney, Shutts & Bowen, LLP, 300 S. Orange Avenue, Suite 1000 P.O. Box 4956, Orlando, FL 32802-4956; on this _____ day of December, 2006.