

IN THE SUPREME COURT OF FLORIDA

PMI Mortgage Insurance Co.
Appellant/Petitioner,

Case No.: SC10-412
3RD DCA Case No.: 3D09-65
L.T. Case No: 04-11093-CA-21

vs.

Jose A. Baide and Martin D. Kahn,
Appellee/Respondents.

PETITIONER'S BRIEF ON JURISDICTION CONCERNING
THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL

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FORMAT OF REFERENCES

Appellant/Petitioner PMI Mortgage Insurance Co. shall be referred to as “PMI.” Appellee/Respondent Jose A. Baide shall be referred to as “Baide.” Appellee/Respondent Martin D. Kahn shall be referred to as “Kahn.” References to the record on appeal shall be in the format: (R. #). References to the appendix of the Initial Appellate Brief to the Third District shall be in the format: (BA. #). References to the appendix shall be in the format: (A. #).

STATEMENT OF THE FACTS AND CASE

PMI obtained a final judgment against Baide on March 30, 2005 (R. 19). PMI was unable to obtain payments or locate assets for Baide and filed a Motion for Proceedings Supplementary to Execution (R. 23-25). Hearing was held on PMI's motion. The trial court entered an order appointing Kahn as a special magistrate for an examination of Baide (BA. 1). PMI informed the court that the judgment debtor was responsible for the costs of proceedings supplementary, including any fees claimed by Kahn. The trial court struck the provision in PMI's proposed order requiring a deposit from the judgment debtor to ensure payment of the magistrate's fees; however, the order did not require PMI to pay the fees or fix any amount for fees (BA. 1).

An examination was scheduled for December 28, 2006, and Baide did not appear (BA. 2). PMI filed a motion for contempt. A show cause hearing was held, and Baide did appear (R. 28-30). The trial court entered a new order, appointing General Magistrate Elizabeth Schwabedissen to take the judgment debtor's examination (R. 31; A. 3). A new examination date was scheduled for August 13, 2007 in front of Magistrate Schwabedissen (R. 31; A. 3). She filed a report on September 5, 2007 (R. 32-35). Kahn filed nothing until his Motion for Judgment for Special Magistrate's Fees dated September 24, 2008—more than a year after the conclusion of the proceedings by the filing of the General Magistrate's Report

and almost two years after any participation by Kahn (R. 36-40). Hearing on Kahn's motion was held on December 23, 2008 before Judge Mary R. Barzee (BA. 4). The court entered a Judgment for Special Magistrate's Fees on that date (BA. 5).

PMI filed an appeal of the judgment (R. 77-78). Kahn sought to have jurisdiction returned to the Circuit Court to amend the judgment, and an Amended Judgment for Special Magistrate's Fees was entered (R. 54). The Third District Court of Appeal rendered its opinion on December 9, 2009 (A. 1). A Motion for Rehearing was filed on December 21, 2009 (R.). Rehearing was denied on February 2, 2010 (R.) A Notice to Invoke Discretionary Jurisdiction was filed on March 2, 2010.

SUMMARY OF ARGUMENT

Two years after the magistrate conducted an examination, the trial court assessed the costs of the magistrate against PMI without prior notice or opportunity to object to the fees or withdraw the request for proceedings supplementary. PMI sought review from the Third District Court of Appeal, and the order was affirmed. The opinion of the Third District Court of Appeal conflicts with the decisions of other District Courts and of the Florida Supreme Court on three different grounds: (1) lack of jurisdiction, (2) contrary to express statutory language, and (3) lack of due process.

The opinion of the Third District is in conflict with the Second District in *Bank One, N.A. v. Batronie*, 884 So.2d 346, 348-349 (Fla. 2d DCA 2004) and the Fifth District in *Maresca v. Olivo*, 819 So.2d 855, 857 (Fla. 5th DCA 2002), holding that the trial court loses jurisdiction upon entry of a final order, except as provided by rule.

The opinion of the Third District is contrary to the express language of §56.29(11), Fla. Stat. (2008). Therefore, the opinion is in direct conflict with the decisions reached by the Second District in *Bloco, Inc. v. Porterfield Oil Co.*, 990 so.2d 578 (Fla. 2d DCA 2008) and the Fourth District in *Gaedeke Holdings, Ltd. v. Mortgage Consultants, Inc.*, 877 So.2d 824 (Fla. 4th DCA 2004), holding that costs and fees pursuant to §56.29, Fla. Stat. may *only* be assessed against the

judgment debtor.

The Third District's decision permits the imposition of magistrate's fees on PMI without any prior notice, which violates their due process rights contrary to the this Court's ruling in *Stockman v. Downs*, 573 So.2d 835 (Fla. 1991). Assessing costs and fees against PMI *two years* after the conclusion of the proceedings is an *ex post facto* assessment. This violates not only notice requirements but also the "reasonable time" standard espoused by this Court in *Saia Motor Freight Line, Inc. v. Reid*, 930 So.2d 598, 600 (Fla. 2006).

The Supreme Court of Florida should exercise its discretionary jurisdiction and consider this case to resolve these conflicts of opinions and statutory interpretation.

ARGUMENT

Two years after the magistrate conducted an examination, the trial court assessed the costs of the magistrate against PMI, without prior notice or opportunity to object to the fees or withdraw the request for proceedings supplementary. PMI sought review from the Third District Court of Appeal, and the order was affirmed. This opinion conflicts with the decisions of other District Courts and of the Florida Supreme Court.

Proceedings supplementary to execution were terminated on September 5, 2007 (R. 32-35). No objections were made; no motions were filed pursuant to Fla. R. Civ. P. 1.530 or 1.540; nor were any motions filed within one year. Kahn's Motion for Judgment for Special Magistrate's Fees is dated September 24, 2008—more than a year after the conclusion of the proceedings and almost two years after the examination scheduled with Kahn (R. 36-40). The trial court lost jurisdiction to award the fees. *See Bank One, N.A. v. Batronie*, 884 So.2d 346, 348-349 (Fla. 2d DCA 2004); *Maresca v. Olivo*, 819 So.2d 855, 857 (Fla. 5th DCA 2002) (holding that the trial court loses jurisdiction upon entry of a final order, except as provided by Rule). Therefore, the opinion of the Third District is in conflict with the holdings of the Second District and Fifth District Courts of Appeal.

The opinion of the Third District Court of Appeal in the instant case is contrary to the express language of §56.29(11), Fla. Stat. (2008). The Third District's opinion acknowledges that the statute expressly “provides that costs in

proceedings supplementary are taxable against the judgment debtor” (A. 1, p.2). However, the opinion then affirms the trial court’s order taxing costs against the judgment creditor, PMI (A. 1, p. 2 and 4). Therefore, the opinion is in direct conflict with the decisions *on the same issue* reached by the Second District Court of Appeal in *Bloco, Inc. v. Porterfield Oil Co.*, 990 so.2d 578 (Fla. 2d DCA 2008) and the Fourth District Court of Appeal in *Gaedeke Holdings, Ltd. v. Mortgage Consultants, Inc.*, 877 So.2d 824 (Fla. 4th DCA 2004), holding that costs and fees pursuant to §56.29, Fla. Stat. may *only* be assessed against the judgment debtor.

The trial court entered an order appointing Kahn, *sua sponte*, as a special magistrate in proceedings supplementary to execution (BA. 1). PMI did not request a magistrate and could not object to the appointment. *See Calderon v. Kalb*, 963 So.2d 857 (Fla. 3d DCA 2007). The trial court has the option to hold the examination without a magistrate. §56.29(2), Fla. Stat. (2008). Thus, the costs at issue were entirely within the discretion of the trial court—not a cost incurred by PMI for which reimbursement is sought (e.g., court reporter’s attendance or cost of transcripts ordered by a party). The order appointing the special magistrate does not require either party to pay the costs of the magistrate and does not state the amount of any fees or costs. (BA. 1). However, more than a year after the conclusion of proceedings supplementary, the trial court ordered PMI to pay the costs and fees of the special magistrate (BA 4 and 5). The Third District’s decision permits the assessment of magistrate’s fees against PMI, notwithstanding that there

was no prior notice and no opportunity for PMI to withdraw the request for examination and avoid additional costs. The award of costs against PMI violates PMI's rights to due process, contrary to the Florida Supreme Court's analysis in *Stockman v. Downs*, 573 So.2d 835, 837 (Fla. 1991): "[T]he potential that one may be required to pay an opposing party's attorney's fees may often be determinative in a decision on whether to pursue a claim, dismiss it, or settle." Likewise, in the instant matter, notice of the possibility of assessment of costs against PMI could have been determinative in a decision to pursue a different means of discovery and collection than proceedings supplementary to execution. The act of assessing costs and fees against PMI two years after the conclusion of the proceedings is an *ex post facto* assessment. This violates not only notice requirements but also the "reasonable time" standard espoused by this Court in *Saia Motor Freight Line, Inc. v. Reid*, 930 So.2d 598, 600 (Fla. 2006).

The Third District's opinion acknowledges conflict with other District Court rulings but attempts to distinguish because those cases. Where those other opinions involved the taxation of costs against implied third parties, the present matter involved the taxation of costs against the judgment creditor (A. 1 p. 3). The conflict, however, is that costs can *only* be taxed against the judgment *debtor*. The Third District concludes its opinion with the statement that "PMI may recover the fee from the judgment debtor as costs at the conclusion of the proceedings supplementary" (A. 4). However, the award of fees at issue was made after the

conclusion of the proceedings (R. 32-35 and BA 4 and 5). Further, *when* costs and fees are assessed against a party is not addressed in §56.29(11), Fla. Stat. (2008)—only that they *must* be assessed against the judgment debtor. *See Bloco, Inc. v. Porterfield Oil Co.*, 990 so.2d 578 (Fla. 2d DCA 2008); *Gaedeke Holdings, Ltd. v. Mortgage Consultants, Inc.*, 877 So.2d 824 (Fla. 4th DCA 2004). The Third District’s opinion, that fees may be assessed against the judgment creditor “in the first instance” and then re-assessed at the conclusion of the proceedings against the judgment debtor, contradicts the statutory language and the opinions of other District Courts on this issue.

The Supreme Court of Florida should exercise its discretionary jurisdiction and consider this case to resolve the conflicts and statutory interpretation.

CONCLUSION

The decision of the Third District Court of Appeal is in direct conflict with the decisions of other District Courts of Appeal and conflicts with prior decisions of the Florida Supreme Court. Pursuant to Fla. R. App. P. 9.030(a)(2)(A)(iv) and (vi), this Court has jurisdiction to resolve these conflicts. This Court should accept jurisdiction to resolve the conflict and to clarify the discrepancies.

CERTIFICATE OF SERVICE

I certify that on _____ a copy of this brief was furnished by mail to: Martin D. Kahn, 9344 Northwest 48 Doral Terrace, Miami, Florida 33178; Jose A. Baide, 944 Northeast 154th Street, North Miami Beach, FL. 33162.

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CERTIFICATE OF COMPLIANCE

I certify that this Brief is submitted in Times New Roman 14 point in compliance with Fla. R. App.P. 9.210(a)(2).

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