

IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. SC11-1256
LOWER TRIBUNAL CASE NO. 3D10-2983

ARLENE PECORA,

Petitioner,

vs.

SIGNATURE GARDENS
LTD., a Florida limited partnership, DEUX
MICHEL, INC., a Florida corporation,
SIGNATURE GRAND, LTD., a Florida
limited partnership, and GRAND PARTNERS,
INC., a Florida corporation,

Respondents.

RESPONDENTS' ANSWER BRIEF ON JURISDICTION

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INTRODUCTION, STATEMENT OF THE CASE AND OF THE FACTS

Introduction

The Petitioner, Arlene Pecora (referred to herein as “Pecora” or “Petitioner”), seeks discretionary review of a March 30, 2011 Third District Court of Appeal Opinion (the “Opinion”), affirming an award of summary judgment in favor of the Respondents on Pecora’s claim for breach of contract for failure to give her a right of first refusal on the sale of the Respondents’ assets by its Court appointed Receiver. Pecora seeks discretionary review because she claims, inaccurately, that the Third District Court of Appeal’s decision conflicts with *Old Port Cove Holdings, Inc. v. Old Port Cove Condominium Association 1, Inc.*, 986 So.2d 1279 (Fla. 2008) and, *Pearson v. Fulton*, 497 So.2d 989 (Fla. 2nd DCA 1986), on the same point of law. Additionally, she raises jurisdictional and venue arguments which she previously appealed and lost in the Third and Fourth District Courts of Appeal. More important, she filed a prior petition to invoke this Court’s jurisdiction on those same issues which this Court denied.

Statement of the Case and Facts

Michael Pecora and Jerome C. Berlin owned 50% each of the shares of Duex Michel, Inc., the general partner of Signature Gardens Ltd. (“Signature Gardens”) and

50% each of the shares of Grand Partners, Inc., the general partner of Signature Grand, Ltd. ("Signature Grand"). After a dispute in April, 2003, Michael Pecora shot Jerome Berlin and then killed himself. Thus, the Berlin Estate became a 50% owner in Duex Michel, Inc. and Grand Partners, Inc. and the Petitioner became the owner of the other 50% interests. See the Opinion at page 2. Administrators and temporary and permanent Receivers have been in control of the Signature Entities since shortly after the deaths of Jerome Berlin and Michael Pecora. Opinion at pages 2-3 and page 3 of Pecora's Petition. Despite the Petitioner's claim now that the sale at issue is voluntary, she fought every attempt by the Courts and their appointed Administrators and Receivers to exercise control over the Signature Entities, and any proposed sale, at every turn.¹ The Receiver sold the Signature

¹ See, *Pecora, etc. v. In Re: The Estate of Jerome C. Berlin*, Third District Court of Appeal Case No. 3D04-3193; *Arlene Pecora v. Bret Berlin as Personal Representative of the Estate of Jerome C. Berlin*, Third District Court of Appeal Case No. 3D08-1946; *Arlene Pecora, as Personal Representative of the Estate of Michael Pecora and Arlene Pecora, individually v. Bret Berlin as Personal Representative of the Estate of Jerome C. Berlin*, Third District Court of Appeal Case No. 3D09-594, 3D09-1343 (Consolidated); *Arlene Pecora v. Signature Gardens, Ltd. et al.*, Broward County Circuit Court Case No. 09-00232 (19); *Arlene Pecora v. Signature Gardens, Ltd., etc.*, Fourth District Court of Appeal Case No. 4D09-1192; *Arlene Pecora v. The Estate of Michael Pecora*, Fourth District Court of Appeal Case No. 4D04-2047; *Arlene Pecora v. Jesse H. Diner, Esq., et al.*, Fourth District Court of Appeal Case No. 4D07-769; *Arlene Pecora v. Atkinson, Diner Stone, etc.*, Fourth District Court of Appeal Case No. 4D07-2437; *Arlene Pecora v.*

Gardens to which the Petitioner objected because the listing agreement and ultimate sale did not include a right of first refusal she asserted entitlement to under the Signature Gardens' Distribution Agreement. Opinion at page 4. The Trial Court conducted a hearing, took testimony from the Receiver that a right of first refusal would have a chilling effect on the listing and sale of the Signature Gardens, and determined that the Petitioner did not have a right of first refusal. Opinion at pages 4-5. The Petitioner did not appeal that ruling nor the approval of the Signature Gardens without a right of first refusal. Opinion at page 5.

The Receiver then moved for summary judgment on the Petitioner's claim that she was entitled to a right of first refusal with respect to the Signature Grand. The Trial Court granted the Motion which was affirmed by the Third District Court of Appeal holding that the Distribution Agreement providing the right of first refusal contemplated sale by either the survivor of Jerome Berlin or Michael Pecora or their

Jesse Diner, Esq., et al., Fourth District Court of Appeal Case No. 4D07-2934; *Arlene Pecora v. Estate of Michael A. Pecora*, Fourth District Court of Appeal Case No. 4D07-4772; *Arlene Pecora v. Jesse H. Diner, Esq., etc.*, Fourth District Court of Appeal Case No. 4D08-823; *Arlene Pecora v. Jesse H. Diner, Esq., etc.*, Fourth District Court of Appeal Case No. 4D08-1692; *Arlene Pecora v. Deux Michel, Inc., etc.*, Fourth District Court of Appeal Case No. 4D10-1062; *Arlene Pecora v. Estate of Michael A. Pecora*, Fourth District Court of Appeal Case No. 4D10-2300; and, *Arlene Pecora v. Deux Michel, Inc., etc.*, Fourth District Court of Appeal Case No. 4D10-2996

Personal Representatives should the survivor fail to market and sell the Signature Entities; not sale by a court-appointed receiver in a judicial proceeding. The Third District specifically relied upon the unambiguous language of the contract which provides that the “Personal Representative” is authorized to seek and procure a buyer for the assets and/or shares of the corporation “giving the Survivor the right of first refusal on any offer received for the decedent’s interest in the corporation” and that if “a buyer is procured by the Survivor, the Personal Representative shall have a right of first refusal with respect to such offer.” (e.s.). Opinion at page 6. The Third District concluded that the Distribution Agreements did not provide for the exercise of a right of first refusal in a sale by a court appointed receiver in a judicial proceeding, therefore, Pecora could not exercise that option. Opinion at page 16.

The Opinion correctly noted that there were no Florida cases on point addressing this particular situation. Opinion at page 8.² The Court reviewed the particular facts of this case and concluded that the right of first refusal as provided for in the particular Distribution Agreement at hand cannot be exercised in the context of the probate proceedings below; at the very least because the Petitioner’s

² It thus begs the question as to how the Petitioner can claim conflict with any other case where there is no case deciding this particular point of law.

interpretation of the contract would lead to dual rights of first refusal available to both the Berlin Estate and the Petitioner. Opinion at footnote 4. The Petitioner's interpretation of the contract invites further court proceedings as a means to resolve the dueling rights of first refusal asking this, and the lower courts, to rewrite the contract to allow for court intervention to resolve this defect in the contract.

SUMMARY OF THE ARGUMENT

This Court should not exercise its discretion to take jurisdiction over Pecora's Petition because the Third District's Opinion does not conflict with *Old Port Cove* and *Pearson v. Fulton*. The Third District merely cited to the definition of the right of first refusal contained in those opinions; it did not apply the point of law decided by *Old Port Cove* or *Pearson*. Neither case entertained the same point of law decided by the Third District Court of Appeal nor is the Opinion inconsistent with the holdings in those two (2) cases.

To the extent Pecora is seeking to revive her claim that the Third District misapplied Chapter 607, Florida Statutes, her Petition should be rejected summarily. Pecora repeatedly appealed that issue to the Third and Fourth District Courts of Appeal and was rejected every time. The Petitioner already attempted to invoke the jurisdiction of this Court to decide the application of 607, Florida Statutes, and this

Court declined jurisdiction. *See Arlene Pecora v. Signature Gardens, Ltd., et al.*, Supreme Court Case No. SC10-498. Accordingly, this Court should decline jurisdiction again.

ARGUMENT

I. The March 30, 2011 Decision of the Third District Court of Appeal Presents No Express and Direct Conflict

Pecora contends that this Court should accept jurisdiction in this matter because the Opinion conflicts with *Old Port Cove* and *Pearson*. However, a cursory review of those opinions reveals that there is no conflict with the decision below.

As a threshold matter, this is a court of limited jurisdiction under Florida's Constitution. *See Mystan Marine, Inc. v. Harrin*, 339 So.2d 200, 201 (Fla. 1976). Pecora asserts here that jurisdiction should be exercised because the Opinion misapplied existing decisional law. Under this limited application of jurisdiction, it should only be invoked where the District Court has applied a conclusion of law to reach a conflicting result in a case involving essentially the same set of facts as in the alleged conflicting decision of this Court. *See Nielsen v. City of Sarasota*, 117 So.2d 731 (Fla. 1960); *Florida Power and Light Company v. Bell*, 113 So.2d 697 (Fla. 1959). Pecora has not established that the Opinion "expressly and directly conflicts with a decision of another district court of appeal or the Supreme Court on the same

question of law” as required by Florida Constitution Article V, §3(b)(3); *Fla. R. App.P.* 9.030(a)(2)(A)(iv).

In *Old Port Cove*, the point of law passed on by this Court was whether the rule against perpetuities applied to a right of first refusal. The Third District simply recited the definition of a right of first refusal contained in *Old Port Cove*, but did not apply any of the points of law decided therein. In *Pearson*, the Second District held that the Appellant perfected his option to a right of first refusal by exercising that right in writing within the 120 days afforded by contract. The point of law passed on by *Pearson*, when an option is perfected, was not relevant, much less applied, by the Third District. Neither *Pearson* nor *Old Cove* involved the sale of property or assets through a judicial process by a court appointed receiver. Indeed, in *Old Port Cove*, there was no sale but rather an action to quiet title on a property with the petitioning party asserting that a right of first refusal more than 25 years old violated the rule against perpetuities. Additionally, the Appellant claimed that §689.225, *Fla. Stat.*, which modified the rule, could not be applied retroactively to defeat the owner’s right to dispose of the property to whomever he chose. Here, obviously, the rule against perpetuities and §689.225, *Fla. Stat.* had no role in the Third District’s decision.

Even if the Opinion can be construed as an application of the point of law

stated in *Old Port Cove* and *Pearson*, the application below is not in conflict with those cases nor was the point of law misapplied. The clause at issue provided for a right of first refusal where either the survivor or personal representative procured a buyer, not the Receiver. The contracting parties' failure to provide for the sale by a receiver is no small problem. Under Pecora's interpretation of the contract, both she and the Berlin Estate are entitled to a right of first refusal when the Receiver procures a buyer. She asserts that the dueling claims can then be decided by the lower court, conceding that the contract is unworkable as written without further court intervention. However, she points to no case which authorizes a court to interpret a contract as contemplating judicial intervention to implement its alleged purpose. In fact, the settled case law is inapposite. *See Fernandez v. Homestar at Miller Cove, Inc.*, 935 So.2d 547, 551 (Fla. 3rd DCA 2006)(a court is powerless to rewrite a contract to make it more reasonable or advantageous for one of the contracting parties); and, *Hill v. Deering Bay Marina Ass'n, Inc.*, 985 So.2d 1162, 1166 (Fla. 3rd DCA 2008)(courts do not rewrite contracts).

More important, the Opinion, in its essence, is simply an interpretation of a particular contract clause, which by its language, did not apply to the circumstances presented in the lower court. As such, it is nothing more than a garden variety

contract interpretation case over which this Court should not take jurisdiction. When exercising its discretion, the Court must confine itself “to hearing cases having important ramifications for the State’s juris prudence”. *Joel v. State*, 405 So.2d 418, 423 (Fla. 1981); *Ansin v. Thurston*, 101 So.2d 808, 811 (Fla. 1958) (“a limitation of review to decisions in ‘direct conflict’ clearly evinces a concern with decisions as precedence as opposed to adjudications of the rights of particular litigants.”). Here, the Court’s ruling is limited to the particular facts of this case and the language contained in the parties’ contract. Thus, this court should not take jurisdiction.

II. The Appellant has raised jurisdiction and venue under Chapter 607, Florida Statutes in numerous appeals all decided against her and this Court has already declined jurisdiction on that issue in a separate appeal filed by the Appellant

Pecora has had multiple opportunities in the lower and appellate courts to argue her position that Chapter 607, Florida Statutes requires jurisdiction and venue in Broward County, not in Miami-Dade. All of her sundry motions and appeals, including a prior attempt to invoke the jurisdiction of this Court to pass on the issue, have been rejected. In *Arlene Pecora v. Signature Gardens, Ltd., et al.*, Supreme Court Case No. SC10-498, Pecora sought to invoke this Court’s jurisdiction because the lower court stayed a dissolution action she filed in Broward County in favor of the dissolution action previously filed in Miami-Dade which was affirmed by the Fourth

District. She argued that the stay, in effect, was in conflict “with cases from this court and others on the interpretation and application of Chapter 607, Florida Statutes.” Therefore, this Court should decline jurisdiction on this issue, **again**.

CONCLUSION

For the foregoing reasons, the Court should find that it is without conflict jurisdiction and dismiss the Petitioner’s request for discretionary review.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Answer Brief was served upon counsel by E-mail and U.S. Mail on the attached service list this day of July, 2011.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Answer Brief complies with the type-volume limitations set forth in *Fla. R. App. P.* 9.210(a)(2) and 9.210(a)(5) and is prepared in Times New Roman 14-point font.

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