

IN THE SUPREME COURT OF FLORIDA

CASE NO. _____

LOWER DCA CASE NO. 3D14-271

**YACHT BRASIL MOTOR BOATS &
CHARTERS, LLC,**

Petitioner,

-VS-

JOHN GLUCK,

Respondent.

PETITIONER'S JURISDICTIONAL BRIEF

On Review from the District Court of Appeal
Third District, State of Florida

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Florida District Court of Appeal Case

PNC Bank v. Duque,

137 So. 3d 476 (Fla. 4th DCA 2014) 2, 3, 5, 6

STATEMENT OF THE CASE AND FACTS

Petitioner, YachtBrasil Motor Boats and Charters, LLC (hereinafter “Petitioner”), Defendant/Counter-Plaintiff in the Trial Court and appellant in the Third District Court of Appeal, respectfully submits this brief in support of its invocation of this Court’s discretionary jurisdiction to review a decision that expressly and directly conflicts with prior decisions of this Court and another District Court of Appeal’s decision on the same point of law. See Rule 9.030(a)(2)(iv), Florida Rules of Appellate Procedure. Consequently, in this statement of the case and facts, Petitioner will confine itself to those facts as stated in the underlying Third District Court of Appeal’s Opinion, a copy of which is attached as “Appendix A.”

The Petitioner was sanctioned by the Trial Court’s order entered on June 5, 2013 striking its answer and affirmative defenses, counterclaim, and awarding the Respondent attorney’s fees and costs related to Respondent’s sanctions’ motion. No prior discovery sanctions had been entered against Petitioner in the Trial Court.

An appeal was filed to the Third District Court of Appeal to review the Trial Court’s order granting the Respondent’s motion striking Petitioner’s answer and affirmative defenses to Respondent’s Complaint, striking Petitioner’s counterclaim with prejudice, and awarding Respondent’s attorney’s fees and costs in connection with Respondent’s motion for sanctions against Petitioner. The Third District

Court of Appeal affirmed the Trial Court's order on June 4, 2014 stating: "YachtBrasil Motor Boats & Charters LLC, and Aderbal Coelho, Junior appeal the trial court's Order Granting Sanctions dated June 5, 2013 striking Yacht Brasil's answers and affirmative defenses and dismissing Yacht Brasil's counterclaim with prejudice. Although these are severe sanctions, we find the trial court did not abuse its discretion and find that each of the elements of Kozel v. Ostendorf, 629 So. 2d 817 (Fla. 1993) is supported by the evidence." (App. A). Petitioner's request for rehearing was denied on June 20, 2014, and the Petitioner's notice to invoke the discretionary jurisdiction of this Court was timely filed on July 3, 2014.

SUMMARY OF THE ARGUMENT

This Court has and should exercise jurisdiction, pursuant to Article V § 3(b)(3), Fla. Const., to review the Florida Third District Court of Appeal's Opinion because of express and direct conflict with decisions of this Court and other District Courts of Appeal, namely the Fourth District Court of Appeal. While the Third District Court of Appeal's June 4, 2014 Opinion contemplated the six factors promulgated by Kozel v. Ostendorf, 629 So. 2d 817, 818 (Fla. 1993), it completely neglected to contemplate whether lesser sanctions were appropriate as mandated by this Court in Ham v. Dunmire, 891 So. 2d 492 (Fla. 2004), and further did not require prior sanctions before imposing the most severe sanction of case dismissal, which is expressly contradicting PNC Bank v. Duque, 137 So. 3d

476 (Fla. 4th DCA 2014). Accordingly, conflict jurisdiction is conferred upon this Court and this Court should address the Third District Court of Appeal's express misapplication of the requirement of evaluating lesser discovery sanctions prior to case dismissal, as determined by prior sanctions actually being entered by the Court before dismissal itself.

ARGUMENT

THIS COURT SHOULD EXERCISE JURISDICTION UNDER ARTICLE V § 3(B)(3), FLA.CONST., TO REVIEW THE THIRD DISTRICT COURT OF APPEAL'S DECISION BASED UPON ITS EXPRESS AND DIRECT CONFLICT WITH PRIOR DECISIONS OF THIS COURT AND OTHER DISTRICT COURTS OF APPEAL ON THE SAME POINT OF LAW.

The decision of the Third District Court of Appeal in this case expressly and directly conflicts with the decision of this Court in Ham v. Dunmire, 891 So. 2d 492 (Fla. 2004), and the Fourth District Court of Appeal's ruling in PNC Bank v. Duque, 137 So. 3d 476 (Fla. 4th DCA 2014).

A. The Third District Court of Appeal's Opinion contradicts this Court's Mandate in Ham v. Dunmire.

This is simply not a case involving a protracted history of discovery abuses, numerous motions to compel, prior sanctions by the trial court, patent prejudice to the opposing party, or other circumstances that would in any way warrant imposition of the ultimate sanction of dismissal. In Ham, this Court made clear that “dismissal of an action is unwarranted in a case, such as this, where more appropriate sanctions were available.” Ham, 891 So. 2d at 499. This is true

“because the sanction of dismissal in all cases must be a reasonable response to the discovery infractions committed.” Id. at 498. The second factor articulated by this Court in Kozel, 629 So. 2d at 818, “whether the attorney has been previously sanctioned,” must at all times be considered in conjunction with “if a sanction less severe than dismissal with prejudice appears to be a viable alternative, the trial court should employ such an alternative.” Id. That is why this Court in Ham remanded the case to the District Court with instructions to remand to the Trial Court for a determination of what sanctions, short of dismissal, were appropriate for the discovery violations of the Petitioner. Ham, 891 So. 2d at 501 (emphasis added).

Here, this Court’s decision in Ham is irreconcilable with the Third District Court of Appeal’s June 4, 2014 Opinion affirming the Trial Court’s June 5, 2013 Order striking Petitioner’s answers and affirmative defenses and dismissing Petitioner’s counterclaim with prejudice. Where, as here, the Trial Court has not imposed previous sanctions prior to case dismissal with prejudice it facially apparent that lesser sanctions were never contemplated. The Third District Court of Appeal’s misapplication of Kozel, which contradicts this Court’s express language in Ham, stems from its complete failure to address the Trial Court’s failure to consider alternative, lesser sanctions as evidenced by the June 4, 2014 Order’s deficient finding that “Although these are severe sanctions, we find the

trial court did not abuse its discretion and find that each of the elements of Kozel v. Ostendorf, 629 So. 2d 817 (Fla. 1993) is supported by the evidence.” (App. A). However, application of the six Kozel factors itself is insufficient without also determining whether lesser sanctions were available, and if no prior sanctions were ever entered it constitutes prima facie evidence that lesser sanctions were available. See Ham, 891 So. 2d at 498-99. In summary, the Third District Court of Appeal’s June 4, 2014 Order expressly contradicts the precedent of this Court in Ham because its failure to consider that there were no prior sanctions entered before the Order dismissing the case is in of itself prima facie evidence of the failure to contemplate lesser sanctions as mandated by Kozel and rearticulated in Ham. See Ham, 891 So. 2d at 498-99; Kozel, 629 So. 2d at 818.

B. The Third District Court of Appeal's Opinion Directly Conflicts with PNC Bank v. Duque, 137 So. 3d 476 (Fla. 4th DCA 2014), Based on Different Interpretations of Ham.

Recently the Fourth District Court of Appeal, applying this Court’s ruling in Ham, upheld that “[t]he imposition of the ultimate sanction of dismissal is warranted in cases involving a protracted history or discovery abuses, numerous motions to compel, prior sanctions by the trial court, and patent prejudice to the opposing party.” Duque, 137 So. 3d at 478 (Fla. 4th DCA 2014) (citing Ham, 891 So. 2d at 499) (internal quotation marks omitted) (emphasis added). The coordinating conjunction “and” between “prior sanctions by the trial court, and

patent prejudice to the opposing party” clearly mandates that under the Florida Fourth District Court of Appeal’s interpretation of Ham, dismissal as a discovery sanction is only warranted if all the following are satisfied: (i) protracted history of discovery abuses, (ii) numerous motions to compel, (iii) prior sanctions by the trial court, and (iv) patent prejudice to the opposing party,” and the absence of one of these factors dictates that the ultimate sanction of dismissal is unavailable. See id. This directly conflicts with the Third District Court of Appeal’s June 4, 2014 Opinion, which contemplated the Kozel factors, but nevertheless neglected to consider the absence of prior sanctions, and under Duque prior sanction(s) are a prerequisite prior to case dismissal for discovery violations. See Duque, 137 So. 3d at 478. Accordingly, jurisdiction is appropriate to resolve the conflict between the Fourth District Court of Appeal and the Third District Court of Appeal regarding whether prior sanctions are necessary before the case dismissal for discovery violations.

CONCLUSION

Based on the express and direct conflicts shown to exist, this Court should enter an Order accepting jurisdiction and quash the Third District Court of Appeal's June 4, 2014 Opinion.

CERTIFICATE OF SERVICE

I CERTIFY that a copy hereof has been furnished on July 14, 2014, via email service to: Jane Moscovitz at jmoscowitz@moscowitz.com and Norman Moscovitz at nmoscowitz@moscowitz.com from Moscovitz & Moscovitz, P.A. at Sabadell Financial Center, Suite 2050, 1111 Brickell Avenue, Miami, Florida 33131.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief was prepared in Times New Roman,
14-point font, in compliance with Fla. R. App. P. 9.210.

Dated: July 14, 2014.

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Appendix A
Third District Court of Appeal
State of Florida

Opinion filed June 4, 2014.
Not final until disposition of timely filed motion for rehearing.

Nos. 3D14-271 and 13-1733
Lower Tribunal No. 12-27257

YachtBrasil Motor Boats & Charters, LLC, et al.,
Appellants,

vs.

John Gluck,
Appellee.

Appeals from the Circuit Court for Miami-Dade County, Sarah I. Zabel,
Judge.

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YachtBrasil Motor Boats & Charters LLC.

Moscowitz & Moscowitz and Norman A. Moscowitz and Jane W.
Moscowitz, for appellee.

Before SUAREZ, SALTER, and SCALES, JJ.

SUAREZ, J.

YachtBrasil Motor Boats & Charters LLC, and Aderbal Coelho, Junior
appeal the trial court's Order Granting Sanctions dated June 5, 2013 striking

Appendix A

YachtBrasil's answers and affirmative defenses and dismissing YachtBrasil's counterclaim with prejudice. Although these are severe sanctions, we find the trial court did not abuse its discretion and find that each of the elements of Kozel v. Ostendorf, 629 So. 2d 817 (Fla. 1993) is supported by the evidence.

Affirmed.