

SUPREME COURT OF FLORIDA

CASE NO. SC14-2038

Lower Tribunal Case No. 3D14-380, 13-23414 CA 15

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**WILLIAM SCOTT HANNON, individually and G&S REALTY ADVISORS
CORP., a Florida Corporation,**

Petitioners,

vs.

MARK ROUSSO and THE ALHADEFF LAW GROUP, P.L.,

Respondents.

ANSWER BRIEF OF RESPONDENTS

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II. STATEMENT OF THE FACTS AND OF THE CASE

The underlying action is a declaratory judgment seeking a determination that an agreement is declared null and void for lack of consideration. The Plaintiff—respondent, Andrew Mirmelli (“Mirmelli”), contacted the defendant—petitioner, William Scott Hannon (“Hannon”), regarding the potential sale or lease of a parking lot in Miami. Before Hannon, who claimed to be a real estate agent and principal for the owner of the lot, agreed to provide any information to Mirmelli, he demanded that Mirmelli sign a document titled “The Gateway Confidentiality/Non-Circumvention Agreement” (“the Agreement”) promising that he would provide specific confidential documents regarding an alleged development called the Gateway. This Agreement forbade Mirmelli from disclosing any of the information furnished by Hannon to third parties and from circumventing Hannon by contacting another realty service or agent to pursue purchase or rental of any property in a specific block. The Agreement specifically states that nothing therein constitutes an offer of sale and that the seller, Hannon, could solicit other offers or sell the property to a third party without notice to Mirmelli but provided nothing to Mirmelli in return. After signing the agreement, HANNON told MIRMEELLI that there were no opportunities available.

Some months after Mirmelli signed the Agreement, MARK ROUSSO, a non-party to the Mirmelli–Hannon Agreement, purchased a commercial parking lot

in the area. Mirmelli brought suit against Hannon for a declaratory judgment seeking a determination that an agreement is declared null and void for lack of consideration, to rescind their Agreement and recover damages for the lost potential to purchase or lease properties on the 200 Block of E Flagler Street. Mirmelli alleged that Hannon had not provided the evaluation materials as mandated in the Agreement and that Hannon had otherwise wrongfully induced Mirmelli into signing the Agreement. Hannon did not countersue but Hannon responded by denying the substance of Mirmelli's allegations and raising the affirmative defense that he could not be held personally liable because he was working as an agent. Hannon has not raised any counterclaims against Mirmelli and has not interpleaded Rousso or Alhadeff. Thus, Rousso and Alhadeff currently stand as wholly unrelated nonparties to the underlying litigation. Given that relevance is framed by the pleadings, and Hannon failed to include any reference anywhere in his pleadings to implicate or involve Rousso or Alhadeff, any information requested from Rousso or Alhadeff is irrelevant and beyond the scope of discovery.

Defying this well-established tenet, during the course of the litigation, Hannon sought discovery of Rousso's financial information and communications between Rousso and Alhadeff, Rousso's legal counsel, purportedly to obtain details regarding the sale of the parking lot. Rousso and Alhadeff moved for a

protective order, claiming that their purchase of the lot was irrelevant to Mirmelli's pending claims against Hannon, particularly because Roussso and Alhadeff were not involved in the litigation, their financial information is presumed confidential based on Article 1 Section 23 of the Florida Constitution, and the communications between Roussso and his counsel are protected by the attorney-client privilege and irrelevant. In response, Hannon argued that the facts of the sale were relevant in the Mirmelli-Hannon litigation because the transaction appeared fishy² to him given the odd procedural background. The trial court denied the motion for a protective order, and Roussso and Alhadeff were ordered to submit to the discovery requests. Roussso and Alhadeff petitioned the Third District Court of Appeal for certiorari and the Third District quashed the trial court order, granting Roussso and Alhadeff the protective order. Petitioner moved for a rehearing in the Third District and, upon denial, has brought the issue to this Court.

III. POINT ON APPEAL

Whether Roussso v. Hannon, 146 So. 3d 66 (Fla. 3d DCA 2014), conflicts with or disregards Board of Internal Improvement Trust Fund v. The American Educational LLC, 99 So. 3d 450 (Fla. 2012) or Sucart v. Office of Commissioner, 129 So. 3d 114 (Fla. 3d DCA 2013).

IV. SUMMARY OF ARGUMENT

Petitioner has failed to invoke the discretionary review of this Court where Petitioner has failed to establish a direct and express conflict between the Third

DCA's Opinion or the Florida Supreme Court opinion.¹ Petitioner argues that Board of Trustees and Sucart dictate that, especially when addressing trial courts' determination of discoverability of materials that appear to be relevant, granting certiorari is an extremely rare form of relief that should be granted in very limited circumstances.

The cases relied upon by Petitioner in attempting to establish an express and direct conflict with the Third District's Opinion and the Florida Supreme Court opinion do not expressly and directly conflict with either opinion. Rather, Petitioner has too narrowly presented the law on the standard for certiorari review. The Third District's decision in Rousso thoroughly acknowledges and expressly agrees with this high standard, mandated by the Florida Constitution, before reiterating the well-established tenet that relevance is determined by the pleadings and concluding that **the facts, as pled, in Rousso** demonstrate exactly the sort of extraordinary situation that warrants granting certiorari of non-final orders and are on all fours with Board of Trustees and Sucart. Moreover, the Third District Court's Opinion establishes that the lower court departed from the essential requirements of law and thus, certiorari was appropriate.

V. ARGUMENT

¹ Petitioner posits that this Court has jurisdiction to consider a review of the Rousso decision based on Petitioner's erroneous assertion that the decision in Rousso conflicts with this Court's decision in Board of Trustees and misapplies the Third District's decision in Sucart.

This case does not provide a basis for the exercise of discretionary jurisdiction. The Supreme Court of Florida has the authority as the highest court of the state to resolve express and direct conflicts created by the district courts of appeal. Cobly Materials, Inc. v. Caldwell Const., Inc., 926 So. 2d 1181 (Fla. 2006). One test utilized by the Florida Supreme Court to determine whether decisions are considered to be in express and direct conflict is whether the decisions are irreconcilable. Aravena v. Miami-Dade County, 928 So. 2d 1163, 1166-67 (Fla. 2006).

Petitioner claims that “the Third District in Rousso conflicts with or misapplies this Court’s pronouncements in American Educational and that of the Third District itself, in Sucart.” Respondent's Motion p. 9. However, the majority opinion in this case is clearly distinguishable from, and therefore reconcilable with, these two decisions.

A. Petitioner Mischaracterizes Board of Trustees as Conflicting with Rousso, Given that Board of Trustees Deals with Discovery for Parties to the Litigation where Rousso Deals with Non-Parties to the Case

In Board of Trustees, American Educational Enterprises, LLC (American) was the assignee of Florida National College's (FNC) right, title, and interest to and under a contract for the sale and purchase of state-owned property. 99 So. 3d 450, 452 (Fla. 2012). As part of its deal with American, the Board propounded to American a request for the production of documents seeking several confidential

financial documents transacted by FNC prior to assignment. Id. In the case of Board of Trustees, the financial documents that Board sought to obtain through discovery were documents that had been available to a prior party whose position Board now held. These facts differ from the present case, given that in Board of Trustees the party whose records were being sought was the entity who had purchased and then assigned the property to the defendant. In the present case, Petitioner seeks banking records from non-parties, wholly uninvolved in the dispute, whose financial privacy is guaranteed by Article 1, Section 23 of the Florida Constitution.

Ultimately, the court granted the request for discovery of the financial information noting that “[t]he financial information sought in the disclosure order may lead to evidence to resolve the underlying action based upon the parties’ contentions regarding the value of the property as compared to the purchase price. Id. at 459. (emphasis added). Board of Trustees clearly stipulated that the information is discoverable if it appears to be relevant to the subject matter of the pending action based on the pleadings.² As was noted in the majority opinion, the instant case involves the records and financial information of non-parties who, based on the pleadings and the record, have no relevant connection to the parties in

² “It is axiomatic that information sought in discovery must relate to the issues involved in the litigation, as framed in all pleadings” Krypton, 629 So. 2d at 854. See also Fla. R. Civ. P. 1.280(b)(1) (discovery must be relevant to the subject matter of the pending action).

this case.³ Absent relevance established in the pleadings, non-parties' information is protected by the privacy guaranteed by the Florida Constitution. Fla. Const. art. 1 sec. 23.⁴

B. Petitioners Mischaracterize Sucart and the Standards for Certiorari
Review When Dealing with Cat-out-of-the-bag Discovery

The Petitioner also alleges that the majority opinion diverges from this Court's prior opinion in Sucart; however this case also falls squarely in line with the Sucart decision⁵. In Sucart the Court held that "...a departure from the essential requirements of the law that will justify issuance of this extraordinary writ requires significantly more than a demonstration of legal error." The majority opinion has established that a departure from the essential requirements of law exists in the

³ Discovery orders that require the disclosure of claimed confidential information are reviewed with greater caution than those that are simply burdensome or costly due to overbreadth. Megaflight, Inc. v. Lamb, 749 So.2d 594, 595 (Fla. 5th DCA 2000) ("[W]e agree with those who suggest that erroneous orders that require overbroad discovery of nonprivileged documents should be subjected to certiorari review more cautiously than erroneous orders requiring discovery of confidential or privileged matters."), quoted by, Bd. of Trs. of Internal Improvement Trust Fund, 99 So.3d at 456. Indeed, an order requiring the disclosure of confidential "cat-out-of-the-bag" information is precisely the type of order that can cause irreparable harm. Allstate, 655 So.2d at 94.

⁴ It is of note that the Florida Constitution extends a higher level of privacy than that proscribed by the Federal Constitution, demonstrating a strong belief in that this State holds as to the protection of its citizen's privacy. See Art. 1 § 23, Fla. Const.

⁵ It should be noted that the protective orders filed by the non-parties in Sucart alleged that the trial court lacked subject matter jurisdiction due to federal preemption, rather than a privilege claim asserted in the instant case. Sucart at 1114.

instant case, citing numerous cases explaining that “[d]iscovery is limited to those matters relevant to the litigation *as framed by the pleadings*.” Rouso v. Hannon, 146 So. 3d 66, 69 (Fla. 3d DCA 2014)⁶. Here we are dealing with privileged, irrelevant financial documents from non-parties. As this Court stated, discovery is from non-parties is limited to relevant documents as defined by the pleadings.

Moreover, the majority holds that the present case demonstrates the issue of irreparable harm that granting Certiorari is meant to protect against, “[i]ndeed, an order requiring the disclosure of confidential ‘cat-out-of-the-bag’ information is precisely the type of order that can cause irreparable harm.” Id. at 71. (quoting Allstate Insurance Company v. Langston, 655 So.2d at 94).

It is well established that “[c]onfidential discovery sought from **third parties** is not subject to a mere relevance inquiry as the dissent implies; rather, the respondents must establish a need for the information that outweighs the privacy interests of the third party.” Westco, Inc. v. Scott Lewis’ Gardening & Trimming, Inc. 26 So.3d 620, 622 (Fla. 4th DCA 2009) (“When confidential information is sought from a non-party, the trial court must determine whether the requesting party establishes a need for the information that outweighs the privacy rights of the

⁶ See also Diaz–Verson v. Walbridge Aldinger Co., 54 So.3d 1007, 1011 (Fla. 2d DCA 2010); Capco Props., LLC v. Monterey Gardens of Pinecrest Condo., 982 So.2d 1211, 1213–14 (Fla. 3d DCA 2008); Richard Mulholland & Assocs. v. Polverari, 698 So.2d 1269, 1270 (Fla. 2d DCA 1997); Krypton Broad. of Jacksonville, Inc. v. MGM–Pathe Commc'ns Co., 629 So.2d 852, 854 (Fla. 1st DCA 1993),

non-party.”)⁷ Here, the majority concludes that the Petitioner has not, **based on the pleadings**, established that the need for the information outweighs the constitutionally protected privacy interests of the non-parties. “**Hannon simply has not shown, based on the record, that his need for the information sought outweighs the privacy rights of Rousso and Alhadeff** because the only information sought can be more easily obtained through Mirmelli. Rousso v. Hannon, at 71 (emphasis added).

Not only does compelling discovery of information that is **not relevant based on the pleadings** depart from the essential requirements of the law, the fact that the information sought is the privileged and confidential financial information of non-parties renders it a violation of the Florida Constitution. It is well established that “[t]he right of privacy set forth in Article 1, Section 23, of the Florida Constitution ‘undoubtedly expresses a policy that compelled disclosure through discovery be limited to that which is necessary for a court to determine contested issues.’ ” Rappaport v. Mercantile Bank, 17 So. 3d 902, 906 (Fla. 2d DCA 2009) (citing Woodward v. Berkery, 714 So. 2d at 1036).⁸

⁷ See also Berkeley v. Eisen, 699 So.2d 789, 791 (Fla. 4th DCA 1997); CAC–Ramsay Health Plans, Inc. v. Johnson, 641 So.2d 434, 435 (Fla. 3d DCA 1994); Aetna Life Ins. Co. v. Hausman, 598 So.2d 223, 224 (Fla. 5th DCA 1992); Higgs v. Kampgrounds of Am., 526 So.2d 980, 981 (Fla. 3d DCA 1988) (citing Rasmussen v. South Fla. Blood Serv., 500 So.2d 533, 535 (Fla.1987)).

⁸ Notably, in Rappaport v. Mercantile Bank, 17 So. 3d 902 (Fla. 2d DCA 2009), the court held that the trial court “depart[ed] from the essential requirements

Allowing discovery of the privileged, confidential financial information from non-parties who have no connection to the matter, **as is evident from the pleadings**, would certainly rise above the level of legal error, indeed, it would be a violation of the Florida Constitution. The majority opinion concurs, nothing that:

[B]oth types of information Hannon seeks—third party financial records and records kept by an attorney about his non-party client³—are of the utmost sensitivity and are not discoverable unless the party seeking discovery establishes a need for the discovery sufficient to overcome the privacy rights of the third party. *Westco, Inc. v. Scott Lewis' Gardening & Trimming, Inc.*, 26 So.3d 620, 622 (Fla. 4th DCA 2009) ... This heightened standard is necessary because “ ‘the disclosure of personal financial information may cause irreparable harm to a person forced to disclose it, in a case in which the information is not relevant,’ ” *Rappaport v. Mercantile Bank*, 17 So.3d 902, 906 (Fla. 2d DCA 2009) (quoting *Straub v. Matte*, 805 So.2d 99, 100 (Fla. 4th DCA 2002)), and because “personal finances are among those private matters kept secret by most people.” *Woodward v. Berkery*, 714 So.2d 1027, 1035 (Fla. 4th DCA 1998) (citing *Winfield v. Div. of Pari-Mutuel Wagering*, 477 So.2d 544 (Fla.1985)).

CONCLUSION

Because the relevant facts of Rousso are distinguishable from the pertinent facts in both Board of Trustees and Sucart, the Third District's decision in Rousso was correct, rendering a review of the Rousso decision by this Court unnecessary.

of law because the order requires Mrs. Rappaport, a non-party to disclose financial information that is neither relevant to the Bank's claims nor reasonably calculated to lead to the discovery of admissible evidence.” *Id.*, at 908. The Rappaport court further found that “[t]o the extent that the circuit court's order requires Mrs. Rappaport to disclose her personal financial information, it undeniably violates her right to privacy.” *Id.*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was, on November 15, 2014, served via email upon Arnaldo Velez, Arnaldo Velez, P.A., Attorneys for Petitioner, 35 Almeria Avenue, Coral Gables, FL 33134

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the Answer Brief of Respondents filed in this appeal complies with the font requirements of Rule 9.210(a)(2), of the Florida Rules of Appellate Procedure.

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