IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

TD BANK, N.A.,

Petitioner,

v.

RAZORBACK FUNDING, LLC; D3 CAPITAL CLUB, LLC; BFMC INVESTMENT, LLC; LINDA VON ALLMEN, as Trustee of the VON
(caption continued on inside cover)

Case No. 13-4611

On Petition for Writ of Prohibition or Writ of Certiorari to the Circuit Court of the Seventeenth Judicial Circuit, In and For Broward County

---

REPLY BRIEF OF PETITIONER TD BANK, N.A., IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION OR WRIT OF CERTIORARI

LAWRENCE S. ROBBINS*
JOSHUA S. BOLIAN*
Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP
1801 K Street, N.W., Suite 411-L
Washington, DC 20006
(202) 775-4500

PETER J. COVINGTON*
McGuireWoods LLP
201 North Tryon Street, Suite 3000
Charlotte, NC 28202
(704) 343-2000

MARCOS DANIEL JIMÉNEZ
(Fla. Bar No. 0441503)
AUDREY M. PUMARIEGA
(Fla. Bar No. 0085206)
McDermott Will & Emery LLP
333 Avenue of the Americas, Suite 4500
Miami, FL 33131
(305) 358-3500

Counsel for Petitioner TD Bank, N.A.

(* admitted *pro hac vice*)

ALLMEN DYNASTY TRUST; D&L PARTNERS, LP; DAVID VON ALLMEN, as Trustee of the DAVID VON ALLMEN LIVING TRUST; ANN VON ALLMEN, as Trustee of the ANN VON ALLMEN LIVING TRUST; DEAN KRETSCHMAR; COOPER MANAGEMENT; ANTHONY DEGENNARO, as Trustee of the EXTRA INNING DYNASTY TRUST; ADELE MUSSRY; JACK MUSSRY; NASSIM MUSSRY; MELINA EL-ANI; DANIELLE EL-ANI; H&N ASSOCIATES; ARETZ & ASSOCIATES; PARK NATIONAL CAPITAL FUNDING, LLC; PARK NATIONAL MORTGAGE SERVICING; SCOTT MORGAN; VICEROY GLOBAL INVESTMENTS, INC.; CONCORDE CAPITAL, INC.; IRA SOCHET, as Trustee of the IRA SOCHET REVOCABLE INTER VIVOS TRUST; INVESTORS RISK ADVANTAGE, LP; SUSSCO, INC.; EDWARD PALEY; FLORENCE PALEY; THE EDWARD AND FLORENCE PALEY FOUNDATION; STEVEN PALEY; LAURA PALEY; JANE ZARETSKY; STEVEN ZARETSKY, as Trustee of the JANE ZARETSKY DYNASTY TRUST; LAWRENCE E. DEKELBAUM; RICHARD POLIDORI; and SHALOM STRICTLY KOSHER MEATS, INC.,

Respondents.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES (Continued)

Page(s)

Rules

Regulations

PRELIMINARY STATEMENT

This is an extraordinary case warranting the grant of an extraordinary writ. The circuit court long ago dismissed this case, retaining jurisdiction only to enforce Plaintiffs' settlement agreement with TD Bank, N.A. ("TD"). Plaintiffs have now moved for sanctions against TD and seek attorneys' fees as relief. This relief, however, is barred by the plain terms of the Release in the settlement. Despite this, Plaintiffs have not moved to rescind the settlement (and, under a federal court order, they may not do so now). Nor have Plaintiffs yielded in their demand for attorneys' fees, even though the circuit court already has held that "the [R]elease embodies [Plaintiffs'] compensatory claims." A-161.[1]

Notwithstanding all of these problems, the circuit court has assumed jurisdiction to receive Plaintiffs' "offer of proof" charging TD with scads of misconduct—all of which is unrelated to enforcing the settlement—and to require TD's responses thereto. And that's not all. Even though the only sanctions the circuit court could impose are criminal in nature, the court repeatedly has refused to issue TD formal notice of the charges levied against it or to appoint an impartial prosecutor.

---

[1] "A-" refers to pages in the Appendix to TD's petition. "SA-" refers to pages in the Supplemental Appendix to Coquina's Opposition. "RA-" refers to pages in the Reply Appendix filed herewith. *See* Fla. R. App. P. 9.100(k) (authorizing supplemental appendix with a reply brief).

Plaintiffs' Opposition ("Opp.") attempts to justify the illegal proceedings initiated by the circuit court by mischaracterizing them. Plaintiffs deny that the circuit court is conducting *any* kind of proceeding, so that it need not follow the rules of procedure or observe due process. But that violates Florida law and common sense. They likewise deny that the circuit court is conducting an inquiry on the merits, insisting that the court is merely *interpreting* the settlement agreement and has jurisdiction to do so. But that blinks what the circuit court has actually ordered. Finally, Plaintiffs deny even that they released their claim in the settlement, arguing that they did not learn of TD's alleged misconduct until after they settled. But, even assuming the truth of the latter assertion, that simply ignores the express language of the settlement's Release barring all claims, whether "known or unknown" or "actual or potential."

As explained more fully below, none of Plaintiffs' arguments is persuasive. This Court should therefore grant a writ of prohibition or a writ of certiorari.

ARGUMENT

I. THIS COURT SHOULD GRANT A WRIT OF PROHIBITION BECAUSE THE RELEASE PROSCRIBES THE CIRCUIT COURT'S ORDERS

Plaintiffs appear to be of two minds. First, they contend that prohibition would be premature, because it turns on the meaning of the Release, which the circuit court has yet to interpret. Opp. 4. Second, they contend that "the [R]elease

is immaterial" because the circuit court has jurisdiction under its inherent authority, making prohibition improper. Opp. 17. Either way, Plaintiffs are wrong.

A. This Court Should Grant A Writ Of Prohibition Without Further Interpretation Of The Release By The Circuit Court

Plaintiffs first argue that TD's writ-of-prohibition claim—that the circuit court lacks jurisdiction because the parties settled this case (TD Petition 3-4, 22-23 ("Pet.")—is premature. That is so, they argue, because (i) the circuit court has jurisdiction to determine whether it has jurisdiction (Opp. 4, 14-15), and (ii) to determine whether it has jurisdiction, the court must interpret the settlement contract (Opp. 3-4). Therefore, they say, the circuit court has jurisdiction to interpret the settlement contract, in order to determine whether it may proceed. And, because prohibition lies only to prevent courts from acting beyond their jurisdiction, prohibition is unwarranted.

Plaintiffs' syllogism does nothing to justify the circuit court's proceedings. TD does not contend, nor could it, that the circuit court lacks authority to construe the settlement. *See Paulucci v. Gen. Dynamics Corp.*, 842 So. 2d 797, 803 (Fla. 2003) ("[T]he extent of the court's continuing jurisdiction to enforce the terms of the settlement agreement is circumscribed by the terms of that agreement.") (quoted at Pet. 22). The problem is that the circuit court *has* construed the settlement—erroneously—and it has moved on to proceedings to award relief that the

settlement plainly bars. And, regardless, this Court has the authority to interpret the Release in the first instance.

Contrary to Plaintiffs' unsupported claim that "the circuit court has not yet interpreted [the settlement] contract," Opp. 4, the circuit court has construed the settlement against TD. In briefing on their amended motion, Plaintiffs vigorously asserted that the settlement's Release did not bar action on the motion (A-211-220; RA-16-21), and TD responded that it did (RA-7-9). Despite TD's protest, the circuit court ordered on October 17, 2013, that the case should go forward. A-289-290. Thereafter, TD moved for reconsideration or dismissal, arguing that the Release forbade the proceedings the circuit court's order contemplated (A-292-294; RA-26-28); Plaintiffs opposed (A-311-316). The circuit court again rejected TD's position, ordering that proceedings should continue despite the Release. A-327-328. The circuit court has given no hint that it intends to reconsider these rulings.

What is more, the proceedings in the circuit court have nothing to do with further interpretation of the settlement. Rather, the court has ordered Plaintiffs to submit an "offer of proof" on the merits of their underlying claims. A-289; *see also* A-327. And Plaintiffs have done so, submitting a sixteen-page "proffer of existing evidence of alleged misconduct." Opp. 1; *see* SA-27-42. This "'proffer request' stage of proceedings" (*see* Opp. 5) aims, in Plaintiffs' counsel's words, "to

go into what kind of discovery needs to be undertaken in order to have an evidentiary hearing before [the circuit court] to prove what we have facially alleged as p[er]vasive fraud on the [c]ourt." A-244.[2] It is not at all about what the settlement means. Thus, although the circuit court has jurisdiction to determine the scope of the settlement, that jurisdiction does not encompass the proceedings it has ordered.

In any event, the settlement is entirely unambiguous, so this Court may construe it as a matter of law. Indeed, Plaintiffs do not assert that the settlement is ambiguous, and, "[w]here contract language is clear and unambiguous, it is up to the court to interpret the contract as a matter of law." *Neumann v. Brigman*, 475 So. 2d 1247, 1249 (Fla. 2d DCA 1985); *see also Royal Oak Landing Homeowner's Ass'n v. Pelletier*, 620 So. 2d 786, 788 (Fla. 4th DCA 1993) (per curiam). In particular, this Court may construe unambiguous contracts where the trial court has failed to do so. *Wilson v. S. Repair Servs., Inc.*, 795 So. 2d 1121, 1123-24 (Fla. 5th DCA 2001); *Balto v. Maley*, 464 So. 2d 579 (Fla. 4th DCA 1985) (per curiam). As TD has explained (Pet. 17-21), and as Plaintiffs have not refuted, the Release bars the award of any further relief to Plaintiffs, including attorneys' fees. Thus, because Plaintiffs' motion seeks such relief (A-220), the circuit court lacks jurisdiction to consider it.

---

[2] TD categorically disagrees with Plaintiffs' allegations, and it has appealed the findings of the *Coquina* court (*see* Opp. 7 n.3) to the Eleventh Circuit.

B. The Circuit Court Lacks Jurisdiction Under Its Inherent Authority To Award Relief That The Release Prohibits

Alternately, Plaintiffs assert that the circuit court has jurisdiction over their claim under its inherent authority. This authority, they reason, extends only to "'extreme' and 'egregious'" misconduct. Opp. 16. And their belief that TD might have committed such misconduct, they allege, did not arise until after they signed the Release. *Id.* Thus, Plaintiffs assert, they never released their claim, as their "sanctions motion necessarily accrued *after* the release was executed and became effective." Opp. 17.

This alternative argument fails because it ignores the language of the Release. Plaintiffs released all claims "known *or unknown*," "actual *or potential*." A-39 (emphases added). And Florida law is clear that "unknown" means "unknown": "Numerous Florida cases have upheld general releases, even when the releasing party was unaware of the defect at the time the agreement was executed." *Mazzoni Farms, Inc. v. E.I. DuPont De Nemours & Co.*, 761 So. 2d 306, 314 (Fla. 2000); *accord Jackson v. BellSouth Telecomms.*, 372 F.3d 1250, 1278 (11th Cir. 2004) (applying Florida law); Pet. 18-19 (citing additional cases). Hence, even if Plaintiffs did not learn of the alleged facts to support their claim until after they signed the Release (which TD disputes, *see* Pet. 19 n.7), that would not matter. The Release covers Plaintiffs' claim—it is not "immaterial" (*contra* Opp. 17)—and the circuit court therefore lacks jurisdiction.

In a footnote, Plaintiffs argue that the circuit court has jurisdiction under its inherent authority even if the Release covers their claim. Opp. 17 n.6. But the two cases they cite support TD, not Plaintiffs. In *Rakusin v. Christiansen & Jacknin, P.A.*, the court "reserv[ed] jurisdiction to consider the sanction motion against appellant" when it dismissed the case pursuant to a settlement. 863 So. 2d 442, 443 (Fla. 4th DCA 2003). Here, by contrast, the circuit court reserved jurisdiction only to enforce the settlement, not to consider any sanctions motion. A-84-85. And the court in the *DuPont* case used its inherent authority to impose sanctions *payable to the court*. *In re E.I. DuPont De Nemours & Co.-Benlate Litig.*, 99 F.3d 363, 366-67 (11th Cir. 1996). Here, TD has acknowledged that the circuit court has inherent authority to impose such sanctions. Pet. 20-21. But, should it do so, it must follow criminal procedures, as sanctions payable to the court are punitive in nature. *DuPont*, 99 F.3d at 368-69 (reversing contempt order because the district court "did not afford DuPont the procedural protections the Constitution requires for the imposition of criminal contempt sanctions").[3]

Both arguments Plaintiffs raise against prohibition are without merit. This Court should grant a writ of prohibition.

---

[3] As TD explained in the Petition (at 20), the "inequitable conduct doctrine" of *Bitterman v. Bitterman*, 714 So. 2d 356 (Fla. 1998), and related cases (*see* Opp. 15-16) does not entitle Plaintiffs to seek relief based on claims they have released.

II. THIS COURT SHOULD GRANT A WRIT OF CERTIORARI BECAUSE THE CIRCUIT COURT IS CONDUCTING PROCEEDINGS WITHOUT AFFORDING TD NECESSARY PROCEDURAL PROTECTIONS, CAUSING IRREPARABLE HARM

Plaintiffs' argument against a writ of certiorari springs from the odd premise that the circuit court has not "initiate[d] any form of proceedings." Opp. 5; *accord* Opp. 3, 12, 20-21. That premise is false. The circuit court has been "considering a sanctions motion" (Opp. 18) since 2012, having held three major hearings, and it has now has ordered Plaintiffs to file an outline of their proof, invited TD to respond, and ordered a hearing at a date to be determined. A-289-290; A-327-328; SA-68. This is all part of a "'procedural means for seeking redress from a tribunal'"—which, under the law of this State (and basic common sense), constitutes a "proceeding." *Raymond James Fin. Servs., Inc. v. Phillips*, 126 So. 3d 186, 190 (Fla. 2013) (quoting *Black's Law Dictionary* 1324 (9th ed. 2009)).[4] Regardless what they are called, the circuit court is employing procedures whose only permissible outcome (other than dismissal) is sanctions payable to the Court. Pet. 16-21. For that reason, TD is entitled to the procedural protections that apply in criminal contempt proceedings. Pet. 23-31.

[4] Indeed, Plaintiffs' own authorities apply to "proceedings." Opp. 13 n.5 (acknowledging that, under Fla. R. App. P. 9.100(h), the circuit court's "proceedings were automatically stayed"); Opp. 18 ("'[P]roceedings should be permitted to run their course [in the trial court].'" (quoting *Haridopolos v. Citizens for Strong Sch., Inc.*, 81 So. 3d 465, 468 (Fla. 1st DCA 2011) (en banc)). And it is unclear how "let[ting] TD clear its name" (Opp. 14) is anything but a proceeding.

Seeking to bolster their claim that the circuit court's orders amount to nothing, Plaintiffs insist that the circuit court has merely "give[n] TD a chance" to defend itself. Opp. 1; *accord* Opp. 5 ("TD could refuse to proffer evidence in response to the court's request, and the court might . . . still decide not to proceed."); Opp. 13-14, 18 (same). That argument is completely illogical—the fact that a litigant has the "option" of offering *no* defense cannot undermine its right to procedural protections, for at least two reasons. First, as noted above, the circuit court has ordered a hearing on the offer of proof. By all indications, TD is required to attend that hearing or else suffer prejudice. Plaintiffs tellingly omit any mention of this, save for their block quotation of the circuit court's order (Opp. 11-12).

Second, and more fundamentally, the choice of "defend yourself in an unconstitutional proceeding or don't defend yourself at all" is an untenable Hobson's choice. It would force TD to choose one of two illegal fates. By submitting to the circuit court's proceedings, TD would suffer a deprivation of its rights under Florida law and the U.S. Constitution. Pet. 25-31. But, by electing not to submit, TD would forgo its "opportunity to be heard," which is "[t]he fundamental requisite of due process of law." *Grannis v. Ordean*, 234 U.S. 385, 394 (1914); *accord Keys Citizens For Responsible Gov't, Inc. v. Fla. Keys Aqueduct Auth.*, 795 So. 2d 940, 948 (Fla. 2001). TD should not be subjected to such a dilemma.

The circuit court's proceedings—necessarily criminal in nature but lacking the protections of criminal procedure—subject TD to irreparable harm. Plaintiffs do not contest that, to the extent that the circuit court has initiated "proceedings," those proceedings would deny TD its constitutional rights. *See* Opp. 21. And "certiorari is an appropriate remedy where constitutional rights are deprived or delayed during the pendency of a legal proceeding." *Williams v. Spears*, 719 So. 2d 1236, 1239 (Fla. 1st DCA 1998); *see also Belair v. Drew*, 770 So. 2d 1164, 1167 (Fla. 2000) (per curiam) ("approv[ing]" this holding of *Williams*); *Joseph v. State*, 642 So. 2d 613, 613 n.1 (Fla. 4th DCA 1994) ("Certiorari does lie, since the nature of the potential harm [to a constitutional right] is irreparable."). And the deprivation of these rights will harm TD in a concrete way—the circuit court has effectively compelled TD to proffer evidence on the merits of a dispute that it settled. The expense and inconvenience of the circuit court's proceedings (*see* Opp. 19 & n.7), though palpable, are not the principal basis of TD's petition. The harm is deprivation of TD's rights.

To boot, Plaintiffs' reliance on *Haridopolos v. Citizens for Strong Schools*, 81 So. 3d 465 (Fla. 1st DCA 2011) (en banc), and *Rodriguez v. Miami-Dade County*, 117 So. 3d 400 (Fla. 2013), is misplaced. Those cases, unlike this case, involved routine prejudgment dispositive motions. *See Haridopolos*, 81 So. 3d at 466 (motion to dismiss); *Rodriguez*, 117 So. 3d at 403 (motion for summary

judgment). Here, by contrast, the circuit court has refused to deny a postjudgment motion for sanctions despite a general release—the first such situation that the circuit judge had ever seen (A-138). Granting the Petition, therefore, would do nothing "'to eviscerate any limitations on the use of'" extraordinary writs. *But see* Opp. 20 (quoting *Rodriguez*, 117 So. 3d at 405).

Plaintiffs' argument stands on the premise that the circuit court has not initiated proceedings or, really, done anything at all that could harm TD. That premise is demonstrably false. This Court should grant a writ of certiorari.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of prohibition (or, in the alternative, for a writ of certiorari), quash the circuit court's orders of October 17, 2013, and December 2, 2013, and remand with instructions for the circuit court to deny Plaintiffs' motion with prejudice and to proceed (if at all) under proper procedures.

Dated: March 3, 2014

Respectfully submitted,

By: /s/ Marcos Daniel Jiménez

LAWRENCE S. ROBBINS*
JOSHUA S. BOLIAN*
Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP
1801 K Street, N.W., Suite 411-L
Washington, DC 20006
(202) 775-4500

PETER J. COVINGTON*
McGuireWoods LLP
201 North Tryon Street, Suite 3000
Charlotte, NC 28202
(704) 343-2000

MARCOS DANIEL JIMÉNEZ
(Fla. Bar No. 0441503)
AUDREY M. PUMARIEGA
(Fla. Bar No. 0085206)
McDermott Will & Emery LLP
333 Avenue of the Americas, Suite 4500
Miami, FL 33131
(305) 358-3500

Counsel for Petitioner TD Bank, N.A.

(* admitted *pro hac vice*)

CERTIFICATE OF SERVICE

I hereby certify that, on this 3rd day of March, 2014, a true and correct copy of the foregoing Reply Brief of Petitioner TD Bank, N.A., in Support of Petition for Writ of Prohibition or Writ of Certiorari was furnished in the manner indicated to all parties listed in the service list below.

By: /s/ Marcos Daniel Jiménez
Marcos Daniel Jiménez
(Fla. Bar No. 0441503)

SERVICE LIST

Via Electronic Mail

WILLIAM R. SCHERER, ESQ.
JAMES F. CARROLL, ESQ.
REID A. COCALIS, ESQ.
Conrad & Scherer, LLP
P.O. Box 14723
Fort Lauderdale, FL 33302
Tel: (954) 847-3362
Fax: (954) 463-9244
wscherer@conradscherer.com
jcarroll@conradscherer.com
rcocalis@conradscherer.com
Counsel for Respondents

BRUCE S. ROGOW, ESQ.
TARA A. CAMPION, ESQ.
Bruce S. Rogow, P.A.
500 E. Broward Blvd., Ste. 1930
Fort Lauderdale, FL 33394
Tel: (954) 767-8909
Fax: (954) 764-1530
brogow@rogowlaw.com
tcampion@rogowlaw.com
Counsel for Respondents

Via Electronic Mail

HARLEY S. TROPIN, ESQ.
GAIL A. MCQUILKIN, ESQ.
THOMAS A. TUCKER RONZETTI, ESQ.
ADAM M. MOSKOWITZ, ESQ.
Kozyak Tropin & Throckmorton, P.A.
2525 Ponce de Leon Boulevard, 9th Floor
Coral Gables, FL 33134
Tel: (305) 372-1800
Fax: (305) 372-3508
hst@kttlaw.com
gam@kttlaw.com
tr@kttlaw.com
amm@kttlaw.com
Counsel for Respondents

CERTIFICATE OF COMPLIANCE

I hereby certify that this Petition for Writ of Prohibition or Writ of Certiorari complies with the typeface requirements of Fla. R. App. P. 9.100(*l*) because it has been prepared in 14-point Times New Roman font.

By: /s/ Marcos Daniel Jiménez
Marcos Daniel Jiménez
(Fla. Bar No. 0441503)