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Equity Procedure: Limitation of Discovery

Floyd V. Hull Jr.

to the equitable lien doctrine,[15] the result reached in the instant case is not surprising. The opinion indicates, however, that the existence of the express trust between the defendant and his son was the basis for invoking the jurisdiction of the equity court. Therefore, in the absence of a trust relationship or some other ground for equity jurisdiction, such as fraud, it is still doubtful that a seller of chattels can upon default of his debtor obtain a lien in equity on the chattels or on the land improved by them.

JAMES D. CAMP, JR.

EQUITY PROCEDURE: LIMITATION OF DISCOVERY

Wofford v. Wofford, 47 So.2d 306 (Fla. 1950)

In a suit for divorce defendant wife moved for an order requiring plaintiff to deliver to defendant all books, records and papers that in any way concerned, affected or pertained to the operation of his businesses. The chancellor entered the order pursuant to Florida Equity Rule 49.[1] On certiorari, HELD, the order was too broad and must be quashed.

Rule 49 has been in existence since June 4, 1931, and was incorporated verbatim into the new Florida Equity Rules. Prior to 1931 the only method by which a party could secure, before trial, documents in the control of the adverse party was through use of a separate bill

[15]Palmer v. Edwards, 51 So.2d 495 (Fla. 1951) (reversing dismissal of bill claiming equitable lien on proceeds of sale of building for value of labor and material used in constructing it); Johnson v. Craig, 158 Fla. 254, 28 So.2d 696 (1946), *rev'd on rehearing*, 158 Fla. 256, 28 So.2d 693 (1947) (directing chancellor to entertain bill for equitable lien on house and lot to extent of value of labor of friends procured by complainant in constructing house); see Thacher v. International Supply Co., 176 Okla. 14, 54 P.2d 376 (1936) (result similar to that of principal case reached on analogous factual situation).

[1]FLA. EQ. R. 49: "On the motion of any party, after reasonable notice, the court may order any other party or parties to produce books, records and papers containing or believed to contain evidence pertinent to the cause of action or defense of the movant which are in the possession or control of the party or parties named in the motion and order, either for inspection before or use at the trial, at such time or times and under such reasonable terms and conditions as may be prescribed by the court in its order on such motion."

for discovery or a formal prayer for discovery.[2] Rule 49 was adopted to eliminate the necessity for formal prayer and to afford litigants a simpler and less expensive method of procuring pertinent evidence in the adversary's control. It was not designed to allow a party to engage in fishing expeditions, to pry unnecessarily into the business of his adversary, or to afford the movant an avenue for embarrassment.[3]

Rule 34 of the Federal Rules of Civil Procedure, which became effective September 16, 1938, differs from the Florida equity rule only in that it provides for "designated" documents that "constitute or contain evidence," while the Florida rule does not contain the word "designated" and provides for production of documents "containing or believed to contain evidence." Because of the difference in wording the Florida rule should logically be subject to a much broader interpretation, but the Supreme Court in the principal case infers that it has the same effect as the federal rule. The only limitations on the federal rule are that the movant must designate the documents desired, must present facts from which the court may conclude that they constitute or contain evidence material to some matter in issue, and must show that they are in the possession, custody or control of the adverse party.[4]

The Florida rule does not on its face curtail the number of documents procurable. Conceding that documents cannot be brought in on bare suspicion alone,[5] the only limitation appearing is that they must contain or be reasonably believed to contain evidence pertinent to the issue. In the principal case, however, the Court, obviously reading into the rule a limitation that it does not contain, holds that it does not contemplate the delivery of books or documents en masse.

Considerable judicial limitation of discovery as prescribed by statute[6] has appeared in actions on the law side. *Atlantic Coast Line Railroad Co. v. Allen*[7] held that written statements made by em-

[2]See Therrell v. Howland, 108 Fla. 299, 146 So. 203 (1933).

[3]Hollywood Beach Hotel & Golf Club, Inc. v. Gilliland, 140 Fla. 24, 191 So. 30 (1939).

[4]Thomas French & Sons v. Carleton Venetian Blind Co., 30 F. Supp. 903 (E.D.N.Y. 1939); Stewart-Warner Corp. v. Staley, 4 F.R.D. 333 (W.D. Pa. 1945); Heiner v. North American Coal Corp., 3 F.R.D. 63 (W.D. Pa. 1942.)

[5]Gribbel v. Henderson, 154 Fla. 78, 16 So.2d 639 (1944).

[6]FLA. STAT. §91.30 (1949); for a thorough discussion see Mehrtens, *Deposition and Discovery in Florida under the Federal Rules*, 1 U. OF FLA. L. REV. 149 (1948).

[7]40 So.2d 115 (Fla. 1949).

ployees of defendant in anticipation of litigation and in the possession of defendant, his agent, or his attorney are not proper subjects for discovery. The result in *Miami Transit Co. v. Hurns*[8] is even narrower. Plaintiff, even though unconscious and hospitalized for months following collision with defendant's bus, was denied discovery of statements of witnesses taken by defendant immediately after the accident. Both opinions profess to approve, yet both decisions refuse to follow, the doctrine of *Hickman v. Taylor*,[9] in which work-products of defendant's attorney in preparation for trial were protected against discovery because of the lack of any showing that plaintiff lacked access to the information via other sources. The United States Supreme Court stated emphatically, however, that the workings of defendant or his agent are not immune to discovery.[10] The disregard of the *Hickman* case and of the federal procedure statutorily adopted by Florida has been criticized vigorously,[11] but the Florida Court seems determined to accord discovery as little scope as possible despite the mandate of the Legislature.

In the few cases construing Rule 49 the equity courts apparently give it a more liberal construction in suits for accounting[12] than in divorce proceedings.[13] This result may well be desirable because of the animosity normally existing between parties to a divorce proceeding and their not infrequent desire to embarrass the adverse party. The same rule, however, should not be subject to differing constructions in different types of suit. If a stricter rule governing production of documents in divorce proceedings is desired, a separate rule therefor should be promulgated.

Wofford v. Wofford has been followed in a recent divorce case[14] decided under the new Florida Equity Rules. Plaintiff-husband, in reply to defendant's counterclaim for alimony, counsel fees and traveling expenses, admitted possession of an estate worth several million dollars and a willingness to pay any sum the court might decree.

[8]46 So.2d 390 (Fla. 1950).

[9]329 U.S. 495 (1947), analyzed in Mehrtens, *supra* note 6, at 170-171.

[10]*Id.* at 507, 508, 511-512.

[11]See Wigginton, *New Florida Common Law Rules*, 3 U. OF FLA. L. REV. 1, 20-22 (1950); 2 U. OF FLA. L. REV. 288 (1949).

[12]Gribbel v. Henderson, 154 Fla. 78, 16 So.2d 639 (1944); Commercial Bank in Panama City v. Atlanta & St. Andrews Bay Ry., 120 Fla. 167, 162 So. 512 (1935); Gables Racing Ass'n, Inc. v. Persky, 116 Fla. 77, 156 So. 392 (1934).

[13]Jacobs v. Jacobs, 50 So.2d 169 (Fla. 1951); Wofford v. Wofford, 47 So.2d 306 (Fla. 1950).

[14]Jacobs v. Jacobs, 50 So.2d 169 (Fla. 1951).