37,305

IN THE SUPREME COURT OF FLORIDA

NO. 37,305

JEFFERSON REALTY OF FORT LAUDERDALE, INC., a Florida corporation; JEFFERSON REALTY OF SOUTH DADE, INC., a Florida corporation; JEFFERSON FUNLAND, INC., a Florida corporation, and JEFFERSON STORES, INC., a Delaware corporation authorized to do business in the State of Florida,

Petitioners,

vs.

UNITED STATES RUBBER COMPANY, a New Jersey corporation,

Respondent.

* * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * *

PETITIONERS' REPLY TO RESPONDENT'S BRIEF ON THE MERITS

* * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * *

FILED

OCT 30 1968

SID J. WHITE
CLERK SUPREME COURT
By Chief Deputy Clerk

FULLER AND FEINGOLD
1674 Meridian Avenue
Miami Beach, Florida
and
FRATES, FAY, FLOYD & PEARSON
12th Floor, Concord Building
Miami, Florida

Attorneys for Petitioners

The only real issue involved in this matter is whether or not JEFFERSON PARENT CORPORATION is the real party in interest in this litigation. The Respondent has attempted to becloud this real issue by setting forth in its Brief the question of damages and summary judgment. Both of these questions have been previously covered and in this regard Petitioners attach hereto the Brief and Appendix for Appellees filed in the District Court of Appeal, Third District.

As to the question of damages, the attached Brief sets forth the following:

I. The proper measure of damages is, as set forth in the case of Moses vs Autuono, 56 Fla. 499, 47 So 925 (1908), "the difference between the stipulated rent and the value of the use of the premises" (Page 15 of said Brief) (emphasis supplied).

II. The determination of the amount of the "stipulated rent was derived at by the computation of the following three items as shown on Page 5 of the said Brief:

A. "minimum guaranteed annual rental of $15,000 over the initial fifteen-year term of the lease (R. 68). A simple mathematical computation reveals that the plaintiffs would have received a minimum rental of $225,000 per lease for the initial term. From this figure, we must deduct the money which would have been advanced for construction costs and returned to U. S. RUBBER by credit towards rentals (R. 64). The plaintiffs would have been entitled to a total of $325,600 combined minimum rental for the initial fifteen-year term (Px. 6, A-1). This latter figure does not include percentage rental, but it does include a deduction for taxes, insurance, and maintenance costs for the buildings." (Page 5 of said Brief) (emphasis supplied).

B. Percentage rental: "additional rental of five percent of U. S. RUBBER'S gross sales from the leased premises during each month, to the extent that it exceeded the guaranteed minimum rental." (Page 5 of said Brief) (emphasis supplied).

C. Additional rental of "three percent of its gross sales on advertising . . . to be conducted under the Jefferson name (R. 97)." (Page 5 of the said Brief) (emphasis supplied).

III. The "value of the use of the premises" was found to be "zero dollars", as the undisputed testimony was to the effect that "the buildings were to be built on space that was far removed from the main entrance of the store. After U. S. RUBBER prevented the issuance of a title policy, the area reserved for U. S. RUBBER was

paved for surplus parking space. This space is never used for parking, even in the peak times of customer traffic at the Dade locations; however, the Broward location does use the lot at peak times (T. 107-108). In other words, "the value of the use of the premises" is zero dollars, or a nominal amount. (Page 17 of said Brief). U. S. RUBBER offered no evidence to dispute this testimony, nor did U. S. RUBBER offer any evidence that there was any "value of the use of the premises"; accordingly, the above set forth testimony of the Plaintiffs was undisputed.

IV. "The record clearly shows that the plaintiffs lost rental payments and advertising. When the expenses, which the plaintiffs would have incurred, are deducted from the minimum guaranteed rental, the record reveals that the plaintiffs would have received $325,600 over the term of the lease (Px. 6). Since the jury returned a verdict for only $400,000, simple subtraction reveals that the verdict represents an assessment of advertising

and percentage rental damages in the amount of $74,000 over the fifteen year term of the lease." (Page 19 of said Brief).

V. "If we assume that this verdict represents minimum rental plus advertising damages over the term of the lease, the jury assessed $4,960.00 per year for advertising damages ($74,400.00 divided by fifteen years). This figure represents gross sales of $165,333.33 per year for three stores, or $55,111.11 for each store. Mr. Kamens (defendant's witness) testified that, of the 140 units which he has operated, eighty-five percent go ahead in the first two years, and going into the third year the largest majority tend to level off at a steady volume somewhere between $300,000and $310,000 (T. 525-526). He stated that if he had to project a sales volume to the Jeffersons on the day of trial, as he did in 1962, he would project a sales volume somewhere between $200,000 and $300,000 (T. 526). If this verdict was the result of speculation and conjecture, the defendant - not the plaintiffs - received the

benefit of any doubt in the jurors' minds." (Pages 19 and 20 of said Brief).

As to the question of summary judgment, this Court's attention is respectfully directed to Point I. of the said Brief on Pages 9 and 10 thereof, which states the following:

> "In arguing the propriety of the Trial Judge's granting a summary judgment for the plaintiffs, the defendant correctly states that parties may make the performance of a designated act or event a condition precedent to the existence of a contract. However, the defendant fails to recognize that there was no failure of condition in the contract before the Court.
>
> This contract was executed. It was binding on both parties. The defendant wanted a designated type of leasehold insurance; plaintiffs agreed to cause this insurance to be issued. The defendant knew that the title insurance binder could not be written until the three simple subordination agreements were released and recorded. These agreements were for the sole benefit of the defendant, and the signature of U. S. RUBBER was not necessary. At U. S. RUBBER'S request the agreements were sent to it, and the defendant withheld the agreements, thereby preventing the plaintiffs from performing their part of the bargain.
>
> If we assume that this was a condition precedent, this case is clearly within that long established principle which holds that a person who prevents the happening or performance of a condition precedent

cannot avail himself of his own wrong to avoid his liability. See Walker v. Chancey, 96 Fla. 82, 117 So.705 (1928); Knowles v. Henderson, 156 Fla. 31, 22 So. 2d 384, ALR 600 (1945). While these cases involve brokers, the principle is applicable to all contracts. Melvin v. West, Fla. App. 2nd Dist. 1958, 107 So. 2d 156, 160. This principle is well founded in reason and logic. A party who contracts for another to do a certain thing impliedly promises that he will do nothing to hinder or obstruct the performing party in doing the agreed thing. Melvin v. West, supra. If he interferes, he has breached the agreement and will not be heard to complain of its nonperformance.

The record before the Trial Judge conclusively showed that the plaintiffs had done everything required of them, under the leases and the law, to go forward with the project. For reasons unknown, the defendant decided to renege on the deal and withheld the documents, knowing that by doing so it was leaving the plaintiffs without a means of securing title insurance.

The defendant has completely misrepresented, or failed to recognize, the operative facts. This same statement of facts and argument was made before the Trial Judge, who saw the facts in the proper light and applied the correct rule of law. There is no error in the lower court's finding for the plaintiffs on the issue of liability." (Pages 9 and 10 of said Brief).

As to the real issue of whether or not JEFFERSON PARENT CORPORATION is the real party in interest in this litigation,

the Trial Judge answered this in the affirmative. The Respondent disagrees with the Trial Court and takes the position that JEFFERSON PARENT CORPORATION was a "stranger". The Honorable District Court of Appeal, Third District, appears to act as if the problem did not exist.

## C O N C L U S I O N

The Petitioners reaffirm the matters set forth in their Brief on the Merits and state that the judgments of the Trial Court herein should be affirmed and the reversal of the District Court of Appeal, Third District, should be set aside for the following reasons:

1. The formal joinder of JEFFERSON STORES, INC. during the trial was not reversible error because the joinder was authorized by Florida law and U. S. RUBBER has not shown, nor can it show that it was prejudiced.
2. The Trial Court's adjudication re real party in interest was abandoned by U. S. RUBBER and never argued before the District Court of Appeal.

3. A clear case of conflict certiorari exists herein and the prior decisions of the Supreme Court of Florida should be deemed binding so that a Trial Court Judge may have clear guide lines before him in applying the law of Florida.

Respectfully submitted,

FULLER AND FEINGOLD
and
FRATES, FAY, FLOYD & PEARSON
Attorneys for Petitioners

By
B. C. FULLER

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing Petitioners' Reply to Respondent's Brief on the Merits was mailed to RICHARD S. BANICK and MARVIN E. BARKIN, Attorneys for UNITED STATES RUBBER COMPANY, Resondent, 501 City National Bank Building, Miami, Florida, of counsel: FOWLER, WHITE, COLLINS,

GILLEN, HUMKEY & TRENAM, 501 City National Bank Building,

Miami, Florida, this 29th day of October, 1968.

FULLER AND FEINGOLD
1674 Meridian Avenue
Miami Beach, Florida 33139

and

FRATES, FAY, FLOYD & PEARSON
12th Floor, Concord Building
Miami, Florida 33130

Attorneys for Petitioners

By___________________________
B. C. FULLER