IN THE SUPREME COURT OF FLORIDA

HARRY HORN and SALA HORN, his wife,

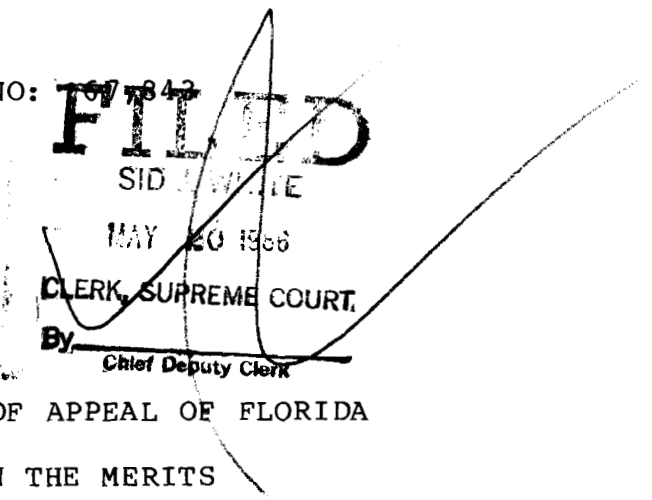
Petitioners,

vs.

SHELDON GREENE & ASSOCIATES, INC., a Florida corporation, and LITWIN REALTY, INC., a Florida corporation.

Respondents.

CASE NO: [illegible]



REVIEW OF THE THIRD DISTRICT COURT OF APPEAL OF FLORIDA

RESPONDENTS' ANSWER BRIEF ON THE MERITS

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RESPONDENTS' RESTATEMENT OF THE CASE AND FACTS PURSUANT TO F.R.A.P. 9.120(c)

Respondents, Sheldon Greene & Associates, Inc. and Litwin Realty, Inc., elect pursuant to Florida Rule of Appellate Procedure 9.120(c) to restate the presentation of the case and facts offered by Petitioners. In Respondents' view, the Statement of the Case and Facts in the Initial Brief is both inaccurate and misleading.

Harry and Sala Horn on October 30, 1985 petitioned the Supreme Court of Florida for review of Sheldon Greene & Associates, Inc. vs. Rosinda Investments, N.V., 475 So. 2d 925 (Fla. 3rd D.C.A. 1985). The Supreme Court on April 7, 1986 entered an order accepting jurisdiction of the case pursuant to Article V, Section 3(b)(3), of the Florida Constitution and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(IV).

Mr. and Mrs. Horn and Rosinda Investments, N.V. (hereinafter referred to as the buyers and seller, respectively), were the Defendants in the trial court. Sheldon Greene & Associates, Inc. and Litwin Realty, Inc. (hereinafter referred to as "Greene" and" Litwin") were the Plaintiffs in the trial court.

The trial court, Judge Edward S. Klein presiding, in a nonjury trial entered a judgment against Greene and Litwin based on the determination that the lack of continuous negotiations inaugurated by the brokers required a finding as a matter of law that the brokers were not the "procuring cause of sale" and hence not entitled to a commission.

The Third District Court of Appeal of Florida on August 13, 1985 rendered an opinion which reversed the judgment entered by the trial court and remanded the case to the trial court with directions to enter judgment for Greene and Litwin. Seller, Rosinda Investments, N.V. has not petitioned the Supreme Court of Florida for review of the District Court of Appeal's decision.

At the conclusion of the non-jury trial, the trial judge made specific findings of fact which were accurately summarized and restated by the District Court of Appeal in the third paragraph of their opinion, as follows:

> "The purchasers, Mr. and Mrs. Horn, visited Litwin Realty, Inc. to discuss investing in a hotel property. Mr. Pollock, Litwin's agent, introduced the Horns to Mr. Bastacky of Sheldon Greene & Associates, Inc., because that agency had a larger inventory of hotel properties. On two separate occasions, Pollock and Bastacky took the Horns to visit and inspect the Prince Arthur Apartments.[1] The Horns' visit and inspections were done with the full knowledge and approval of the owner's resident manager.[2] According to Bastacky, only when the Horns told him they were not interested in purchasing the property and when he learned that the Horns had bought another hotel property did he stop communicating with the Horns. Within a year of being shown the Prince Arthur Apartments by Bastacky and Pollock, the Horns contacted an agent for Rosinda Investments, N.V., the owners of the apartments, and directly negotiated the purchase of the apartments.

The Horns acquired the property in the name of a corporate entity of which they were half owners, and it was conveyed by Rosinda to a trustee for the corporation. In sum, then, the brokers showed the Horns the property and had no further involvement only because the Horns misleadingly informed them that they had no interest in purchasing the property."

"[1]The brokers also showed the Horns some other properties. Subsequently, Litwin learned that the Horns submitted a purchase offer to buy one of these properties directly to the owners without notifying either Litwin or Sheldon Greene & Associates. Litwin advised the owners of the property of the brokers' claim to a commission in the event of a sale, but no sale was ever consummated.

"[2]There is absolutely no question in this record, and the appellees do not seriously contend otherwise (despite the disserter's contrary view) that the trial court found that the brokers initially showed the Prince Arthur Apartments to the Horns and that the property was shown the Horns with the full knowledge and approval of the owner's resident manager, Akber Ali. The record reveals that Ali, whom the dissent calls a "caretaker," was the resident manager of the apartments and along with his duties of renting the apartments and maintaining the building, was required to greet and accompany brokers who were showing the property to prospective buyers. Before the Horns' visit to the property, one of which lasted an hour and one-half, Bastacky, accompanied by Ali, had shown the property on nine or ten occasions. Ali's wife kept the books of the apartments. The owner's official agent, Sadru Esmail, was Ali's brother..."

The facts as stated by the District Court of Appeal in the majority opinion were specifically determined as findings of fact by the trial court at the conclusion of the non-jury trial. The Trial Judge stated:

> THE COURT: Let me interrupt. How do you explain the fact that Mrs. Litwin put the Greene people on notice back in December of 1980 together with a mailgram to Mr. and Mrs. Horn?
>
> They are very adamant in their denial of ever having met this man and I just feel like, having heard all of the testimony, I must try to solve that issue against your clients.
>
> Under what possible theory could Mrs. Litwin have come up with this cloak and dagger position with regard to going to the bother of sending a mailgram to Sheldon Greene's office in December of 1980 involving the Lombardy Inn? Why would she have picked the Greene's name? Did she like them?
>
> THE COURT: How did she put the Horns and Greenes together? There are ten thousand real estate offices in Miami and Miami Beach. There are three million people in Dade County. There are not that many, but how do you explain that to me?
>
> MR. ZEMEL: All I know is that the Horns are very adamant that they did--that the first time they met Mr. Bastacky---
>
> THE COURT: That is why it is a little incredible.

(Transcript at 389-390)

> THE COURT: Well, let me say this for the purposes of the record. I am the Judge of the credibility of witnesses and I just about have decided on the issue of the meeting with the Horns and Mr. Bastacky. I am resolving that issue in favor of the plaintiffs' theory. Now, wherever that leads us on the law so be it. I am still not satisfied that that in fact makes a necessity for finding for the plaintiff because of the other matters that are involved..
>
> But, I think we are going to have to concede that fact and the more I sit here the more I think that I am going to have to resolve that in favor of

> the plaintiffs. It just doesn't sound logical that Mrs. Litwin would pick the Greene agency and decide to send a mailgram out to them and the Horns on the same day without giving it some credence to their version.
>
> THE COURT: I am going to reserve ruling on this case and ask the attorneys, if you would, to submit memorandums of law.
>
> Now that we have cleared the air on some of the factual issues, I have made some findings of fact.

(Transcript at 400)

In contrasting the facts found by the trial court and restated by the District Court of Appeal with those presented by Petitioners, one theme becomes self-evident: that Petitioners' version of the facts is solely premised on what it perceives to be the "facts" and is not based upon what was determined by the trial court at the conclusion of the proceeding. As such, the Statement of Facts as contained on pages 1 through 4 of Petitioners' Brief on the Merits is both inaccurate and misleading.

Specificially, the recitation of the Horns' testimony regarding their arrival in South Florida, the acquisition of the Greystone Hotel, and the meeting with Mr. Bastacky is totally irrelevant to the issues before the trial court and this Court.

As to Mr. and Mrs. Horn's testimony regarding their having never met Mr. Bastacky nor having been shown the Prince Arthur Apartments by them, it is uncontraverted that the trial court rejected the Horns' version of their involvement with Mr. Bastacky and Mr. Pollock regarding the Prince Arthur Apartments. (Transcript at 389-391)

The evidence adduced at trial established that Mr. Bastacky,

in conjunction with Mr. Pollock, showed the Prince Arthur Apartments to Mr. and Mrs. Horn on two occasions. Mr. Bastacky testified as follows:

> Q. Were the Horns the first people you had shown the property?
>
> A. No.
>
> Q. So, Ali Akber knew who you were?
>
> A. Yes.
>
> Q. Approximately how much time did you spend at the property?
>
> A. We must have spent between an hour and an hour and a half at the property because it was necessary to see many parts of it to be able to see the picture that existed within the property.
>
> Q. For example, what did you shown them?
>
> A. I showed them the units that were above the first floor in the north building. I showed them the basement of the north building. Then, we looked at the apartments in the south building and then we looked at the house behind the building.
>
> Q. Was Ali Akber with you during this time?
>
> A. Yes, he was.
>
> Q. Did the Horns show any interest in this property?
>
> A. Yes, they seemed to be interested in the property.
>
> Q. What other properties did you show them that same day?
>
> A. Next we went to the Lombardy Inn which is on Collins and south--in the 600 block south of the Prince Arthur and we went through that building in a similar manner although it took less time because the units were similar in the Lombardy Inn and it was just one building.
>
> Q. Did you see any other properties that day?

A. Yes. From there we went to the South Beach and we looked at the Sea Deck, which is located on Collins near Lincoln Road.

Q. Now, when you say we, again, that would be the Horns, Gary Pollock and yourself?

A. Gary Pollock and myself and the Horns.

Q. What did you do after you saw the Sea Deck?

A. We talked and we tried to evaluate the properties in terms of their needs.

Q. Now, where did this discussion you are talking about take place?

A. The first time we did this it took place in the car. The second time we held a lengthy discussion it took place in the Horns' home.

Q. Where did they take place?

A. We went to look at the Prince Arthur again.

Q. Approximately how long after the first visit did you again visit the Prince Arthur?

A. A week, two weeks.

Q. Does we encompass the same people?

A. Gary Pollock, the Horns and myself.

Q. Now, where did you go from there?

A. We went back to the Horn's home where we sat in the Florida room and we went over the paperwork that described the financial position of each of the properties.

Q. Did they appear to have any interest in one property more than another property at that point?

A. Not at that time.

Q. Did you subsequently have occasion to show the Prince Arthur property?

A. A third time?

Q. Yes.

A. No.

Q. Now, where did that trip originate from?

A. We picked up the Horns at their home.

Q. Who is we?

A. Gary Pollock and myself.

Q. How did you get together?

A. I drove to my office and I left my car and we took his car.

Q. You went to the Horns then?

A. Yes.

Q. Where did the Horns live?

A. Somewhere in North Miami. Not far.

Q. Not far from Gary Pollock's office?

A. From the Litwin Realty Office.

Q. Did you go inside their home at that time?

A. No. We went inside their home after we had looked at the properties.

Q. You picked up Gary Pollock and you went to the Horns and you picked up the Horns?

A. Yes.

Q. Where did you go from the Horns?

A. We went to the Prince Arthur again and looked it over in more careful detail.

Q. How much time approximately did you spend that time?

A. I would say between an hour and a half and one hour.

Q. Who was present on behalf of the Prince Arthur?

A. Ali Akber and we looked it over in a more careful manner and we looked at it and they were able to look at it knowing the manner in which the property operated and the financial structure of the property.

(Transcript at Pages 34 through 37)

The evidence further established that Mr. and Mrs. Horn indicated to Mr. Bastacky and Mr. Pollock that they were not interested in purchasing the Prince Arthur Apartments.

In his testimony Mr. Bastacky commented:

Q. Did you offer to submit a contract to purchase any of those properties?

A. Yes. They told us that although they liked the Prince Arthur and Lombardy they preferred to be in the South Beach area where the atmosphere was more Jewish, more in keeping with their own way of living.

So, we discussed some of the South Beach properties and abandoned the Prince Arthur and Lombardy Inn as properties for them to buy.

Q. Now, you say something more Jewish. What was the problem with the Prince Arthur?

A. Well. the Prince Arthur is in an area where you have a lot of French Canadians and you have transients and it is not like the properties in the South Beach where people come and stay for long periods of time where they may live their life.

The people who use the South Beach properties are predominantly Jewish people and people who use the Prince Arthur generally are not.

Q. What about the Lombardy Inn?

A. The Lombardy Inn is much like the Prince Arthur although there are--there may be Jewish people there

using the property, it is not a wholly-Jewish atmosphere there.

Q. Did you submit any offer to purchase the Prince Arthur on their behalf?

A. No.

Q. Why not?

A. Because they wanted to be in the South Beach area and they wanted to have a Jewish atmosphere around them.

Q. Did you submit any offers to purchase any of the South Beach properties on their behalf?

A. No.

Q. Why not?

A. I don't know why. They didn't submit offers on the South Beach properties and I don't know why.

Q. How about the Lombardy Inn?

A. They didn't submit an offer on the Lombardy Inn through me.

Q. Did you know if they submitted it through anyone?

A. I was told they submitted another one through another broker.

Q. But, you had shown them the Lombardy?

A. Certainly and together with the owner, Mr. Maranda.

Q. When did you stop showing the Horns property?

A. When I heard that they--there were two reasons. There were two reasons I stopped showing them properties.

First of all, they could not decide which property to consider of the properties that I had shown them and I had shown them the best ones and I learned that they bought the Greystone Hotel.

Q. Did you subsequently have occasion after you had finished dealing with the Horns to visit the Prince Arthur hotel?

A. Yes.

Q. Approximately when was that?

A. Late in 1980, late in the year.

Q. Now, was it 1980?

A. 1981, Pardon me.

Q. 1980 was when you showed the Horns the property?

A. When I showed them the property.

Q. Late in 1981 was when you had occasion to visit the property again?

A. Well, I knew that the property had been sold or I was told it was sold. I was told it was sold to a Indian group.

Q. By whom?

A. Mr. Sadru told me it was sold to an Indian group when I submitted the offers for Carl Cote and so I waited a number of months and thought I would go in and introduce myself to the owners and make myself known to them and to get a listing if they were interested in offering it for sale.

Q. Who accompanied you?

A. I was alone.

Q. What did you find out when you got to the property?

A. I found a handyman doing some repair work and when I asked to be introduced to the owners he told me to go to the Greystone and ask for Mr. and Mrs. Horn.

Q. Did you in fact meet with the Horns?

A. Yes.

Q. Subsequently?

A. Yes.

Q. Did you have any occasion subsequently to talk with Mr. Sadru Esmail again?

A. Yes.

Q. Approximately when did that take place?

A. Shortly after I found--I found out that the Prince Arthur was owned by the Horns, Sheldon Greene and I visited Mr. Sadru and we also visited the Horns.

(Transcript at Pages 38 through 40)

The District Court of Appeal in its majority opinion in this case correctly stated that the trial judge sitting as the trier-of-fact had made specific findings of fact which supported and confirmed the Respondents' version of the material facts. In evaluating the legal issues present in the cause, the District Court commented:

> "The trial judge erroneously believed that the brokers had to establish (which clearly and concededly they did not) that there were continuous negotiations between the seller and purchaser conducted by or through the brokers which ultimated in the sale of the property. This failure, said the trial judge, was fatal to the brokers' claim."

(Appendix at A3)

In reviewing the applicable law, the Court of Appeal presented the following analysis:

> "The correct rule of law is not that stated by the trial judge; it is, instead, that a broker, to be

considered the "procuring cause" of a sale, must have brought the purchaser and seller together and effected a sale through continuous negotiations inaugurated by him unless the seller and buyer intentionally exclude the broker and thereby vitiate the need for continuous negotiations. Plainly,

> "[w]hen the broker has brought the prospective parties together, they cannot complain that the broker did not participate in negotiations when they have purposely excluded the broker from these negotiations by dealing with one another directly and in secret."
>
> First Realty Corp. v. Standard Steel Treating Co., 268 So. 2d 410, 413 (Fla. 4th DCA 1972).

See Bermil Corp. v. Sawyer, 353 So. 2d 579 (Fla. 3d DCA 1977); Alcott v. Wagner & Becker, Inc., 328 So. 2d 549 (Fla. 4th DCA 1976) (commission due where seller's property advertised by broker, prospective buyer reads ad and discovers seller is a friend, and consummates sale without broker); Mead Corp. v. Mason, 191 So. 2d 592 (Fla. 3d DCA 1966), cert. denied, 200 So. 2d 813 (Fla. 1967) (commission due where broker showed buyer property twice, buyer and seller negotiated terms of sale without notifying broker, and agreed as part of purchase contract that no broker was involved). Thus, where the broker is excluded, the requirement of continuous negotiations is quite obviously dispensed with, and the broker is nonetheless deemed to be the "procuring cause" of the ensuing sale. See Realty Marts, Inc. v. Barlow, 312 So. 2d 544 (Fla. 1st DCA 1975). Moreover, a broker has done all that he is required to do and is entitled to a commission where he has shown the buyer the property but makes no further efforts because an initial purchase offer is rejected or the buyer expresses no interest in the property. See Crystal River Enterprises, Inc. v. Nasi, Inc., 418 So. 2d 1038 (Fla. 5th DCA 1982); Gibbs v. Gibbs, 296 So. 2d 613 (Fla. 1st DCA 1974). If the rule were otherwise:

> "a crafty prospect could reject the contract submitted by the broker, go behind his back to the owner, modify the terms without affording the broker an opportunity for negotiations, purchase the

property and thereby evade, on behalf of the seller, the payment of a commission. Such is [3]not the law of the State of Florida."

Realty Marts International, Inc. v. Barlow, 348 So. 2d 63, 64 (Fla. 1st DCA 1977).

Thus, the continuous negotiation requirement is vitiated where the seller and buyer exclude the broker, and the broker need only establish that the seller and buyer dealt him out. While we acknowledge that such descriptive terms as "secret," "clandestine," and "conspiratorial" are often found in the broker commission cases, the use of such terms hardly establishes an additional element of a broker's cause of action for a commission, that is, that the seller and buyer acted with bad motives. In our view, these terms, in this context, means nothing more than that the buyer has negotiated directly with the seller without the participation of the broker who first called the property to the buyer's attention; this negotiation is called "secret," "clandestine," and "conspiratorial" because only the buyer and seller are in on it.

We therefore conclude that liability for the brokers' commission may be predicated on the simple fact that the seller and buyer, having been brought together with the brokers, strike their own deal. Contrary to the trial court, we conclude that there is no need for continuous negotiations to be conducted by or through a broker once the broker has been excluded by the seller and buyer. Accordingly, we reverse the judgment below with directions to enter judgment for the brokers."

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[3]It is also not the law of the State of Florida that buyers and sellers can be let off the hook for a broker's commission upon a showing, in the words of the dissent, "that the buyers were, in good faith, not interested in The Prince Arthur Apartments when first shown the property by the brokers...and that they only later became interested in The Prince Arthur when by happenstance they were led to the seller's agent...."

To permit such a defense to a suit for a broker's commission would be virtually to do away with the cause of action. The ludicrousness of the "I wasn't interested" defense is demonstrated in the present case by the fact that the Horns were first shown The Prince Arthur by the brokers in December 1980, bought another property (the Greystone) in February 1981, and contracted to buy The Prince Arthur in April 1981.

SUMMARY OF ARGUMENT

I

The decision and opinion of the District Court of Appeal is not in conflict with Shuler v. Allen, 76 So. 2d 879 (Fla. 1955) and other cases similarly requiring that continuous negotiations be initiated by the broker and result in a sale of the property in order for the broker to be considered the procuring cause of sale, because the instant appeal requires application of an exception to that rule of law which dispenses with the continuous negotiation requirement where the broker has been actually or effectively excluded by the seller and/or buyer from commencing or participating in such negotiations.

II

The opinion and decision of the Third District Court of Appeal is not in conflict with the case of First Realty Corp. of Boca Raton v. Standard Steel Treating Co., 268 So. 2d 410 (Fla. 4th D.C.A. 1972) and cases similarly holding that in order to be considered the procuring cause of sale for purposes of establish-

ing a right to a commission the broker is not required to have participated in continuous negotiations with the seller and buyer where the broker has been excluded by the parties from such negotiations.

First Realty Corp. of Boca Raton v. Standard Steel Treating Co., 268 So. 2d 410 (Fla. 4th D.C.A. 1972) is entirely consistent with the District Court of Appeals determination and has been cited in the opinion as a part of the legal basis for the District Court of Appeal's conclusion that the trial court applied an incorrect rule of law in rendering its final judgment for the defendants.

III

The Third District Court of Appeal in determining the result in this cause applied the factual determinations and findings of the trial court and applied them to the correct rules of law. At no point in the course of appellate review did the District Court of Appeal reweigh or reevaluate the evidence considered by the trial court.

Thus, the legal position adopted by the Petitioners regarding conflict with Delgado v. Strong, 360 So. 2d 73 (Fla. 1978) and cases similarly holding is fallacious.

Petitioners have sought review of a decision rendered by the Third District Court of Appeal which reversed the trial court upon

a determination that the trial judge applied an erroneous rule of law in his decision to enter judgment against Respondents. The District Court of Appeal's opinion reflects a correct analysis and application of controlling authority and therefore the decision of the Third District Court of Appeal should be affirmed.

ARGUMENT

I

THE DECISION OF THE COURT OF APPEAL DOES NOT CONFLICT WITH SHULER V. ALLEN, 76 So. 2d 879 (FLA. 1955) AND OTHER CASES SIMILARLY HOLDING THAT CONTINUOUS NEGOTIATIONS BETWEEN THE SELLER AND BUYER, INITIATED BY THE BROKER, ARE A PREREQUISITE TO ESTABLISHING A BROKER'S ENTITLEMENT TO A COMMISSION AS THE PROCURING CAUSE OF SALE.

Petitioners cite the Supreme Court of Florida's decision in Shuler v. Allen, 76 So. 2d 879 (Fla. 1955) for the legal proposition that a broker can only be considered as the procuring cause of sale, thereby earning a commission, if he has initiated and participated in continuous negotiations between the seller and buyer which thereafter conclude in a sale of the property in question. Petitioners argue that the rule is absolute, that no exceptions exist, even where the broker is actually or effectively excluded from initiating or participating in such negotiations as a result of conduct by the seller and/or buyer.

Simply stated, Petitioners' reliance on Shuler v. Allen (supra) is both artificial and misplaced. First, Shuler v. Allen specifically confronts only the factual scenario in which a broker is given the opportunity to engage in continuous negotiations with the seller and buyer and either fails to do so or allows such

negotiations to lapse to a state whereby no agreement for sale of the property may be reached.

To adopt the absolute requirement of continuous negotiations -- even where the broker has been excluded from the negotiations -- would sanction an "open door" for fraud by which parties could avoid compensating real estate brokers, and would thereby be motivated to do so, by excluding them from participating in such negotiations.

Such was not the intent, desire or aim for which the rule in Shuler v. Allen (supra) was crafted. To the contrary, Shuler v. Allen specifically holds that a broker will be entitled to a commission even though the buyer and seller consummate the transaction on terms different from those in the original listing agreement. Shuler v. Allen simply requires the broker to initiate and participate in continuous negotiations between the seller and buyer where he is given the opportunity to do so.

Numerous courts in this State have held that the rule of Shuler v. Allen is subject to the exception of exclusion of the broker from negotiations by the seller and/or buyer.

In this connection, see Alcott v. Wagner, 328 So. 2d 549 (Fla. 4th D.C.A. 1976); Bermil v. Sawyer, 353 So. 2d 579 (Fla. 3rd D.C.A. 1977); Brandenburg Investment Corporation v. Farrel Realty, Inc., 463 So. 2d 558 (Fla. 2nd D.C.A. 1985); Gibbs v. Gibbs, 296 So. 2d 613 (Fla. 1st D.C.A. 1974); Realty Marts International, Inc. v. Barlow, 348 So. 2d 63 (Fla. 1st D.C.A. 1977) and Crystal

River Enterprises, Inc. v. Nasi, Inc., 418 So. 2d 1038 (Fla. 5th D.C.A. 1982).

This Court in Taylor v. Dorsey, 19 So. 2d 876 (Fla. 1944) clearly embraced the concept that where the broker has brought the buyer and seller together, and has been thereafter prevented from engaging in negotiations with the parties, he will nevertheless be entitled to a commission where negotiations culminate in a sale of the property.

The various district court of appeal decisions such as Gibbs v. Gibbs, 296 So. 2d 613 (Fla. 1st D.C.A. 1974); Mellet v. Henry, 108 So. 2d 69 (Fla. 3rd D.C.A. 1959); Realty Marts International, Inc. v. Barlow, 348 So. 2d 63 (Fla. 1st D.C.A. 1977) and Crystal River Enterprises, Inc. v. Nasi, Inc., 418 So. 2d 1038 (Fla. 5th D.C.A. 1982), have applied the legal concept of procuring cause as announced in Taylor v. Dorsey, (supra), so as to avoid a result in which fraudulent conduct by the seller and/or buyer will deprive the broker of his rightful compensation. Clearly, Taylor v. Dorsey and its progeny recognized the necessity of protecting brokers from fraud or collusion involving sellers and buyers, as was self-evident from the majority opinion of the District Court of Appeal in its repudiation of the "I wasn't interested" defense proferred by the dissenting Judge.

It should be emphasized that Shuler v. Allen, (supra) was decided on a set of facts involving a written listing agreement between the seller and the broker under which the broker had

engaged in initial negotiations but had abandoned further efforts to complete the negotiations despite circumstances indicating a potential transaction could be consummated.

The facts involved in the instant case establish that the buyers misleadingly informed the broker that they had no interest in purchasing the Prince Arthur Apartments, and thereupon after discovering who the owner was, communicated directly with his agent in order to complete the "deal." Obviously, the rule of law crafted in Shuler v. Allen, 76 So. 2d 879 (Fla. 1955) is not applicable to the controlling facts in this case.

In summary, the fundamental legal and factual distinctions announced in Shuler v. Allen, (supra) and Sheldon Greene & Associates v. Rosinda Investments, N.V., 475 So. 2d 925 (Fla. 3d D.C.A. 1985) clearly establish that no conflict exists between the respective decisions.

II

THE DECISION OF THE COURT OF APPEAL DOES NOT CONFLICT WITH FIRST REALTY CORP. OF BOCA RATON V. STANDARD STEEL TREATING CO., 268 So. 2d 410 (FLA. 4th D.C.A. 1972), AND OTHER DECISIONS WHICH HOLD THAT THE BROKER TO BE DEEMED THE PROCURING CAUSE OF SALE NEED NOT PARTICIPATE IN CONTINUOUS NEGOTIATIONS WITH THE SELLER AND BUYER, WHERE THE BROKER HAS BEEN ACTUALLY OR EFFECTIVELY EXCLUDED BY THE PARTIES FROM SUCH NEGOTIATIONS.

As a primary thrust of the Petitioners' attack on the District Court of Appeal's decision in the instant cause they have adopted the view that the decision of the Fourth District Court of Appeal in First Realty Corp. of Boca Raton v. Standard Steel

Treating Company, 268 So. 2d 410 (Fla. 4th D.C.A. 1972) directly conflicts with the legal principles stated in the Third District Court of Appeal's opinion in Sheldon Greene & Associates v. Rosinda Investments, N.V., 475 So. 2d 925 (Fla. 3rd D.C.A. 1985).

Contrary to Petitioners' assertion, however, First Realty Corp. of Boca Raton (supra) is harmonious and consistent with the decision under review and was cited by the District Court of Appeal in the body of its opinion for the proposition that the broker is not required to engage in continuous negotiations between the parties where one or both of the parties have clandestinely excluded the broker by dealing directly with one another.

Frankly, it is difficult to understand the real basis of Petitioners' legal analysis in its Initial Brief in view of the inconsistent legal arguments offered in support of Shuler v. Allen (supra) and First Realty Corp. of Boca Raton (supra). The two legal positions adopted by Petitioners are diametrically opposite: one argument requires absolute adherence to the continuous negotiation rule while the second supports the exception in instances where the broker is excluded.

If Petitioners are seeking to argue a conflict between the instant cause and First Realty Corp. of Boca Raton (supra) on the basis that purposeful exclusion of the broker by the seller and the buyer is necessary, that position is simply not supported by First Realty Corp. of Boca Raton, nor by any of the cases cited therein.

As Petitioners candidly state in their Initial Brief:

> "On the other hand courts are not disposed to allow a broker's undertaking to be defeated by fraud or inequitable conduct on the part of his principal, whereby the principal would profit by the broker's service and at the same time evade a just liability to make due compensation."

(Petitioners' Initial Brief at P. 15)

But Petitioners have misapprehended the applicable rules of law with respect to a purported requirement that the broker must be involved in some continuous negotiations between the buyer and seller, even where the broker is misleadingly told that no negotiations are necessary or possible because the buyer has no interest in purchasing the property in question. In this regard the Supreme Court's decision in Estes v. Moylan, 94 So. 2d 362 (Fla. 1957) is both illustrative and appropriate.

In Estes this Court ratified and confirmed the legal principle that a broker will be deemed the procuring cause of sale and therefore will be entitled to a commission, even in the absence of continuous negotiations, where the lack of such negotiations is directly attributable to conduct of a party to the transaction which is either fraudulent or inequitable and which is calculated to avoid the payment of a brokerage commission.

Based on the foregoing, no continuous negotiations were required in the case at bar and as such, the factual determination as to the existence of continuous negotiation was unnecessary and irrelevant.

In an attempt to forecast a "cloud of doom" resulting from the District Court of Appeal's decision in this cause, Petitioners argue that the Court has given birth to new case law which creates an irrebutable presumption that a buyer who claims no interest in a particular piece of property, and who later, purchases it without the broker's involvement, will nevertheless be deemed the procuring cause of sale thereby earning a commission.

This conclusion, and the "presumption" which springs from it, is without any logical basis. To the contrary, the District Court's decision involves application of existing case law to reach a conclusion both supported and justified by stare decisis, logic and common sense.

The rule of law to which Petitioner refers, namely

> "(That) a broker has done all he is required to do and is entitled to a commission where he has shown the buyer the property but makes no further efforts because an initial purchase offer is rejected or the buyer expresses no interest in the property." Sheldon Greene & Associates v. Rosinda Investments, N.V., 475 So. 2d at 928 (Appendix at A3).

is clearly an application of the "purposeful exclusion" exception under First Realty Corp. of Boca Raton, (supra) and this Court's "deceitful conduct" ruling in Estes v. Myolan, 94 So. 2d 362 (Fla. 1957).

Furthermore the language employed by the District Court of Appeal, as quoted above, required that the buyer simply "tell the truth" to the broker as to his desire or decision regarding the

interest he or she may have with respect to a particular parcel of real estate. Obviously, if the buyer claims no interest, then the broker cannot logically assume that there exists a need to commence negotiations between the buyer and seller.

It should be remembered that the trial judge made a finding of fact that the Horns' version of the facts was "a little incredible" (Transcript at 389) and that their testimony was not believable as it related to their having ever met Mr. Bastacky, or having been shown the Prince Arthur Apartments by the brokers, and as to their professed lack of interest in the property until the "face to face" meeting with Sadru Esmail. (Transcript at 391).

Thus, for purposes of determining whether the brokers had been excluded, the findings of fact by the trial court both expressly and impliedly make such a finding. (Transcript at 391).

Therefore, the decision rendered by the District Court in this cause is premised on considerations of existing law, common sense, business reality and an expressed desire by Florida Courts to prevent fraud and deceit from causing an inequitable result -- the deprivation of a broker's right to a commission.

The rule of law stated in Shuler v. Allen, 76 So. 2d 879 (Fla. 1955) is not disturbed by the Third District's decision; on the contrary, it conforms to the express policy of Shuler (supra) promoting fairness and preventing manifest unjustice and oppression.

III

THE DECISION OF THE COURT OF APPEAL DOES NOT CONFLICT WITH DELGADO V. STRONG, 360 So. 2d 73 (Fla. 1978) AND OTHER CASES SIMILARLY HOLDING THAT AN APPELLATE COURT MAY NOT SUBSTITUTE ITS JUDGMENT FOR THAT OF THE TRIAL COURT BY REEVALUATING THE EVIDENCE ON APPEAL.

A review and analysis of the decision rendered by the Third District Court of Appeal in this cause clearly reveals that a careful inspection of the transcript of the trial was made by the District Court prior to the preparation of its opinion, and establishes that the trial judge determined that the greater weight of evidence supported the broker's version of the material facts in issue.

As the transcript points out, the trial judge determined that the Horns were shown the Prince Arthur Apartments by the Respondents-Brokers and that the Horns' version of how they were introduced to the property was, in the words of the court, "a little incredible." (Transcript at 390).

It is clear that as to all material factual disputes between the Brokers-Respondents and the Horns, such disputes were resolved in the Broker's favor. (Transcript at 391). There existed no material factual disputes between the seller, Rosinda Investments, N.V. and the Brokers-Respondents.

It was stipulated that Rosinda Investments, N.V., through their authorized agent, Sadru Esmail, gave an oral open listing to the broker and it was established by the trial court that Bastacky showed the Prince Arthur to the Horns with the full knowledge of

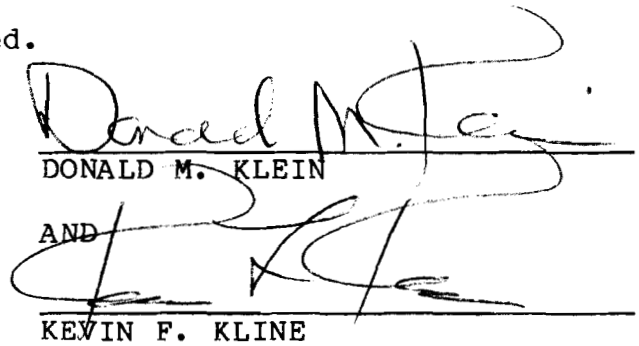
the owner's on-site manager. (Transcript at 7). Sadru Esmail had requested Mr. Bastacky only to inform him of individuals shown the property in the event the prospective purchaser was interested in making an offer to purchase. (Transcript at 25).

Based on the foregoing, the District Court of Appeal applied the stipulated, undisputed or determined facts to the correct rules of law reaching the conclusion that the brokers, under those facts, were indeed the procuring cause of sale.

It is therefore self-evident that the District Court of Appeal neither reevaluated nor reweighed the evidence considered by the trial court and, hence, no conflict exists between the instant appeal and the Supreme Court's decision in Delgado v. Strong, 360 So. 2d 73 (Fla. 1978).

CONCLUSION

Based on the foregoing, the decision of the Third District Court of Appeal should be affirmed.



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