c1A 9-9-86

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. 67,843

REVIEW OF THE THIRD DISTRICT COURT OF APPEAL OF FLORIDA

PETITIONERS' INITIAL BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND OF THE FACTS

Harry Horn (hereinafter referred to as "Mr. Horn") and Sala Horn, his wife (hereinafter referred to as "Mrs. Horn), have petitioned the Supreme Court of Florida for review of Sheldon Greene & Associates v. Rosinda Investments, N.V., 475 So. 2d 925 (Fla. 3d DCA 1985). The supreme court has accepted jurisdiction 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, along with Rosinda Investments, N.V. (hereinafter referred to as "Rosinda"), were the defendants in a suit to recover a real estate brokerage commission. Sheldon Greene & Associates (hereinafter referred to as "Greene") and Litwin Realty, Inc. (hereinafter referred to as "Litwin"), were the plaintiffs. The trial court, sitting as the finder of fact, ruled in favor of Mr. and Mrs. Horn and Rosinda. Greene and Litwin appealed. The court of appeal reversed the judgment and remanded the action to the trial court with directions to enter judgment for Greene and Litwin. Rosinda has not petitioned for review.

At the trial, there were two basic versions of the events leading up to this dispute--that presented by Mr. and Mrs. Horn, and that presented by Greene and Litwin. Mr. and Mrs. Horn testified as follows: Fleeing the violence of the South Bronx, Mr. and Mrs. Horn arrived in Southeast Florida in November 1980. Mr. and Mrs. Horn had been in both the clothing and real estate businesses in New York, and were interested in purchasing a hotel in the South Beach area of Miami Beach. They had $200,000

to invest. (Transcript at 249-250, 273-77, 321-23)

While sitting in the lobby of a Holiday Inn in Hollywood, Mr. and Mrs. Horn saw Litwin's office and, upon entering, were introduced to a Mr. Pollock. During November 1980, Mr. Pollock showed Mr. and Mrs. Horn three hotels, the Enchanted Isle, the Lombardy and the Nassau. The Horns were not interested in the Lombardy, and attempts to buy the Enchanted Isle and the Nassau proved unsuccessful. (Transcript at 250-52, 254-56, 277-86, 291-97, 312-18, 323-26, 333-39, 341-45)

During November 1980, the period in which Mr. Pollack was showing Mr. and Mrs. Horn the three hotels, Mr. and Mrs. Horn also visited other real estate brokers including, on November 25, one located in the Greystone Hotel. One of the properties being offered by the real estate broker located in the Greystone, a Mr. Schron, was the Greystone itself, which was owned by two rabbis from New York. Mr. and Mrs. Horn were interested. Rabbi Nachem, one of the owners, was contacted by telephone, and negotiations began. During the course of the negotiations, Rabbi Nachem and Mr. Schron told Mr. and Mrs. Horn to be on the lookout for other properties in which the rabbis and Mr. Schron might take an interest. Around the middle of December 1980, Rabbi Nachem came to Southeast Florida to meet with Mr. and Mrs. Horn concerning the purchase of the Greystone. An agreement was reached. Mr. and Mrs. Horn returned to New York, closed out their affairs, and traveled to Israel. On February 18, 1981, Mr. and Mrs. Horn returned to Southeast Florida, and closed

on the Greystone. The purchase of the Greystone consumed the $200,000 Mr. and Mrs. Horn had to invest. (Transcript at 256-58, 261, 286-91, 328-331)

About one month after Mr. and Mrs. Horn purchased the Greystone, its manager, whose wife was pregnant, resigned to return with her to Puerto Rico, so that they could be with his wife's mother when the baby was born. Jose "Pepe" Quinteros (hereinafter referred to as "Pepe") was at the time going from hotel to hotel seeking employment. When Pepe arrived at the Greystone, Mr. and Mrs. Horn informed him that they were looking for a manager. Pepe informed Mr. and Mrs. Horn that he had previously worked at the San Juan Hotel for twenty-two years. Mr. and Mrs. Horn asked Pepe for a reference and were given the name of the San Juan's manager, Sadru Esmail (hereinafter referred to as "Mr. Esmail"). (Transcript at 258-60, 330-31, 339-41)

Mr. and Mrs. Horn contacted Mr. Esmail. After discussing the qualifications of Pepe, who was hired, the conversation turned to the hotel business in general. Remembering Rabbi Nachem and Mr. Schron, Mr. and Mrs. Horn asked Mr. Esmail if he knew of any hotels on the market. Mr. Esmail informed Mr. and Mrs. Horn that the Champlain and the Prince Arthur, two hotels owned by the same owner as the San Juan, were on the market. Mr. and Mrs. Horn looked at the Champlain and found what they considered to be a very low class of clientele. The Prince Arthur was another story. Rabbi Nachem was contacted, came to Southeast Florida, and inspected and negotiated the purchase

of the Prince Arthur. Mr. and Mrs. Horn subsequently acquired a fifty percent interest in the Prince Arthur, using money borrowed from Mr. Horn's brother, and became its managers. (Transcript at 260-65, 301-11, 331-33)

In December 1981, two persons, who Mr. and Mrs. Horn assumed from the way they behaved were city inspectors, entered the Greystone and seated themselves in the lobby. After about ten minutes, Mr. Horn asked if he could help them. Their response was to ask Mr. Horn if he knew who was the owner of the Prince Arthur, because they wanted to buy it. These two persons, whom Mr. and Mrs. Horn had never seen before, turned out to be a Mr. Bastacky and a Mr. Greene. (Transcript at 253, 268-69, 328)

The testimony on behalf of Greene and Litwin varied here and there from that of Mr. and Mrs. Horn. As summarized by the court of appeal, Greene and Litwin's version was 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. [footnote omitted] The Horns' visits and inspections were done with the full knowledge and approval of the owner's resident manager.[2]

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[2]There is absolutely no question in this record, and the appellees do not seriously contend otherwise (despite the dissenter's contrary view), that the trial court found that the brokers initially showed The Prince

> According to Bastacky, only when the Horns told him that 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 owner 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 in any negotiations only because the Horns misleadingly informed them that they had no interest in purchasing the property.

> Arthur Apartments to the Horns and that the property was shown to 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' visits to the property, one of which lasted an hour and a 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.

(Appendix at A1-2)

Mr. and Mrs. Horn disagreed, however, with much of the testimony on behalf of Greene and Litwin. (Transcript at 252-55, 265-73, 298-306, 327-29, 336) In the course of disagreeing, Mr. Horn testified as follows:

> Q. Now, you have been sitting here throughout the entire trial. Is that correct?

A. Yes.

Q. You have heard Mr. Bastacky testify yesterday that he met you?

A. Yes.

Q. And you heard him testify that he met you in Mrs. Litwin's office?

A. Right.

Q. When was the first time that you ever met Mr. Bastacky?

A. Mr. Bastacky, I never met him and I have not met Mr. Greene in my life. I met them for the first time when they came into the Greystone and I thought they were city inspectors.

(Transcript at 252-53)

Q. Now, Mr. Horn, you testified that you had met Mr. Pollock in November of 1980?

A. Yes.

Q. You testified Mr. Pollock took you to see how many hotels?

A. Three.

Q. Three hotels?

A. Yes. The Enchanted Isle, the Lombardy and the Nassau. I told him I wasn't interested.

Q. Did he mention the Prince Arthur to you?

A. No. Never.

(Transcript at 254)

Q. In any event, Mr. Horn, is it your testimony that whenever Mr. Pollock showed you a property that he had you sign a paper acknowledging that he had shown the property to you by him? [sic]

A. Right.

. . . .

Q. Did Mr. Pollock ever ask you to sign one of those papers with respect to the Prince Arthur Hotel?

A. He never mentioned the Prince Arthur.

(Transcript at 270-71) Mrs. Horn, also in the course of disagreeing, testified as follows:

Q. Now, did Mr. Pollock take you to the Prince Arthur Hotel or Prince Arthur Apartments?

A. No.

Q. When was the first time that you met Mr. Bastacky?

A. I met Mr. Bastacky and this man when he came to the Greystone. They were standing in the corner.

Q. When?

A. I do not know. It seems like it was not too long ago. I thought they were inspectors for the city. That was the only time I had seen them when they came to visit us at the Greystone Hotel. That is when I saw them for the first time, this man and the other man.

(Transcript at 328)

Q. He showed you the Enchanted Isle?

A. Yes, he did.

Q. He showed you the Nassau?

A. Yes, he did.

Q. He wanted to show you the Lombardy Inn?

A. Yes.

Q. You did not want to see it?

A. No. My husband didn't like the curve.

Q. What other properties did Gary Pollock show you?

A. None.

(Transcript at 336) Akber Ali testified that he had never seen Mr. and Mrs. Horn at the Prince Arthur prior to its purchase and had never seen them with Mr. Bastacky. (Transcript at 145-53)

During the closing arguments, the trial court made several comments on the evidence:

> THE COURT: If I could interrupt you for one minute. That is one point of interest to the Court is [sic] the fact that in the interim the Horns did, in fact, buy another piece of property. So, whatever that is worth. They did purchase the Greystone in February of 1981.
>
> MR. ZEMEL: Right.
>
> THE COURT: Which gives--it is a fact of a break in chain [sic] of negotiations and the fact that the people who are being sought to be charged with a commission here between the time of the initial contact between the broker, if we now give credibility to Mr. Bastacky's version and everybody else's except the Horns, that the Horns bought a different piece or [sic] property in that chronological time period.
>
> That may present some interesting problems with regard to this issue of continuing negotiations and continuity in that type of thing.
>
> . . . .
>
> THE COURT: Isn't it conceivable that they met as the broker has testified and that Mr. Horn and Mrs. Horn in reality were not interested in that property at that time back in December of 1980 and they in fact bought another piece of property in that the matter was abandoned, to use Mr. Bastacky's own words, when they indicated their disinterest in the property.
>
> Thereafter they bought the Greystone and after they had maybe discussions with that Rabbi Nachem and they decided, well,

maybe they might be interested in the thing. Isn't there a break in the continuity and chain?

. . . .

THE COURT: I think the question comes in, of course, to play as to when did the broker's service end. I can understand if it was a continuous transaction and there was a so-called conspiracy and the people were acting in bad faith.

But, it is just as conceivable, I guess, to assume that--see the point is there, again, I stress the fact that Mr. and Mrs. Horn did in fact purchase a separate and distinct piece of property in the interim.

In other words, they consummated a deal. They were looking for a hotel on Miami Beach and they did in fact buy one. They bought the Greystone in February of 1981 and they also bought another one six weeks later.

(Transcript at 383-85)

THE COURT: Now we are getting into a different issue.

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.

(Transcript at 391)

THE COURT: That little scenario, I believe, did happen. I believe that Pepe was there somewhere and came into the picture like your clients claim he did and for the sake of making a finding of fact, I would find

> that to be the case and this happened at the end of February or March of 1981 and that is how the Horns made contact directly with Mr. Sadru.
>
> Let us say that is a finding of fact.

(Transcript at 393)

> THE COURT: I am leaning towards [sic] conspiracy. I am leaning towards the fact--towards the conclusion that a conpsiracy [sic] was not proven between the seller and the buyer. In other words, your argument made considerable sense to me, Mr. Greenfield, as far as the negligence of your client and your argument about the two innocent parties and their never having been put on notice of the fact that the Horns were brought to the premises other than the contact with Mr. Ali.
>
> I am leaning towards that conclusion.

(Transcript at 402) At the conclusion of the trial, on January 24, 1984, the trial court requested memorandums of law. (Transcript at 402)

In the pertinent part of its final judgment, which was rendered April 5, 1984, the trial court concluded

> that under all of the circumstances [1] the Plaintiffs have failed to establish that they were the procuring cause of the sale, and [2] the Plaintiffs have failed to prove that there were continuing negotiations between the seller and purchaser, conducted by or through the broker, and as such have failed to meet the test enunciated by the Court in the case of Shuler v. Allen, Fla. 76 So.2d 879 (S.Ct. 1955).

(Record at 143)

In its decision, the court of appeal stated that its task of deciding the case on appeal was made easier by the fact that the trial court, as the finder of fact, had announced that it believed Greene and Litwin's version of the events leading up

to the dispute. The court of appeal then summarized Greene and Litwin's version of the facts. (Appendix at A2) The court of appeal further stated that the trial court had erroneously believed that Greene and Litwin had to establish that there were continuing negotiations between the seller and purchaser, conducted by or through the brokers, resulting in the sale of the property. (Appendix at A3) The court of appeal further stated:

> 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 not the law of the State of Florida."[3]
>
> Realty Marts International, Inc. v. Barlow, 348 So.2d 63, 64 (Fla. 1st DCA 1977).

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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...."

(Appendix at A3-4)

SUMMARY OF ARGUMENT

For a broker to earn his commission, the sale must be effected by continuous negotiations inaugurated by the broker, which the broker has either conducted or been purposely excluded from as a result of the seller and buyer having dealt with one another directly and in secret. Contrary to the statement of law expressed by the court of appeal, there must be a factual determination that the sale was effected by continuous negotiations inaugurated by the broker.

When a trial court's judgment contains no findings of fact and the the evidence is conflicting, it must be presumed that the trial court found every fact, justifiable by the evidence, necessary to support the trial court's judgment. In the present case, the judgment of the trial court contained no findings of fact. It was error for the court of appeal to elevate non-binding oral comments made by the trial court to the level of binding written findings of fact. By doing so, the court of appeal impermissibly reweighed the evidence. There was competent substantial evidence from which the trial court could have concluded either that Greene and Litwin never showed the Prince Arthur to Mr. and Mrs. Horn, or that the sale to Rabbi Nachem was not the result of continuous negotiations inaugurated by Greene and Litwin.

ARGUMENT

This is a review of a decision in which the court of appeal reversed the trial court upon a holding that the trial court reached an erroneous conclusion of law. Because, in reversing the trial court, the court of appeal both applied an incorrect rule of law and reevaluated the evidence, the decision under review should be quashed and this action remanded to the court of appeal with directions to reinstate the judgment of the trial court.

THE DECISION OF THE COURT OF APPEAL IS IN EXPRESS AND DIRECT CONFLICT WITH SHULER V. ALLEN, 76 SO. 2D 879 (FLA. 1955), AND THOSE OTHER CASES WHICH HOLD THAT WHERE A BROKER HAS BROUGHT THE PARTIES TOGETHER AND THE SALE IS EFFECTED AS A RESULT OF CONTINUOUS NEGOTIATIONS BETWEEN THE PARTIES, INAUGURATED BY AND CONDUCTED BY THE BROKER, THE BROKER WILL BE ENTITLED TO HIS COMMISSION EVEN THOUGH THE SALE EVENTUALLY CONSUMMATED IS ON TERMS AND AT A PRICE DIFFERENT FROM THOSE IN THE ORIGINAL LISTING OR UNDER THE ORIGINAL EMPLOYMENT; AND WITH FIRST REALTY CORP. OF BOCA RATON V. STANDARD STEEL TREATING CO., 268 SO. 2D 410 (FLA. 4TH DCA 1972), AND THOSE OTHER CASES WHICH HOLD THAT THE PARTIES CANNOT COMPLAIN THAT THE BROKER DID NOT PARTICIPATE IN THE CONTINUOUS NEGOTIATIONS WHEN THE PARTIES HAVE PURPOSELY EXCLUDED THE BROKER FROM THE CONTINUOUS NEGOTIATIONS BY DEALING WITH ONE ANOTHER DIRECTLY AND IN SECRET

If a broker has brought a seller and a prospective buyer together, and a sale is effected as a result of continuous negotiations inaugurated by the broker, he will be entitled to his commission even though the sale eventually consummated is on terms and at a price different from those in the original listing or under the original employment. Shuler v. Allen, 76 So. 2d

879, 882 (Fla. 1955); Taylor v. Dorsey, 155 Fla. 305, 308, 19 So. 2d 876, 878 (1944). Generally, "continuous negotiations" contemplates continuous negotiations between the seller and the prospective buyer conducted by the broker. The requirement of continuous negotiations is not complied with when the broker conducts his negotiations with the prospective buyer alone, unless the seller participates in such negotiations or at least has knowledge of the fact that such negotiations are going on. Shuler, 76 So. 2d at 882-83. To establish any other rule would result in a manifest injustice, subject the seller to continuous and unwarranted liability, and result in oppression. Id. at 883. Where a broker has failed to effect a sale, and negotiations have ceased or been broken off, the seller may take up the negotiations where they were left off and complete the sale. The mere fact that the sale may in some degree have been aided by the previous efforts of the broker does not of itself entitle the broker to a commission, unless it clearly appears that those efforts were the procuring cause of the sale. Darracott v. Hemphill, 82 So. 2d 719, 721-22 (Fla. 1955).

On the other hand, courts are not disposed to allow a broker's undertaking to be defeated by any 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. This rule is usually applied (1) where the seller interrupts incomplete and continuing negotiations between the broker and the prospective buyer and effects a sale directly to the buyer at a price lower than that for which the

broker was authorized to negotiate; or (2) where the broker procures a person who is unwilling to pay the stipulated price, but the person makes a counteroffer which is accepted by the seller. Recovery is allowed on the theory that the seller, by his interruption of the negotiations or by acceptance of the counteroffer, has deprived the broker of the opportunity to bring the prospective buyer up to the authorized price; and hence that the seller has waived any price requirement stipulated in his contract with the broker. Estes v. Moylan, 94 So. 2d 362, 365 (Fla. 1957). Therefore, the seller and buyer cannot complain that the broker did not participate in the continuous negotiations when they have purposely excluded the broker from the continuous negotiations by dealing with one another directly and in secret. First Realty Corp. of Boca Raton v. Standard Steel Treating Co., 268 So. 2d 410, 412-13 (Fla. 4th DCA 1972).

Continuous negotiations are a necessary element in either case. Thus, for the broker to earn his commission, as a matter of law, it is essential that the sale be effected by continuous negotiations inaugurated by the broker, Shuler, 76 So. 2d at 882; Taylor, 155 Fla. at 308, 19 So. 2d at 878; First Realty Corp. of Boca Raton, 268 So. 2d at 412, which the broker has either conducted, Shuler, 76 So. 2d at 882-83, or been purposely excluded from as a result of the seller and buyer having dealt with one another directly and in secret, First Realty Corp. of Boca Raton, 268 So. 2d at 412-13, see Estes, 94 So. 2d at 365. As explained by the court of appeal in First Realty Corp. of Boca Raton, what constitutes continuous negotiations in a given

case does not admit of a precise time formula whereby following each offer there must be an acceptance or a counteroffer, within a limited specified period of time. First Realty Corp. of Boca Raton, 268 So. 2d at 412. Therefore, the presence of this essential element, continuous negotiations, is a question of fact. See id.

In the present case, however, the court of appeal has abolished the requirement that the sale be effected as a result of continuous negotiations inaugurated by the broker. Under the new rule of law announced by the court of appeal, "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, 475 So. 2d at 928. (Appendix at A3). A showing "that the buyers were, in good faith, not interested . . . when first shown the property by the brokers," is of no avail under this new rule of law; the seller and buyer are, nonetheless, liable for the commission. Id. at n.3 (Appendix at A3). Under the new rule of law, therefore, if an initial purchase offer is rejected or the prospective buyer expresses no interest in the property, but does eventually buy the property, the broker need not show that the sale was effected by continuous negotiations inaugurated by the broker, in order to collect a commission. Id. at 927-28 & n.3 (Appendix at A2-3).

This new rule encompasses an irrebuttable presumption that if a broker once shows property to a potential buyer who expresses

no interest or rejects the purchase offer, and the potential buyer ultimately buys the property from the seller without the participation of the broker, the buyer must have in fact been interested from the beginning and the broker is, therefore, the procuring cause. Thus, the court of appeal has created a new rule of absolute liability for brokerage commissions. Under this rule, a broker, in order to collect his commission, need only establish that he showed the property to the prospective buyer, and that the prospective buyer eventually purchased the property. The need for a factual showing that the purchase resulted from negotiations continuous from the brokers' showing of the property, has been done away with. Applying this new irrebuttable presumption in the present case, the court of appeal was easily able to conclude that "the brokers . . . had no further involvement in the negotiations only because the Horns misleadingly informed them that they had no interest in purchasing the property," id. at 927 (emphasis added)(Appendix at A2). Contrary to the conclusion reached by the court of appeal, however, such is not and should not be the law in Florida.

None of the cases cited by the court of appeal in Sheldon Greene & Associates support the abolishment of the need for a factual determination of continuous negotiations. In First Realty Corp. of Boca Raton, the broad question was whether the broker conducted continuous negotiations within the definition set forth in Schuler. A summary judgment against the broker was reversed because whether there had been continuous negotiations could only be determined as a matter of fact. Because what

constitutes continuous negotiations in a given case does not admit of a precise time formula, a break in continuity could not be determined as a matter of law. The question whether the broker had been purposely excluded could only be determined after the finder of fact determined whether there were continuous negotiations. First Realty Corp. of Boca Raton, 268 So. 2d at 412-13. In Bermil Corp. v. Sawyer, 353 So. 2d 579, 584-85 (Fla. 3d DCA 1977), the court of appeal found that the jury verdict in favor of the broker was supported by competent substantial evidence. In Alcott v. Wagner & Becker, Inc., 328 So. 2d 549, 550-51 (Fla. 4th DCA 1976), an involuntary dismissal of the broker's action was reversed by the court of appeal because the dismissal precluded a weighing of the evidence, including the question of continuous negotiations, by the trial court as the finder of fact. In Mead Corp. v. Mason, 191 So. 2d 592, 595 (Fla. 3d DCA 1966), cert. denied mem., 200 So. 2d 813 (Fla. 1967), the court of appeal found that the jury verdict in favor of the brokers was supported by sufficient evidence. In Realty Marts, Inc. v. Barlow, 311 So. 2d 544, 545 (Fla. 1st DCA 1975), an involuntary dismissal of the broker's action was reversed by the court of appeal and remanded with directions that the trial court hear such further evidence as may be adduced. In Crystal River Enterprises, Inc. v. Nasi, Inc., 418 So. 2d 1038, 1039-40 (Fla. 5th DCA 1982), the court of appeal reversed a summary judgment against the seller and the involuntary dismissal of his action against the buyer for indemnification for a commission paid to a broker after a default judgment. The action was remanded

for completion of the trial, to allow the buyer an opportunity to present evidence that the broker was not the procuring cause of the sale. In Gibbs v. Gibbs, 296 So. 2d 613, 614 (Fla. 1st DCA 1974), the court of appeal reversed the judgment against the broker upon a finding that the manifest weight of the evidence demonstrated that the broker did not abandon efforts to make and complete the sale, which occurred a little more than one month after the initial showing and on substantially the same terms as those negotiated by the broker. Finally, in Realty Marts International, Inc. v. Barlow, 348 So. 2d 63, 64 (Fla. 1st DCA 1977), the court of appeal reversed a judgment against the broker, upon a finding that the uncontradicted evidence revealed that the buyer had gone directly to the sellers after having been shown the property by the broker, and purchased the property on substantially the same terms as negotiated by the broker. See also Warren E. Hunnicutt, Jr., Inc. v. Gleason, 462 So. 2d 878, 879-80 (Fla. 2d DCA 1985)(involuntary dismissal proper where there was no evidence that sale resulted from continuous negotiations instituted by broker); Danieli Corp. v. Bryant, 399 So. 2d 387, 389 (Fla. 4th DCA)(judgment for broker affirmed where, although trial court made no specific findings of continuous negotiations or that broker was procuring cause, both were implicit in the judgment and there was sufficient evidence in the record to support both), review denied mem., 407 So. 2d 1102 (Fla. 1981).

Such a rule of law, abolishing the need for a factual determination of whether the sale resulted from negotiations continuous from the broker's showing of the property, would, as stated

by the supreme court in Shuler, "result in a manifest injustice, subject the seller [and thus the buyer] to continuous and unwarranted liability, and result in oppression," Shuler, 76 So. 2d at 883. It would destroy the balancing protection, afforded both the broker and the seller and buyer, which is provided by a factual determination of whether the sale resulted from continuous negotiations inaugurated by the broker. It would, indeed, have a chilling effect on a seller's efforts to sell his property after a broker's unsuccessful attempts.

THE DECISION OF THE COURT OF APPEAL IS IN EXPRESS AND DIRECT CONFLICT WITH DELGADO V. STRONG, 360 SO. 2D 73 (FLA. 1978), AND THOSE OTHER CASES WHICH HOLD THAT AN APPELLATE COURT MAY NOT SUBSTITUTE ITS JUDGMENT FOR THAT OF A TRIAL COURT BY REEVALUATING THE EVIDENCE

An appellate court may not substitute its judgment for that of a trial court by reevaluating the evidence. Delgado v. Strong, 360 So. 2d 73, 73 (Fla. 1978) If, upon the pleadings and evidence before the trial court, there is any theory or principle of law which would support the trial court's judgment, the appellate court is obliged to affirm the judgment. Cohen v. Mohawk, Inc., 137 So. 2d 222, 225 (Fla. 1962).

Where the judgment under review contains no findings of fact, the appellate court must accept the evidence most favorable to the prevailing party, and disregard the conflicting evidence supporting the position of the appellant. NCNB National Bank of Florida v. Aetna Casualty & Surety Co., 477 So. 2d 579, 583 (Fla. 4th DCA 1985); Jacquin-Florida Distilling Co. v. Reynolds, Smith & Hills, Architects-Engineers-Planners, Inc., 319 So. 2d

604, 607 (Fla. 1st DCA 1975); Coble v. Agnew, 128 So. 2d 158, 159 (Fla. 2d DCA 1961); see Vandergriff v. Vandergriff, 456 So. 2d 464, 466 (Fla. 1984); Cohen, 137 So. 2d at 224, 225; Danieli Corp. v. Bryant, 399 So. 2d 387, 389 (Fla. 4th DCA), review denied mem., 407 So. 2d 1102 (Fla. 1981); Castille v. Starr, 376 So. 2d 935, 936 (Fla. 4th DCA 1979). Thus, where there are no findings of fact in the judgment, the appellate court may only reverse the trial court if there is no theory under which the judgment could be sustained. Spurrier v. United Bank, 359 So. 2d 908, 909-10 (Fla. 1st DCA 1978).

Restated, an appellate court may not disturb the implied findings of fact made by a trial court in support of a judgment, any more than may an appellate court interfere with express findings of fact upon which a judgment is predicated. When the evidence is conflicting, it must be presumed that the trial court found every fact, justifiable by the evidence, necessary to support the trial court's judgment. So far as the trial court has passed on the weight of the evidence or the credibility of the witnesses, the trial court's implied findings are conclusive. Griffith Co. v. San Diego College For Women, 45 Cal. 2d 501, 507-08, 289 P.2d 476, 479-80 (1955).

In the present case, the judgment of the trial court contained no findings of fact. It is true that the trial court, during the closing arguments, at several points orally interjected its inclination toward deciding certain factual disputes in favor of one party or the other. However, as pointed out by Judge Hubbart in a thoughtful dissent, no authority can be found

for treating a trial court's oral comments as formal and binding findings of fact, as the court of appeal has done in this case. See Sheldon Greene & Associates v. Rosinda Investments, N.V., 475 So. 2d 925, 930 (Fla. 3d DCA 1985)(Hubbart, J., dissenting) (Appendix at A6). In the interim between an oral expression of opinion at a non-jury trial and the rendering of a formal written judgment, there is nothing to prevent a trial court from changing its mind, upon reflection, on any disputed point of fact or law. See id. (Appendix at A6).

The non-binding nature of a trial court's commentary on the evidence is particularly illustrated by the present case, where over two months passed from the end of the trial until the rendering of the formal written judgment. Also to be noted is the fact that the trial court's comments on the evidence were couched in non-conclusive language. The trial court orally stated, "I just about have decided on the issue of the meeting with the Horns and Mr. Bastacky," "I am resolving that issue" and "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" (emphasis added). This is not the language of a formal and binding finding of fact.

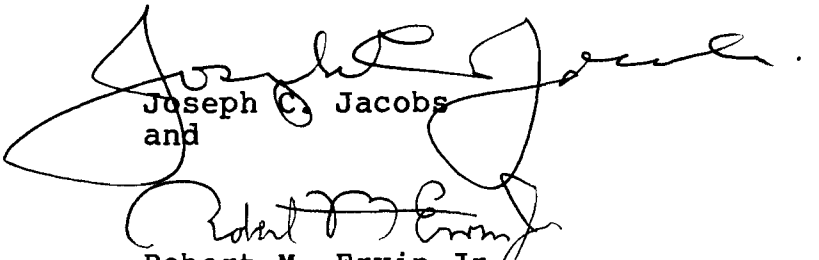
There was before the trial court competent substantial, albeit hotly disputed, evidence from which the trial court could have found that Greene and Litwin were not the procuring cause of the sale of the Prince Arthur. This is so, first, for the simple reason that Mr. and Mrs. Horn testified that they were

never shown the Prince Arthur by Greene, Litwin or their salesmen. Second, even assuming, as did the court of appeal, that the trial court did ultimately conclude that Mr. and Mrs. Horn were shown the Prince Arthur by Greene, Litwin or their salesmen, there was still competent substantial evidence from which the trial court could have found, in accordance with the majority of its oral comments during the closing arguments, that Rabbi Nachem's purchase of the Prince Arthur did not result from negotiations continuous from the supposed showing to Mr. and Mrs. Horn. See Shuler v. Allen, 76 So. 2d 879, 882-83 (Fla. 1955); First Realty Corp. of Boca Raton v. Standard Steel Treating Co., 269 So. 2d 410, 412-13 (Fla. 4th DCA 1972). Either of these two factual findings would support the judgment of the trial court.

By ignoring this evidence and viewing the evidence in a light most favorable to the appellants, Greene and Litwin, the court of appeal impermissibly reweighed the evidence and substituted its judgment for that of the trial court on disputed issues of fact. See Delgado, 360 So. 2d at 73; see also Fearick v. Smugglers's Cove, Inc., 379 So. 2d 400, 403 (Fla. 2d DCA 1980) (whether a broker is a procuring cause is a question of fact).

CONCLUSION

For the foregoing reasons, the decision under review should be quashed and this action remanded to the court of appeal with directions to reinstate the judgment of the trial court.



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