

IN THE SUPREME COURT OF FLORIDA

HARRY HORN and  
SALA HORN, his wife,

Petitioners,

vs.

CASE NO: 67,843

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

Respondents. /

REPLY TO APPLICATION FOR DISCRETIONARY REVIEW OF  
THE THIRD DISTRICT COURT OF APPEAL OF FLORIDA

RESPONDENTS' BRIEF ON JURISDICTION

DONALD M. KLEIN  
and  
KEVIN F. KLINE  
of the law firm of  
KLINE, MOORE & KLEIN, P.A.  
2665 South Bayshore Drive  
Suite 903  
Coconut Grove, Florida 33133  
Phone: (305) 385-9793

TABLE OF CONTENTS

CITATION OF AUTHORITY.....iii  
SUMMARY OF ARGUMENT.....iv  
RESPONDENTS' STATEMENT OF THE CASE AND THE FACTS.....1  
ARGUMENT:

I

THE DECISION AND OPINION OF THE THIRD DISTRICT COURT OF APPEAL OF FLORIDA DOES NOT CONFLICT DIRECTLY OR INDIRECTLY 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.....4

II

THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL OF FLORIDA IS NOT IN CONFLICT WITH ANY DECISION OF THE SUPREME COURT OF FLORIDA OR ANY DISTRICT COURT OF APPEAL ON THE ISSUE OF WHETHER CONTINUOUS NEGOTIATIONS ARE REQUIRED AS A PRE-REQUISITE TO ESTABLISHING A BROKER'S RIGHT TO A COMMISSION AS THE PROCURING CAUSE OF SALE.....6

III

THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL OF FLORIDA IS NOT IN CONFLICT WITH FIRST REALTY CORP. OF BOCA RATON V. STANDARD STEEL TREATING CO., 268 So. 2d 410 (Fla. 4th D.C.A. 1972) OR CASES SIMILARLY HOLDING THAT IN ORDER TO BE DEEMED THE PROCURING CAUSE OF SALE FOR PURPOSES OF ESTABLISHING 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.....8

CONCLUSION.....10

RESPONDENTS' APPENDIX.....A-1

    OPINION OF THE THIRD DISTRICT COURT OF  
    APPEAL OF FLORIDA.....A-1

    ORDER OF THE THIRD DISTRICT COURT OF  
    APPEAL OF FLORIDA DENYING REHEARING MOTION.....A-13

    FINAL JUDGMENT OF THE CIRCUIT COURT IN AND  
    FOR DADE COUNTY, FLORIDA.....A-14

    EXCERPTS FROM THE TRANSCRIPT OF THE TRIAL.....A-16

    CERTIFICATE OF SERVICE

CITATION OF AUTHORITY

Alcott v. Wagner & Beeker, Inc., 328  
So. 2d 549 (Fla. 4th D.C.A. 1976).....7

Bermil Corp vs. Sawyer, 353 So. 2d 579  
(Fla. 3rd D.C.A. 1977).....7

Branderburg Investment Corporation v.  
Farrell Realty, Inc., 463 So. 2d 558  
(Fla. 2nd D.C.A. 1985).....7

Crystal River Enterprises, Inc. v. Nasi,  
Inc., 418 So. 2d 1038 (Fla. 5th D.C.A.  
1982).....7

Delgado v. Strong, 360 So. 2d 73 (Fla. 1978).....4,5

First Realty Corp. of Boca Raton v. Standard  
Steel Treating Co., 268 So. 2d 410 (Fla.  
4th D.C.A. 1972).....8,9,10

Gibbs v. Gibbs, 296 So. 2d 613 (Fla. 1st  
D.C.A. 1974).....7

Mead Corp. v. Mason, 191 So. 2d 592 (Fla.  
3rd D.C.A. 1966) cert. denied 200 So. 2d  
813 (Fla. 1967).....7

Realty Marts International, Inc. v. Barlow,  
348 So. 2d 63 (Fla. 1st D.C.A. 1977).....7

Shuler v. Allen, 76 So. 2d 879 (Fla. 1955).....6,7,8

## SUMMARY OF ARGUMENT

### I

The Third District Court of Appeal in determining the result in this cause adopted the factual determinations of the trial court and applied them to the correct rules of law. At no point in the determination of the appeal 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.

### II

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 dis-

penses 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.

### III

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 establishing 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 decision.

RESPONDENTS' STATEMENT OF THE CASE AND THE FACTS

The Petitioners, HARRY HORN and SALA HORN, his wife, pursuant to Article V, Section 3(b)(3), of the Florida Constitution and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(ix) have petitioned the Supreme Court of Florida for review of the Third District Court of Appeal of Florida's decision in Sheldon Greene & Associates, et al v. Rosinda Investments N.V., et al, 475 So. 2d 925, (Fla. 3rd D.C.A. 1985). Rosinda Investments N.V. has not sought review by the Supreme Court of Florida of the instant cause.

The Petitioners were co-defendants with Rosinda Investments N.V. in the trial court and co-appellees before the District Court of Appeal. Respondents appealed an adverse final judgment entered by the Circuit Court in a non-jury trial. The Third District Court of Appeal of Florida reversed the Circuit Court determination with directions to enter a final judgment in favor of the Respondents.

The Third District Court of Appeal stated at the outset in its opinion that the trial court had believed and accepted the broker's version of the crucial facts in the case. This determination by the District Court of Appeal is clearly supported and substantiated by the record on appeal which contained findings as to specific factual matters and as to the veracity of the Petitioners-Horn. (Appendix at A-16). Furthermore, the trial court concluded that the Horns' claim

that they had not been shown the Prince Arthur Apartments by Mr. Pollack and Mr. Bastacky was incredible. (Appendix at A-17).

In summarizing the facts the Court of Appeals noted the following: The Horns visited the offices of Litwin Realty, Inc. and were introduced to an agent, Mr. Pollack, who contacted Mr. Bastacky of Sheldon Greene & Associates, Inc. because that real estate agency had a larger inventory of hotel properties for sale.

Thereupon Pollack and Bastacky showed the Horns numerous hotel properties, including the Prince Arthur Apartments; the Prince Arthur Apartments was shown to the Horns with the full knowledge and approval of the owner's resident manager.

Bastacky testified that the Horns, after viewing the Prince Arthur Apartments, indicated they were not interested in purchasing the property. When Bastacky subsequently learned that the Horns had purchased the Greystone Hotel after seeing the Prince Arthur, he ceased all efforts to communicate with them for the purpose of showing them other available properties.

Within a few months after being shown the Prince Arthur Apartments, the Horns contacted the agent for Rosinda Investments, N.V., the owners of the Prince Arthur, and directly negotiated a sale of the property without notifying the brokers of their actions (Appendix at A-20).

The Third District Court of Appeal in its decision set forth the correct rule of law to be applied in this cause when it 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 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.

". . . 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 sale. . . . Moreover, a broker has done all he is required to do and is entitled to a commission when 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."

Accordingly, the Third District Court of Appeal concluded that applying the above-stated rules of law to the facts found by the trial court required a determination that the brokers were the procuring cause of the sale of the Prince Arthur Apartments, and thus entitled to a commission.

#### ARGUMENT

##### I

THE DECISION AND OPINION OF THE THIRD DISTRICT COURT OF APPEAL OF FLORIDA DOES NOT CONFLICT DIRECTLY OR INDIRECTLY 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." (Appendix at A-17).

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. (Appendix at 20).

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 undisputed that Bastacky showed the Prince Arthur to the Horns with the full knowledge of the owner's on-site manager. (Appendix at A-18). 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. (Appendix at A-19).

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. (Appendix at A-2).

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).

## II

THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL OF FLORIDA IS NOT IN CONFLICT WITH ANY DECISION OF THE SUPREME COURT OF FLORIDA OR A DISTRICT COURT OF APPEAL ON THE ISSUE OF WHETHER CONTINUOUS NEGOTIATIONS ARE REQUIRED AS A PREREQUISITE TO ESTABLISHING A BROKER'S RIGHT 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 a 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 be involved in continuous negotiations between the parties where he is given the opportunity to do so.

Numerous courts in this State have determined both expressly and impliedly 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); Branderburg 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). The

above-cited cases clearly recognized the necessity of protecting brokers from fraud or collusion involving sellers and/or buyers, as pointed out in the majority's repudiation of the "I wasn't interested" defense proffered by the dissent in the District Court of Appeal's opinion.

Secondly, Shuler v. Allen was premised on a factual pattern 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. In the instant appeal, the buyers simply informed the broker that they did not wish to purchase the property and thereafter communicated directly with the seller in order to conclude the transaction. Obviously, the rule of Shuler v. Allen was not intended to apply in this type of situation.

In summary, the fundamental legal and factual distinctions between Shuler v. Allen (supra) and the instant case clearly establish that no conflict exists between the legal principals of Shuler v. Allen and the Third District Court of Appeal's decision.

### III

THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL OF FLORIDA IS NOT IN CONFLICT WITH FIRST REALTY CORP. OF BOCA RATON v. STANDARD STEEL TREATING CO., 268 So. 2d 410 (Fla. 4th D.C.A. 1972) OR CASES SIMILARLY HOLDING THAT IN ORDER TO BE DEEMED THE

PROCURING CAUSE OF SALE FOR PURPOSES OF ESTABLISHING 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.

As the third prong of their Petition for Discretionary Review, Petitioners Horn argue that First Realty Corp. of Boca v. Standard Steel Treating Co., 268 So. 2d 410 (Fla. 4th D.C.A. 1972) directly conflicts with the opinion and decision of the Third District Court of Appeal which Petitioners seek to have reviewed. 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 directly dealing with one another.

Frankly it is difficult to understand the real basis of Petitioner' legal argument in its brief in view of the inconsistent legal arguments offered in support of Shuler v. Allen under Argument II and First Realty Corp of Boca Raton in Argument III. 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 Petitioner is seeking to argue a conflict between the instant cause and First Realty Corp. of Boca Raton (supra) on the basis that purposeful exclusion 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. Furthermore, although it is unclear from a review of the argument contained in Part III of Petitioner's Brief on Jurisdiction, it appears that Petitioner seeks to adopt the view that the broker must have been involved in some preliminary negotiations between the seller and buyer prior to exclusion from negotiations in order to fall within the exclusion exception set forth in First Realty Corp. of Boca Raton (supra). Such is not the law of the State of Florida, as the District Court of Appeal stated:

"Moreover a broker has done all he is required to do and he 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." (citing Crystal River Enterprises, Inc. v. Nasi, 418 So. 2d 1038 (Fla. 4th D.C.A. 1982) and Gibbs v. Gibbs, 296 So. 2d 613 (Fla. 1st D.C.A. 1974)). "Thus the continuous negotiation requirement is vitiated where the seller and buyer exclude the broker, and the broker need only establish the seller and buyer dealt him out."

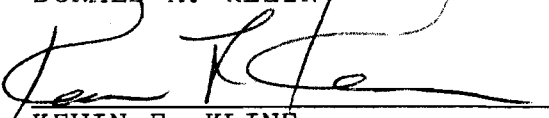
In viewing the legal principles adopted by the District Court of Appeal above and in reading them in conjunction with the rule of law set forth in First Realty Corp. of Boca Raton (supra), the unmistakable conclusion is that no conflict has been created as a result of the District Court of Appeal's decision.

CONCLUSION

The Respondents respectfully request that the Supreme Court of Florida deny application of its discretionary jurisdiction in this cause because no conflict between the instant cause and other cases has been shown to exist.



DONALD M. KLEIN



KEVIN F. KLINE  
of the law firm of  
KLINE, MOORE & KLEIN, P.A.  
2665 South Bayshore Drive  
Suite 903  
Coconut Grove, Florida 33133  
Phone: (305) 285-9793