OA 8-26-86

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.

_____/

REVIEW OF THE THIRD DISTRICT COURT OF APPEAL OF FLORIDA

PETITIONERS' REPLY BRIEF ON THE MERITS

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and
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ARGUMENT

In their answer brief, Greene and Litwin have professed some difficulty in perceiving conflict between the decision under review and the existing case law relevant to determining when a broker has earned his commission. Under the existing case law, cited in the initial brief, in order for the broker to earn his commission:

(1) There must be a sale

(2) effected by <u>continuous negotiations</u>

(3) which were inaugurated by the broker and

(4) which the broker either

  (a) conducted or

  (b) was purposely excluded from as a result of the seller and buyer having dealt with one another directly and in secret.

Everyone agrees that under certain conditions, expressed in element (4)(b) above, it would be unjust to require of the broker that he <u>conducted</u> the "continuous negotiations." The existing case law requires, however, that there be a <u>factual</u> determination that the sale has at least some <u>nexus</u> to the broker. This nexus is provided by the existence of a continuous sequence. Its origin lies in the broker showing property to a prospective buyer. Its middle part, the all-important link, is composed of "continuous negotiations." Its culmination is the sale of the property to the prospective buyer.

What is essential <u>in all cases</u>, for a broker to earn a commission, is that there be a <u>nexus</u>, a <u>connection</u>, a <u>continuity</u>,

a link between a broker's showing of the property to a prospective buyer and the eventual purchase of that property by the prospective buyer. The presence of this link, known in the existing case law as "continuous negotiations," does not admit of a precise time formula. It is a question of fact.

In the decision under review, the court of appeal has announced that there no longer need be a factual determination of the existence of "continuous negotiations." "A broker has done all he is required to do," the court of appeal has announced, "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." Even were there a showing "that the buyers were, in good faith, not interested . . . when first shown the property by the [broker]," the broker would nevertheless be entitled to his commission, regardless of the intervening events between the showing and the sale.

Citing cases which do not support its conclusion, the court of appeal has abolished the necessity of a factual determination of "continuous negotiations." Once a broker has shown property to a prospective buyer, a commission is due if the prospective buyer eventually, whatever the cause, purchases the property; the listing has become, regardless of its agreed upon terms, an exclusive right to sell. Where once there was a question of fact, there is now an irrebuttable presumption. The nexus has become the missing link.

Greene and Litwin have apparently had no difficulty in perceiving the implications of the other issue under review. The trial court weighed the evidence and reached one result; the court of appeal conducted a de novo trial, reweighed the evidence and reached another result. In their answer brief, Greene and Litwin have quoted extensively from the evidence most favorable to the parties that prevailed before the court of appeal. This is understandable. Given their position, what more could Greene and Litwin do? As the cases cited in the initial brief demonstrate, however, if the record contains evidence which would support the judgment of the trial court, the appellate court is obliged to affirm the judgment. The initial brief points out the evidence which supports the judgment of the trial court.

CONCLUSION

For the foregoing reasons, and for the reasons expressed in the Petitioners' Initial Brief on the Merits, 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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Certificate of Service

I certify that a copy of this Reply Brief On the Merits has been furnished to Donald M. Klein and Kevin F. Kline, of Kline, Moore & Klein, P.A., Suite 903 Grand Bay Plaza, 2665 South Bayshore Drive, Miami, Florida 33133; Andrew H. Moriber, 1000 Rivergate Plaza, 444 Brickel Avenue, Miami, Florida 33131; and Morton B. Zemel, Suite 111, 16666 N.E. 19th Avenue, North Miami Beach, Florida 33162, by mail this 13th day of June 1986.

Attorney