

JML:nbb(L:06)

IN THE SUPREME COURT OF FLORIDA

CASE NO: 70,813

COPPOLA ENTERPRISES, INC.,

Petitioner,

vs.

JURISDICTIONAL BRIEF OF RESPONDENT

HELEN ALFONE,

Respondent.

FILED
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Deputy Clerk

On Petition for Review of a Decision of the District Court
of Appeal on the Grounds of Express and Direct Conflict
of Decisions

RESPONDENT'S BRIEF ON JURISDICTION

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COPPOLA ENTERPRISES, INC.,

Petitioner,

vs.

JURISDICTIONAL BRIEF OF RESPONDENT

HELEN ALFONE,

Respondent.

_____ /

I

PREAMBLE

Petitioner seeks to invoke the discretionary jurisdiction of this Court on the ground of express and direct conflict of decision, but fails to demonstrate the existence of such conflict. The parties will be referred to as they appear before this Court. Petitioner, COPPOLA ENTERPRISES, INC., was the Defendant and Appellant below. Respondent, HELEN ALFONE, was the Plaintiff and Appellee below. The letter "A" shall represent the Appendix of Petitioner.

II

STATEMENT OF THE CASE¹

Respondent sued Petitioner on October 7, 1980 seeking specific performance (Count I) and damages for breach of contract

1. Petitioner has included a Statement of the Facts in his brief which incorporates the facts of this cause as developed at trial. The only "facts" that are relevant to jurisdiction are any facts contained within the opinion of the District Court of Appeal. Therefore, Respondent will not reply to this portion of Petitioner's brief.

for the sale of real property (Count II). In Count III, Respondent sought a declaratory judgment that Petitioner was in breach of the contract and, therefore, the deposit paid at the time of her entry into the contract should be returned. Petitioner answered denying the pertinent allegations of the Complaint and affirmatively defended on the grounds of laches, waiver, default, and discharge. After two prior appeals,² this cause came on for trial and was tried nonjury on January 16, 1986, January 17, 1986, and February 14, 1986.

The Trial Court entered its Final Judgment on May 27, 1986 (A 1-3). The Court found Petitioner was in breach and awarded Respondent loss of bargain damages in the amount of \$65,000.00, return of her deposit and prejudgment interest (A 2-3).

Petitioner timely appealed the Final Judgment to the District Court of Appeal, Fourth District. The Court issued its opinion on May 13, 1987. The Court held, inter alia, relying on this Court's decision in Gassner v. Lockett, 101 So.2d 33 (Fla. 1958), that a contractual vendee did receive the profit made by the vendor on the sale of a property to a subsequent purchaser even though no fraud or bad faith is present (A 4). Coppola Enterprises, Inc. v. Alfone, 506 So.2d 1180 (Fla. 4DCA 1987).

Petitioner's Motion for Rehearing was denied.

2. Coppola Enterprises, Inc. v. Arvida Realty Sales, Inc., 435 So.2d 922 (Fla. 4DCA 1983); Coppola Enterprises, Inc. v. Alfone, 467 So.2d 425 (Fla. 4DCA 1985).

Petitioner now seeks review by this Court of the District Court's decision on the grounds of express and direct conflict of decisions. To obtain such review, Petitioner must demonstrate this Court's jurisdiction by establishing the existence of an express and direct conflict between the decision of the District Court in the instant case, and that of another District Court or the Supreme Court on the same point of law.³

III

ISSUE

WHETHER THERE EXISTS AN EXPRESS AND DIRECT CONFLICT BETWEEN THE DECISION OF THE DISTRICT COURT OF APPEAL RENDERED IN THIS CAUSE AND THAT OF ANOTHER DISTRICT COURT OF APPEAL OR THE SUPREME COURT ON THE SAME POINT OF LAW?

IV

SUMMARY OF ARGUMENT

The Rules establishing this Court's conflict jurisdiction are well settled. In order for a conflict to be present, it must be express and appear within the words used in the opinions. Jenkins v. State, 385 So.2d 1356 (Fla. 1980). The conflict must appear within the four corners of the majority decision. Reaves v. State, 485 So.2d 829 (Fla. 1986). The thrust of Petitioners'

3. Petitioner has included in its brief a policy argument as to why the Court should hear this case. Without commenting on the merits of such argument, this Court only will have jurisdiction of this cause if there is an express and direct conflict of decisions. Policy arguments are immaterial to a determination of whether this Court has jurisdiction of the cause based upon an express and direct conflict of decisions. Therefore, Respondent will not respond to the Petitioner's policy argument.

claim of conflict in this cause is that the lower court's decision is in conflict with the decision of the Second District Court of Appeal in Horton v. O'Rourke, 321 So.2d 612 (Fla. 2DCA 1975) and Vogel v. Vandiver, 373 So.2d 366 (Fla. 2DCA 1979) due to what Petitioner contends is the enunciation by the District Court of Appeal below of a different rule concerning the recovery of benefit of the bargain measure of damages for breach of an executory land sale contract in the absence of bad faith. As will be presently demonstrated, there is no express and direct conflict of decisions and this Court lacks jurisdiction of this cause. The Petition for Review should be denied.

V

ARGUMENT

THERE DOES NOT EXIST AN EXPRESS AND DIRECT CONFLICT BETWEEN THE DECISION OF THE DISTRICT COURT OF APPEAL RENDERED IN THIS CAUSE AND THAT OF ANOTHER DISTRICT COURT OF APPEAL OR THE SUPREME COURT ON THE SAME POINT OF LAW.

In order to vest this Court with jurisdiction, the Petitioner must demonstrate that the decision rendered by the District Court of Appeal below, expressly and directly conflicts with another District Court of Appeal or the Supreme Court on the same point of law. Jenkins v. State, supra.; Dodi Publishing Company v. Editorial America, S.A., 385 So.2d 1369 (Fla. 1980). The conflict must appear within the four corners of the majority decision. Reaves v. State, supra.; Department of Health and Rehabilitative Services v. National Adoption Counselling Service,

Inc., 498 So.2d 888 (Fla. 1986). As will be presently demonstrated, no such conflict exists and this Court lacks jurisdiction to entertain the present cause. The Petition for Review should be denied.

The standard by which this Court determines conflict jurisdiction after the passage of the 1980 Constitutional Amendment was addressed in Jenkins v. State, supra. There, this Court construed the amended jurisdictional provisions of the Florida Constitution concerning inter-district conflicts. This section, **Article V, Section 3(b)(3), Florida Constitution** states:

The Supreme Court . . . may review any decision of the District Court of Appeal . . . that expressly and directly conflicts with the decision of another District Court of Appeal or the Supreme Court on the same question of law.

(Emphasis Added)

This Court in Jenkins v. State noted that the conflict must be express: represented in words. Id. at 1359. Measured by the foregoing, there is no express and direct conflict in this cause because Petitioner's claim of conflict does not appear within the four (4) corners of the District Court's decision.

Petitioner contends that the decision of the District Court of Appeal below is in conflict with two decisions of the District Court of Appeal, Second District, adopting the so-called "English Rule" of damages for breach of a land sale contract. Horton v. O'Rourke, supra.; Vogel v. Vandiver, supra. The English Rule as stated in Horton is:

[I]n the absence of bad faith, the damages recoverable for breach by the vendor of an executory contract to convey title of real estate are the purchase money paid by the purchaser together with interest and expenses of investigating title. 321 So.2d at 613.

An analysis of these cases awarding English Rule measure of damages, establishes that loss of bargain damages are inappropriate because the vendors, through no fault of its own is unable to close.

In Horton v. O'Rourke, O'Rourke purchased a home from Horton who was unable to close due to the seller's inability to resolve a Federal Tax Lien which constitutes a title defect on the property. Since no bad faith was present, the Second District Court of Appeal ruled that the O'Rourke's were limited to the English Rule measure of damages and not the benefit of the bargain measure which had been awarded by the Trial Court.

In Vogel v. Vandiver, supra., the seller reached a land sale contract by failing to build the units contracted for. The Trial Court had awarded benefits of the bargain damages based upon the difference in value between the price buyers had contracted to pay for the units and the alleged value of the unit on the contracted day of closing. The Second District reversed relying on Horton v. O'Rourke and limited the buyer to the English Rule measure of damages since bad faith was not present.

The present case is factually distinct from both Horton and Vogel. Not only did the land sale contract not close, but the seller subsequently sold the property to a third party. The

Fourth District Court of Appeal recognized in its opinion below which Petitioner maintains is in alleged conflict with Horton and Vogel:

[T]he law of damages . . . authorizes an award of damages to a contractual vendee to include the profits made by the vendor on the sale of the property to a subsequent purchaser even though there is no proof of fraud or bad faith. See, Gassner v. Lockett, 101 So.2d 33 (Fla. 1958). 506 So.2d at 1181.

The Fourth District's citation to this Court's decision in Gassner is significant because Gassner is the controlling authority by which this Court harmonized the English Rule cases with the factual situation presented by cases such as the instant cause where the property is sold to a second purchaser before the original purchaser closes on the property.⁴ gassner conclusively establishes the absence of any conflict. In Gassner, the vendor, an elderly gentlemen sold real property to one Lockett and prior to closing sold the same property to another individual. The Trial Court found that the vender committed neither an intentional fraud nor was he guilty of bad faith, but was "old, senile, and extremely forgetful . . . and kept few if any accurate records of his numerous transactions". 101 So.2d at 33-34. This Court recognized the vitality of the English Rule measure of damages, but specifically distinguished the factual situation presented by Gassner and held such rule was inapplicable to such

4. Gassner and the instant cause are factually identical in that prior to the first purchaser closing on the property, the property was sold to someone else.

a factual situation, noting:

The reason for the [English] Rule seems to be where a vender acts in good faith he should not be liable for more than the actual loss which might be suffered by the vendee. On the other hand, there is no reason why the vender should be allowed to benefit from such a mistake even though it was made in good faith. Every rule of logic and justice would seem to indicate that where a vender is unable to perform a prior conduct for a sale of lands because of a subsequent sale of the same land, he should be held, to the extent of any profit in the subsequent sale, to be a trustee for the prior vendee and accountable to such vendee for any profit. Id. at 34.⁵

After Gassner, it is clear that not only did the Fourth District Court of Appeal decide the case correctly, but that there is no conflict between the English Rule cases of Horton v. O'Rourke and Vogel v. Vandiver and the present rule enunciated by the Fourth District Court of Appeal.

The instant case is not in express and direct conflict with either Vogel, Horton, or any other decision of either this Court or another District Court of Appeal. To the contrary, the opinion of the District Court is absolutely consistent with this Court's opinion in Gassner v. Lockett. The Petition for Review

5. Petitioner distinguishes Gassner because the Trial Court in the instant cause declared the breach to be something other than the sale of the property to the second individual. However, this Court's jurisdiction is predicated not on what the trial court found but on whether the District Court's decision below is in express and direct conflict with that of another District Court of Appeal or of this Court on the same point of law. The decision of the District Court of Appeal below does not specify the event of breach and therefore Petitioner's contentions are immaterial to this inquiry.

should be denied.⁶

VI

CONCLUSION

Based upon the foregoing cases, Respondent respectfully requests that this Court deny the Petition for Review for lack of conflict jurisdiction.

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and

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BY: 

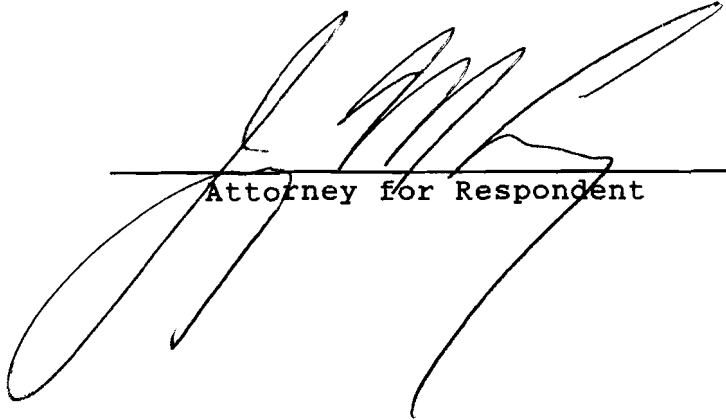
JAY M. LEVY, ESQUIRE

6. Petitioner in arguing that Gassner is distinct from the instant cause overlooks that Respondent sought specific performance in her complaint. While this count was resolved by stipulation between the parties, certainly if Respondent was entitled to specific performance, she would be entitled to the measure of damages (profit) that she would have obtained if she had been able to complete the sale and sell the property to the second purchasers.

VII

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Brief was mailed this 11th day of July, 1987 to: ARTHUR C. KOSKI, ESQUIRE, 4800 North Federal Highway, Suite 304-A, Boca Raton, Florida 33431.



Attorney for Respondent