O/a 1-5-88

IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

COPPOLA ENTERPRISES, INC., Petitioner, vs. HELEN ALFONE, Respondent.	FOURTH DISTRICT COURT CASE 4-86-1646 SUPREME COURT CASE NO. 70,813

REPLY BRIEF OF PETITIONER

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PREFACE

The following designations, abbreviations and symbols will be used in this Brief:

Petitioner, Defendant, COPPOLA ENTERPRISE, INC., (COPPOLA)

Respondent, Plaintiff, HELEN ALFONE, (ALFONE)

Defendant, ARVIDA REALTY SALES, INC., (ARVIDA)

Transcript (T)

Record on Appeal (R)

STATEMENT OF THE FACTS
AND
STATEMENT OF THE CASE

The Petitioner repeats and realleges the Statement of the Facts and the Statement of the Case as set forth in the Petitioner's Initial Brief.

ARGUMENT

ARE BENEFIT OF BARGAIN DAMAGES ALLOWED TO A VENDEE UNDER A CONTRACT FOR SALE OF REAL PROPERTY IN THE ABSENCE OF BAD FAITH WHERE THE VENDOR CONVEYS TITLE AFTER THE BREACH OF CONTRACT?

The Respondent has argued in her Brief that the Trial Court determined the Petitioner to be guilty of bad faith. Although the language of the Trial Court is inconsistent in its Final Judgment, the Appellate Court has apparently and correctly established that the requisite element of bad faith of COPPOLA was not present.

All of the evidence indicated good faith on the part of COPPOLA. COPPOLA entered into the Purchase Agreement in April of 1978. COPPOLA notified ALFONE of the mortgage requirement on May 17, 1978 (COPPOLA'S Exhibit 7, R-946-947). COPPOLA relied on ALFONE'S representation that it would be a cash sale. (COPPOLA'S Exhibit 6, R-943-945) (Vol. III, T-45). COPPOLA notified ALFONE of the status of construction (COPPOLA'S Exhibit 5 and 8; R-942; R-948-950). COPPOLA prosecuted the construction of Lot 53 in a reasonable manner once the building permit was obtained (COPPOLA'S Exhibits 11 and 3; R-955-957). Once the Certificate of Occupancy was issued COPPOLA properly notified ALFONE of the closing (COPPOLA'S Exhibit 4; R-929-940). All of the above acts are consistent with good faith.

It was on the other hand ALFONE who exhibited "bad faith". ALFONE changed her mind on the cash purchase in November 1979, and failed to advise COPPOLA. (Vol. III, T-144-145). ALFONE listed the property for resale in March of 1980, prior to any

ownership, and failed to advise COPPOLA. ALFONE applied for a mortgage and was rejected in the summer of 1980 and failed to advise COPPOLA.

ALFONE'S attorney seeks to unilaterally modify the Purchase Agreement on August 25, 1980 and through his own testimony admits that he was "negotiating" with COPPOLA. These acts are all consistent with the definition of "bad faith" as set forth in Bosso v. Neuner, 426 So. 2d 1209 (Fla. 4th DCA 1983).

COPPOLA notified ALFONE on three occasions of the requirement to close based upon ALFONE'S prior representation; to wit, July 21, August 8 and August 12, 1980.

Notwithstanding the mailing of the July 21, 1980 letter, Gillespie, COPPOLA'S attorney, did on August 8, 1980 and again on August 12, 1980 forward additional correspondence to ALFONE by certified mail. (R-897-902).

ALFONE by her testimony acknowledged receipt of all three items of correspondence. ALFONE did not remember when she received the July 21, 1980 letter, but ALFONE did acknowledge receipt. (Vol. III, T-151).

At the very latest, ALFONE received all of Gillespie's letters on August 12, 1980. COPPOLA was still at this time under the impression that ALFONE would be closing for cash, but ALFONE knowing that her intention had changes from mortgage to cash and back to mortgage had not, as of August 20, 1980, notified COPPOLA of her need for a mortgage. On each of these dates, COPPOLA was willing to convey to ALFONE. On August 25, 1980, ALFONE attempted to renegotiate and by the very language of Van Dusen's

(Van Dusen is ALFONE'S attorney) letter stated she needed to get a mortgage. It was only after receiving this information that COPPOLA on September 4, 1980, requested ARVIDA to place Lot 53 back on the market for sale. The subsequent contract to the new buyer, Kayton, was dated September 25, 1980, and the sale consummated on October 7, 1980. The testimony of GEORGE COPPOLA clearly indicated that the decision to resell was based upon ALFONE'S failure to comply with the Purchase Agreement and that Kayton was procured by ARVIDA well after the decision was made on ALFONE'S failure to obtain mortgage financing. (See also Vol. I, T-109). In the absence of bad faith, benefit of bargain damages should not be allowed. The COPPOLA/ALFONE patter was addressed in Savage v. Horne, 31 So. 2d 477 (1947). On page 482 the Supreme Court stated:

> "Where a vendor is ready, able and willing to fulfill the contract on his part, and tenders performance, but the vendee refused to buy the vendor may rescind the contract, and may if he chooses then sell the land to another person without incurring any liability."

See also Hustad v. Williams, 321 So. 2d 601 (4th DCA 1975).

COPPOLA reasonably relied upon the letter sent by ALFONE'S attorney, Van Dusen, that ALFONE needed forty five (45) days within which to obtain a mortgage. COPPOLA was not advised of ALFONES' ability to pay cash for the unit but was merely advised that ALFONE needed additional time in which to obtain a mortgage. (Vol. III, T-45, 64, 67 and 69).

The Trial court committed obvious error by inserting its own subjective determination that a reasonable extension of time should have been granted to allow ALFONE to obtain financing. In

Bella Vista Inc., v. Interior and Exterior Specialty, Inc., 436 So. 2d 1107 (4th DCA 1983) the District Court of Appeal properly found that it is reversible error for a Court to substitute its own judgment as to what constitutes a reasonable extension period of time for closing. The Bella Vista Trial Court determined that instead of having a ten (10) day notice period the seller should have allowed a sixty (60) day period for which to allow the buyer to secure financing. The District Court of Appeal found this to be reversible error and the undersigned respectfully suggests that the Trial Court's determination that ten (10) days to secure financing was unreasonable and that a longer period of time was necessary is similar to the reversible posture adopted by the Trial Court in Bella Vista.

The undersigned further respectfully suggests that the District Court in the case at bar recognized the error of the Trial Court in its opinion by stating:

> "Although the language of the case law is somewhat confusing we believe the law of damages as enunciated by the Florida Supreme Court, authorizes an award of damages to a contractual vendee to include the profit 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." (Emphasis added).

In Port Largo Club, Inc., v. Warren, 476 So. 2d 1330 (Fla. 3d DCA 1985) on pages 1333 and 1334 thereof, the Court stated:

> "Bad faith has been defined as: The opposite of 'good faith', generally implying or involving actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive." (Emphasis added).

COPPOLA was prepared to close this transaction in late July of 1980. (R-929-940). In contrast to the actions of the Seller in Port Largo Club, COPPOLA took positive action to effectuate the completion of the Purchase Agreement by extending ALFONE'S closing date on two occasions subsequent to July 1980. (R-897-899; R-900-902). Also see Wolofsky v. Behrman, 454 So. 2d 614 (Fla. 4th DCA 1984). Only after receipt of the letter of August 25, 1980, in which ALFONE'S attorney requested an additional thirty (30) to forty five (45) days to obtain financing (thereby suggesting a closing in October 1980 or later, if ever) did COPPOLA refuse to extend the time for closing, placing Unit 53 back on the market. (R-903-904; Vol I, T-88-89, T-104-105).

Assuming that the Trial Court was correct in its finding that, as a result of the foregoing, COPPOLA, not ALFONE, breached the Purchase Agreement, such action by COPPOLA did not constitute "bad faith" but at most was but an honest mistake as to one's contractual rights or duties. Port Largo Club, supra.

It is based upon the foregoing argument that COPPOLA respectfully suggests that the District Court correctly determined that there was "no proof of fraud or bad faith".

With the absence of bad faith COPPOLA respectfully request this Court to consider the argument contained in COPPOLA'S Initial Brief as to the correct measure of damage.

SUMMARY

In Summary, the Trial Court was in error in its reasoning that COPPOLA'S acts demonstrated a failure to exercise good faith. The District Court correctly concluded that there "is no proof of fraud or bad faith". However, the District Court, incorrectly assessed benefit of bargain damage in a case where there was no fraud or bad faith. The correct application of the law of damage does not allow the imposition of benefit of bargain damages.

CONCLUSION

The Petitioner respectfully requests that the decision of the appellate court be reversed and this cause remanded to the trial court for further proceedings specifically limiting the Respondent's damage to a return of deposit, interest thereon and costs incurred in investigating the title.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by MAIL to Mark Shumaker and Jay M. Levy at 6401 Southwest 87th Avenue, Suite 200, Miami, Florida 33173 on this 30 day of November, 1987.

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