IN THE SUPREME COURT OF FLORIDA

JAMES GIBSON,

Defendant, Crossdefendant,
Counterclaimant, Petitioner,

vs.

NEAL AND NEAL REALTORS,

Plaintiff,

vs.

GARTH COURTOIS and SALLY COURTOIS,

Defendants, Crossclaimants,
Counterdefendants, Respondents.
_____/

Case No. 70,921

District Court of Appeal
2nd District No. 86-2368

# BRIEF OF PETITIONER

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## PRELIMINARY STATEMENT

Petitioner, James C. Gibson, shall be referred to as Gibson or petitioner. Respondents, Garth and Sally Courtois, shall be referred to as the Courtoises or respondents. References to the record on appeal shall be by the letter "V." followed by the appropriate volume number and then the letter "R." followed by the appropriate page number. References to the Appendix shall be by the letter "A." followed by the Tab Number. All emphasis is added unless otherwise noted.

## STATEMENT OF THE CASE AND FACTS

On April 5, 1984, Gibson submitted an offer to purchase the Courtoises' home through their realtor Faye E. Ballard of Neal and Neal Realtors. The offer was in the form of a written contract for sale and purchase (V.I., R. 1-9). On the following morning, Gibson revoked his offer and demanded the return of his $12,000.00 escrow deposit pursuant to Paragraph 3 of the contract. (V.I., R. 35-36). Paragraph 3 of the contract provided:

> 3. Time for Acceptance. If this contract is not executed by the seller and buyer on or before April 6, 1984, the aforesaid deposit shall be, at the option of the buyer, returned to him and this agreement shall be null and void. The date of contract, for purposes of performance, shall be regarded as the date when the last one of the seller and buyer has signed this contract.

(V.I., R. 4-5).

After Gibson revoked his offer, he was provided with a Western Union Mailgram, which had been sent on April 5, 1984 by the Courtoises to Ballard, accepting Gibson's offer. (V.I., R. 68). The Courtoises did not execute the written contract for sale and purchase until April 10, 1984, four days after the time required by the contract and after Gibson had revoked his offer to purchase their home. (V.I., R. 70).

The parties' contract provided that, if Gibson revoked before acceptance, he was entitled to a refund of the escrow deposit. (V.I., R. 4-5). Despite the fact that they had not timely accepted Gibson's offer, the Courtoises refused to authorize Neal

and Neal to return Gibson's escrow deposit to him. Neal and Neal Realtors accordingly filed a complaint in interpleader against defendants Garth and Sally Courtois and James C. Gibson. (V.I., R. 1-9).

The Courtoises cross-claimed against Gibson, asking the court to enforce the contract and order the escrow deposit forfeited to them. (V.I., R. 10-14). Gibson in turn cross-claimed against the Courtoises, seeking return of his deposit, attorneys' fees, and costs on the grounds that he had revoked his offer prior to acceptance. (V.I., R. 23-28). The trial court rendered Final Summary Judgment in favor of Gibson ruling that he had revoked his offer prior to acceptance and was therefore entitled to the return of his deposit. (V.I., R. 92). The Second District Court of Appeal affirmed the trial court's judgment on March 5, 1986. (A. 2).

On June 6, 1986, Gibson filed a motion to recover his attorneys' fees incurred in obtaining (and defending on appeal) the judgment in his favor for the return of his escrow deposit as provided in the parties' contract. (V.I., R. 93, 94-95). That contract explicitly provided for the recovery of such fees by the prevailing party:

> Attorney's Fees And Costs. In connection with <u>any litigation arising out of the contract</u>, the prevailing parties shall be entitled to recover all costs incurred, including reasonable attorney's fees." (V.I., R. 4-5).

Since the court ruled against the Courtoises on their claim to enforce the contract and instead ordered the deposit refunded to Gibson, Gibson prevailed in litigation arising out of the contract.

On August 20, 1986, the trial court entered a final order denying Gibson's motion to assess attorneys' fees on the grounds that, since there was no enforceable contract between the parties, Gibson could not enforce the attorneys' fee provision of the contract. (V.II., R. 133). On June 26, 1987, the Second District Court of Appeal affirmed, holding that "[b]ecause the contract upon which appellant's motion for attorney's fees was predicated never came into existence, there was no basis on which to award attorney's fees." The Court cited Weiner v. Tenenbaum, 452 So.2d 986 (Fla. 3d DCA 1984), pet. for rev. dismissed, 458 So.2d 274 (Fla. 1984) and Leitman v. Boone, 439 So.2d 318 (Fla. 3d DCA 1983) and noted that, in following those decisions, it was in conflict with Sousa v. Palumbo, 426 So.2d 1072 (Fla. 4th DCA 1983).

By order dated January 15, 1988, this Court elected to exercise its discretionary jurisdiction to review the decision of the Second District Court of Appeal.

## SUMMARY OF ARGUMENT

This entire litigation was spawned by Respondent's refusal to authorize the escrow agent to return Gibson's deposit. Respondent's actions were based upon his mistaken belief that he had a right to the money arising from the Contract of Sale and Purchase. Respondent did not prevail on that issue - Gibson did. In the process, Gibson was forced to hire an attorney and incur legal fees in litigating the countervailing right of the parties vis-a-vis the contract and seeking a refund of his escrow deposit. The parties to the dispute were not strangers. Their legal relationship drew its shape and substance from the Contract document and their dispute flowed directly from that document. As the prevailing party, Gibson is entitled to recover his attorneys' fees pursuant to the clause in the contract providing for costs and attorneys' fees to the prevailing party in any litigation arising out of the contract.

The district court's decision not only ignores the reality of the nature of the parties' litigation, which directly raised issues arising out of the parties' contract, it also contravenes the fundamental policies of fairness and mutuality which must govern such a contract dispute. To refuse to award Gibson his attorneys' fees incurred in vidicating his right to the return of his deposit under the contract is patently unfair where respondents would have been allowed fees had they prevailed in this action.

Moreover, even though the parties' contract for the purchase of the home was unenforceable, the separate contract regarding the escrow deposit clearly was enforceable. It is a well settled principal of contract law that one instrument may contain two or more separate contracts. If an instrument contains two or more separate contracts, the instrument is then divisible. Gibson is therefore entitled to recover his attorneys' fees as the prevailing party in an action in which he sought the return of his deposit pursuant to the terms of the parties' seprate escrow/deposit agreement.

For these reasons, this Court should reverse the Second District's decision and remand this case for hearing on the amount of Gibson's attorneys' fees incurred in this litigation, including fees incurred in the Second District and here.

## ARGUMENT

AS THE PREVAILING PARTY IN A SUIT BROUGHT BY RESPONDENTS TO ENFORCE THE CONTRACT AND BY PETITIONER FOR THE RETURN OF HIS DEPOSIT, PETITIONER IS ENTITLED TO RECOVER ATTORNEY'S FEES AS PROVIDED IN THE CONTRACT

Florida courts have consistently held that the prevailing party in a contractual dispute is entitled to attorney's fees when the contract provides for an award of attorney's fees to the winning side. Daniels v. Arthur Johannessen, Inc., 496 So.2d 914 (Fla. 2d DCA 1986); Ford v. Swope, 492 So.2d 782 (Fla. 2d DCA 1986). Indeed, it has been specifically held that:

> where a contract provides for an award of attorney's fees to the prevailing party in any litigation arising out of the contract a court is without discretion to decline to enforce the provision . . . .

Blue Lakes Apartments, Ltd. v. George Gowing, Inc., 464 So.2d 705, 709 (Fla. 4th DCA 1985); Brickell Bay Club Condominium Association, Inc. v. Forte, 397 So.2d 959, 960 (Fla. 3d DCA 1981) (courts have no discretion to decline to enforce a provision granting attorney's fee to the prevailing party in a contractual dispute).

In the instant case, it is undisputed that the parties' contract expressly provided that, "[i]n connection with any litigation arising out of the contract, the prevailing party shall be entitled to recover all costs incurred, including reasonable attorneys' fees." As the prevailing party in litigation arising

out of this contract, Gibson is contractually entitled to recover his attorney's fees and the district court erred in denying his recovery of those fees.

1. Gibson was the prevailing party in respondents' suit to enforce the purchase contract and require a forfeiture under it.

Respondents sought a determination in this litigation that a valid and enforceable contract existed between them and Gibson. They further alleged that Gibson breached that contract, thereby entitling them to retain Gibson's $12,000 escrow deposit as liquidated damages. Gibson prevailed against respondents' claim under the contract by establishing that he had revoked his offer to purchase the property prior to respondents' acceptance and that, under the terms of the parties' escrow agreement, he was entitled to the return of his deposit. By holding that attorney's fees could not be recovered here because -- by prevailing -- Gibson had established that no contract existed between the parties, the district court ignored the reality of the litigation between these parties.

Respondents brought suit against Gibson seeking to enforce the contract and retain his escrow deposit as damages. As a result, Gibson was forced to litigate the validity of the contract and his right to recover his escrow deposit under that contract. This litigation necessarily arose out of the contract, and Gibson was the prevailing party in it. As such, Gibson is entitled to

recover his attorney's fees pursuant to the provision in the contract providing for attorney's fees to the prevailing party in any litigation arising out of the contract.

In Sousa v. Palumbo, 426 So.2d 1072, 1073 (Fla. 4th DCA 1983), the Fourth District Court of Appeal examined a similar situation and held directly contrary to the Second District. In Sousa, the plaintiff brought an action to enforce the terms of a stock purchase agreement. The trial court held that the agreement was unenforceable. Despite the fact that the stock purchase agreement expressly provided that the prevailing party in any action brought to enforce or interpret the agreement was entitled to reasonable attorney's fees, the trial court refused to grant attorney's fees to the defendant who was the prevailing party in the action.

The Fourth District reversed, holding that, as the prevailing party in an action to enforce the agreement, the defendant was entitled to recover attorney's fees -- even though the contract itself was actually held to be unenforceable. The court reasoned as follows:

> . . . In our view the appellees should not be estopped to invoke this provision because they claimed in defense that there was no enforceable contract. To estop the appellees in such cases is to ignore the plain meaning of the attorneys' fee provision that provides for fees and costs to the prevailing party. Indeed, if anyone should be estopped it should be the appellant who claims that the agreement is valid and enforceable against the appellees, but seeks to deny validity and enforceability of the attorneys' fee provision.

Id. at 1073.

Other Florida decisions have similarly held.[1/] See e.g., Bende v. McLauglin, 448 So.2d 1146 (Fla. 4th DCA 1984) (defendant who prevailed against plaintiff's action for specific performance of a contract for the sale of land was entitled to attorney's fees because the unenforceable contract provided for attorney's fees); Ross v. Hacker, 284 So.2d 399 (Fla. 3d DCA 1973) (party who sought to enforce contract is estopped from arguing that no contract existed where prevailing party sought attorney's fees pursuant to a contractual provision).

Despite the Third District decision in Ross v. Hacker, supra, a different result was reached in Weiner v. Tenenbaum, 452 So.2d 986 (Fla. 3d DCA 1984), following Leitman v. Boone, 439 So.2d 318 (Fla. 3d DCA 1983). In Leitman, the Third District held that "the trial court's finding that no contract was ever formed means that no legal obligations whatsoever were created between the parties, [citations omitted], and that an award of attorneys' fees is precluded." Id. at 319. However, a vigorous dissent by Chief Judge Schwartz in Leitman correctly identified the flaws in the majority's reasoning.

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[1/] Likewise, courts in other jurisdiction have reached the same result. Manier v. Anaheim Business Center Company, 207 Cal. Rptr. 508, 510 (Cal. Ct. App. 1984) and Care Construction, Inc. v. Century Convalescent Centers, Inc., 126 Cal. Rptr. 761, 763 (Cal. Ct. App. 1976) (both cases interpret the California statute as providing attorney's fees to the prevailing party in contract actions even when the court finds that a contract does not exist).

As Judge Schwartz pointed out, "the result reached by the court is based upon the application of a legal catch phrase rather than a reasoned analysis of the problem before us." 439 So.2d at 323. He concluded that an attorney's fees provision, such as the one found in the parties' contract here means that the losing party must pay the attorney's fees of the winning side -- regardless of the result:

> It seems clear to me that, by suing upon it [the contract], the plaintiffs, . . . necessarily subjected themselves to the effect of the attorney's fee clause of that same writing. Since that provision itself states that the prevailing party in any action "arising out of this contract" is entitled to those fees, it can make no difference which side wins the case; in this context, the word "contract" must mean the paper sued upon, irrespective of what the litigation established is its legal effect.

Id. at 323-24.

Chief Judge Schwartz's analysis is in accord with the Third District Court of Appeal's earlier decision in Ross v. Hacker, supra. There, the prevailing party successfully defeated an action for the specific performance of a contract for the sale of real estate. The prevailing party then sought attorney's fees under the same contract. When the plaintiff opposed the prevailing party's application for attorney's fees, the court held that "the plaintiff is estopped to maintain such a position in an action in which he has sought specific performance of a contract providing for attorney's fees." Id. at 399.

Cases arising under analogous situations confirm the correctness of the Sousa and Ross v. Hacker, decisions, as well Judge Schwartz's dissent in Leitman. For instance, the Third District recently held that attorneys fees could be awarded to the prevailing party even where he prevailed by demonstrating the court's lack of subject matter jurisdiction over the cause. Spear v. Spear, 516 So.2d 1132 (Fla. 3d DCA 1987). Under that reasoning, Gibson should recover his attorney's fees when he demonstrates the lack of enforceability of the particular provisions of the contract relied upon by respondents in this litigation. Similarly, cases decided under Florida's Deceptive and Unfair Trade Practices Act, Fla. Stat. § 501.201, et seq. (1985), support the conclusion that attorney's fees should have been awarded here. Section 501.2105 of this Act states that, if litigation arises as a result of a violation of this statute, the prevailing party is entitled to recover reasonable attorney's fees from the losing side. Where plaintiffs have brought suit under the Act but lost because it did not apply to them, the courts awarded attorney's fees to the defendants because the plaintiffs had brought their action under the Act. Brown v. Gardens by the Sea South Condominium Association, 424 So.2d 181, 184 (Fla. 4th DCA 1983); Rustic Village, Inc. v. Friedman, 417 So.2d 305, 306 (Fla. 3d DCA 1982). In short, even though the Act was ultimately held inapplicable, the defendants were declared to be entitled -- as prevailing parties -- to attorney's fees under the Act.

Fundamental principles of fairness support the conclusion reached those courts there. Those decisions reflect a justified concern on the part of the Florida courts that contracts and legislative acts be interpreted in an equitable manner. Otherwise, contractual and statutory attorney's fees provisions would always favor the party seeking to enforce the contract or statute because that party would stand to recover his attorney's fees if he prevailed but would not be at risk to pay the other party's fees if he lost. The unfairness of such a result is patent. See Pan-Am Tobacco Corp. v. Department of Corrections, 471 So.2d 4, 5 (Fla. 1984) (contractual obligations must be mutually enforceable; otherwise, the contract is illusory).

The law frowns upon one-sided attorney fee provisions, and the result which respondents seek is just such an inequitable result. As a California court explained in Coast Bank v. Holmes, 19 Cal. App. 3d 581, 97 Cal. Rptr. 30, 39 (Cal. Ct. Ap. 1971);

> It is common knowledge that parties with superior bargaining power, especially in "adhesion" type contracts, customarily include attorney fee clauses for their own benefit. This places the other contracting party at a distinct disadvantage. Should he lose in litigation, he must pay legal expenses of both sides and even if he wins, he must bear his own attorney's fees. One sided attorney's fees clauses can thus be used as instruments of oppression to force settlements of dubious or unmeritorious claims.

Unquestionably, had the Courtoises prevailed in this action the court would have awarded fees to them as the prevailing party. Indeed, they specifically claimed attorney's fees in their cross-claim against Gibson. Fair is fair, and as the prevailing party, in that litigation, Gibson should be awarded his fees.

2. Gibson was the prevailing party in his suit to enforce the separate escrow/deposit agreement contained in the purchase contract

The district court's decision that Gibson is not entitled to recover his attorneys' fees because there was no enforceable purchase contract is erroneous for an entirely different reason. Although there was no contractual obligation on Gibson's part to purchase respondents' home, that does not mean there were no contractual obligations between the parties. Quite to the contrary, the district court explicitly held that respondents were bound to return Gibson's escrow deposit, as provided under the purchase contract. Since Gibson prevailed in enforcing that separable agreement, he is entitled to his attorney's fees.

It is a settled principle of contract law that one instrument may contain two or more separate contracts and the instrument is then divisible. Local No. 234 of United Association of Journeymen and Apprentices of Plumbing and Pipefitting Industry of United States and Canada v. Henley & Beckwith Inc., 66 So.2d 818 (Fla. 1953); New Products Corp. v. City of North Miami, 241 So.2d 451 (Fla. 3d DCA 1970, cert. denied, 244 So.2d 434 (1971)); Reserve Life Insurance Company v. Lomolino, 474 So.2d 1210 (Fla. 4th DCA 1985). In determining whether an instrument constitutes one

entire contract or two or more divisible contracts, the intent of the parties should control. As the Florida Supreme Court ruled in Local No. 234:

> Whether a contract is entire or divisible depends upon the intention of the parties. . . . And this is a matter which may be determined "by a fair construction of the terms and provisions of the contract itself, and by the subject matter to which it has reference." [citations omitted].

66 So.2d at 822.

In the instant, case the contract for sale and purchase contains at least three divisible agreements.2/ The first agreement concerns the sale of the property. Second, the contract contains a brokerage agreement between the Courtoises and Neal and Neal Realtors. Third, the contract sets forth an escrow/deposit agreement between Gibson, Neal and Neal Realtors, and the Courtoises.

Under the terms of this severable escrow/deposit agreement, Gibson was clearly entitled to the return of his $12,000 deposit. The contract provides that, if the respondents failed to execute the instrument by April 6, 1984, Gibson had the right to revoke his offer to purchase the property and to a return of his escrow deposit. If the instrument was validly executed by both parties but Gibson failed to perform under the contract, the respondents were entitled to retain his deposit as liquidated damages for breach of contract.

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2/Indeed, paragraph 11 of the contract expressly recognizes that it contains several agreements as it provides: "No agreements or representations, unless incorporated in this contract, shall be binding upon any of the parties." (V.I., R. 4-5).

Here, it has been judicially determined that Gibson revoked his offer to purchase the property before the Courtoises made an effective acceptance. Moreover, the Courtoises failed to execute the contract on or before April 6, 1984, as was required under the terms of the deposit agreement. Accordingly, under the explicit terms of the parties' separate agreement as to the escrow deposit, Gibson was entitled to the return of that deposit -- and the court so held, thereby enforcing that agreement.

In Don L. Tullis & Associates, Inc. v. Benge, 473 So.2d 1384 (Fla. 1st DCA 1985), the First District Court of Appeal examined a similar situation. There two parties had entered into a settlement contract which required them to merge an account and to enter into an employment agreement. When the defendant failed to execute the employment agreement and merger document as required in the settlement agreement, the plaintiff filed suit for specific performance of the settlement agreement. Despite holding the employment agreement unenforceable, the court concluded that the settlement agreement was a divisible contract and thus the terms of the settlement agreement regarding merger of the accounts were enforceable. Id. at 1386.

In the instant case, the escrow/deposit agreement expressly recognizes that the buyer and seller may never execute the contract and further provides that, if this occurs, the buyer is entitled to the return of his escrow deposit. Thus, Gibson, Neal and Neal Realtors, and the Courtoises clearly intended the escrow/deposit agreement to constitute a separate contract. And,

even though the contract for sale and purchase was unenforceable, the separate escrow/deposit agreement contained within that contract is still enforceable. Accordingly, Gibson is entitled to recover his attorneys' fees as the prevailing party in an action in which he sought the return of his deposit pursuant to the terms of the parties' separate and legally enforceable escrow/deposit agreement.

## CONCLUSION

Based on the foregoing arguments and authorities cited therein, this Court should reverse the district court's decision and remand this case to the lower court with directions to award Gibson his reasonable attorney's fees incurred in all prior proceedings and in the prosecution of the instant appeal.

Respectfully submitted,

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