IN THE SUPREME COURT OF FLORIDA

JAMES GIBSON,

Defendant, Crossdefendant,
Counterclaimant, Petitioner,

vs.

CASE NO. 70,921

NEAL AND NEAL REALTORS,

Plaintiff,

vs.

GARTH COURTOIS and SALLY COURTOIS,

Defendants, Crossclaimants,
Counterdefendants, Respondents.

_____/

BRIEF OF RESPONDENTS

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STATEMENT OF CASE AND FACTS

During September, 1983-March, 1984, Petitioner Gibson through his realtor Faye Ballard of Neal and Neal Realtors, sought to buy a home in Manatee County. During this period Ballard obtained information regarding homes for sale, home contents, prices, amounts of deposit, whether an assumption of mortgage was possible, payments, acceptance dates, closing dates, etc. Ballard examined homes, took either or both the Gibsons to examine homes twice monthly, prepared and submitted offers by Gibson to buy homes. In short, Ballard did all the things expected of and done by a realtor for Gibson. (V.I., R. 8-10)

In mid-March, 1984, the Respondents Courtois, then in Michigan, put their Manatee County home up for sale through Neal and Neal. On April 2, 1984, Ballard, with Gibson present, prepared the first Gibson offer to buy the Courtois home, which Gibson executed. To emphasize his intent to purchase the Courtois' home, Gibson deposited $12,000.00 with Ballard as earnest money rather than the usually required $500-$1,000. A telephone call from Ballard's office to the Courtoises in Michigan ensued, but the parties were $6,500 apart and no agreement was reached. (V.I., R. 11-14, 41-42)

Three days later, April 5, 1984, Ballard and Gibson prepared a second offer to buy which Gibson executed, another telephone conference was had with the Courtoises in Michigan, and this time a deal was struck. Promptly thereafter on April 5, 1984, the

Courtoises sent a mailgram to Ballard confirming the price and closing date, which had been the only matters unresolved. On April 6, one hour before the mailgram arrived, Gibson met with Ballard, told her that he was not going through with the purchase and that he wanted the return of his $12,000. (V.I., R. 22-24)

Neal and Neal, holding Gibson's $12,000, filed a bill of interpleader, Gibson and the Courtoises cross-claimed. Notwithstanding the uncontradicted testimony of Ballard, who was the sole witness in the case, that she acted as a dual agent for both Gibson and the Courtoises (V.I., R. 36), the Trial Court held that no contract had come into existence, and the Second District Court of Appeal affirmed. The $12,000 plus interest was paid over to Gibson.

Gibson's later motion for an award of attorney's fees, which would now total near $10,000, was denied, and the Second District Court of Appeal affirmed. The case is before this Court solely on the issue of Gibson's entitlement to an award of attorney fees. The April 5, 1984, offer to buy made by Gibson provided,

> "In connection with any litigation arising out of the contract...."

the prevailing party was entitled to attorney fees.

SUMMARY OF ARGUMENT

No contract between Gibson and the Courtoises existed, and in the absence of a contract, attorney's fees are not recoverable.

The escrow-deposit provisions of the proposed contract are not independent, severable undertakings from the proposed agreement to buy-sell the residence.

ARGUMENT

THERE IS NO ENTITLEMENT TO ATTORNEY FEES IN THE ABSENCE OF A CONTRACT

1. This Court held in Estate of Hampton vs. Fairchild-Florida Construction Co., 341 So.2d 759 at 761 (1976) that attorney fees are not recoverable unless (i) a statute or (ii) a contract specifically authorizes their recovery or (iii) unless equity permits recovery from a fund benefitted by the legal services. This rule has been adhered to by no less than four of the five intermediate appellate courts:

First District:	American and Foreign Ins. Co. vs. Avis, etc., 401 So.2d 855 (1981); Miller vs. Colonial Banking Co., 402 So.2d 1365 (1981)
Second District:	Wilkins vs. Jenkins Const. Co., 475 So.2d 743 (1985); Saul vs Bass, et al, 399 So.2d 130
Third District:	Leitman vs. Boone, 439 So. 2d 318 (1983); Weiner vs. Tenebaum, 452 So.2d 986 (1984)
Fifth District:	Medina vs. Medina, 461 So.2d 1028 (1985)

In Leitman, supra, the proposed contract language was the same as in the case at bar,

> "In connection with any litigation arising out the contract...." (p. 319)

and the majority followed the ruling of the Supreme Court in Hampton vs. Fairchild - Florida, supra. The dissent in Leitman cited Sousa vs Palumbo, 426 So.2d 1072 (4th DCA, 1983) as controlling. In Sousa the proposed contract provided,

"In any action to enforce or interpret the rights or obligations of the parties...." (emphasis added)

The 4th DCA specifically found that it had to "interpret" the proposed contract; "interpret": to "explain, elucidate, translate." Webster's Third New International Dictionary. The Leitman clause is identical to that contained in the Gibson-Courtois document and if that language is even dimly susceptible to explanation, elucidation, etc., our business is relegated to a hopeless jungle of words without meaning.

Gibson complains at length on p. 12 of his brief, how unfairly he was treated, seemingly oblivious to the harm, financially and emotionally, that he caused the courtoises when, to impress his earnesty to buy, he plunked down 12 times the amount of deposit required, increased his offer three-days later, and then walked away the following morning.

There was no contract in the case at bar.

THERE WAS NO CONTRACT DIVISIBLE OR OTHERWISE

2. Gibson next argues that this simple two page proposed contract "For Sale and Purchase" of a home must be fragmented, worse, Gibson-Courtoises intended it to be fragmented, so that an enforceable contract fragment emerges, upon the breach of which attorney fees may be awarded.

What Local No. 234, etc., 66 So.2d 818, at 821, cited and quoted from by Gibson on pp. 13-14 of his brief, goes on to hold is that a contract is indivisible where entire fulfillment

of the agreement is contemplated. Entire fulfillment of the proposed Gibson-Courtois contract was obviously contemplated until the last hour.

CONCLUSION

There was no contract between Gibson-Courtois.

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A copy hereof mailed to Gwynne A. Young, P. O. Box 3239, Tampa, Florida 33602, this 27th day of February, 1988.

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