IN THE SUPREME COURT OF FLORIDA

JAMES GIBSON,

Defendant, Crossdefendant,
Counterclaimant, Petitioner,

vs.

NEAL AND NEAL REALTORS,

Case No. 70,921

Plaintiff,

vs.

GARTH COURTOIS and SALLY COURTOIS,

Defendants, Crossclaimants,
Counterdefendants, Respondents.
_____/

PETITIONER'S JURISDICTIONAL BRIEF

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STATEMENT OF THE CASE AND FACTS

This case involves the question of whether Petitioner was entitled to recover his attorney fees as the prevailing party in a claim brought by Respondents to enforce a real estate contract and retain Petitioner's escrow deposit.

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.

On the morning of April 6, 1984, Gibson advised Faye Ballard of Neal and Neal Realtors that he was revoking his offer to purchase the Courtoises' home and demanded the return of his $12,000.00 escrow deposit pursuant to Paragraph 3 of the contract for sale and purchase. 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.

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 Mr. Gibson's offer. 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 the time at which Gibson had revoked his offer to purchase their home.

The parties contract provided that, if Gibson revoked before acceptance, he was entitled to a refund of the escrow deposit. Despite the fact that they had not timely accepted Gibson's offer, the Courtoises refused to authorize Neal and Neal to return Gibson's $12,000.00 escrow deposit to him. Neal and Neal Realtors filed a complaint in interpleader against defendants Garth and Sally Courtois and James C. Gibson. The Courtoises answered and crossclaimed against Gibson asking the court to enforce the contract, order the escrow deposit forfeited to them, requesting attorney fees and court costs. Gibson answered and crossclaimed against the Courtoises seeking return of his deposit, attorney fees, and costs, on the grounds that he had revoked his offer prior to acceptance and was therefore entitled to a return of his deposit under the terms of the contract. On February 8, 1985, Gibson filed his motion for summary judgment against Neal and Neal on the complaint and against the Courtoises on the crossclaim and counterclaim. On or about March 14, 1985, the Courtoises moved for summary judgment against Gibson. On June 25, 1985, the trial court rendered Final Summary Judgment in favor of Gibson and against the Courtoises and Neal and Neal Realtors ruling that Gibson had revoked his offer prior to acceptance, and was entitled to the return of his escrow deposit.

From this final summary judgment the Courtoises filed their Notice of Appeal on July 24, 1985. On March 5, 1986, the Second District Court of Appeal per curiam affirmed the trial court's Final Summary Judgment in favor of Gibson. Courtois v. Gibson, 485 So.2d 429 (Fla. 2d DCA 1986).

On June 6, 1986, Gibson filed his motion to recover his attorney fees incurred in obtaining judgment for the return of his escrow deposit and in defending the appeal filed by the Courtoises. The contract which Respondents sought to enforce provided:

> "R. Attorney's Fees and Costs. In connection with any litigation arising out of the contract, 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 and ordered the deposit refunded to Gibson, a decision which was thereafter affirmed by the Second District Court, 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 attorney fees on the grounds that since the court had previously ruled that there was no enforceable contract between the parties, that Gibson could not enforce the attorney fee provision of the contract. Gibson filed his Notice of Appeal from this final order on August 17, 1986. On June 26, 1987, the Second District Court of Appeal rendered its opinion affirming the decision of the trial court.

In its opinion, the Second District court ruled that because the contract upon which Petitioner's motion for attorney fees was predicated never came into existence, there was no basis on which to award attorney fees. On July 23, 1987, Petitioner timely filed his Notice to Invoke Discretionary Jurisdiction with the Second District Court of Appeal seeking review of this decision.

ARGUMENT

POINT I: THIS COURT HAS JURISDICTION BECAUSE THE DECISION DIRECTLY AND EXPRESSLY CONFLICTS WITH PRIOR DECISIONS OF OTHER DISTRICT COURTS OF APPEAL

The Second District Court of Appeal followed the decisions of the Third District Court of Appeal in Weiner v. Tenenbaum, 452 So.2d 986 (Fla. 3rd DCA) pet. for rev. dismissed, 458 So.2d 274 (Fla. 1984) and Leitman v. Boone, 439 So.2d 318 (Fla. 3rd DCA 1983). These opinions are in direct conflict with the opinion of the Fourth District Court of Appeal in Sousa v. Palumbo, 426 So.2d 1072 (Fla. 4th DCA 1983). In its opinion the Second District specifically recognizes this conflict by stating, "In following Weiner and Leitman, we recognize that we are in conflict with Sousa v. Palumbo, 426 So.2d 1072 (Fla. 4th DCA 1983)."

In the Sousa case the Fourth District Court of Appeal awarded attorney fees to a defendant who prevailed in an action to enforce a stock purchase agreement by convincing the trial court that the stock purchase agreement was unenforceable. In reaching its decision, the Fourth District Court reasoned that a party who seeks to enforce an agreement as valid and loses, should be estopped from denying the enforceability of the attorney's fee provision contained in the agreement which that party was seeking to enforce.

The holding in the instant case is in direct conflict with that decision, as the Respondents sought to enforce the contract and lost. Had they succeeded, they would have claimed attorney's

fees under the agreement. Applying Sousa, they should be estopped from denying the enforceability of the attorney's fee provision contained in the contract which clause they sought to enforce. The conflict is clear.

Although not cited by the Second District as being in direct conflict, the decision also conflicts with Bende v. McLaughlin, 448 So.2d 1146 (Fla. 4th DCA 1984) (per curiam decision holding defendant who prevailed against plaintiff's action for specific performance of a contract for the sale of land was entitled to attorney fees) and Ross v. Hacker, 284 So.2d 399 (Fla. 3rd DCA 1973) (party who sought to enforce contract is estopped from arguing that no contract existed where prevailing party sought attorney fees pursuant to a contractual provision).

Where there exists a clear conflict between decisions of three District Courts of Appeal, a conflict which the Second District specifically recognizes in its opinion, this Court should exercise its discretion and review the case.

CONCLUSION

For the foregoing reasons, this Court should take jurisdiction and resolve the conflict created by this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petitioner's Jurisdictional Brief has been furnished by mail to Lawrence E. Staab, Esquire, attorney for Neal and Neal Realtors, Inc., 3300 26th Street West, Bradenton, Florida 33505, and to Don Paul Greiwe, Esquire, Attorney for Garth and Sally Courtois, 3300 26th Street West, Bradenton, Florida 33505, this 14th day of August, 1987.

Suzanne A. Young
Attorney