

IN THE SUPREME COURT OF FLORIDA

JAMES GIBSON,

Defendant, Crossdefendant,
Counterclaimant, Petitioner,

vs.

Case No. 70,921

NEAL AND NEAL REALTORS,

Plaintiff,

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

vs.

GARTH COURTOIS and SALLY COURTOIS,

Defendants, Crossclaimants,
Counterdefendants, Respondents.

REPLY BRIEF OF PETITIONER

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Statement of Case and Facts

Petitioner disagrees with the Statement of Case and Facts as set forth by Respondents. They are argumentative and deal in large part with facts not relevant to the issue before this Court, that being the conflict between the decisions of the Third District and Fourth District based upon which this Court elected to exercise its discretionary review.

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

Respondents treat the Second District's decision on the parties' first appeal as a sweeping decision that there was no contract at all here. They then argue the undeniable proposition that there is no entitlement to attorney's fees in this litigation, absent a contractual right to recover them. Their argument fails, however, because of their totally incorrect characterization of the nature and extent of the District Court's actual decision in the earlier appeal of this case.

It is quite true that the District Court held that there was no contract to buy respondents' home because of respondents' lack of timely acceptance of petitioner's offer. But that does not mean -- as respondents blandly assume -- that there was no contract for the return of petitioner's escrow/deposit or that there was no contract for the recovery of attorney's fees by the prevailing party in any litigation over the parties' respective contractual obligations. Quite to the contrary, the District Court squarely enforced petitioner's contractual right to the return of his deposit.

Thus, the narrow question presented here is whether the attorneys' fees provision in the parties' real estate purchase and sale agreement is enforceable where litigation was filed by

respondents to enforce the alleged agreement to buy the respondents' home and petitioner was in turn required to sue in order to recover the deposit he had made under that contract. This Court accepted jurisdiction to resolve the conflict between the District Court's decision below and the decisions of other district courts of appeal on that issue. It is respectfully submitted that, when a thoughtful analysis is made of that issue, it is clear that attorneys' fees should be awarded petitioner as the prevailing party in this litigation -- just as the parties had agreed would be the case.

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

The decisions cited in petitioner's initial brief establish that petitioner was entitled to recover his attorney's fees when he prevailed in the litigation filed by respondents over the enforceability of his alleged obligation to buy respondents' home and when he successfully asserted his right to recover his escrow deposit under the parties' contract. [Brief of Petitioner at 8-12]. As those decisions correctly recognize, an attorney's fee provision, such as the one included in the parties' contract here, means that the losing party must pay the attorney's fees of the prevailing party -- regardless of whether the contract sued upon is held enforceable in its entirety or not.

Judge Schwartz hit the nail on the head when he pointed out that:

[B]y suing upon it [the contract], the plaintiffs, . . . necessarily subjected themselves to the effect of the attorney's fee clause of that same writing. Since the 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.

Leitman v. Boone, 439 So.2d 318, 323-24 (Fla. 3d DCA 1983) (dissenting opinion). The Fourth District's decision in Sousa v. Palumbo, 426 So.2d 1072 (Fla. 4th DCA 1983), as well as the other decisions initially cited by petitioner, is consistent with the cogent and compelling reasoning of Judge Schwartz.

Respondents have been totally unable to attack that reasoning or to refute the patent unfairness of the decision below -- which would allow respondents to have recovered their attorney's fees, exactly as they claimed in their complaint, if they had prevailed in this litigation, but precludes that same right to petitioner when he prevailed. Indeed, they have failed to present any reasons at all supporting the lack of mutuality in this regard which respondents' position necessarily requires. Rather, as demonstrated in petitioner's initial brief, the sound, well-reasoned rule is set forth in the Florida decisions which the District Court below declined to follow, and it is that reasoning which should be adopted by this Court.

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

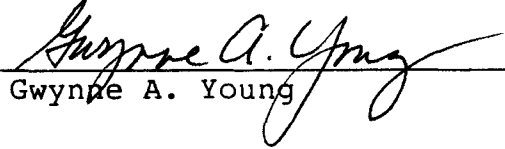
Respondents argue that "entire fulfillment" of the contract was "obviously contemplated" by them. [Brief of Respondents at 5]. The inescapable fact is, however, the District Court explicitly recognized that there were divisible agreements here when it held that petitioner was contractually entitled to the return of his escrow/deposit but that there was no contractual obligation on petitioner's part to purchase respondents' home. In light of that holding, it is clear that petitioner was the prevailing party in enforcing that separate, distinct agreement between the parties. As such, the parties' contract grants him the right to recover his attorney's fees in this litigation.

Conclusion

This Court should reverse the decision of the District Court below and instead enter its decision allowing the award of attorneys' fees to the prevailing party in litigation over the parties' respective obligations under a real estate purchase and sale agreement containing an explicit provision for such a recovery of attorneys fees.

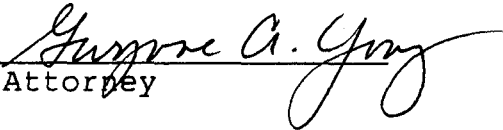
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By:


Gwynne A. Young

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail this 17th day of March, 1988 to Don Paul Greiwe, Esquire, 7444 Broughton, Sarasota, Florida 33580, attorney for Respondents.



Attorney