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IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO.: 72,713

CIVIL ACTION NO.: 83-6869
ORANGE COUNTY, FLORIDA.

APPEAL NO.: 86-1140
DISTRICT COURT OF APPEAL

ROBERT J. KATZ,

Petitioner,

vs.

HARRY VAN DER NOORD, et al.,

Respondents.

PETITIONER'S INITIAL BRIEF ON THE MERITS

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PREFACE

ROBERT J. KATZ, hereinafter referred to as ("BUYER") was the Plaintiff in the Trial Court.

Respondent, **HARRY VAN DER NOORD;** individually **ROBERT UNDERWOOD,** individually and **d/b/a INDIANA EXCHANGE PARTNERSHIP, an Illinois partnership**, hereinafter referred to as ("SELLER") was the Defendant in the Trial Court.

1. "Trial" - The trial was a jury trial held before the Honorable Frederick Pfeiffer on _____ day of _____, in Orange County, Florida, on the issues of breach of contract.

2. "R" - The record on appeal.

STATEMENT OF THE CASE AND OF THE FACTS

This cause rose out of an Agreement to sell a mobile home park to the Respondents, (hereinafter "SELLERS"), to the Petitioner, (hereinafter "BUYER"). Pursuant to the terms of the sales contract, the SELLERS warranted that "normal operating expenses" of the park would not exceed 32% of gross income.

Upon further investigation, prior to the closing, BUYER learned that such expenses far exceeded the 32% of the gross income and refused to close, eventually filing suit against the SELLERS for damages, breach of contract, fraud and rescission. BUYER, long before trial was instructed by the Trial Court to make an election of remedies between the various causes of action.

BUYER dropped this claim for rescission of the contract, and pursued only his claims for damages for breach of contract and fraud. The SELLERS counter-sued for breach of contract, fraud and misrepresentation.

A jury trial was held in the Ninth Judicial Circuit in and for Orange County, Florida, and verdict was returned finding the BUYER had breached the contract and awarded SELLERS a judgment of $25,000.00 representing the earnest money the BUYER had deposited with SELLER prior to closing. Subsequent to this verdict, and upon BUYERS motion, the trial judge entered a judgment non obstante veredicto based on his determination that as a matter of law and by the contract's unambiguous definition of normal operating expenses, BUYER had not breached the contract. The

Trial Court ordered that the $25,000.00 earnest money be returned to the BUYER and BUYER be entitled to a new trial on the issue of damages.

This judgment was appealed to the Fifth District Court of Appeal in Van der Noord v. Katz, 481 So.2d 1228 (Fla. 5th DCA 1985) (the "first appeal") which affirmed the judgment n.o.v. and returned the $25,000.00 earnest money, but reversed as to the issue of a new trial for the BUYER'S damages.

Upon remand the BUYER filed a motion for costs and attorneys' fees based on Paragraph 20 of the contract, which provides in pertinent part:

> "In the event of any litigation between the parties growing out of this Agreement, prevailing party shall be reimbursed upon reasonable costs and expenses, including but not limited to, reasonable attorneys' fees."

The BUYER'S Motion for Attorneys' Fees was heard on May 28, 1986, and Judge Pfeiffer, finding that SELLERS had been a big factor in the escalated costs of litigation, entered an award of attorneys' fees in the amount of $68,391.00 against the SELLERS. (Appendix P. 1-4).

SELLERS again appealed this award (the "second appeal") on the bases that the BUYER did not properly introduce its evidence of fees and that the fees were unreasonable. At oral argument, the unreasonableness argument was abandoned.

The Fifth District of Appeal issued its decision of May 12, 1988, denying BUYERS attorneys' fees based not upon the trial record, but upon a wholly new issue raised by the Fifth District Court of Appeal. (Appendix P. 4). The Fifth District Court of

Appeal claimed even though it was never argued by the parties and is factually untrue, that BUYER rescinded the contract. BUYER subsequently on May 27, 1988, filed his Motion and Request for Rehearing en banc to the which the SELLERS filed their Response and Motion to Strike or Deny Motion for Rehearing June 6, 1988. The Fifth District of Appeal denied the Motion for Rehearing on June 23, 1988 (Appendix), and Petitioners filed a notice to invoke the discretionary jurisdiction of this Honorable Supreme Court on July 5, 1988. This Honorable Court accepted jurisdiction on October 4, 1988.

SUMMARY OF THE ARGUMENTS

Three different District Courts of Appeal have passed on the issue of whether a party who has prevailed in litigation arising out of the underlying contract should be entitled to attorneys' fees when the contract has found to be unenforceable or rescinded. The three District Courts of Appeal, the Fifth, Fourth and Third, have taken somewhat different views.

The Fourth District Court of Appeal has found that if the litigation arose out of the interpretation of the contract, then notwithstanding the remedy sought or the enforceability of the contract the prevailing party should be entitled to a reasonable attorneys' fee and costs. On the opposite end of the spectrum, the Fifth District Court of Appeal has found that notwithstanding a valid underlying contract, if a party seeks rescission or repudiation of the contract, then the contract is annihilated and attorneys' fees provision thereunder is not available for the prevailing party. The middle ground has been staked out by the Third District Court of Appeal, which holds that if the underlying contract is valid notwithstanding the type of remedy sought by the party, the prevailing party should be entitled to attorneys' fees and costs.

Under the Fourth District Court of Appeals analysis, this Honorable Court should reverse the Fifth District Court of Appeal because here the litigation arose out of an interpretation of the contract. Under this analysis, the BUYER having prevailed, he cannot be estopped from asserting his right to attorneys' fees

based on the initial contract.

Even if the Court does not follow the Fourth District Court of Appeal, this Court should still reverse the Fifth District Court of Appeal based on the Third District Court of Appeal's opinion because as here, there was a valid underlying contract that survives the remedy granted by the Court.

And finally, the position taken by the Fifth District Court of Appeal fails to look at the underlying contract in determining whether or not the prevailing party should be entitled to attorneys' fees. The logic employed by the Fifth District Court is flawed and this Honorable Court should reverse based on the Third or the Fourth District Court of Appeal's holdings.

FIRST ISSUE

THIS COURT SHOULD ADOPT SOUSA V. PALUMBO AND HOLD A PREVAILING PARTY IN LITIGATION WHO IS ENTITLED TO ATTORNEYS' FEES UNDER EVEN AN INVALID CONTRACT DOES NOT LOSE THE RIGHT TO ATTORNEYS' FEES IF THE NON-PREVAILING PARTY ASSERTS THE VALIDITY OF THE CONTRACT.

On April 29, 1983, the parties to this lawsuit signed a contract for sale of a mobile home park in the City of Cocoa, Florida. The parties specifically agreed to Paragraph 20 of the contract, which relates to the issue of attorneys' fees:

> 20. "In the event of any litigation between the parties growing out of this Agreement, the prevailing party shall be reimbursed for all reasonable costs and expenses, including but not limited to reasonable attorneys' fees." (Emphasis Added).

The Trial Court found and the Fifth District Court of Appeal later affirmed the Trial Court (except as to the new trial on damages, which was reversed) in the first appeal, based on the finding that the SELLERS had breached their contract with BUYER. Van der Noord v. Katz, 481 So.2d 1228 (Fla. 5th DCA 1985).

The BUYER, prior to trial, was required by the Trial Court to elect his remedy; in fact, at a hearing on February 15, 1984, the Trial Court required BUYER to elect his remedy. On March 12, 1984, BUYER specifically elected damages as his remedy and dismissed his count for rescission. The Court, after the appeal, awarded BUYER damages in the amount of $25,000.00, plus costs, interest and attorneys' fees.

In the second appeal by the SELLERS in Van der Noord v.

Katz, 13 F.L.W. 1179 (Fla. 5th DCA 1988), the Fifth District Court of Appeal reversed the Trial Court's award of attorneys' fees stating that the BUYER had elected the remedy of repudiation/rescission and by doing so:

> "The buyer extinguished and annihilated it [the contract] as effectually as if it had never existed and thereafter the buyer had no more right to recover under the Agreement in the form of attorneys' fees or otherwise than if it had never existed."

In the present case, however, the BUYER never reputiated or elected to rescind the contract. Furthermore, after the first appeal SELLERS never objected to the Trial Court's right to an award of attorneys' fees under the contract; all of SELLER'S objections were aimed at the competency of the evidence of reasonable attorneys' fees. As pointed out by Judge Upchurch in his dissenting opinion below in the second appeal, these issues were brought up unilaterally by the Fifth District on appeal. See generally, Van der Noord v. Katz, supra.

Even if this Honorable Court finds that the contract was rescinded dispite the Trial Court's Order and BUYER'S election of remedies to the contrary, this Court should still reverse the Fifth District Court of Appeal and follow the holdings by the Fourth District Court of Appeal in Sousa v. Palumbo, 426 So.2d 1072 (Fla. 4th DCA 1983), and Bende v. McLaughilin, 448 So.2d 1146 (Fla. 4th DCA 1984).

The Fifth District Court of Appeal in Van der Noord has taken the illogical position that if a party prevails at trial

for breach of an admittedly valid contract, and elects the remedy of rescission, the prevailing party cannot recover the attorneys' fees per a provision of the contract, because the original contract is "extinguished and annihilated". This position taken by the Fifth District is misguided.

The Fourth District as well as others including Judge Schwartz in his dissent in Leitman v. Boone, 439 So.2d 318 (Fla.3d DCA 1983) have chosen to take the more enlightened view of upholding attorneys' fees provisions versus the "vaporation theory" taken by Fifth District Court of Appeal in Van der Noord. The enlightened approach looks at the intent of the parties, the plain meaning of the attorneys' fee provision, as well as the parties' respective legal positions taken in the lawsuit. With respect to the plain meaning of the attorneys' fees clause, Judge Upchurch in his dissenting opinion in Van der Noord called attention to a significant point - that the attorneys' fees clause plainly states that:

> "The prevailing party be reimbursed for all litigation arising out of the parent agreement...". Van der Noord, 13 F.L.W. Fla. 5th DCA, 1988.
> (Emphasis Added).

Thus, the Court should look at the plain meaning of the attorneys' fees clause. The dissent in Van der Noord is therefore consistent with an enlightened view taken by the Fourth District in Sousa, supra.

In Sousa v. Palumbo, supra, the leading Fourth District case, the Appellant had filed an action for specific performance of a stock purchase agreement, and the Trial Court held that the

contract was unenforceable against the Appellees because the contract was only executed by three of six stockholders and that the contract was conditioned upon all six signatures before it became enforceable.

The Fourth District Court of Appeal in reversing the Trial Court's decision not to award attorneys' fees, specifically looked at whether or not the Appellant's action was one to enforce or interpret the rights and obligations of the parties of the contract. The Court went on to say that even though the Appellant took the position that the contract was unenforceable, the litigation nevertheless arose out of the contract; therefore the prevailing party should not be estopped to envoke the provision of attorneys' fees just because they claimed that there was no enforceable contract. The Court went on to say that to estop the parties in such cases would be to ignore the plain meaning of the attorneys' fees position that provides for fees and costs to the prevailing party. Sousa, 426 So.2d 1072 at 1073.

The Fourth District again in Bende v. McLaughilin, supra, affirmed its decision in Sousa by upholding an award of attorneys' fees to the Defendant who was being sued for specific performance of a contract for sale of land and who prevailed.

In an analogous case law, Rustic Village, Inc. v. Friedman, 417 So.2d 305 (Fla. 3d DCA 1982) and Brown v. Gardens By the Sea South Condominium Association 424 So. 2d 181 (Fla. 4th DCA 1984) (following Rustic Village), the Courts found that that when a defendant successfully argues, contrary to the plaintiff's contention that Section 501.2105 Florida Statutes (1981), did not

apply to the suit, the defendant should not be estopped from obtaining an award of attorneys' fees under the provision of the very statute which authorizes fees to a successful party in an action brought pursuant to its terms.

This analogous case law sheds light on Judge Upchurch's dissenting opinion in Van der Noord, where the distinction is made between the "agreement" and "litigation arising out of the agreement". Rustic Village and Brown stand for the proposition that when a cause of action falls agreeably under a statutory ambit, which allows for attorneys' fees, then the prevailing party is entitled to attorneys' fees whether or not the statute was ultimately applicable or not. By analogy, the dispositive factor is not whether the statute ultimately applies or whether the contract is enforceable, but rather whether the litigation arose over the enforcement of a statute or the interpretation of a contract. See also Business Aide Computer v. Central Florida Mack Truck, 432 So.2d 681 (Fla. 5th DCA 1983); Care Construction, Inc. v. Century Convalescent Center, 126 Cal. Rptr. (4th DCA 1976); and Moulin Electric Corp., v. Roach, 175 Cal. Rptr. 111 (3d DCA 1981).

The Fourth District Court of Appeal's position regarding this issue is more consistent with the public policy of the State of Florida. This Honorable Court has consistently upheld attorneys' fees provisions contained in contracts and statutes. See Estate of Hampton v. Fairchilds Florida Construction Co., 341 So.2d 759 (Fla. 1976); Kittel v. Kittel, 210, So.2d 1 (Fla. 1968); and Codomo v. Emanuel, 91 So.2d 653 (Fla. 1956).

Moreover, the Florida Legislature this year passed Senate Bill 215 or Chapter Law 88-160, which provides that:

> "If a contract contains a provision allowing attorneys' fees to a party when he is required to take any action to enforce the contract, the Court may also allow reasonable attorneys' fees to the other party when that party prevails in any action, whether as plaintiff or defendant, with respect to the contract. (Emphasis Added) Chapter Law 88-160.

To the extent that the Florida Legislature and this Honorable Court set Florida public policy it would seem even to the most impartial observer that the Fourth District Court of Appeal's position in looking at the plain meaning of the attorneys' fees provisions is more in line with the view the Florida Legislature has taken and also with this Honorable Court's positions regarding upholding these attorneys' fees provisions. Compare Chapter Law 88-160 with the holding in Sousa supra, and Bende supra, versus the holding in Van der Noord supra, and the majority in Leitman supra.

If this Honorable Court is inclined to follow the Fourth District Court of Appeal's position regarding this legal issue then you should reverse the Fifth District Court of Appeal's decision in Van der Noord, supra, because the issue litigated in this suit arose out of the contract which provided for attorneys' fees to the prevailing party. Sousa, supra.

SECOND ISSUE

EVEN IF THIS COURT REJECTS SOUSA V. PALUMBO, WHICH AWARDS ATTORNEYS' FEES PURSUANT TO AN ATTORNEYS' FEES CLAUSE, EVEN WHEN THE UNDERLYING CONTRACT IS INVALID, IT SHOULD STILL ACCEPT LEITMAN V. BOONE AND REJECT VAN DER NOORD BECAUSE VAN DER NOORD ERRONEOUSLY HOLDS THAT THE REMEDY OF RESCISSION VITIATES AN ADMITTEDLY VALID CONTRACT CLAUSE THAT PROVIDES FOR ATTORNEYS' FEES TO THE PREVAILING PARTY.

The parties to this lawsuit entered into a contract for the sale of a mobile home park on April 29, 1983. The document was properly executed and signed by all the parties. The contract contained all the necessary elements to insure its validity. The Fifth District Court of Appeal even affirmed the Trial Court's finding of fact which clearly indicated in paragraph 8 that the contract controlled the transaction.

> 8. "The contract is unambigious. It controlled the transaction. The March 15, 1983, memorandum between the parties was merged into, and superseded by the contract. Van der Noord, 481 So.2d 1228, at 1229.

The BUYER, prior to closing discovered that the SELLER had misrepresented what the normal operating expenses did not exceed the agreed-upon 32% of gross income. As a result of SELLER'S breach (misrepresentation), BUYER was forced to sue for breach of contract and damages. On February 15, 1984, the Trial Court, at a hearing, required the BUYER to elect his remedy. BUYER elected to sue for damages on the breach of contract. (See Appendix P-5, P-10). Further, on August 17, 1984, at a hearing on a Motion for

Directed Verdict, the Court specifically addressing the question BUYER'S causes of action, BUYER'S attorney stated:

Mr. Simmons: "We did have a fourth cause of action which, at the beginning of this lawsuit, which was rescission, we elected to forego and made our election of remedy so we do have the breach of contract." (Appendix P. 10).

In Leitman v. Boone, supra, the Third District Court of Appeal staked out a middle ground on the positions taken by the Fourth District Court of Appeal and the Fifth District Court of Appeal. The Third District Court of Appeal held that the underlying contract's validity was a condition precedent to asserting the attorneys' fees clause by the prevailing party regardless of the remedy sought. See Leitman v. Boone, 439 So.2d 318, at 321. This differs from the Fourth District Court of Appeal's position, which relies upon whether the litigation arose out of the contract and not upon the validity of the underlying contract. See generally Sousa v. Palumbo,supra.

The Fifth District Court of Appeal, however,has taken a much different approach because they choose not to look at whether the underlying contract was valid or invalid (Third District position) or whether the litigation arose out of the contract (Fourth District). The Fifth District looks solely at the type of remedy the parties employ seeking resolution to the contract. See generally, Katz v. Van der Noord, supra.

In Leitman, the Trial Court found that the defendants had not accepted the Plaintiff's offer to purchase in a manner con-

templated by the parties, that is, by executing the deposit receipt form; thus, no contract to sell the real estate ever existed. Because the underlying contract never existed, the Third District Court of Appeal reversed the Trial Court's award of attorneys' fees and costs pursuant to the attorneys' fee clause of the contract, citing Brickeltown, Inc. v. Hirschfield, 404 So.2d 153 (Fla. 3d DCA 1981), rev. den., 412 So.2d 466, (Fla. 1982).

If this Honorable Court accepts the Leitman majority opinion, then this Court should also reverse the Fifth District Court of Appeal's holding in the case at bar. Here, it is very clear that there was a valid contract for the sale of a mobile home park on April 29, 1983. This fact, i.e., the validity of the underlying contract, under Leitman is the lynchpin in determining whether the attorneys' fees provision clause will be available to the prevailing party. The Third District Court of Appeal, here, would award the BUYER attorneys' fees pursuant to the fees provision of the contract, because there was a valid underlying contract. See Leitman v. Boone, 429 So.2d 318 at 321.

As was pointed out earlier, the lynchpin for the Fourth District Court of Appeal, as set out in Sousa, is not whether there was a valid underlying contract, but rather whether the litigation arose out of the contract. If this Court is inclined to follow the logic employed by the Fourth District Court of Appeal in Sousa, then you should reverse the Fifth District Court of Appeal's holding. See Van der Noord, 481 So.2d 1228.

Now we turn to the Fifth District Court of Appeal's position

taken in the case at bar. The Fifth District has taken the position in Van der Noord that notwithstanding whether the underlying contract was valid or whether the litigation arose out of the contract, the contract is extinguished and annihilated if the prevailing party seeks a remedy of rescission. This is not the position taken by the BUYER in the case at bar. Even if this Court finds, however, that BUYERS did seek rescission of the contract, you should still reverse the Fifth District Court of Appeal because the underlying contract was valid.

"Rescission" is a restitutionary remedy that the Courts have fashioned to provide just relief of an injured party. In doing so, the Courts are trying to seek and employ justice to the injured parties.

Two of the leading authors on contract law both point out the confusion that many courts are faced with when restitution or rescission are used as a remedy for breach of contract. See generally Corbin on Contracts, Section 1105 and 1106 (1971); and Williston on Contracts, Third Edition, Section 1455 (1955). The Fifth District Court of Appeal's position in looking at what remedy the parties are seeking in order to determine whether or not the underlying contractual provision governs is a product of the confusion regarding this specific area of the law.

A leading commentator disagrees with the Fifth District Court's position taken in this case. Professor Dobbs points out:

> "Another difficulty with the rescission approach to restitution is that it may lead the court erroneously to suppose that the contract being rescinded can be wholly ignored." Dobbs on Remedies, Section 12.1, (1973). (Emphasis Added).

We argue with Professor Dobbs, Corbin and Williston, that a restituting remedy is a remedy employed by the Court to provide relief to a aggressive party. The same remedy (restitution) that the Courts have fashioned in order to provide complete relief to an aggrieved party should not, because of strained logic, be used to deny that party the relief of attorney's fees admittedly agreed to by the parties when they entered into the contract. Restitution is only a remedy that awards relief of placing the parties in the status quo ante.

In fact, the Fifth District's opinion flies in the face of this Court's ruling in Cheek v. McGowan Electric Supply Co., 511 So.2d 977 (Fla. 1987), in which this Court held:

> A contractual provision authorizing the payment of attorney's fees is not part of the substantive claim because it is only intended to make the successful party whole by reimbursing him for the expense of litigation.

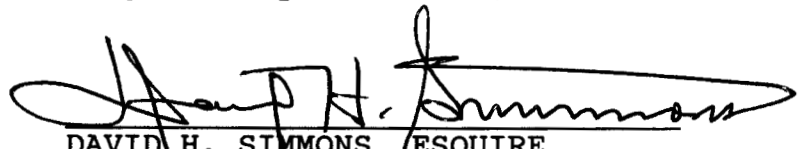
This Court's ruling in McGowan dealt with damages, which is only a remedy - just as restitution is only a remedy. In each instance, attorney's fees are not part of the substantive claim. The Fifth District's ruling fails to make "the successful party whole".

CONCLUSION

The litigation in the present case arose out of an interpretation of the contracts, providing for attorneys' fees, in which the BUYER prevailed, therefore this Court should reverse the Fifth District Court of Appeal based on Sousa v. Palumbo,. Even if this Court does not follow Sousa v. Palumbo and follows the Third District Court's view taken in Leitman, the Fifth District Court of Appeal should still be reversed because the underlying contract providing for attorneys' fees was valid and controlled the transaction.

For the reasons set forth here and above, the BUYER respectfully requests that the judgment of the Fifth District Court of Appeal, State of Florida, be reversed, and that BUYERS be entitled to attorneys' fees and costs as provided the contract that was entered into between the BUYER and the SELLER for the purchase of a mobile home park.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 31st day of October, 1988, to: CHARLES HOLCOMB, ESQUIRE, Holcomb and Deans, 9 Magnolia Street, Cocoa, Florida 32922.

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