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IN THE SUPREME COURT
STATE OF FLORIDA

FILED
SID J. WHITE
JUL 15 1988
CLERK, SUPREME COURT
By _____
Deputy Clerk

ROBERT J. KATZ,

Petitioner,

vs.

HARRY VAN DER NOORD, et al.,

Respondents.
_____/

Appeal No.

Civil Action No.: 83-6869
Orange County, Florida

Appeal No.: 86-1140
District Court of Appeal

PETITIONER'S BRIEF ON JURISDICTION

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PREFACE

In this brief, the following abbreviation will be used:

"App." - Appendix to this brief.

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STATEMENT OF THE CASE AND OF THE FACTS

This cause arose out of an agreement to sell a mobile home park from 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 closing, buyer discovered that such expenses far exceeded 32% of the gross income and refused to close, eventually filing suit against sellers for damages, breach of contract, fraud and rescission. The buyer, long before trial, was instructed by the trial court to make an election of remedies between these various causes of action. Buyer dropped the claim for rescission of the contract, and pursued only his claims for breach of contract, fraud and damages.

The sellers countersued for breach of contract, fraud and misrepresentation. A jury trial was held in the Ninth Judicial Circuit, In And For Orange County, Florida, and a verdict was returned finding the buyer had breached the contract and awarding seller a judgment of $25,000.00 representing the earnest money buyer had deposited with sellers prior to closing. Subsequent to this verdict and upon buyer's Motion, the trial judge entered a judgment non obstante veredicto based on his determination that, as a matter of law and the trial court's definition of a normal operating expenses, buyer had not breached the agreement. The trial judge ordered that the $25,000.00 earnest money be returned to the buyer and buyer be entitled to a new trial on the issues of damages. This judgment was appealed and

the Fifth District Court of Appeal in Van Der Noord v. Katz, 481 So.2d 1228 (Fla. 5th DCA 1985), affirmed the judgment N.O.V. and the return of the $25,000.00 earnest money, but reversed as to the issue of a new trial on buyer's damages.

Upon remand the buyer filed a Motion for Costs and Attorneys' Fees based on paragraph 20 of the agreement to purchase which provides in pertinent part:

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

The buyer's Motion for Attorneys' Fees came on for hearing and on May 28, 1986, Judge Pfeiffer entered an award of attorneys' fees in the amount of $68,391.00 against the sellers. (App. 1-2). Sellers again appealed this award and the Fifth District Court of Appeal issued its decision on May 12, 1988, denying buyer's attorneys' fees, based not upon the trial record, but upon a new issue raised only by the Fifth District Court of Appeal (App. 3-7). Buyer subsequently on May 27, 1988, filed its Motion and Request for Rehearing En Banc to which the sellers filed their Response and Motion to Strike or Deny Motion for Rehearing on June 6, 1988. The Fifth District Court of Appeal denied the Motion for Rehearing on June 23, 1988, (App. 8), and the Petitioner filed a Notice To Invoke the Discretionary Jurisdiction of July this Honorable Supreme Court on July 5, 1988. (App. 9-10). (Emphasis added)

I

THE OPINION OF THE FIFTH DISTRICT COURT OF APPEAL DIRECTLY CONFLICTS WITH THE OPINIONS OF THE FOURTH DISTRICT COURT OF APPEAL IN SOUSA V. PALUMBO, 426 So.2d 1228 (Fla. 4TH DCA 1983) AND BENDE V. McLAUGHLIN, 488 So.2d 1146 (Fla.4TH DCA 1984)

Article V Section 3(b)(3) of the Florida Constitution enables the Supreme Court to review any decision of a District Court of Appeal that expressly and directly conflicts with a decision of another District Court of Appeal or the Supreme Court on the same question of law. The Supreme Court defines the term "expressly" by its ordinary dictionary meaning: "In an express manner." Jenkins v. State, 385 So.2d 1356 (Fla. 1980). In further clarifying the basis for accepting conflict jurisdiction, this Court stated that:

> "a discussion of the legal principles which the court applied supplies a sufficient basis for a petition for conflict review. It is not necessary that the court explicitly identify conflicting district court or supreme court decisions in its opinion in order to create an "express" conflict under Section 3(b)(3) of the Florida Constitution." Ford Motor Company v. Kikis, 401 So.2d 1341 (Fla. 1981).

It is, therefore, clear that while it is not necessary that the District Court of Appeal explicitly identify a conflicting appellate decision in its order, the District Court must at least address the legal principles which were applied as a basis for the decision.

In case at bar, the Fifth District Court of Appeal, reached this threshold in its opinion dated May 12, 1988. The Fifth District Court of Appeal based its decision on the apparent

conclusion that the buyer had somehow repudiated the purchase agreement. The Court stated:

> "The prior appellate opinion in this case clearly states that because the buyer elected to repudiate (rescind) the agreement and recover his $25,000.00 deposit, he could not also recover damages under the agreement which he might have otherwise recovered had he affirmed the contract and sought damages caused by the sellers' breach. In contemplation of law, by repudiating the agreement, the buyer extinguished and annihilated it as effectually as if it had never existed and thereafter the buyer had no right to recover damages under the agreement in the form of attorney's fees or otherwise than if it had never existed... If a contract never existed obviously no one is a party to it and no one is entitled to recover attorney's fees based on some provision in it." (Emphasis added) Noord v. Katz, supra.

The Court in reaching this decision, ignored the fact that the buyer had dropped his course of action for rescission and proceeded only on his claim for breach of contract and damages. The Fifth District Court of Appeal also disregarded the fact that during the entire trial, neither side took the position that the contract did not exist and neither side sought rescission. The Fifth District Court of Appeal based its opinion squarely on the Third District Court of Appeal case of Leitman v. Boone, 439 So.2d 318 (Fla. 3d DCA 1983). Compare the Fifth District Court of Appeal holding with the Fourth District Court of Appeal in Sousa v. Palumbo, 426 So.2d 1072 (Fla. 4th DCA 1983), where the trial court also denied appellees recovery of attorney's fees under provision of a contract which allowed such recovery. The trial court ruled that since the contract in question was only executed by three of the six stockholders and the contract was conditioned upon the execution by all six before it

would become enforceable, the contract, therefore, never existed. The Fourth District of Appeal affirmed the ruling that the contract, not properly executed, was unenforceable, but went on to allow recovery under the attorney's fees clause which read:

> "In any action to enforce or interpret the rights or obligations of the parties, the prevailing party shall be entitled to recover all costs incurred, including a reasonable attorney's fee in addition to any other remedy to which he may be entitled".

The Fourth District Court of Appeal held that the appellant's action was clearly one seeking:

> "to enforce or interpret the rights or obligations of the parties since such action sought an interpretation of the contract by which it would be enforceable severally against each stockholder executing the contract, each of the appellees having done so. Upon prevailing against appellant's action the appellees were entitled to fees and costs. Furthermore, 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". (426 So.2d at 1073).

The Fourth District Court of Appeal went on to reverse the trial courts decision denying attorneys' fees to appellees. In a more recent case Bende v. McLaughlin, 448 So.2d 1146 (Fla. 4th DCA 1984), the Fourth District again had the opportunity to consider the same question. In that case, the court affirmed the award of attorneys' fees based on its own precedent in Sousa v. Palumbo, supra, and went on to state: "we acknowledge that a contra view is expressed in Leitman v. Boone, supra, thus the two cases are in conflict". (448 So.2d at 1146). It is apparent

that the Fourth district has expressly recognized that the conflict exists between the Districts on this question.

II

THE DISPOSITIVE ISSUE IN THE CASE AT BAR HAS BEEN RECENTLY CERTIFIED TO THE SUPREME COURT BY THE THIRD DISTRICT COURT OF APPEAL AS BEING IN DIRECT CONFLICT WITH THE FOURTH DISTRICT COURT OF APPEAL OF SOUSA V. PALUMBO, 426 So.2d 228 (Fla. 4TH DCA 1983)

The Third DCA in its most recent case dealing with the same issue, while again clinging to its precedent in Leitman v. Boone, supra, that attorney's fees are not proper in a case where a contract has been found never to have existed, stated:

> the trial court's findings lead to the inescapable conclusion that no contract ever existed between the parties because "there was no meeting of the minds". Since the claim for attorneys' fees rests solely on a contract which was found never to have existed, no legal obligation was created between the parties and an award of attorneys' fees is precluded. We are aware that this holding conflicts with the 4th DCA decision in Sousa v. Palumbo, 426 So.2d 1228 (Fla. 4th DCA 1983), therefore, we certify the following question to the Florida Supreme Court:
>
> "whether a party is precluded from proclaiming attorneys' fees under a contract which has been found to have never existed." Irv David, a/k/a Irving Weinberger v. Harold Richman, 13 FLW 1304 (Fla. 3d DCA May 31, 1988).

It is interesting to note that the Third District Court of Appeal decided in Leitman v. Boone, supra, included a length dissent by Chief Judge Schwartz supporting the reasoning used by the Fourth District Court of Appeal in Sousa, supra. In addition, in the present case at bar, Judge Upchurch, dissented,

stating:

> "it is obvious that the parties considered this agreement as to fees divisible, a separate and distinct agreement that the prevailing party be reimbursed for all litigation arising out of the parent agreement and not affected by its rescission, because there was no objection to the court's retention of jurisdiction to award fees or to consideration of the question by the trial court. All objections were directed to the competency of the evidence." Noord v. Katz, No. 86-1140, slip op. (Fla. 5th DCA May 12, 1988).

CONCLUSION

It is abundantly clear that there exists a distinct express conflict between the opinion filed by the Fifth District Court of Appeal in this matter and the contrary holdings expressed by the Fourth District Court of Appeal in Sousa, supra, and Bende, supra. The Fifth District Court of Appeal ruling is based on a similar ruling by the Third District Court of Appeal in Leitman v. Boone, supra, concerning the same issues and indeed the Third District Court of Appeal in its most recent case on the subject recognizes the conflict that exists among the circuits and certified the question to the Florida Supreme Court.

Petitioner has demonstrated the classic example of conflict jurisdiction, and therefore, respectfully requests that

this Court take jurisdiction and enter its Order accepting jurisdiction and directing the parties to file appropriate brief.

Respectfully submitted by Petitioner,

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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/Hand Delivery this 19th day of July, 1988, to Charles Holcomb, Esquire, 9 Magnolia Street, Cocoa, Florida 32922 and to Bradly R. Bettin, Esquire, 9 Magnolia Street, Cocoa, Florida 32922.

David H. Simmons