IN THE SUPREME COURT
STATE OF FLORIDA

ROBERT J. KATZ,

Petitioner,

vs.

HARRY VAN DER NOORD, et al.,

Respondents.

Case No.: 72,713

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

Appeal No.: 86-1140
District Court of Appeal-
Fifth District

FILED
SID J. WHITE
AUG 2 1988
CLERK, SUPREME COURT
By
Deputy Clerk

RESPONDENT'S ANSWER BRIEF ON JURISDICTION

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PREFACE

In this brief, the following abbreviation will be used:

"App." - Appendix to the brief.

SUMMARY OF ARGUMENTS

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II

THE DISPOSITIVE ISSUE IN THE CASE AT BAR HAS NOT BEEN CERTIFIED TO THE SUPREME COURT BY THE THIRD DISTRICT COURT OF APPEAL.

STATEMENT OF THE CASE AND OF THE FACTS

The Petitioner shall be referred to as "Buyer" herein and the Respondents as "Sellers" herein.

Respondents, as Sellers, agreed to sell a mobile home park to Petitioner, as Buyer. In the contract, Respondents, as Sellers, warranted that during a certain period of time prior to closing, the "normal operating expenses" of the park would not exceed 32% of gross income. Claiming that such expenses exceeded 32% of gross income, the Petitioner, as Buyer, refused to close and sued Respondents, as Sellers, for damages for breach of contract and fraud. The Respondents counterclaimed for breach of contract, fraud, and misrepresentation. Based on the trial court's definition of "normal operating expenses" the jury found that the Petitioner, as Buyer, had breached the contract and awarded the Respondents the $25,000.00 that Petitioner had deposited with Respondents as earnest money. Upon the Petitioner's motion, the trial judge entered a judgment notwithstanding the verdict because the trial court found, contrary to the jury verdict, that the Respondent had breached the agreement. The trial court ordered that the $25,000 deposited be returned to the Petitioner and granted the Petitioner a new trial on the issue of damages. The Respondent appealed. The District Court affirmed the final judgment non obstante verdicto as to the Respondent's (Seller) breach and the return of the $25,000 deposit to the Petitioner but reversed as to the grant of a new trial to the Petitioner on the issue of damages in Van Der Noor v. Katz , 481 So. 2d 1228 (Fla. 5th DCA 1985).

On remand, after the opinion on the first appeal, the Petitioner filed a motion for costs and attorney's fees based on paragraph 20 of the agreement to purchase which provided for attorney's fees to the party prevailing in an action arising out of the agreement. The trial court granted that motion and awarded the Petitioner attorney's fees of $68,391.00. (App. 1-2). The Respondents again appealed.

The Fifth District of Court of Appeal on the prior appeal reversed the grant of a new trial to the Petitioner on the issue of damages because the District Court found that, by refusing to close and purchase the park rather than closing and suing the Respondents (Sellers) to recover money damages resulting from the Respondent's breach of warranty as to the ratio of "normal operating expenses" to gross income, the Petitioner had repudiated the agreement rather than affirming it and had thereby elected a remedy in the nature of a recission. Recission entitled the Petitioner to a restoration of his $25,000 deposit but not to damages resulting from Respondent's breach.

The prior appellate opinion in this case clearly states that because the Petitioner elected to repudiate (rescind) the agreement and recover his $25,000 deposit, he could not also recover damages under the ageement which he might have otherwise recovered had he affirmed the contract and sought damages caused by the Respondent's breach.

The Fifth District Court of Appeal rendered its opinion on the second appeal on May 12, 1988, reported as Van der Noord v. Katz , 13 FLW 1179 (Fla. 5th DCA 1988). The Fifth District Court of Appeal denied Petitioner's Motion for rehearing on June 23, 1988 (App 8).

Petitioner then filed its Notice to Invoke the discretionary jurisdictions to the Supreme Court of Florida on July 5, 1988 (App. 9-10).

The statement we made by Petitioner on page 3 of its Brief:

> "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 recission of the contract, and pursued only his claims for breach of contract, fraud and damages."

Such statement is inappropriate to this matter as the first opinion in the initial appeal, Van der Noord v. Katz , 481 So. 2d 1228 (Fla. 5th DCA 1985) was dispositive of those factual allegations and a re-hash is barred by res judicata as no rehearing was sought on the Court's Opinion at that time.

ARGUMENT

I

THE FIFTH DISTRICT COURT OF APPEAL'S OPINION IN THIS CASE DOES NOT EXPRESSLY OR DIRECTLY CONFLICT WITH THE OPINIONS OF THE FOURTH DISTRICT COURT OF APPEAL AS IT IS NOT BASED UPON THE HOLDINGS IN THOSE CASES.

Petitioner still seeks another "bite of the apple" after being denied such second bite twice by the Fifth District Court of Appeal.

Respondent does not argue that there is no express conflict in the cases decided by the Fourth District Court of Appeal in Sousa v. Palumbo , 426 So. 2d 1072 (Fla. 4th DCA 1983) and Bende v. McLaughlin , 448 So. 2d 1146 (Fla. 4th DCA 1984), with the Law as stated in the cases decided by the Third District Court of Appeal in Leitman v. Boone , 439 So. 2d 378 (Fla. 3rd DCA 1983) and David v. Richman , 13 FLW 1304 (Fla. 3rd DCA) 1988.

The Fifth District Court of Appeal, in its opinion now being sought by Petitioner to be reviewed by this Court, mentioned in passing the holding in Leitman v. Boone , 439 So. 2d 318 (Fla. 3rd DCA 1983). The Fifth District Court of Appeal thereafter made very clear the basis upon which its Opinion now sought to be reviewed was based. The Court said at page 1179 of its Opinion:

> "The prior opinion of this court held that because of his repudiation and recission the buyer was not entitled to a new trial on the issue of damages for breach of contract. That holding became "the law of the case" and was binidng on the trial court on remand.
>
> As to the particular issue of the buyer recovering

> attorney's fees under the rescinded agreement, there is a specific determination in our prior opinion that is even more controlling than the doctrine of the "law of the case." In the original trial the buyer presented evidence of accountant's and attorney's expenses. In Van Der Noord , 481 So. 2d at 1230, this court held that such evidence was based solely on speculation. Having failed to introduce competent, substantial evidence in regard to this issue, the buyer is not entitled to a second bite of the apple.
>
> Therefore, in our prior opinion in this very case, this court expressly adjudicated that the buyer's evidence as to attorney's fees was legally insuff-cient and that he was not entitled to another chance to litigate that issue. That determination is res judicata as to the buyer's entitlement to attorney's fees in this case."

Accordingly, the Fifth District Court of Appeal reversed the trial court.

It thus becomes obvious that the ruling of the court now sought to be reviewed was based upon the law of the case and res judicata and not expressly or directly on the point argued by Petitioner as certified in David , supra, i.e.

> "Whether a party is precluded from claiming attorney's fees under a contract which has been found to have never existed." (David , supra, at page 1305).

The first basis stated by the Fifth District Court of Appeal in the Opinion sought to be reviewed was the "law of the case" as established in its first opinion. (App. 5). The law remains that whatsoever is once established between the same parties in the same case continues to be the law of the case, whether correct on general principles or not, so long as the facts on which such decision was predicated continue to be the facts in the case. Wroton v. Wash-Bowl, Inc. , 465 So. 2d 967 (Fla. 2nd DCA 1984); 3 Fla Jur 2nd, Appellate Review , Section 414.

The second basis which the Fifth District Court of Appeal characterizes as even more controlling than the doctrine of the law of the case, is res judicata, i.e. that its prior opinion worked as an estoppel as to the various matters therein adjudged or that might have been settled thereby. McEwen v. Grower's Loan and Guaranty, Co. , 156 So. 527 (Fla. 1934); 13 Fla Jur 2nd, Courts and Judges , Section 137. The doctrine is applicable to appellate decisions. Lockhart v. Dade County , 25 So. 2d 646 (Fla. 1946).

The first opinion of the Fifth District Court of Appeal was not motioned for rehearing and is determinative of the issues thereunder.

It is clear that the ruling of the Fifth District Court of Appeal was based upon the legal reasoning of law of the case and res judicata and not the law alleged to be in conflict by Petitioner. The mention in Petitioner's brief, Page 4, that the court raised a new (emphasis supplied) issue is totally unfounded.

A dissenting opinion also cannot afford a basis for involving the discretionary jurisdiction of the Supreme Court under Rule 9.030(a)(2)(A)(iv), Florida Rules of Appellate Procedure, and expressly so when the opinion is written, as in this case, by a Judge of the same Court which rendered the majority opinion. However, it should be noted that Judge Upchurch in his dissenting opinion, dissented on an entirely different basis than the basis of conflict of case law on the point made by Petitioner. (App-6).

II

THE DISPOSITIVE ISSUE IN THE CASE AT BAR HAS NOT BEEN CERTIFIED TO THE SUPREME COURT BY THE THIRD DISTRICT COURT OF APPEAL.

As can be derived from the argument on Point I by Respondents, the Petitioner has failed to perceive that the basis of the opinion rendered by the Fifth District Court of Appeal was not in conflict with cases in the Third and Fourth District Courts on Appeal, but was in fact rendered upon the principles of law of the case and res judicata. The analysis shall not be repeated here again. The answer which may be rendered to the certified question posed in David v. Richman , supra, would not affect the basis of the decision in the case at Bar in the least.

CONCLUSION

It is apparent that the Opinion sought by Petitioner to be reviewed by the Supreme Court does not provide a basis for the exercise of discretionary jurisdiction of the Supreme Court. The Supreme Court should exercise its discretion to decline review in that the basis for review presented by Petitioner is inaccurate and misplaced. This court should therefore enter its order denying review of the opinion of the Fifth District Court of Appeal rendered on May 12, 1988.

Respectfully Submitted by
Respondent

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to David H. Simmons, Esquire, Post Office Box 87, Orlando, Floirda 32802 by deposit in the U.S. Mail on the 1st day of August, 1988.

CHARLES M. HOLCOMB, ESQUIRE