IN THE SUPREME COURT OF
THE STATE OF FLORIDA

CASE NO. **72,763**
FOURTH DISTRICT NO. **4-86-2663**

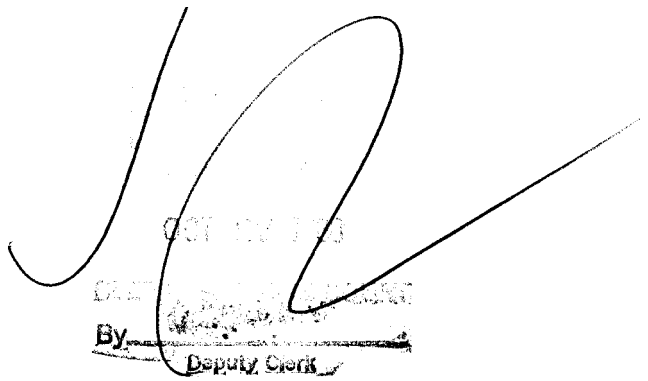
SAMARA DEVELOPMENT CORPORATION,

Petitioner

vs.

RICHARD MARLOW and MIDLANTIC NATIONAL BANK AND TRUST COMPANY,

Respondents.



DISCRETIONARY REVIEW OF THE CERTIFIED QUESTION FROM THE FOURTH DISTRICT COURT OF APPEAL

REPLY BRIEF FOR PETITIONER

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STATEMENT OF THE CASE AND THE FACTS

Petitioner reaffirms its Statement of the Case and Facts and only states herein additional areas of disagreement with the Respondent's Statement of the Case and Facts as contained in its Answer Brief.

The Fourth District Court of Appeal certified the question at issue due to the fact that ". . .interpretations of an act by the agency empowered to enforce an act are entitled to great weight and will not be departed from except for cogent reasons and unless clearly erroneous. . ." (Petitioner's Initial Brief Appendix at 5). The Court recognized a conflict with its decision and the administrative interpretations of ILSA.

The issue of the existence or nonexistence of the remedy of specific performance is not part of the question certified by the Fourth District Court of Appeal and is not before this Honorable Court for decision. Additionally, the existence or nonexistence of the remedy of specific performance was not an issue for decision before the Fourth District. The Opinion of the Fourth District assumes, and can only be read to indicate, that the remedy of specific performance was provided in the contract in the instant case. Finally, Respondent has admitted in the Circuit Court that the contract in the instant case provided the remedy of specific performance to the purchaser. (Petitioner's Initial Brief Appendix at 49).

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> statutory scheme. . . .The agency's interpretation need not be the only reasonable one or even the one that we would reach had we decided the question initially; if the agency's interpretation is reasonable, it will be upheld. 777 F.2d at 1448.

These standards as set forth by both the federal and state courts do not require that the individual relying on the guidelines go behind the process involved in making the regulation or guideline, as Respondent would suggest in its Answer Brief, to determine if in fact the regulation or guideline is reasonable.

The Fourth District Court of Appeal certified to this Court the question for decision on the basis **of** the following statement set forth in its Opinion:

> Be that as it may, since interpretations of an act by the agency empowered to enforce an act <u>are entitled to great weight and will not be departed from except for cogent reasons and unless clearly erroneous</u>, . . . , we are constrained to certify the following question to the Supreme Court of Florida as a question of great public importance . . . [Emphasis supplied]

(Petitioner's Initial Brief Appendix at 5).

Petitioner submits that Respondent has not provided any support for its proposition that the many interpretations given by HUD and OILSR of Section 1702(a)(2), which were relied on by Petitioner, were clearly erroneous.

Respondent suggests in its Answer Brief that "Petitioner's argument overlooks the fundamental premise that courts, not administrative agencies, have the ultimate responsibility for construing statutes." (Respondent's Answer

Brief at 13). Contrariwise, Petitioner has set forth in its Initial Brief that Respondent's argument was the exact argument made by the federal district court in the Winter case which was rejected by the Eleventh Circuit. (Petitioner's Initial Brief at 11-12).

Respondent attempts to rely upon the legislative history of ILSA to support its position that the Guidelines set forth by HUD are unreasonable. Yet, Respondent fails to cite any instance of legislative history that demonstrates that this is true. One should be able to surmise that HUD had available the legislative history of the statute when drafting its Guidelines and issuing its Advisory Opinions.

In its attempt to support its position that Advisory Opinions are not persuasive, Respondent sets forth in its Answer Brief that "the Advisory Opinions make no reference to the content of the contracts in question other than to indicate that the remedy of specific performance has not been deleted." (Respondent's Answer Brief at 18). Petitioner submits that Respondent's assertion is incorrect and calls this Court's attention to Advisory Opinion dated April 23, 1982 - OILSR No. 1-00801-09-64, Advisory Opinion dated May 6, 1982 - OILSR No. 1-00795-09-63, and Advisory Opinion dated June 2, 1982 - OILSR No. 1-00822-09-68, all of which contain additional references to the contracts there in question. (Petitioner's Initial Brief Appendix at 24-25, 26-27, and 28-30).

REPLY TO ARGUMENT II OF RESPONDENT'S BRIEF

In its second Argument, Respondent attempts to bring before this Court an issue that was not certified by the Fourth District Court of Appeal. The issue of the "continued viability of the right of specific performance" (Respondent's Answer Brief at **24)** is not at issue, as the Fourth District has certified the question with the assumption that the right of specific performance has been provided.

Respondent also sets forth that **"HUD's** interpretation of what constitutes a two-year obligation **. . .** has been revised and now defers to general principles of contract law under the laws of the jurisdiction in which the project is located." (Respondent's Answer Brief at **28).** Petitioner would argue that this is not the case in the context of this issue. What the HUD Guidelines do set forth is that state contract law is used to determine whether a particular remedy is illusory--the Guidelines do not say that general principles of contract law are to be used to determine whether the right of specific performance is required under ILSA. Petitioner re-emphasizes that the **1979** and **1984** Guidelines set forth that in order to qualify for the exemption, the remedy of specific performance must be available to a purchaser in a contract. (Petitioner's Initial Brief Appendix at **11** and **38).** Petitioner has provided the remedy of specific performance in the contract in the instant case.

Respondent's Brief makes mention of the Advisory Opinion pertaining to the Pass Christian Heights, OILSR No. 1-00766-28-8. The language quoted by Respondent is a rhetorical question set forth by HUD which asks if a limitation to a return of deposit or specific performance constitutes a limitation on the purchaser's right to damages. If this is true, under the Pass Christian Heights opinion, the contract would not qualify for the two-year exemption. Petitioner urges that this does not in any way support Respondent's position. This sentence by HUD merely states the obvious, which is the exact issue before this Court: Whether a limitation of remedy to a return of deposit or suit for specific performance permits the developer to be qualified for the two-year ILSA exemption. The Pass Christian Heights opinion does not go on to answer this question in the context of the specific performance remedy. Additionally, the Pass Christian Heights opinion is a 1981 opinion. The numerous Advisory Opinions issued by OILSR subsequent to this time, and the 1979 and 1984 Guidelines issued by HUD, have all supported Petitioner's position that it is only a limitation on the remedy of specific performance that will eliminate the developer's exemption under the two-year provision.

Respondent would urge that the obligation of Petitioner in this instance is illusory because it is granting only the right of specific performance, and not the right to any other remedy. Respondent then continues that to determine whether an obligation is illusory, the contract law of the state in question

should be looked to. Petitioner urges the Court to consider the fact that Congress could never have intended for ILSA to mean different things in different jurisdictions. ILSA was to provide standards that the public could rely on and have confidence in. The interstate land sales industry throughout this country was to be subject to this legislation.

Respondent attempts to argue that under Florida contract law, Petitioner's obligation to perform under the contract at issue is illusory since the remedy of damages was not granted to the purchaser. However, the cases that Respondent offers to support its position are inapposite in that the cases Respondent cites are those in which the remedy of specific performance was not provided in the contracts there at issue. Here, the remedy of specific performance is clearly granted to Respondent.

Additionally, as set forth by Respondent in its Answer Brief, Florida law has established that if the remedy of specific performance is not granted in a contract, and is not available for a particular reason, the court will fashion a remedy to give to the aggrieved party, including the remedy of loss of bargain and compensatory damages. (Respondent's Answer Brief at **32-37**). In Blue Lakes Apartments Ltd. v. Georse Gowing, Inc., **414** So.2d **705** (Fla. 4th DCA 1985), cited by Respondent in its Answer Brief at **33-34** and **36-37**, a provision in a contract for the purchase of a condominium unit set forth that in the event of a default by seller, the buyer was limited solely to a remedy of a return of

its deposit. The Fourth District Court of Appeal stated that such a limitation of remedies makes the seller's obligations "wholly illusory." (Id. at 709). The court awarded loss of bargain and compensatory damages to the buyer and noted that specific performance would have been granted if the subject condominium unit had not already been sold by the seller. Respondent's argument, that the Petitioner's failure to provide to Respondent a specific remedy for damages in the contract in the instant case makes the contract illusory under Florida law, is contra to the Blue Lakes Apartment Ltd. case and other cases cited by Respondent in its Answer Brief. (Respondent's Answer Brief at 32-37). Florida courts will tailor a remedy of damages or specific performance where appropriate to render the obligations of a seller real and not illusory.

Petitioner has provided Affidavits from three (3) attorneys practicing real estate law in the State of Florida who have an in depth understanding of, and experience with, Section 1702(a)(2) of ILSA and ILSA in general. (Petitioner's Initial Brief Appendix at 85-90). They affirm Petitioner's position that OILSR has "required only the remedy of specific performance to enforce a developer's obligation to complete construction within two (2) years." (Petitioner's Initial Brief Appendix at 85, 87 and 90). They assert that the remedy of damages has never been required by OILSR as a condition for exemption under Section 1702(a)(2) and that to the best of their knowledge, such a requirement would be "contrary to existing law and administrative

authority." (Petitioner's Initial Brief Appendix at 86, 88 and 90). In addition, they indicate that throughout the country, the remedy of specific performance is an often preferred remedy for buyers and that real estate contracts regularly do not provide for the remedy of damages in the event of a seller's default. Petitioner submits that Respondent's assertion that Petitioner's obligation to complete is illusory since the remedy of specific performance is provided, and not that of damages, is clearly in conflict with the understanding of said three (3) attorneys.

Respondent attempts to assert that the remedy of specific performance is not available to Petitioner because subsequent to this litigation, the condominium unit in question has been sold to someone else. However, at no time has Respondent attempted to invoke its remedy of specific performance.

REPLY TO ARGUMENT III OF RESPONDENT'S BRIEF

Respondent attempts to assert that public po icy does not dictate that Petitioner can rely on the interpretations given by HUD in that the decisions involving this issue in the State of Florida were available for Petitioner to rely on. Petitioner would draw this Court's attention to the fact that Dorchester Development, Inc. v. Burk, 439 So.2d 1032 (Fla. 3rd DCA 1983), the case relied upon by Respondent, was dated November 1, 1983. The contract in the instant case was entered into during the same month. At the most, Dorchester was the only opinion available to Petitioner at the time of its entry into the contract with Respondent. The contract had been negotiated over a period of time prior to the rendition of the Dorchester opinion. Furthermore, Petitioner again re-emphasizes that Dorchester did not deal with the issue of a limitation of the remedy of specific performance. Rather, completely opposite from the instant case, Dorchester addressed the situation when the right to specific performance is not granted in the contract. The statement in Dorchester which the Respondent relies upon was dicta and did not relate to the issues presented therein for decision.

Respondent's attempt to set forth a line of authority that Petitioner should have relied on in this instance is irrelevant in that all of this information, except arguably the Dorchester decision, was not available at the time this contract was entered into. The only available authority which Petitioner

could rely upon at that time were a series of interpretations from **1979** through **1982** by HUD and OILSR supporting its position.

As the **1979** Guidelines indicate, the Guidelines cannot possibly address the "myriad of possibilities occurring in land development and land sales activity." (Petitioner's Initial Brief Appendix at **36).** Accordingly, HUD has authorized the issuance of Advisory Opinions dealing with specific situations. In this instance, a long line of Advisory Opinions dealing with the exact language at issue in the instant case have been presented to HUD. HUD has consistently set forth its opinions, as demonstrated in Petitioner's Initial Brief, that the language set forth in the contract in the instant case meets the exemption requirements of ILSA. (Petitioner's Initial Brief Appendix at **24-27, 31-34).** Clearly, Petitioner's reliance upon these Advisory Opinions should not have been misplaced.

Petitioner re-emphasizes that HUD, in its final exemption Guidelines issued in **1984,** dealt with the Dorchester case and stated as follows:

> In the case of Dorchester Development, Inc. v. Tema Burk, Schwartz & Nash, **439** So.2d **1032 (1983),** the Court held that there must be an unconditional commitment to complete the condominium units within two **(2)** years and that the remedies available to the purchaser must not be limited. Although the opinion's language was broad, it is HUD's position that the court's concern regarding limitations on remedies was confined to the right of specific performance. [Emphasis supplied]
>
> Guidelines for Exemptions Available Under the Interstate Land Sales Full Disclosure Act, **49** Fed. Reg. **31,375, 31,378 (1984).**

(Petitioner's Initial Brief at 16).

The 1984 Guidelines thus indicated that a contract such as that in the instant case, which provides the remedy of specific performance, complies with the requirements for exemption under ILSA.

REPLY TO ARGUMENT IV OF RESPONDENT'S BRIEF

Respondent attempts to bring before this Court an issue pertaining to the availability of the right of specific performance under the contract in the instant case. This particular issue was not certified by the Fourth District Court of Appeal. Petitioner would therefore urge that this argument is irrelevant, and therefore should be ignored by this Court.

Additionally, the Fourth District Court of Appeal stated in its Opinion as follows:

> The appellate issue presented is whether the limitation in a contract, otherwise covered by the Interstate Act, that the purchaser's remedy in the event of a breach by the seller is restricted to specific performance and that no claim for damages may be pursued disqualifies the contract for exemption from the Act.

(Petitioner's Initial Brief Appendix at 2-3).

The existence or nonexistence of the remedy of specific performance was not an issue for decision before the Fourth District Court of Appeal. The Opinion of the Fourth District assumes, and can only be read to indicate, that the remedy of specific performance was provided in the contract in the instant case.

Respondent has provided, as part of its Appendix to its Answer Brief, the Order On Motions For Summary Judgment in this cause issued by Circuit Court Judge Wennet wherein it is stipulated by all parties that "Paragraph V.B. of the contract

between Plaintiff and Samara affords Plaintiff the right of specific performance in the event of Samara's breach." (Respondent's Answer Brief Appendix at 9). Respondent cannot now take a contrary position.

CONCLUSION

Based upon the above foregoing citations and authority, and Petitioner's Initial Brief, Petitioner urges this Honorable Court: to answer the certified question so as to find that a developer is exempt from 15 U.S.C. 1702(a)(2) of ILSA when the contract for sale provides for completion within two (2) years and affords the buyer the remedies of a return of the deposit or specific performance in the event of a breach by the seller of the two (2) year construction obligation; to overrule both Berzon v. Oriole Homes Corporation, 497 So.2d 670 (Fla. 4th DCA 1986) and the decision rendered by the Fourth District Court of Appeal in the instant case; and to affirm the decision of the trial court in the instant case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief for Petitioner was furnished via U.S. Mail to GLENN M. MEDNICK, ESQ., Gutkin, Miller, Shapiro, Selesner & Shoobe, Attorneys for Respondent, RICHARD MARLOW, **1300** N. Federal Highway, Suite **107,** Boca Raton, Florida **33432,** and BRUCE GOODMAN, ESQ., and KEVIN O'GRADY, ESQ., Ruden, Barnett, McClosky, Schuster & Russell, P.A., Attorneys for Respondent, MIDLANTIC NATIONAL BANK AND TRUST CO., P. O. Box **1900,** Ft. Lauderdale, Florida **33302,** this 26 day of October, **1988.**

SHERR, TIBALLI, FAYNE & SCHNEIDER

By: _____
BRIAN J. SHERR