SUPREME COURT OF FLORIDA

CASE NO.: **72, 927**

IRV DAVID, a/k/a IRVING WEINBERGER,

Petitioner,

V.

HAROLD RICHMAN,

Respondent.

BRIEF OF RESPONDENT

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INTRODUCTION

The Petitioner IRV DAVID shall be referred to herein as "DAVID" or "Defendant". The Respondent, HAROLD RICHMAN, shall be referred to herein as "RICHMAN" or "Plaintiff". The symbol "R" will be utilized to designate the record on appeal. The symbol "App" will be utilized to designate DAVID's Appendix.

This cause arises out of the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida. The subject of this Appeal is an Amended Final Judgment, dated June 17, 1987. Petitioner appeals from the Amended Final Judgment solely as to the denial of his demand for attorneys' fees. The Respondent, cross appeals the award of damages because of an error in the calculations of damages by the Trial Judge.

The Trial Judge and the District Court of Appeal, Third District, properly denied attorneys' fees because it found there was no contract between the parties as there was no meeting of the minds on the essential elements of the purported contract. The District Court of Appeal, Third District, certified the following question to the Supreme Court:

> WHETHER A PARTY IS PRECLUDED FROM CLAIMING ATTORNEY'S FEES UNDER A CONTRACT WHICH HAS BEEN FOUND TO HAVE NEVER EXISTED?

The Trial Judge found that the value of the townhouse had increased by $10,000.00 by RICHMAN's expenditures and that was the measure of betterment due the Plaintiff below, but subtracted therefrom $4,000.00 as the cost for restoration repairs of the townhouse and thereby gave the Plaintiff a net credit for betterments of $6,000.00. The Trial Judge then gave the exact

same cost of restoration credit to DAVID for restoration repair of the unit of $4,000.00. Therefore, RICHMAN has been shortchanged by the sum of $4,000.00 which has been credited to DAVID twice.

STATEMENT OF THE CASE

On August 27, 1979, RICHMAN as the Purchaser and DAVID as the Seller executed a Contract for Sale and Purchase of a town-house condominium unit at a purchase price of $89,900.00. App. 1-3. DAVID refused to close and RICHMAN filed an action for specific performance. R1-11. On March 28, 1980, the Trial Court granted specific performance by summary judgment. R28-29.

RICHMAN obtained possession and assumed the existing first mortgage on the property and made the monthly payments from October 1, 1980 through December 1, 1985. RICHMAN also executed a purchase money note and second mortgage to DAVID which DAVID then assigned to a third party for consideration. RICHMAN made the monthly payments on that purchase money second mortgage from October, 1980 through December 1, 1985.

RICHMAN, in reliance on the summary judgment, took possession of the property and made improvements and repairs in excess of $28,000.00. On March 8, 1983 DAVID filed a Notice of Appeal. R34. On March 13, 1984 the District Court of Appeal of Florida, Third District reversed the summary judgment and remanded the case to the Trial Court for further proceedings. App. 4-5.

On the issue of specific performance after remand the Trial Court entered its final judgment on July 27, 1985 holding that the contract executed by the parties was not formed because there was no meeting of the minds as to all the material elements of the contract. R64-67, App.15-18. The Trial Court held:

" 1. That the contract is ambiguous as to its financial provisions and cannot support a claim for specific performance.

2. That there was no meeting of the minds of the parties as to all the material elements of the contract..." App.17-18.

The Court thereupon denied specific performance, cancelled the outstanding warranty deed to RICHMAN and retained jurisdiction to determine any damages claimed by either party as well as claims for attorneys' fees and costs.

At the subsequent trial, the Court considered the evidence and entered a final judgment on May 11, 1987. R135-137. The Court totalled the credits for each of the parties and in doing so subtracted $4,000.00 from RICHMAN's credits for restoration repairs that DAVID made when he resumed possession but added to DAVID's credits for the same restoration repairs the same $4,000.00 thereby crediting DAVID twice. The Trial Court held:

" Plaintiff paid the first and second mortgage payments for the 61 months he resided in the townhouse and is entitled to recover $396.00 original first mortgage payments and $285.55 second mortgage payments totalling $681.55 for 61 months, giving Plaintiff a credit for mortgage payment of $41,745.55 he paid during the occupancy of the townhouse.

The fair rental value of the townhouse was $830.00 per month for 61 months, totalling $50,630.00 for which Defendant is entitled to credit.

Plaintiff's claim for additional damages resulting from his inability to take possession was heard before the Honorable Sam I. Silver who determined such damages to be $3,852.60. This Court, upon hearing the evidence on repair damages from Plaintiff's inability to take possession, finds the previous award by Judge Silver to be reasonable and affirms this amount as credit to Plaintiff.

The Defendant upon recovering his townhouse, had restoration costs, including a complete replacement of a master bath in which all fixtures had been removed by Plaintiff, of over $7,000.00. The Court finds the reasonable costs required to restore the townhouse as a result of Plaintiff's possession, over and above usual wear and tear of rental unit, to be **$4,000.00.** This amount is a credit to Defendant.

The contract for sale of this unit in **1979** was for **$89,900.00.** The testimony as to value as of December 1, **1985,** in its today's condition was **$99,900.00.** The Court finds this to be the value of the unit after being restored by Defendant, but that the value as of December 1, **1985,** in the condition Plaintiff left the premises was **$95,900.00.**

This would be an increased value in favor of Plaintiff in the amount of **$6,000.00,** attributable to Plaintiff's betterments.

The credits to Plaintiff are:

Mortgage Payments	**$41,574.55**
(Error-should be	**$41,745.55)**
Credit for Repairs	**3,852.60**
Credit for Betterments	**6,000.00**
Total Credit to Plaintiff =	**$51,427.15**
(Should be	$51,598.15)

The credits to Defendant are:

Reasonable Rents	**$50,630.00**
Restoration of Unit	**4,000.00**
Total	**$54,630.00**
Credit in favor of Defendant	$ **3,202.85**
(Should be	**$3,031.85)**

The Court finds the amount of damages to Defendant to be **$3,202.85** after credits are given to both parties." **R159-160**

RICHMAN filed a motion for rehearing calling to the Court's attention the computation error and the **$4,000.00** error. **R138-**

139. DAVID filed a motion to alter or clarify the judgment because it failed to rule on the issue of attorneys' fees. R-140. The Trial Court heard these motions and entered the appealed from Amended Final Judgment, awarding DAVID damages of $3,202.85 plus costs of $840.95 and denying all claims for attorney fees. R158-161, App.6-9. DAVID appealed the denial of attorney fees and RICHMAN appealed the damage computation. R153-154. On appeal the District Court of Appeal of Florida, Third District, rendered its decision on May 31, 1988 affirming the Trial Court's Judgment but certifying the following question to the Florida Supreme Court: (App.10-13)

> WHETHER A PARTY IS PRECLUDED FROM CLAIMING ATTORNEY'S FEES UNDER A CONTRACT WHICH HAS BEEN FOUND TO HAVE NEVER EXISTED?

DAVID then filed his Petition for Review before the Florida Supreme Court.

SUMMARY OF ARGUMENT

With regard to DAVID'S appeal, the Trial Court's denial of attorney's fees to DAVID should be affirmed because no "contract" existed between the parties, thereby precluding any basis for an award of attorney's fees. The findings of the Trial Court lead to the inescapable conclusion that there was no meeting of the minds between the parties and, therefore, no contract ever existed between them. Since DAVID'S claim for attorney's fees is based solely on the Contract which was found to have never existed, no obligation was created between the parties and, therefore, an award of attorney's fees is precluded.

With regard to RICHMAN'S cross appeal the Trial Court should be reversed because of the mathematical errors on the face of the Amended Final Judgment which incorrectly credited DAVID twice for the same amount, to wit: $4,000.00 was deducted from the $10,000.00 betterment credit that the Trial Judge found RICHMAN was entitled to (making a net credit of only $6,000.00), and the Trial Judge then in his final computations, again credited DAVID by giving him a credit for restoration repairs of $4,000.00.

POINTS INVOLVED ON APPEAL

POINT I:

WHETHER A PARTY IS PRECLUDED FROM CLAIMING ATTORNEY'S FEES UNDER A CONTRACT WHICH HAS BEEN FOUND TO HAVE NEVER EXISTED?

POINT 11:

WHETHER THE TRIAL COURT ERRED IN ITS COMPUTATION OF CREDITS BETWEEN THE PARTIES?

ARGUMENT
POINT I

A PARTY IS PRECLUDED FROM CLAIMING ATTORNEY'S FEES UNDER A CONTRACT WHICH HAS BEEN FOUND TO HAVE NEVER EXISTED,

In Florida, attorneys' fees cannot be awarded to a successful litigant in any cause unless authorized by contract or statute. Codomo v. Emanuel, 91 So.2d 653 Fla. 1956; and Riviera v. Deauville Hotel Employee Service Corp., 277 So.2d 265 Fla. 1973. An award of attorneys' fees to a defendant who prevails in an action for specific performance can only be made where there is a contract that provides for attorneys' fees to the prevailing party. Where entitlement to attorneys' fees rest solely on a "contract" which is found to have never existed, an award of attorneys' fees is precluded. See Weiner v. Tenenbaum, 452 So.2d 986 (Fla. 3rd DCA 1984), Leitman v. Boone, 439 So.2d 318 (Fla. 3rd DCA 1983), Douglass v. Jones, 422 So.2d 352 (Fla. 5th DCA 1982).

In Weiner v. Tenenbaum, 452 So.2d 986 (Fla. 3rd DCA 1984), petition for review was dismissed by the Florida Supreme Court 458 So.2d 274 (Fla. 1984). The Third District Court of Appeals reaffirmed its holding in Leitman v. Boone, 439 So.2d 318 (Fla. 3rd DCA 1983), which held that where the purchaser's action for specific performance of a contract for sale was denied upon the grounds that the parties failed to form a contract and, therefore, no legal obligation was created between the parties, no obligation existed to justify an award of attorneys' fees.

In the instant case the Trial Court, by its Final Judgment of July 23, 1985 held that there was no meeting of the minds of the parties as to all the material elements of the contract. The Trial Court did not declare the purported contract between the parties unenforceable but held that there was no contract between the parties because there was no meeting of their minds as to the essential terms. It is hornbook law that there can be no contract where there is no meeting of the minds on the essential terms.

> "In order that there be a contract, the parties must have a definite and distinct intention, common to both and without doubt or difference. Until all understand alike, there can be no assent, and therefore no contract. Both parties must assent to the same thing in the same sense, and their minds must meet as to all the terms." Webster Lumber Co. v. Lincoln, (1927) 94 Fla. 1097, 115 So. 498, 502. Accord: Enid Corp. v. Mills (Fla., 1958), 101 So.2d 906; Minsky's Follies of Florida v. Sennes (5 Cir., 1953), [redacted] v. Atlas Movin & Stora e [redacted] Fla., 161, 125 So.2d 903; Fincher v. Belk-Sawyer Co. (Fla., 1961), 127 So.2d 130.

Therefore no contract was formed between the parties as a result of the lack of the meeting of the minds and no legal obligation was created, consequently, no award of attorneys' fees could be made based upon the purported agreement. Thus, the Trial Court and the District Court of Appeal, Third District, should be affirmed on the denial of attorney's fees to DAVID.

POINT II

THE TRIAL COURT ERRED IN ITS COMPUTATIONS OF CREDITS BETWEEN THE PARTIES IN THE AMOUNT OF FOUR THOUSAND AND NO/100 ($4,000.00) DOLLARS AND RICHMAN WAS SHORT-CHANGED BY THIS AMOUNT.

The Trial Judge credited DAVID two times with the same $4,000.00 credit for restoration repairs of the unit. More specifically, the Trial Court deducted from RICHMAN's credits for betterments $4,000.00 for the decrease in the value of the premises because of needed restoration repairs. The Trial Judge gave RICHMAN a $6,000.00 credit for betterment instead of the $10,000.00 that he found RICHMAN was entitled to. DAVID then received a credit for restoration of the unit of $4,000.00 and RICHMAN was thus charged with the same entry and short-changed by **$4,000.00.**

This error in the calculation amounts to $4,000.00 and thus, RICHMAN was entitled to a recovery of **$797.15** and would then be the prevailing party entitled to recover his costs. For these reasons, the errors in calculations must be corrected and this Court should reverse that portion of the Amended Final Judgment with directions to enter a second amended final judgment awarding RICHMAN **$797.15** together with his costs from DAVID.

CONCLUSION

Since there was no contract formed between the parties there was no right to an award of attorneys' fees based thereon and that portion of the Amended Final Judgment should be affirmed. Because the Trial Judge made mathematical errors in his calculations of damages, that portion of the Amended Final Judgment should be reversed with directions to enter a second amended final judgment correcting those errors and entering an award to RICHMAN in the amount of $797.15 together with his costs.

Respectfully submitted,

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By: _____
ALLAN M. GLASER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 27 day of September, 1988 to GREENFIELD AND DWAL, 1680 N.E. 135th Street, North Miami, Florida 33181.

By: 
ALLAN M. GLASER

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