SUPREME COURT OF FLORIDA

CASE NO. 72,927

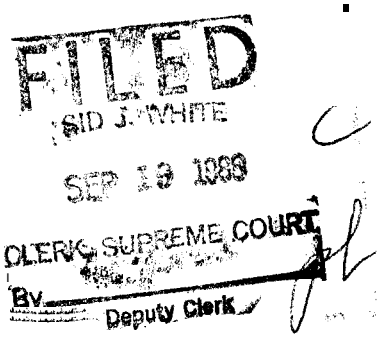
IRV DAVID, etc.,

Petitioner,

vs.

HAROLD RICHMAN,

Respondent.



PETITIONER'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE

The Respondent, Harold Richman, ("Richman"), as the Buver, and Petitioner, IRV DAVID a/k/a IRVING WEINRERGER, ("DAVID"), as the Seller, executed a contract for Sale and Purchase of a townhouse condominium unit at a purchase price of $89,000.00 (APP. 1-3).

The sale did not take place on November 1, 1979, as required by the contract and Richman filed a specific performance action to enforce the contract, executed by both parties, and requested attorney's fees as provided by the contract to the prevailing party (R. 1-11).

On March 28, 1980, the trial Court entered a Summary Judgment for Specific Performance in favor of Richman (R. 28) and by subsequent Orders directed conveyance of'the property (R. 29). Thereafter, a partial Order awarding Richman possession and damages in the amount of $8,900.00, $3,900.00 for out of pocket expenses, and $5,000.00 damages for affecting Richman's lifestyle, and retained jurisdiction to assess additional damages (R. 30-32).

On October 18, 1982, a trial Order was entered awarding Richman $3,852.60 additional damages plus $9,000.00 attorney's fees (R. 33) for a total award of $21,752.60.

The Third District Court of Appeal reversed the Summary Judgment and all subsequent Orders. David v.

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Richman, 446 So.2d 1140 (Fla. 3d DCA 1984) because all Orders entered were permeated by the alleged fraud of Richman as related in the Opinion (APP. 4-5).

Upon remand the trial Court bifurcated the issue of specific performance from the damage claims made by both parties.

After a trial on the issue of specific performance, the trial Court entered its Final Judgment for DAVID on this issue and retained jurisdiction for trial on damages and to award attorney's fees (R. 64-67; APP. 15-18).

Thereafter, a trial on damages was heard and an Amended Final Judgment was entered awarding DAVID $3,202.85 in damages, costs of $840.95 and denying DAVID's request for attorney's fees (R. 158-161; APP. 6-9).

The contract which both parties executed and upon which Richman sued on for specific performance and requesting attorney's fees contained the following provision (Paragraph "T"; APP. 3):

> "In connection with any litigation including appe11ate proceedings arising out of this contract, the prevailing party shall be entitled to recover reasonable attorney's fees and costs.. .."

Appeal was taken by DAVID on the denial of attorney's fees. Richman cross-appealed on the amount of damages.

The Third District Court of Appeal entered its Opinion affirming DAVID's damage award and affirmed the

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trial Court's denial of DAVID's request for attorney's fees for the reason it found that the contract executed by both parties never existed (R. 162-166; APP. 10-14).

In affirming the denial of fees the Third District recited that it was aware that its holding conflicted with the Fourth District Court's decision in Sousa v. Palumbo, 426 So.2d 1072 (Fla. 4th DCA 1983) and in so recognizing, certified the following question to this Court:

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

This question is now before this Court for consideration.

SUMMARY OF ARGUMENT

That the denial of attorney's fees to the prevailing Defendant in an action filed by the Plaintiff to enforce a written contract, executed by both parties, which contained a provision for attorney's fees to the prevailing party, becomes existing if the Plaintiff prevails, but becomes a contract which never existed if the Defendant prevails, is based on legal gymnastics and a false interpretation of when a contract is actually nonexisting and one that is not enforceable.

In this case there was an existing contract executed and accepted by both parties. The trial Court found the contract to be in existence and granted Summary Judgment

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for Richman and awarded him $9,000.00 attorney's fees under the attorney's fees provision of the contract. Upon reversal and trial the trial Court denied specific performance, primarily on the determination that Richman did not have the financial ability to close on November 1, 1979, as required by the contract, and was not excused from having the funds to pay the purchase price on that date (R. 64-67).

The trial Court recognized there was a contract, but found it to be unenforceable. The Third District found the contract never existed, in spite of it being an actual document executed and accepted by both parties.

Petitioner will show that the cases cited by the Third District in support of their finding that "the contract never existed" are cases where the Court found that one party did not execute or accept the offer therefore the contract never came into existence.

ARGUMENT

ISSUE I

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

The above issue is as worded by the Third District Court of Appeals in its certification to this Court.

The District Court in its Opinion first finds there was a contract between the parties then has the contract

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vanish as never having existed on its finding that the trial Court found there was no meeting of the minds of the parties as to all the material elements of the contract.

In the case of Sousa v. Palumbo, 426 So.2d 1072 (Fla. 4th DCA 1983) cited as being in conflict with its instant opinion, the Plaintiff sued on a contract for specific performance which required executions by all six stockholders before it became enforceable. The Fourth District found this contract to be unenforceable against the sellers because it was only executed by three of the six stockholders.

Under the theory of the Third District supported by the cases cited in its opinion, the Sousa contract never existed because it was never properly executed or accepted.

The Third District cites the following cases to support its opinion that the contract never existed and attorney's fees for the prevailing Defendant are precluded. Weiner v. Tenebaum, 452 So.2d 986 (Fla. 3d DCA 1984), review dismissed, 458 So.2d 274 (Fla.1984); Leitman v. Boone, 439 So.2d 318 (Fla. 3d DCA 1983); accord Gibson v. Courtois, 509 So.2d 962 (Fla. 2d DCA 1987); Douglass v. Jones, 422 So.2d 352 (Fla. 5th DCA 1982); Webster Lumber Co. v. Lincoln, 99 Fla. 1097, 115 So. 448, 502 (1927); accord Strong & Trowbridge Co. v. H. Barns & Co., 60 Fla.

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153, 54 So. 92 (1911); Enid Corp. v. Mills, 101 So.2d 906 (Fla. 3d DCA 1958).

In reviewing these cases it will be found that in each case the contract had not been executed or accepted bv one of the parties. In the three early cases cited, Webster Lumber Co., Strong v. Trowbridge Co., and Enid Corp., supra, it will be found that in each case the contract had not been executed or accepted by one of the parties, nor did the Court have the issue of attorney's fees to the prevailing party to decide. In Webster Lumber Co., the Court found that there was no meeting of minds, while the parties are merely negotiating and found that one party never accepted the proposal of the other. In Strong the Court again found there was no contract because there was no acceptance or execution of the proposed contract.

The Enid case is another case where an oral contract was never executed or accepted by both parties as they could not agree as to who would be responsible for payment to raise the roads in a subdivision if they settled.

In reviewing Douglas, Leitman, Weiner and Gibson, supra, all of these cases contained a provision for attorney's fees to the prevailing party to the litigation arising out of the contract. Attorney's fees were denied to the prevailing partv on the Court's determination the

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contract never existed. In Douglass (1982) the Fifth District found that the Plaintiff tenants filed suit for specific performance against the Defendant landlord on an option to buy contained in the lease between the parties. The lease term ended and the tenant continued on a month to month basis. Later the tenant executed a lease renewal with the husband of the separated landlord, but not with the wife. Tenants sued for specific performance on the renewal lease, not executed by the wife. The Fifth District said "not only was the lease renewal agreement ineffective because it was untimely, it was ineffective because it was not executed by the Appellant (p. 354)." The Court further said that because the lease had expired, the right to attorney's fees under the original lease'was extinguished.

The Third District in Leitman (1983) as in Douglass found that the contract never existed because the instrument had not been signed. The trial Court's finding in Leitman was that the offer made by the Plaintiffs was not accepted, that is, no contract was ever formed." (p. 320). On these findings the Third District, by a majority opinion, found the contract had never existed and denied the prevailing party attorney's fees. The dissenting opinion relied on common sense, practicability and estoppel and said:

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> In any case, the issue before us is not a metaphysical one but the very practical one of the consequences of the appellants' action on an instrument which states in so many words that if one does not succeed in that enterprise, he must pay the attorney's fee of his victorious opponent. It seems clear to me that by suing upon it, the plaintiffs who themselves signed the instrument, necessarily subjected themselves to the effect of the attorney's fee clause of that same writing. Since that provision itself states that the prevailing party to any action arising out of this contract is entitled to those fees, it can make no difference which side winds the case; in this context, the word "contract" must mean the paper sued upon, irrespective of what the litigation establishes is its legal effect. Looking at it in a somewhat different way, by claiming that the document was enforceable and thereby inducing detrimental reliance upon the position by requiring the defendants to defend against it, the plaintiffs satisfied all the elements of an "estoppel." See 28 Am.Jur.2d Estoppel and Waiver § 27 (1956). They must not now, having lost, be heard to say that the suit did not arise "under this contract" after all.

The majority in Lietman said: "The distinction between no contract at all and a contract that is unenforceable makes all the difference here...."

In this case, we have an existing contract executed and accepted by both parties, relied upon by Plaintiff to file suit claiming it to be enforceable requiring the Defendant to defend, and go through three trials and two appeals.

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Is such an executed, accepted and relied on contract a contract that never existed because of a finding that there was no meeting of the minds of the parties as to all the material elements of the contract, or is the contract an unenforceable contract? Under the Third District's Opinion, in Leitman if a contract is sued upon, and is found never to have legally existed, attorney's fees are not available to the Defendant being sued, but if it is found to be unenforceable, the prevailing party, Defendant, is entitled to fees. The dissent in Leitman is of the opinion that when a party files suit on a contract to enforce its terms, that the prevailing party is entitled to fees regardless of what the Court determines its legal effect, either never formed, never existed or unenforceable. The dissent is the only practical and justiciable solution to the issue of awarding attorney's fees, by holding the word "contract means the paper sued upon, irrespective of what the litigation establishes is its legal effect.

The Third District in Weiner, supra, (1984) again found the contract "sued upon'' never existed because the offer was never accepted by the seller; therefore, the contract never existed and an award of fees is precluded.

The Gibson case, supra, cited by the Third District as being in accord with its opinion in Leitman is another

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action by a Plaintiff suing on a contract that had never been executed or accepted by the Defendant, Gibson, just followed Weiner and Leitman and recognized that it was in conflict with Sousa v. Palumbo, supra.

The Third District did not cite any authority which found a contract, "never to have existed", when it was executed and accepted by both parties. All the authorities cited holding the contract "never having existed" have been under facts which the Court found that the contract was not executed or accepted by one of the parties and no contract was ever formed or came into existence.

There are no Florida appellate decisions or any in other jurisdictions, this attorney has been able to find, where a Plaintiff sued on a fully executed and accepted contract, providing for fees, that an appellate Court has made a finding the contract never existed and upon such finding denied fees to the prevailing party.

The Third District apparently changed their thinking in Weiner and Leitman from one of their earlier opinions. In Ross v. Hacker, 284 So.2d 399 (Fla. 3d DCA 1973), in its Opinion, said:

> The trial judge did not set forth the ground for the denial of attorney's fees in his order. However, the Plaintiff-appellee contended before the court that as a result of the contract being cancelled prior to its

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> assignment, the provision for attorney's fees ceased to exist; We hold that plaintiff is estopped to maintain such a position in which he has sought specific performance of a contract providing for attorney's fees.

This holding is in direct conflict with its later holding in Weiner and Leitman. In Leitman the majority holds that there is no estoppel and that:

> One cannot seriously contend that a litigant cannot claim there is a contract and say to a court "if, however, you find against me on my claim, then based on that finding, you cannot award attorney's fees to my opponent."

This same Court in Hacker and the Fourth District in Sousa seriously contended that a litigant could not claim under a contract and then sav, "if, however, *you* find against me on my claim, then based on that finding, you cannot award attorney's fees to my opponent."

Such reasoning is contrary to all precepts of equal justice before the law and is contrary to the law of estoppel as established bv this Court in Palm Reach Co. v. Palm Beach Estates, 148 So. 544 (Fla.1933). In this case this Court held that one who states one set of facts for one purpose and in the same suit deny such allegations and set up a new and different set of facts wholly inconsistent therewith for another purpose is estopped to assume in a pleading filed in a later phase of that same case, any other or inconsistent position toward the same parties

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and subject matter. This case was followed by the First District in the case of Federated Mutual Implement and Hardware Ins. Co. v. Griffin, 237 So.2d 38 (Fla. 1st DCA 1970).

It is clear that Richman in the instant case assumed in his pleadings that the contract was a valid enforceable contract and that he would be entitled to attornev's fees. He obtained a Summary Judgment in his favor and claimed he was entitled to attorney's fees from David and was awarded fees. Upon reversal and losing his action under the contract, he then changes his position and says since the Court found against me, I now claim the contract never existed and the Court cannot award attorney's fees to David. This situation is on all fours with Palm Beach Co., Federated Mutual, Hacker and Sousa, in holding the application of estoppel is available in cases such as this.

The First District in Federated Mutual summed up the estoppel rule by saying (p. 42):

> In its final analysis, the foregoing rule of estoppel is founded upon legal and equitable concepts of justice under the law, or perhaps on such popular expressions as "you can't blow both hot and cold at the same time" or "you can't have your cake and eat it, too." The quintessence, however of this estoppel rule is probably the integrity of our system of justice.

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The Third District holding that estoppel is not applicable, and that a Plaintiff has the perfect right to sue on one assumption, then after losing, change his pleading to assume an opposite position to the detriment of the Defendant, is an impracticable application of the law, denies the legal and equitable concept of equal justice and is a denial of the integrity of our system of justice.

In reviewing the Third District's decisions and authorities it is noted that the Opinions fail to even suggest how the denial of fees is justiciable or fair. To deny fees to the prevailing party to a contract the Plaintiff sues on, which is legally determined to have never existed, which he forced the Defendant to defend', is a denial of due process and equal rights under the law. The Defendant must pay for his defense, but under the theory of the Third District, upon prevailing, he is not entitled to attorney's fees and is left with no recourse by which he can collect for the damages he has sustained.

The contract in this case was not a non-existing contract, but an existing one which was unenforceable. The Third District in Leitman (p. 323) stated:

> "Had an agreement been found to exist, but merely found to be unenforceable the Defendants would have been entitled to attorney's fees."

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When does a contract executed and accepted by both parties become nonexisting or unenforceable? The Supreme Court in Topper v. Alcazar Operating Co., 35 So.2d 392 (Fla. 1948) said:

> It is fundamental that specific performance will not be enforced where the contract is not definite and certain as to essential terms and provisions, and is incapable of being made so by the aid of legal presumptions or evidence of established customs.

There are many specific performance cases which deny enforcement when the terms and conditions are vague, indefinite, no consideration, fraud, lack of mutuality, or not a meeting of minds on some element. However, there is no case denying specific performance on an executed and accepted contract because of a finding of one of the above mentioned infirmities that the contract never existed, only that the contract was unenforceable. The contract in the instant case did exist, but was unenforceable.

If it is the law that when a Plaintiff brings an action on a contract, found never to have existed that he Defendant has no right to attorney's fees, then, in this event, the Supreme Court should find as a matter of law, the Plaintiff filed an action completely devoid of merit and fees should be awarded under Fla.Stat. 57.105.

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CONCLUSION

The question certified by the Third District should be answered that a party is not precluded from claiming attorney's fees under a contract which has been found to have never existed, under circumstances as in this case.

Attorney's fees should be allowed to a prevailing Defendant, defending against a written contract sued on by a Plaintiff, seeking enforcement and fees, regardless of whether each party executed the contract and no contract was ever formed or ever existed, or whether each party did execute the contract and the Court determined its legal effect to be either a contract that never existed or one that was unenforceable. A Plaintiff should not be allowed to have a free shot at suing to enforce a contract, claiming attorney's fees and then upon losing, change his position and say the contract was no good, therefore, Defendant, go your way and pay your own attorney's fees.

Respectfully submitted,

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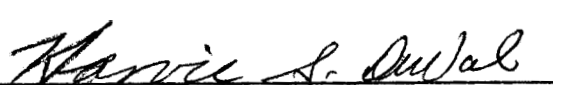
By 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was this 16th day of September, 1988, mailed to:

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