75,806

IN THE SUPREME COURT OF FLORIDA

CASE NO.

DANIEL LEFEMINE and
CATHERINE A. LEFEMINE,

Petitioners,

vs.

JUDITH W. BARON and
S & N KURASH, INC.,

Respondents.

ON PETITION FOR DISCRETIONARY REVIEW

PETITIONERS' BRIEF ON JURISDICTION

LAW OFFICES OF JOE N. UNGER, P.A.
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and

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INTRODUCTION

Petitioners invoke the jurisdiction of this Court based upon the express and direct conflict between the decision of the Fourth District Court of Appeal in the instant case, Lefemine v. Baron, 15 FLW D261 (Fla. 4th DCA January 24, 1990) and the decisions of the District Court of Appeal of Florida, Third District, in Cortes v. Adair, 494 So.2d 523 (Fla. 3d DCA 1986) and Pappas v. Derringer, 145 So.2d 770 (Fla. 3d DCA 1962). Review is sought under Article V, Section 3(b)(3), Florida Constitution.

STATEMENT OF THE CASE AND FACTS

The question before the District Court of Appeal involved a default provision contained in a real estate contract which, upon default by the buyer, permitted the seller to retain the deposit as liquidated damages or, at seller's option, to proceed in law or equity "to enforce his rights under the Contract." Upon default by the seller, the deposit was to be returned upon demand or the buyer at his option could proceed at law or equity "to enforce his rights under the Contract."

The decision of the District Court of Appeal notes that the buyer defaulted ". . .and we find nothing offensive in the language quoted." The provision governing default by a buyer was found enforceable under those decisions[1] which provide that where damages as a result of a breach of a real estate contract

[1] Hutchison V. Tompkins, 259 So.2d 129 (Fla. 1972); Hooper v. Breneman, 417 So.2d 315 (Fla. 5th DCA 1982) and Bruce Builders. Inc.c v. Goodwin, 317 So.2d 868 (Fla. 4th DCA 1975).

are not ascertainable at the time the contract is drawn, the seller may retain a cash deposit if the purchaser fails to perform and the provision is not a penalty.[2]

As indicated in the district court opinion, the case primarily relied upon by petitioners was Cortes v. Adair, 494 So.2d 523 (Fla. 3d DCA 1986). With reference to the Cortes decision, the district court states: ". . .frankly, we are not sure what to make of that decision. . .In any event, to the extent that it is in conflict with our conclusion in the case sub judice, we reject the rationale of **Cortes**." It is this acknowledged conflict between the instant decision and Cortes which is the basis of seeking this Court's jurisdiction.

ISSUE INVOLVED

A PROVISION IN A REAL ESTATE CONTRACT WHICH GIVES TO THE SELLER THE OPTION, UPON DEFAULT BY THE PURCHASER, TO RETAIN THE DEPOSIT AS LIQUIDATED DAMAGES OR BRING AN ACTION AT LAW FOR ACTUAL DAMAGES IS UNENFORCEABLE.

SUMMARY OF ARGUMENT

A contractual provision which makes a defaulting party pay the actual damages or lose a security deposit, depending upon which amount is greater, is not enforceable as a matter of law. Such an option, whether in a real estate sales contract (Cortes v. Adair, supra), or in landlord-tenant lease (Pappas v. Derringer, supra), destroys the mutuality of the agreement.

[2]Under these same authorities, the district court determined that the deposit paid, ten percent of $385,000, was not unconscionable.

ARGUMENT

A PROVISION IN A REAL ESTATE CONTRACT WHICH GIVES TO THE SELLER THE OPTION, UPON DEFAULT BY THE PURCHASER, TO RETAIN THE DEPOSIT AS LIQUIDATED DAMAGES OR BRING AN ACTION AT LAW FOR ACTUAL DAMAGES IS UNENFORCEABLE.

The uncertainty of the District Court of Appeal as to what to "make of" the decision in Cortes V. Adair, 494 So.2d 523 (Fla. 3d DCA 1986) is understandable because it is in conflict with the conclusion in the instant case. The real estate contract here has the precise provision and objectionable alternative given to the seller to either retain the deposit or bring suit for damages.

It is this option which is not enforceable as a matter of law (no matter what the contract provides as far as remedies upon default by the seller.) This is the determination of the Cortes case with which the District Court in the instant case did not agree and refused to follow.

Cortes relies upon the decision in Pappas V. Derringer, 145 So.2d 770 (Fla. 3d DCA 1962) to support the determination that giving to seller the option to keep a deposit or sue for damages is an invalid provision. Pappas examined the question of the validity granted to a lessor to declare a security deposit as liquidated damages or require the lessee to pay actual damages, whichever was greater:

> "We think that this option destroys the mutuality of the agreement as to perspective damages....
>
> * * * *

> It appears from each of the cases cited that an option granted to the lessor to either take the stipulated amount (security deposit) as damages or to refuse to be limited by that amount and thus become entitled to a greater amount of damages, destroys the character of the forfeiture as agreed damages and the forfeiture becomes a **penalty."** Pappas V. Derringer, supra at pages **772-773.**

Here, as in Pappas and Cortes the option is granted to the seller to either retain the deposit as damages or bring suit for a greater amount of damages. This option destroys the character of the contractual provision as liquidated damages and constitutes a penalty under the cases cited. The holding of the District Court of Appeal to the contrary expressly and directly conflicts with the decisions in Cortes and Pappas.

CONCLUSION

It is seldom that a District Court of Appeal acknowledges a conflict with the decision of another District Court of Appeal and yet fails to certify the question to this Court in order to resolve that conflict. That is precisely what occurred in the instant decision and the candid admission of conflict is easily understood. There is unquestionably a conflict in the law of Florida regarding contractual default provisions which permit a seller of real property to either retain a deposit as liquidated damages or bring suit for actual damages, whichever is greater.

This conflict is of no small consequence to the real estate industry in the State of Florida. Many contracts contain this alternative given to the potential seller.

Whether or not a similar alternative is given to a perspective purchaser, as in the instant case, does not change the result.

There is a conflict in the law of Florida, as acknowledged by the District Court of Appeal, and clear basis exists for this Court to accept jurisdiction to resolve this conflict. Otherwise, the current confusion will continue to plague both buyers and sellers of real property in this State. Jurisdiction should be accepted.

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BY: _____
JOE N. UNGER
Counsel for Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by mail upon Joseph L. Schneider, Esquire, 1720 Harrison Street, Suite 1805, Hollywood, Florida 33020; and Peter Strelkow, Esquire, 502 Capital Bank Building, 1666 Kennedy Causeway, North Bay Village, Florida 33141-4196, this 9th day of April, 1990.