IN THE SUPREME COURT OF FLORIDA

CASE NO. **75,806**

DANIEL LEFEMINE and
CATHERINE **A.** LEFEMINE,

Petitioners,

VS.

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

Respondents.

BRIEF OF PETITIONERS ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Petitioners, prospective purchasers of a house and lot in Hallandale, Florida, appealed from a Second Amended Final Judgment. (R.403-405) The action in the trial court sought return of the $38,500 deposit paid in connection with the purchase. The seller, Judith Baron, counterclaimed to retain the deposit. (R.196-197) The broker, s & N Kurash, Inc., cross-claimed against the seller for one-half of any recovery made under the seller's counterclaim. (R.207-209)

After a non-jury trial, the trial judge ruled in favor of the seller on her counterclaim as well as the broker on the cross-claim, finding seller and broker each to be entitled to one-half of the $38,500 deposit. The relevant findings by the trial court were that the Contract for Sale and Purchase of Real Property dated August 10, 1985, governed the rights and duties of the parties; the plaintiffs (buyers) did not comply with their duties of good faith and due diligence set forth in the contract and thus breached its material terms; and that the liquidated damages clause set forth in the contract was enforceable.

A provision in the contract (Plaintiff's Exhibit 12) required the buyer to apply for and make a good faith, diligent effort to obtain a mortgage loan for that portion of the purchase price which remained after deducting the down payment and cash at closing. At trial the Lefemines sought to prove that despite a good faith, diligent effort to secure financing from two banks, they could not do so because their income for the two years preceding the loan request was

insufficient to meet the banks' criteria. (Tr.26, 35-36, 38, 39, 41, 42)

Both the seller and broker were seeking to prove that diligent efforts to secure a loan were not made by the purchasers who failed to supply necessary financial data (primarily tax returns) to the banks. (Tr.5, 53, 127, 128, 135, 139) The trial judge found that the purchasers did not comply with the duty of good faith and diligence "and thus breached the material terms" of the contract. (R.403) Based on this finding and the determination that the liquidated damage clause was enforceable, the $38,500 down payment was awarded to the seller and the broker.

On appeal, the Fourth District Court of Appeal affirmed the determination of the trial court that the default provision in the subject real estate contract was enforceable as liquidated damages. (Appendix 1) The decision quotes the contractual default provision:

> "DEFAULT:
>
> 1. DEFAULT BY BUYER: If buyer fails to perform the Contract within the time specified, the deposit(s) made or agreed to be made by Buyer may be retained or recovered by or for the account of Seller as liquidated damages, consideration for the execution of the Contract and in full settlement of any claims; whereupon all parties shall be relieved of all obligations under the Contract: or Seller, at his option, may proceed at law or in equity to enforce his rights under the Contract.
>
> 2. DEFAULT BY SELLER: If, for any reason other than failure of Seller to make title marketable after diligent effort, Seller fails, neglects or refuses to perform the Contract, all deposit(s)

> made by Buyer shall be returned upon demand; or Buyer, at his option, may proceed at law or in equity to enforce his rights under the Contract.

The decision states that there was no question the buyer defaulted and the quoted language was enforceable. The decision further finds that the amount forfeited, $38,500, was not unconscionable since ". . .only ten percent of the $385,000 purchase price was retained by the seller and one-half of that had to paid to the real estate broker for his services."

The decision rejects the rationale of the Third District Court of Appeal in Cortes v. Adair, 494 So.2d 523 (Fla. 3d DCA 1986) ". . .to the extent that it is in conflict with our conclusion in the case sub judice. . . ." Cortes found a similar buyers default provision to be a penalty. (Appendix 2).

These proceedings followed. This Court accepted jurisdiction based upon an asserted conflict with the Cortes decision and Pappas v. Derringer, 145 So.2d 770 (Fla. 3d DCA 1962).

POINTS ON APPEAL

POINT I

> WHETHER THE TRIAL AND APPELLATE COURTS ERRED IN DETERMINING THAT THE PROVISION OF A CONTRACT FOR SALE AND PURCHASE OF REAL PROPERTY WHICH GOVERNED DEFAULT BY THE BUYER WAS ENFORCEABLE AS A BONA FIDE LIQUIDATED DAMAGE PROVISION RATHER THAN UNENFORCEABLE AS A PENALTY CLAUSE.

POINT II

WHETHER THE TRIAL AND APPELLATE COURTS ERRED IN UPHOLDING THE VALIDITY OF A CONTRACTUAL DEFAULT CLAUSE WHERE, ASSUMING THE PROVISION WAS PROPERLY ONE FOR LIQUIDATED DAMAGES ITS ENFORCEMENT IS UNCONSCIONABLE.

SUMMARY OF ARGUMENT

An option granted to the seller of real property in a contract of sale to either take a stipulated amount (security deposit) as damages or to sue for potentially a greater amount of damages destroys the character of the forfeiture as agreed damages and makes it a penalty. This option granted either is contrary to the legal concept of liquidated damages.

Finding that the amount forfeited was not unconscionable because it only constituted ten percent of a *$385,000* purchase price, one-half of which had to paid to a real estate broker, is an inequitable result achieved through mathematical calculation of a percentage rather than the particular facts of this case. The unconscionability of forfeiting *$38,500* cannot be equitably resolved by mechanical reference to the percentage the forfeited amount bears to the total purchase price.

ARGUMENT

POINT I

THE TRIAL AND APPELLATE COURTS ERRED IN DETERMINING THAT THE PROVISION OF A CONTRACT FOR SALE AND PURCHASE OF REAL PROPERTY WHICH GOVERNED DEFAULT BY THE BUYER WAS ENFORCEABLE AS A BONA FIDE LIQUIDATED DAMAGE PROVISION RATHER THAN UNENFORCEABLE AS A PENALTY CLAUSE.

It is the accepted law of Florida that where damages

which parties could expect as a result of a breach of contract are not readily ascertainable as of the time the contract is drawn up, a liquidated sum (usually the amount of the down payment in a real estate transaction) can be stipulated as liquidated damages to be retained by the seller in the event the buyer defaults under the contract. Hutchison v. Tompkins, 259 So.2d 129 (Fla. 1972). This rule is subject to the exception that equity may preclude forfeiture if the amount retained as liquidated damages would be unconscionable in light circumstances existing at the time of the breach. Hutchison v. Tompkins, supra. In the example cited in the Hutchison case, the parties agreed to a liquidated damage provision of $100,000, the purchaser later repudiated the contract, and the vendor resold the property to another resulting in a loss of only $2,000.

The significant part of the instant agreement between the parties gives to the seller the option to retain as liquidated damages the amount of the deposit paid by the potential purchaser or to sue the purchaser for actual damages. Clearly, if the actual damages envisioned by a seller upon default by a potential purchaser are in excess of the amount designated as liquidated damages, the option to sue and recover actual damages would be exercised. It is this option aspect of the default provision which is inconsistent with the concept of pre-determined, agreed upon damages--liquidated damages.

In Kanter v. Safran, 68 So.2d 553 (Fla. 1953), the court found it "apparent" that the parties to a lease agreement did

not intend to liquidate their damages by stipulating for the forfeiture of a deposit since the default provision states that the lessors could call upon the lessee to respond for damages should the actual damages exceed the amount of the security fund.

In Pappas V. Derringer, **145** So.2d 770 (Fla. 3d DCA 1962), a lessor could declare a security deposit as liquidated damages or require the lessee to pay actual damages whichever was greater:

> "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 the damages, destroys the character of the forfeiture as agreed damages and the forfeiture becomes a penalty." Pappas V. Derringer, supra at page 773.

In Cortes v. Adair, **494** So.2d **523** (Fla. 3d DCA 1986), buyers under a contract for the sale of real property brought an action seeking both the rescission of the contract and return of their **$10,000** deposit. The trial court denied the relief requested and entered judgment for the seller and real estate broker, ordering that, the $10,000 deposit be equally divided as liquidated damages.'

On appeal it was determined that because the liquidated damage clause in the contract was invalid as a matter of law, that portion of the trial court's order which awarded the $10,000 deposit as liquidated damages was reversed.

The default provision enumerating the seller's remedies

'This is precisely what was ordered in the instant case.

in the event of a breach by the buyer is substantially identical to that in the instant case. It provides that if the buyer fails to perform under the contract the deposit could be retained in full settlement of any claim for damages or the seller has the option to proceed at law or in equity to enforce his legal rights under the contract. The decision refers to the default clause as conferring a unilateral benefit on the sellers of choosing the avenue of relief following a breach. The sellers could proceed at law for actual damages or in equity for specific performance or simply elect to keep the security deposit if that amount exceeded actual damages. "Such an option is not enforceable as a matter of law." Cortes v. Adair, supra at pate 524. The court in Cortes cites Pappas v. Derringer for the proposition that a party cannot exploit a provision in a legal document which operates to make a defaulting party pay the actual damages or lose the security deposit depending upon which amount would be greater.[2] The obvious reasoning of the Pappas case is that to grant an option destroys the character of the forfeiture as agreed damages, thus making the forfeiture provision a penalty.

Either the parties to a real estate contract agree to the amount of damages at the outset and create a valid provision for liquidated damages or they do not agree to the amount of damages in advance and permit the seller to retain

[2]Cortes recognizes that the Pappas case involved a lease rather than a sales contract, but finds the default clause in Cortes "similarly defective." Cortes v. Adair, supra at page 525.

the security deposit or to sue for actual damages which may be in excess of the security deposit. The option provision is antithetical to the concept of liquidated damages--damages fixed by the parties at the time of entering into a contract.

It is implied in the decision here reviewed that since the potential purchaser also had an option to either have the security deposit returned or to sue for damages or for specific performance this mutuality of remedy validated both provisions as liquidated damages. Mutuality of remedy does not create a valid liquidated damages provision. This is undoubtedly true whether a contract gives a unilateral or bilateral option provision.

In the event the seller defaults, the buyers have the right to recover their own money (the amount of the deposit) or can sue for specific performance or damages. The right to sue for specific performance could very well be illusory since a change in financial condition since the time of the original contract for purchase could preclude qualifying for the necessary loan. More importantly, if the potential buyer is forced to sue a defaulting seller for damages, it would be necessary to prove loss of bargain and/or replacement of the equivalent aesthetic value which are difficult concepts.

There **is** a right to sue on the part of the buyers, but that right in no way establishes a mutuality when compared with the rights given to the seller in the event the buyers default since the buyers' right to sue is, in many respects illusory. An illusory right is no right at all.

In Blue Lakes Asartments, Ltd. v. Georae Gowing, Inc.,

464 So.2d 705 (Fla. 4th DCA 1985), the seller's default provision permitted the seller to retain the deposit as liquidated damages. The purchaser's provision gave the purchaser the right to have the deposit returned. Neither party was given the right to sue the other. These provisions were found to be "antithetical to the concept of fair dealing in the marketplace" and unenforceable. It was obviously the right to retain the deposit as liquidated damages which created the inherent the unfairness. That inherent unfairness also exists here even though both parties are given the right to sue upon default by the other.

POINT II

THE TRIAL AND APPELLATE COURTS ERRED IN UPHOLDING THE VALIDITY OF A CONTRACTUAL DEFAULT CLAUSE WHERE, ASSUMING THE PROVISION WAS PROPERLY ONE FOR LIQUIDATED DAMAGES, ITS ENFORCEMENT IS UNCONSCIONABLE.

Aside from the fact that the seller's default provision in the contract between the parties is, as a matter of law, a penalty clause which cannot be enforced to permit the seller and broker to retain the deposit, another reason exists for reversing the judgment of the trial court awarding $38,500 of the plaintiffs' money to the defendants.

As stated in Bruce Builders, Inc. v. Goodwin, 317 So.2d 868 (Fla. 4th DCA 1975), citing Hutchison V. Thomkins, 259 So.2d 129 (Fla. 1972), where damages are not ascertainable on the date of the contract a contractual provision for liquidated damages is enforceable unless it is unconscionable to allow the seller to retain a deposit. Stated another way,

"Notwithstanding the facial validity of the liquidated damage clause, if circumstances demonstrate that it would be unconscionable to allow the seller to retain the sum in question as liquidated damages, equity may relieve against the forfeiture." Berndt v. Bieberstein, 465 So.2d 1264, 1265 (Fla. 2d DCA 1985).

Here, the prospective purchasers, the Lefemines, paid a deposit of $38,500, which amounts to 10% of the total price of the $385,000. Assuming default by the potential purchasers, the seller and broker keep the $38,500, and they retain the subject property which was resold at a later date. (Tr.105)

In Bruce Builders, the court examined precedent to see what traditionally had shocked courts' consciences into requiring return of a real estate deposit to avoid an unconscionable result. Deposits of $3,000 and $1,500, ten and fifteen percent of the purchase prices respectively, "created no pangs" and "could be tolerated." Bruce Builders, Inc. v. Goodwin, supra at page 870. A $7,200 deposit which was four percent of the purchase price was not shocking. However, a deposit of $30,000 on a $95,000 contract had been found unconscionable. Hook v. Bomar, 320 F.2d 536 (5th Cir. 1968).

As the court pointed out in the Berndt case, **one** significant factor in determining unconscionability is the amount of money retained vis-a-vis the total contract price. While here the down payment was ten percent of the total price (a percentage not found unconscionable in other cases), the substantial dollar amount of the deposit, the subsequent sale of the property, and the limited financial ability of the

purchasers all indicate that retention of $38,500 by the seller and broker is unconscionable under the particular facts of this case. The Lefemines did **try** to secure a mortgage. They simply had insufficient income to qualify. The contract of purchase was doomed from the outset for reasons beyond the control of the prospective purchasers. To mechanically measure the percentage relationship of the deposit to the purchase price does not equitably demonstrate unconscionability. Ten percent can be, under the proper circumstances, unconscionable. It is unconscionable here to permit respondents to retain petitioners' $38,500.

CONCLUSION

For the reasons and under the authority set forth above, it is respectfully requested that this Court reverse the Second Amended Final Judgment with directions to order that the deposits paid to respondents be returned to petitioners.

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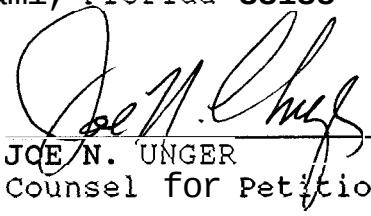
BY: 
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CERTIFICATE OF SERVICE

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 Rhea P. Grossman, Esquire, 2710 Douglas Road, Miami FL 33133, this 2nd day of August, 1990.