IN THE SUPREME COURT OF FLORIDA

CASE NO. **75,806**

ON PETITION FOR DISCRETIONARY REVIEW FROM
THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT, CASE NO. **88-1384**

DANIEL LEFEMINE and CATHERINE A. LEFEMINE,

Petitioners,

vs.

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

Respondents.

RESPONDENTS' ANSWER BRIEF ON THE MERITS

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REPLY TO STAT — NT OF CASE AND FACTS

For the purpose of their Answer Brief on the Merits, Respondents accept the statement of the case and facts as set forth in Petitioners' Brief.

POINTS ON APPEAL

I.

WHETHER 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 PER SE UNENFORCEABLE, AND IF NOT, WHETHER THE TRIAL AND APPELLATE COURTS ERRED IN DETERMINING THAT THE DEFAULT CLAUSE IN THE CASE SUB JUDICE WAS ENFORCEABLE AS A BONA FIDE LIQUIDATED DAMAGE PROVISION?

II.

WHETHER THE TRIAL AND APPELLATE COURTS CORRECTLY DETERMINED, AS A MATTER OF FACT, THAT THE DEFAULT CLAUSE IN THE CASE SUB JUDICE WAS ENFORCEABLE AND NOT UNCONSCIONABLE?

SUMMARY OF THE ARGUMENT

The parties entered into a real estate contract for the purchase and sale of a residential home. The contract set forth the rights of each of the parties if a default occurred. A default did occur and the Petitioners (Buyers) sued for return of their deposit. The Respondents (Seller and Real Estate Agent) counter-claimed alleging that the default was caused by the Petitioners and seeking to retain the deposit monies as liquidated damages pursuant to the contract provision.

The trial and appellate courts found as a matter of ~~fact~~ that (1) the Petitioners defaulted under the terms of the contract; (2) the default provisions of the contract was a bona fide liquidated damage clause; and (3) the amount of the damages (deposit) was not unconscionable.

The fact that the default clauses afforded the sellers and the buyers options when a default occurs, does not, **per** se, require a finding that the clause is one assessing a penalty rather than a clause for liquidated damages. Similarly, the question of unconscionable damages is not determined, as a matter of law, merely because the amounts exceeds actual damages or equates to a percentage of the purchase price, but is a question of fact for determination by the trial court.

ARGUMENT

I.

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 NOT PER SE UNENFORCEABLE, AND THE TRIAL AND APPELLATE COURTS DID NOT ERR IN DETERMINING THAT THE DEFAULT CLAUSE IN THE CASE SUB JUDICE WAS ENFORCEABLE AS A BONA FIDE LIQUIDATED DAMAGE PROVISION

The Fourth District Court of Appeal in the case sub judice, affirmed a factual determination by the trial court that the retention of the deposit by the seller was enforceable as liquidated damages. Lefemine v. Baron, 556 So.2d 1160 (Fla. 4th DCA 1990).

It is Petitioners' contention that the **"choice"** or **"option"** given the seller by the default provisions of the contract to either retain as liquidated damages the amount of the deposit paid by the potential purchaser or to sue the purchaser for actual damages, requires a determination, as a matter or law, that the default clause is a **"penalty"** and, thus, unenforceable.

The reasoning of the Petitioners is based upon Pappas v. Derringer, 145 So.2d 770 (Fla. 3rd DCA 1962) and Cortes v. Adair, 494 So.2d 523 (Fla. 3rd DCA 1986). Both these Third District Court of Appeals opinions are inapposite of the factual issues decided by the trial and appellate courts in the case at bar.

The Petitioners cite and quote from Pappas and Cortes in support of their argument that an **"option"** invalidates, as a matter

of law, a liquidated damage clause because there is a no agreed upon determination of the amount of damages at the time the provisions of a default clause were executed.

Note must first be made that Pappas was decided ten years prior to Hutchison v. Tompkins, 259 So.2d 129 (Fla. 1972). In Hutchison this Court held that

> A contract for the sale of land generally suffers from the same uncertainty as to possible future damages as a lease agreement. The land sale market in Florida fluctuates from year to year and season to season, and it is generally impossible to say at the time a contract for sale is drawn what vendor's loss (if any) will be should the contract be breached by purchaser's failure to close. Accordingly, in the instant case we conclude that the damages which the parties could expect as a result of a breach were not readily ascertainable as of the time the contract was drawn up; therefore, under Hvman,1/ the trial and District Courts erred in construing the liquidated damage provision as a penalty and dismissing the complaint.

The reasoning in Pappas was based on a pre-Hutchinson theory that an "option" provision indicated that there was no agreed upon damages at the time the contract was executed and, thus, the liquidated damage provision was, as a matter of law, a penalty. Since Hutchinson changed this theory, Pappas is no longer applicable as guidance in determining the legality of liquidated damage clauses. The Hutchinson court, however, went a step further by stating that

> For centuries the concept of liquidated

1/ Hvman v. Cohen, 73 So.2d 393 (Fla. 1954).

> damages has been part of our law. We have no wish to emasculate it now by following a rule which renders nearly all deposit receipt contracts invalid. The better result, in our judgment, as Hyman contemplates, is to allow the liquidated damage clause to stand if the damages are not readily ascertainable at the time the contract is drawn, but to permit equity to relieve against the forfeiture if it appears unconscionable in light of the circumstances existing at the time of breach. 259 So.2d at page 132.

The second **"prong"** to Petitioners' argument is seen in their reliance on the opinion in Cortes and their argument that the default provisions of the contract between these parties is unenforceable as a matter of law because the **"option"** confers a unilateral benefit on the seller of choosing the avenue of relief following a breach.

The Cortes Court, as specifically pointed out in Lefemine, 556 So.2d at page 557, "never discusses or distinguishes Hutchinson, Hooper, or Bruce Builders [2]." The Lefemine opinion further explains that "Cortes does not set forth what would happen under the contract, which it interpreted, if the seller defaulted."

Even so, the Fourth District Court of Appeal in Lefemine, distinguished Cortes from the facts in this case by utilizing its decision in Terraces of Boca Associates v. Gladstein, 543 So.2d 1303 (Fla. 4th DCA 1989), which relied upon Cortes. Lefemine determined that Cortes, like Terraces of Boca Associates, was

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

decided upon the "unreasonable disparity in remedy alternatives available to seller and buyers." Cortes is not applicable, therefore, since the Fourth District Court of Appeal specifically found in the case, sub judice, that "[n]o such disparity is found in the purchase and sale agreement at bar".

The contract provisions providing for default in the case sub judice, afford both the sellers and the buyers the same options and remedies. The fact that the potential buyer may only receive back his/her own deposit money as one of the options does not invalidate the provision because of a lack of mutuality. The remedies afforded parties to a contract need not be the same. Such contractual provisions "must be reasonable to be enforced" Blue Lakes Apartments v. George Gowing, Inc., 464 So.2d at page 709.

The first issue on appeal presented to this Court by the Petitioners must be answered in the negative.

II.

THE TRIAL AND APPELLATE COURTS CORRECTLY DETERMINED, AS A MATTER OF FACT, THAT THE DEFAULT CLAUSE IN THE CASE SUB JUDICE WAS ENFORCEABLE AND NOT UNCONSCIONABLE

In reviewing the trial court's judgment, the Fourth District Court of Appeal in the case at bar, found that the deposit amount forfeited was not unconscionable "under the facts here presented". Lefemine v. Baron, 556 So.2d at page 1161 (Fla. 4th DCA 1990).

The Petitioners argue that the opinion of Hutchison v. Tompkins, 259 So.2d 129 (Fla. 1972) mandates that the liquidated damages be held unconscionable and thus, unenforceable.

Respondents agree with the case law argued by the Petitioners. Respondents do not agree that the application of the law, and more particularly, Berndt v. Bieberstein, 465 So.2d 1264 (Fla. 2nd DCA 1985), and the cases cited therein, require a finding that the amount of liquidated damages in the present case is inconscionable. The converse is true. Be that as it may, the facts presented to the trial court were reviewed by the appellate court and a factual determination was made that the amount of the damages under the circumstances in the case at bar was not unconsicionable. Compare, Applegate v. Barnett Bank of Tallahassee, 377 So.2d 1150 (Fla. 1979).

The second issue for review presented by the Petitioners must be answered in the negative.

CONCLUSION

For the reasons expressed herein, and based on the record-on-appeal and the case law relied upon, the Respondents respectfully pray that the decisions of the trial and appellate courts be affirmed, or, alternatively, that this Court determine that the discretionary review should not have been granted.

Respectfully submitted,

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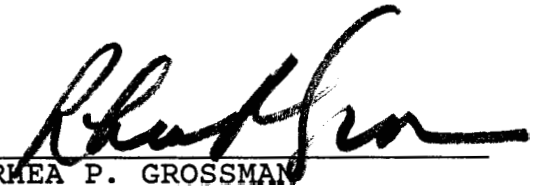
BY: 
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Counsel for Respondents

DATED: August 15, 1990.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONDENTS' ANSWER BRIEF ON THE MERITS was furnished this 15th day of August, 1990, by U.S. Mail, postage prepaid, to: Joe N. Under, Esq., 606 Concord Building, 66 West Flagler Street, Miami, Florida 33130; Gary S. Rackear, Esq., 2534 S.W. 6th Street, Miami, Florida 33135; Joseph L. Schneider, Esq., 1720 Harrison Street, Suite 1805, Hollywood, Florida 33020; and Frank, Schmitt & Frank, P.A., 705 Capital Bank Building, 1666 Kennedy Causeway, North Bay Village, Florida 33141.

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