SUPREME COURT OF FLORIDA

RYBOVICH BOAT WORKS, INC. and ROBERT C. FISHER,

Petitioners,

v.

RANDALL W. ATKINS, as Trustee,

Respondent.
_____/

Case No: 76,052

Fourth District No: 89-2194

PETITIONERS' REPLY BRIEF

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I. THE HOLDING OF ALLIE V. IONATA DOES NOT AND SHOULD NOT PERMIT THE ALLOWANCE OF A TIME-BARRED CLAIM FOR SPECIFIC PERFORMANCE WHEN FILED AS A COMPULSORY COUNTERCLAIM.

A. ALLIE SHOULD NOT BE APPLICABLE TO ACTIONS FOR SPECIFIC PERFORMANCE

The logical underpinning of the Allie decision was that there was no meaningful distinction between an affirmative defense in recoupment and an affirmative judgment in recoupment. Since a claim for specific performance is neither an affirmative defense or in the nature of a claim in recoupment, the Allie decision cannot serve as a basis for allowing a time-barred action for specific performance to be filed as a compulsory counterclaim.

Allie and the other authorities relied upon by ATKINS in his Answer Brief dealt with cases where time-barred actions in recoupment for money damages were allowed to be filed as compulsory counterclaims. The Fourth District Court of Appeal, itself, in the opinion under review, acknowledged that no precedent exists, either in Florida or elsewhere, to permit the filing of a time-barred action for specific performance as a compulsory counterclaim. In fact, such a claim for specific performance could not be filed "in recoupment" because it is not a claim for the recovery of money damages. Nothing cited in ATKINS' Brief refutes the history and application of pleas in recoupment set forth by FISHER in his Initial Brief. Since pleas in recoupment have historically, and by definition, only involved attempts to recover money (as contrasted with claims to compel the conveyance of real property), the Allie decision could not, and should not,

have been made applicable to the instant action wherein one party sought to file a time-barred action for specific performance of a contract to sell real estate.

The Allie decision established legal precedent for the proposition that where one party sought to file a compulsory counterclaim in recoupment, it could to so notwithstanding that an attempt to do so as an independent action would have been barred by a statute of limitation. The Fourth District Court of Appeal, in expanding the holding in Allie beyond the facts of that particular case, applied it to all "compulsory counterclaims" of every nature, without regard as to whether or not those claims were "in recoupment." Allie was intended to and should therefore be limited to claims for money "in recoupment."

ATKINS' Answer Brief attempts to make much of the language in Allie which provides that as long as a compulsory counterclaim is filed in recoupment, a defendant may obtain an "affirmative judgment." ATKINS takes that reference out of context to attempt to show that Allie was intended to apply to any sort of compulsory counterclaim, whether in recoupment or not, to enable a defendant to obtain a judgment. If considered in its proper context, the reference to "affirmative judgment" in Allie must be understood only as a basis for the entry of a judgment in an amount of money damages above the amount claimed by the original plaintiff.

Prior to the decisions in Cherney v. Moody, 413 So.2d 866 (Fla. 1st DCA 1982), Evans v. Parker, 440 So.2d 640 (Fla. 1st DCA 1983), and Allie, a defendant was allowed to raise a time-barred defense in recoupment up to an amount equal to the plaintiff's claim, thereby negating any

recovery by the plaintiff. Cherney, Evans and Allie, allowed a defendant to use a time-barred compulsory counterclaim in recoupment to recover a judgment for damages in an amount above and beyond the amount sought by a plaintiff, hence, the reference to recovery of an "affirmative judgment."

The reference to "affirmative judgment" can be understood only in the context of considering a time-barred compulsory counterclaim if it is brought in recoupment for money damages. The cited decisions do not provide a legal basis or logical support for allowing a defendant to raise a time-barred claim for a specific performance to compel the conveyance of real property as an "affirmative judgment." The granting of a decree for a specific performance cannot logically offset, "recoup" or negate the recovery of an award by a plaintiff for money damages, nor can a request for a specific performance constitute an affirmative defense to a claim for money damages for breach of contract. The award of a specific performance compelling the conveyance of real property is a distinct judicial remedy when compared to an award of breach of contract money damages. In Allie, this Court allowed a counterclaim in "recoupment" for recovery of money as the result of a recission and restitution claim. If this Honorable Court expands the holding in Allie to include compulsory counterclaims beyond those merely in recoupment of money claims, the uncontemplated deleterious consequences will undermine the legislative scheme establishing and the public policy supporting the marketability of title throughout Florida.

ATKINS attempts to demonstrate that Allie is directly applicable to the case under review because, like the instant case, Allie dealt with any equitable claim (for rescission and restitution). ATKINS argues that since

those are equitable claims, analogous to a claim for specific performance, Allie should dictate the result in this case. That reasoning is superficial, faulty and misleading because it overlooks the simple fact that in Allie a buyer sought rescission so that he could obtain restitution, that is, the repayment of money from the seller. In the case under review, the buyer does not seek the return of his money or an affirmative judgment for money damages but, rather, to compel the conveyance of real property.

Allie is further distinguishable because that case only involved claims which affected the rights of the two parties involved in the particular transaction, the seller who sold the real property and the buyer who had bought it. In Allie, if the buyer's compulsory counterclaims for rescission and restitution were granted, the title to the property would go back to the seller and the money the seller received from the buyer would be returned to the buyer. In the case under review, if ATKINS is permitted to proceed on his time-barred claim for a specific performance, FISHER, as seller, will be precluded from selling his property to a third party. Where a seller in the position of FISHER has already sold his property to a third party, that third party could be obliged to give up ownership and possession of that property, unless that third party is found to be a bona fide purchaser for value and without notice of ATKINS' contentions. Therefore, the rights and interests of third parties may be adversely affected by permitting defendants such as ATKINS to file time-barred compulsory counterclaims for specific performance.

B. ALLIE SHOULD NOT BE APPLICABLE WHERE THE STATUTE OF LIMITATION EXPIRES DURING THE PENDENCY OF AN ALREADY EXISTING SUIT.

If this Honorable Court decides to repeal the Statute of Limitations by expanding Allie to freely permit compulsory counterclaims for specific performance whenever they are asserted, it still should not apply Allie where the statute of limitation expires during the pendency of a suit involving a plaintiff's main claim. For unlike Cherney and other cases cited by ATKINS where plaintiffs lay in wait to bring suit after statute of limitations had expired on the defendant's claims, in the case sub judice, FISHER's breach of contract suit was already pending for more than one year before ATKINS filed his counterclaim for specific performance. Fisher did not lay in wait, he asserted his claim, ironically it is now ATKINS whom the District Court of Appeals has decided can now lay in wait until sellers need to clear their titles, whenever that may be.

Defendants should not be allowed to file time-barred actions for specific performance for an unlimited period of time during the entire pendency of a plaintiff's main claim. If a seller were to file a breach of contract action near the end of the five-year period for the filing of a breach of contract action and that claim remained pending for five years or more (after multiple trials and appeals), a buyer should not have the right to file a time-barred claim for specific performance as much as ten years or more after the cause of action for specific performance accrued. That buyer should be compelled to file the time-barred claim for specific performance within the first year of the pendency of the breach of contract action. No reasonable basis exists for providing a buyer more than that one year period

to file his compulsory counterclaim. A buyer could hardly claim prejudice by not being allowed to file his claim beyond that one year period (other than the loss of the right to assert the claim, itself). If the Court will allow Allie to be applied to specific performance claims, it should limit its application accordingly so that the deleterious effect on marketability of title would be minimized (although not eliminated).

C. THE "REASONABLE PROMPTNESS" REQUIREMENT SHOULD NOT REPLACE THE ONE-YEAR STATUTE OF LIMITATION.

ATKINS totally misunderstands the argument set forth in FISHER's Initial Brief concerning the "reasonable promptness" requirement and confuses it with the affirmative defense of laches. FISHER's point was that if the one-year statute of limitation is not applied to specific performance counterclaims, presiding judges will exercise subjective discretion to determine whether a given claim was filed within a reasonably prompt period. Before the Fourth District Court of Appeal decision, the one-year statute of limitation constituted a bright line as to when such claims had to be filed. Once that barrier is removed, fact-specific decisions made by individual judges based upon particular facts and circumstances in a given case will determine whether such claims are deemed brought in a timely fashion. Such decisions of trial court judges would not likely be reversed on appeal unless a showing could be made that the trial court grossly abused its discretion, which is difficult to demonstrate.

Laches, as a separate affirmative defense, was not necessary to be pled in this case because a specific statute of limitation governed the equitable claim of specific performance. Laches would be required to be pled as an

affirmative defense in equitable claims not specifically governed by a particular statute of limitation. In the instant case, the common law doctrine requiring specific performance claims to be filed in a reasonably prompt fashion is pertinent to this discussion whereas a consideration of laches is not. The Legislature has determined that it is in the public interest to establish a bright line (and a short one at that) to bar the filing of specific performance claims beyond one year and promote marketability of title. The Fourth District Court of Appeal decision erases that bright line and substitutes the certainty it established with unpredictability.

D. MARKETABILITY OF TITLE WILL BE ADVERSELY AFFECTED.

FISHER devoted significant space in his Initial Brief to explain the deleterious impact which the Fourth District Court of Appeal decision, if not reversed by this Court, will have on the legislative scheme and public policy supporting marketability of title. The brevity of ATKINS' scant one and one-half page response is a reflection of ATKINS' contempt for those consequences. ATKINS sole response is to suggest that marketability of title will not be adversely affected by the Fourth District Court of Appeal decision so long as the seller defers filing any litigation until he closes on a sale to a bona fide purchaser for value without notice ("BFP") and allows the one-year period for the filing of a counterclaim by the original buyer to pass. ATKINS essentially concedes, therefore, that in all other instances, title would be unmarketable.

ATKINS assumes the unsuccessful seller will be able to find a BFP within five years following the first buyer's breach. During that period, the seller must not file any breach of contract claim against the original buyer. If he can not find a BFP, the seller will file his suit just before the five-year period expires and face the prospect of the original buyer filing a specific performance counterclaim. ATKINS also assumes that the original buyer has not filed any breach of contract litigation to which the seller would be compelled to respond with his own compulsory counterclaim for breach of contract. If the seller failed to file such a compulsory counterclaim and the suit proceeded to trial, the seller would be barred from suing on his claim for the deposit or for damages. After all, compulsory counterclaims are barred if not filed before the main action concludes. On the other hand, if the seller filed a compulsory counterclaim to recover the deposit or breach of contract damages, the original buyer, in turn, could file a time-barred counterclaim for specific performance. The possibility that such a claim could render title unmarketable could have a chilling effect on the willingness of sellers to file worthy claims for their own damages.

In order to perpetuate ATKINS' Draconian scheme, the seller would be required to fraudulently conceal from the BFP the fact that a contract with a prior buyer did not close and that the seller contemplated filing an action for breach of contract (because the original buyer could file a time-barred action for specific performance as a compulsory counterclaim). In fact, if the seller used the same attorney in both transactions, that attorney would be committing an ethical violation of the Rules Regulating

the Florida Bar if he or she failed to inform the second buyer of a prior failed contract. Rule 4-4.1, Truthfulness in Statements to Others, provides:

> "In the course of representing a client, a lawyer shall not knowingly:
>
> > (a) Make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 4-1.6."

Further, Professional Ethics Of The Florida Bar Opinion 65-58 provides:

> "A lawyer who closes mortgage loans on behalf of a mortgage lender should disclose to a purchaser-borrower title defects or clouds known to the lawyer (and to the title insurer) even though the lender is protected by title insurance, when the purchaser-borrower is not represented by an attorney and has direct dealings with the closing attorney."

See McAllister v. Salas, 485 So.2d 1333, 1336 (Fla. 2d DCA 1986)(fn.2).

In McAllister, supra, the Second District Court of Appeals held that an original purchaser who filed an action for specific performance was entitled to develop an evidentiary record encompassing the role of the seller's law firm in conveying property to third parties where the standing of the third party as bona fide purchaser turned entirely upon the issue of notice to them of the buyer's prior claim to the property and the pendency of the buyer's litigation affecting title and where the record contained insufficient facts to determine whether the seller's attorney had an ethical obligation to disclose such information. The Second District stated:

> The courts of this state have long followed the general principle that a third party purchaser, aware of a prior contract to sell to another, is not a bona fide purchaser and the conveyance to such third party is subject to judicial cancellation.
>
> Ibid. at 1335.

See also Coates v. Hale, 429 So.2d 761 (Fla. 1st DCA 1983) ("...[O]ne who takes a conveyance, and who is not entitled to protection as a bona fide purchaser, takes subject to the interest of another under an earlier agreement by the vendor to convey." Coates at 762.)

ATKINS' advice promotes fraudulent concealment and runs against the current trend in the law, which is to eschew the "buyer beware" approach of yesteryear. Courts around the country have mandated an elevated standard of business ethics. No less should be required in this instance.

The issue of whether the second buyer would truly be a BFP would necessarily be a question of fact to be determined by the trier of fact. McDonald v. McGowan, 402 So.2d 1197 (5th DCA 1981) ("Generally, the determination of whether there are sufficient facts known to require further inquiry is one of fact that should be determined by the trier of fact." McDonald at 1200) and McAllister v. Salas, supra. The BFP would have to be included as an indispensable party in any action filed by the original buyer for specific performance, otherwise the action would be dismissed. Hallmark Builders, Inc. v. Hickory Lakes of Brandon, Inc., 458 So.2d 45, 46 (Fla. 2d DCA 1984) (citing Freeman v. Tucker, 79 Fla. 402, 84 So. 174 (1920)). The seller would defend such a claim with a defense (among others possibly) that he no longer owned the subject property. The actual buyer would defend on the basis that he was a BFP and, therefore, took free of any claim of the original buyer. The BFP would have the burden of proving that he was, in fact, a BFP McDonald, at 1200. If the actual buyer could not meet his burden (for whatever reason), he would run the risk that the original buyer

might prevail in his claim for specific performance. See, for example, Henderson Development Co., Inc. v. Gerrits, 340 So.2d 1205 (Fla. 3rd DCA 1976) (where a seller failed to meet the burden of proof placed upon him to show that he had conveyed to a BFP and lost an action for specific performance against an original purchaser). If the second buyer failed to meet his burden and he lost the property, he might feel compelled to cross-claim against the seller on various contract and tort theories (including a claim for fraudulent misrepresentation arising out of the seller's concealment of the existence of a prior unsuccessful contract).

ATKINS' suggestion is foolishly premised on the notion that the seller will be able to predict with certainty that the actual buyer was, in fact, a BFP. Since the seller will not be able to disclose the existence of a prior unsuccessful contract (because then the second buyer could not be a BFP), the seller would have no way of knowing whether the actual buyer knew, of his own independent knowledge from a source other than the seller, of the prior unsuccessful contract. For example, it is possible that the actual buyer might learn of the prior unsuccessful contract from a real estate broker, banking institution, title insurance company, neighbor, surveyor, or the first buyer himself. A seller who followed ATKINS' advice by selling to someone he thought was a BFP and then filing a breach of contract action against the first buyer could unintentionally provide the original buyer with an opportunity to file a time-barred compulsory counterclaim for specific performance only to discover later that the actual buyer was not a BFP.

ATKINS' scheme also presupposes that the seller will not subsequently decide to enter into a joint venture involving (rather than sell) the property. Theoretically, any joint venturer of the seller would have imputed knowledge of the prior unsuccessful contract and, by definition, could not be a BFP. Where a seller decided not to resell the property but, rather, to enter into a joint venture and then initiate breach of contract litigation against the original buyer, the seller's joint venturer could find himself a defendant in a time-barred compulsory counterclaim for specific performance filed by the original buyer. The joint venturer will take little solace in the notion he could sue the seller for damages for concealing the unsuccessful sale to the original buyer.

ATKINS' scheme also ignores the possibility that the seller might not be able to sell the property within the five-year limitations period for the filing of a breach of contract action. If a seller is unable to find a buyer, he will be compelled to file suit against the original buyer before the expiration of the five-year period. In that instance, the original buyer would be free, under the decision of the Fourth District Court of Appeal, to file a time-barred action for a specific performance thereby rendering the title unmarketable (and thereby prevent a sale of the property for an even longer period) until the original buyer's claim was finally adjudicated.

ATKINS also assumes that the original buyer will not take any action to preclude the second buyer from being a BFP. The original buyer could record some document in the public records (e.g., the contract or an affidavit), which would give the second buyer constructive notice. He could find out

who the second purchaser was and contact him directly. He could also contact that buyer's title insurer (which was actually what ATKINS did in this case to prevent FISHER from closing on the sale to the second buyer). Atkins' suggestion that marketability won't be affected by the decision under review is hypocritical since, in this case, he interfered with and prevented Fisher's sale to a second buyer by notifying the second buyer's insurer of his "claim" to the property.

The hypocrisy inherent in ATKINS' advice is further underscored by his reliance upon Cherney v. Moody, 413 So.2d 866 (Fla. 1st DCA). In Cherney, an attorney who filed a breach of contract action against a former client after the two-year statute for the filing of professional malpractice claims expired. The Court held that the client's time-barred malpractice claim (for money damages) could be filed in "recoupment" as a compulsory counterclaim. After decrying the tactics of the attorney in Cherney, ATKINS has no qualms proposing that a seller could avoid a time-barred specific performance counterclaim by waiting until the shorter statute of limitations period for a specific performance action expired and then selling to a BFP before instituting an action for breach of contract. The Machiavellian advice offered by ATKINS would encourage a seller to postpone the filing of a breach of contract action until he either closes with a BFP (and waits for the one-year period to expire) or, if one is not available, until just before the expiration of the five-year period for the filing of a breach of contract action. Encouragement of that sort of delay runs afoul of the public policy designed to induce litigants to present their claims in court sooner rather than at the latest possible moment. Nardone v. Reynolds, 333

So.2d 25 (Fla. 1976) . The unsuccessful seller will always be caught on the horns of a dilemma: if he files suit for breach of contract, his title may remain unmarketable for an indefinite period of time. Contrarily, if he forebears filing suit for breach of contract, he may lose his right to recover the deposit or his damages.

The decision under review upsets the balance sought by the legislature between permitting a buyer to have a reasonable period of time to file a claim for specific performance, on the one hand, against the need to maintain the marketability of real property, on the other hand. The decision, if it is not reversed, will enable an unscrupulous buyer to maintain a "marketability stranglehold" over the seller's property and thereby extort the return of his deposit or the payment of a tribute. Even in the limited instance where a seller could close on a sale to a BFP, neither the seller nor the BFP will be able to predict with certainty the outcome of the original buyer's time-barred specific performance compulsory counterclaim. Even if the BFP successfully defended such a claim, it would be at great expense with no right to recover attorneys' fees from the original buyer.

In such a suit, the BFP will face the difficult task of meeting his burden to prove the existence of a negative, to wit: that he had no knowledge of any claim of the original buyer to the subject property.

Based on the foregoing argument, ATKINS' advice and suggestion that the decision under review will not adversely affect marketability of title should be summarily rejected.

CONCLUSION

The certified question now before this Court should be answered in the negative and the Fourth District Court of Appeal's Opinion should be reversed. This Court's opinion in Allie v. Ionata concerned only pleas in monetary recoupment and did not address time-barred compulsory counterclaims for specific performance. As all land (and all claims for specific performance of contracts to sell it) are unique and the Legislature has decreed that the shortest possible statute of limita- tions governs such actions, this Court should not extend Allie v. Ionata to include claims for specific performance. More than just the two parties to a simple sales transaction will be affected adversely by the application of the Fourth District Court of Appeal decision. The legislative scheme will be undermined, the public policy supporting marketability will be severely eroded, and the practical transactional ramifications will be debilitating.

Finally, the facts and the equities in this case make it particularly in- appropriate to extend Allie v. Ionata in favor of ATKINS who with litigation already pending, sat on his rights for more than one year while defending FISHER's claims.

For all of the foregoing reasons, the Fourth District Court of Appeal's decision in this matter should be reversed and the summary judgment entered in favor of FISHER should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Petitioners' Reply Brief has been furnished by U.S. Mail to ALBERTO MACIA, ESQ., Shea & Gould, 1428 Brickell Avenue, Miami, Florida 33131 this 20th day of September, 1990.

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