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IN THE SUPREME COURT OF FLORIDA

CARL A. MORTIZ, ET UX.,

Petitioners,

v. CASE NO. 77,892

HOYT ENTERPRISES, INC.,

Respondent.
_____/

RESPONDENT'S BRIEF ON THE MERITS OF HOYT ENTERPRISES, INC.

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PREFACE

This respondent's brief on the merits is directed to petitioner's brief by Mr. and Mrs. Moritz served November 4, 1991. The Moritzes were the buyers under a contract with the seller/builder, Hoyt Enterprises, Inc. Generally the parties will be referred to as the buyer or seller or by their individual names.

The record will be designated (R.___). The petitioner's appendix will be designated (A.___) and petitioner's brief as (Br.___).

By order of October 10, 1991, this court accepted jurisdiction and set this case for oral argument on a vote of 5-2.

STATEMENT OF THE CASE AND FACTS

The litigation giving rise to this case is relatively simple. Due to substantial inaccuracies in the petitioner's brief it is necessary to restate the history of the case and the facts.

General Facts and Legal Proceedings

Moritz contracted with Hoyt for the purchase of a home which was in the initial stages of construction by Hoyt. Hoyt owned the real estate and eventually built the entire house under contract with Moritz for cash without mortgages or liens on the property. (R.256-7). This was to be a custom built home and the real issue in the case seems to be whether the amenities and extras in the home were sufficiently "luxurious" to suit the personal taste of the Moritz buyers.

The buyers made a deposit of $57,877.45[1] and construction proceeded for several months. (R.925). Eventually there were arguments by the purchasers that the amenities within the house such as kitchen cabinets were not of sufficiently high quality to be consistent with a "luxurious custom home". The purchasers became dissatisfied with the house and the builder, contacted a lawyer and on his advise went out and found another house, signed a contract on it and bought it. (R.301-2). The purchasers then repudiated the contract arguing that the house had not been built in accordance with the plans and that construction was negligently

[1] The deposit was 10% of the $520,000 sale price plus $5,877.45 in extras.

performed. The seller/builder offered to return the deposit less the damages caused by the buyers' breach but the buyers rejected this offer. (R.400).

Purchasers then sued for damages for breach of contract, for the return of their deposit and for a lien on the property. (R.521-9). There was no alternative claim for return of the deposit if it turned out that the buyer had breached. The seller counterclaimed for his actual damages resulting from the breach of the contract. (R.763-770). The initial counterclaim by seller also contained a claim for the entire deposit as liquidated damages but this claim was disposed of early in the case by summary judgment and was not the subject of the eventual trial. (R.761). The contract was the standard Florida Bar form which contained the standard language on liquidated or actual damages which was held to be an invalid clause by this court in other litigation. When the liquidated damage clause is excised from the contract there is simply no provision stating what happens to the buyer's deposit when the buyer breaches the contract.

After a three day non-jury trial, Judge Jack Cook of the Palm Beach County Circuit Court, found that the house had been properly constructed and that the buyers breached the contract by repudiating it and wrongfully refusing to close. (R.924). The agreed upon purchase price of this custom built home was $520,000 and early in the litigation the builder was successful in selling

the house for $510,000. (R.925).[2] Seller's actual damages were set at $16,861 plus interest of $3,718 for a total of $20,579. Although there was absolutely no finding of any damages to the purchasers, the purchasers were awarded the return of their deposit less the seller's damages. This amount was $37,297.89 plus interest from the date of the purchaser's breach. The legal theory upon which the deposit was returned is uncertain. The return of the portion of the deposit was obviously not based on a breach of the contract by the seller since seller was held not to have breached. There was no basis in the pleadings for a return of the deposit to a breaching buyer.

Early in the case the buyers filed a lis pendens against the property which was of course debt free. The seller/owner moved to dissolve the lis pendens because it was not based on a recorded instrument or mechanics lien. By order of October 13, 1987, after a non-evidentiary hearing, the trial court dissolved the lis pendens but ordered that in the event the property was sold the seller/builder was required to deposit $70,000 in an escrow account to be held pending further order of the court. (R.560). The house was sold and the $70,000 escrow deposit was made by Hoyt and was then used by the court in the satisfaction of the amounts found to be due the parties. Hoyt was deprived of the use of his $70,000 for over a year and a half and in effect had to post a bond to do away with the unlawful lis pendens.

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[2] The sale occurred on November 13, 1987 and suit was filed 6-1/2 months earlier on May 4, 1987.

The contract provided that the prevailing party was entitled to attorney's fees in any litigation arising out of the contract. The trial court found that under the circumstances of this case the seller was the prevailing party and awarded Hoyt attorney's fees. The purchaser appealed to the Fourth District which affirmed in an opinion addressing the attorney's fee issue only. The Fourth District reasoned that since buyer breached the contract and since the seller was awarded an affirmative judgment on the contract, that seller was indeed the prevailing party entitled to attorney's fees. A dissenting opinion urged a contrary result. There was no comment about the absence of a pleading basis for a partial return of the deposit to the breaching buyer.

Detailed Facts

The actual facts stated in the opposing brief are substantially inaccurate. This was a trial in which the court made factual findings and determined the factual issues entirely in favor of the builder/seller. Now, on appeal, the purchasers have chosen to totally recast the facts in their favor which is completely improper. Obviously there was a difference of opinion about whether the house was built properly and in accordance with the plans which were a part of the contract. The buyer's brief tries to convince this court that there were all kinds of terrible problems involving kitchen cabinets, a retaining wall, plumbing, the swimming pool and the installation of a pier into the intracoastal waterway. (Br.7). The fact that Mrs. Moritz may have

testified that she was dissatisfied with some of these things do not make them into facts which this court must accept. The trial court specifically found against the purchasers and in favor of the seller/builder concerning all construction complaints. The final judgment states:

> As to the construction complaints, I find that none of them were so substantial as to entitle the Moritzes to renounce. The Moritzes' own expert testified that the quality of the construction in the house was excellent and that the photos admitted as defendant's exhibit no. 11 support this opinion. (Emphasis added).

There has been absolutely no demonstration that this finding was unsupported. The construction of this house was excellent and completely in accordance with the plans. The purchasers do not get to change the facts on review before this court. The Fourth District Court of Appeal, including the dissent, found that the evidence well supported the trial court's conclusion as to who actually breached the contract. In short, the purchasers became dissatisfied with what they wrongfully thought was improper construction and on their attorney's advice went out and purchased another house. They then repudiated the contract and were in flagrant violation of the contract. They now try to slant the facts in their favor despite the directly contrary factual findings below.

As an example of this improper argument we call attention to the extended assertions that the written contract was deficient and should have included many more written specifications. (Br.6-8). This is harped upon and the contract is severely criticized

because it was not detailed enough. Purchasers argue they expected a "luxury, private family home" because of prior oral representations and now contend that it was all the fault of the builder because of a "deficient contract" which only described the kitchen cabinets as "Raised Panel Cabinets with Pickle". (R.529).

The trial court did not so find and purchasers are absolutely wrong in their statement at page 5 of the brief that the contract was drafted by "the agent of Hoyt as seller". A single page of the transcript (R.27) is relied upon for this statement. It is simply not true. We invite the court's attention to R.67, 81, 181 and 399 where several witness testified that the real estate agent who drew this contract was the agent of the purchasers. Indeed, Mrs. Mortiz admitted this and she was herself a real estate agent with a license from another state. (R.67). She even succeeded in taking a portion of the commission on sale of the house as her own. (R.64-66). The person who drew this contract was the agent of the purchaser not the agent of the seller and the facts are clear on this issue. Under these circumstances the effect of a "deficient contract" are attributable to the Moritz agent and should be disregarded. In any event both parties signed the contract and partially performed under it.

Most of the factual statement is nothing other than a jury argument where all facts are extremely slanted. Another example is "installation of a pier" mentioned at page 7 and commented on thereafter. This case did not concern a pier. There was no obligation on the builder/seller to construct a pier. There

was absolutely nothing in the pleadings about a pier. (R.521-529). In fact, the trial court excluded evidence concerning the pier at R.164 because it was both inadmissible and irrelevant. It is improper for purchasers to now argue to this court that there was a defect in this house concerning a pier where the issue was never pled and the trial court excluded the evidence.

A further example of totally improper factual argument concerns the supposed breach of the contract by use of the escrow monies in the construction of the home. This will be commented on in the argument section herein. In short, the facts are stated as though the plaintiff/purchaser won this case instead of losing it. The trial court and the unanimous District Court of Appeal decision held that the plaintiff breached and not the defendant. The use of the deposit money was held not to be a material breach as a factual matter. (R.927).

A further fact which buyer continually omits from discussion is the fact that Mr. Hoyt offered to return the deposit monies less his damages prior to suit being filed. (R.400-401). This offer was rejected and in the District Court, it was the Moritzes' position that this offer was meaningless because Hoyt did not really know how much his actual damages were at the time of the offer. This may be somewhat true but it was certainly not the fault of the non-breaching party. When Moritz first breached the contract and filed suit the house was near completion but not saleable. At that point in time Hoyt thought it was worth "around $430,000". (R.403). At that moment Hoyt had been damaged at

least to the extent of the difference of $90,000. Hoyt then spent more money and time to complete the house to mitigate his own damage which correspondingly reduced the claim against Moritz. When Hoyt mitigated his damages by selling the house for $510,000, litigation had already been under way for 6-1/2 months and this sale did not change Hoyt from a prevailing party into a non-prevailing party.

SUMMARY OF ARGUMENT

Buyer and seller contracted for the sale and construction of a custom built home on land owned by seller. Buyer paid a 10% deposit and the seller/builder constructed the home in complete compliance with the contract and attached building plans. Purchaser then wrongfully repudiated the contract and bought another house and demanded the return of his full deposit. The seller offered to return the deposit less his damages due to the purchaser's breach but buyer rejected the offer.

The purchaser sued and the seller/builder countersued both asserting a breach of the contract. Purchaser's complaint did not include an alternative demand for return of the deposit in the event that purchaser was the breaching party. The trial court found that the home was properly built in accordance with the plans, that there were no defects and that the purchaser was in breach of the contract. The builder sold the house to a third party after litigation began for a price close to the agreed upon price in the breached contract. Thus the actual damages sustained by the seller/builder were less than the amount of the 10% deposit. The trial court and the District Court of Appeal found that the seller/builder was the prevailing party under the contract and entitled to attorney's fees under the contract.

The purchaser argues that since he received more money out of the deposit than the actual damages of the seller that despite his own breach, purchaser is the prevailing party.

Purchaser's argument is fallacious for numerous reasons.

The most obvious is that purchaser cannot be the prevailing party in litigation based on the contract unless it is held that the seller breached the contract. The trial court's finding was directly to the contrary. The buyer breached the contract rather than the seller. Monies distributed to the purchaser out of purchaser's deposit were simply not based on a breach of the contract by the seller. Purchaser's complaint specifically alleged that he was entitled to the complete deposit because the deposit was used and the house was poorly built in violation of the contract. Purchaser lost on this claim. Purchaser recovered a portion of the deposit for a totally different reason -- simply because seller's actual damages were less than the deposit. The deposit was not returned to purchaser because of any violation of the contract by seller and buyer thus can never recover fees in the guise of having successfully proved a <u>contract claim</u>.

But for a change in the case law declaring liquidated damage clauses unenforceable, the seller would have retained the entire deposit pursuant to the contract. When the liquidated damages provision is excised, this contract is totally silent as to what happens to the buyer's deposit when the buyer breaches.

Florida law does not require the result urged by the purchaser and the case law is in fact to the contrary. The seller who is found to have fully performed the contract and who recovers actual damages for breach of the contract is the prevailing party under the contract. If excess deposit monies remain after

deducting seller's actual damages, this fact does not transform the breaching buyer into a prevailing party.

The trial court erroneously awarded interest to the breaching buyer from the date of buyer's breach and also erroneously denied seller certain additional items of damages and interest.

ARGUMENT

POINT I

WHETHER A "GREATER AWARD OF THE DEPOSIT MONIES" IS THE SOLE FACTOR UPON WHICH PREVAILING PARTY STATUS MUST BE BASED WITHOUT REGARD TO WHO BREACHED THE CONTRACT.

The trial court found Hoyt had not breached the contract and that he built the house to excellent standards in accordance with the plans and written contract of the parties. The court awarded Hoyt $20,579.56 as his actual damages. This amount happened to be less than the $52,000 deposit and obviously less than the $70,000 which Hoyt had been required to place in escrow by an improper court order. The court then distributed the $70,000 -- $45,525.90 to Moritz and the balance of $24,474.10 to Hoyt. The Moritz position before this court is simply that he got more of a distribution from the amount held in escrow than did Hoyt and therefore he must be the prevailing party as a matter of law. Moritz suggests a universal and unalterable test that no matter what issues are litigated (contract or common law) and no matter who breaches the contract, he who ends up with the greater proportion of a deposit, if there happens to be a deposit, is the prevailing party. Neither the law of Florida or sound public policy dictate such a result.

Actual Damages

Hoyt's actual damages were $16,861 plus interest of $3,718.56 for a total of $20,579.56. This was based entirely on the fact that Hoyt was able to sell the house 6-1/2 months after

litigation began for the sum of $510,000. (R.927). The full contract price on this custom built home with specific features ordered and constructed to the personal taste of the Moritzes was $520,000 plus approximately $5,000 in extras. When the builder was able to sell the house for $510,000 he greatly mitigated his own damages and this was to the advantage of the Moritzes who would have been responsible for all of the actual damages which would have resulted from a lesser sales price. If Hoyt had sold the house for $410,000 instead of $510,000 then Moritz would have owed the additional $100,000. The status of a prevailing party for attorney's fees purposes should not be determined on the basis of the non-breaching party's ability to mitigate his own damages. The fact that there was a $52,000 deposit was merely fortuitous. If the deposit had been $40,000 instead of $52,000 then Hoyt's award of actual damages of $20,579 would have been the larger proportion and he would have been the prevailing party even under the Moritz view.

Adoption of this unalterable definition of a prevailing party as urged by Moritz would greatly discourage a non-breaching party from mitigating his damages. Public policy strongly favors mitigation of damages.

Moritz was also not successful in having the deposit returned pursuant to any actual <u>contract</u> provision and in fact should not have had the deposit returned at all. The contract provided in ¶ S that if the seller breached the contract then the buyer could seek specific performance or return of the buyer's

deposit and not waive the right to sue for damages. This is the only paragraph that mentions a return of the deposit. Obviously the Moritz deposit was not returned pursuant to this paragraph because Moritz never proved that the seller breached the contract. This is what Moritz plead but he lost on this issue. If Moritz was entitled to the return of a portion of the escrow monies representing the deposit it was pursuant to the common law theory of "money had and received" or the theory of unjust enrichment neither of which are contained in this contract. It is only this contract which gives the prevailing party the right to attorney's fees. Clearly Hoyt, the non-breaching party, prevailed on all of the contract claims.

Liquidated Damages

This contract, which was prepared by the buyer's agent, contained the standard language regarding a buyer's deposit being liquidated damages to the seller and also giving the seller the right to sue for actual damages. We recognize that this precise contract language in the standard real estate contract has been held by this court to be unenforceable. See, Lefemine v. Baron, 556 So.2d 1160 (Fla. 4th DCA 1990), reversed at 573 So.2d 326 (Fla. 1991). The trial of this case did not concern a claim for liquidated damages -- the judgment was for actual damages. The problem presented by this case is the direct result of excising the contract provision on liquidated damages. With this provision gone there was simply nothing in the document covering this situation.

Florida Law on Prevailing Parties

Petitioner, Moritz cites Fixel Enterprises, Inc. v. Theis, 524 So.2d 1015 (Fla. 1988), Casavan v. Land O'Lakes Realty, Inc., 452 So.2d 371 (Fla. 5th DCA 1989) and Daniels v. Arthur Johannessen, 496 So.2d 914 (Fla. 2d DCA 1986) plus several mechanics lien foreclosure cases asserting that all of these cases hold that whoever gets the most money is the prevailing party. In fact, in this case Hoyt got the most money under the contract and Moritz simply got the return of a portion of his deposit because Hoyt did a good job of mitigating his own damages. Moritz recovered absolutely nothing pursuant to the contract and Moritz was awarded no damages whatsoever.

Fixel Enterprises, Inc. v. Theis, supra, holds that the "prevailing party" is the party who has been awarded an affirmative judgment in its favor at the conclusion of the entire case. The Supreme Court's Fixel opinion certainly does not support the plaintiff herein because that case merely held that the prevailing party fee provision under the mechanic's lien law should not be extended to regular contract law.

Casavan v. Land O'Lakes Realty, Inc. involves a real estate contract deposit which was interplead by the agent holding the deposit. The disappointed buyer and seller had a jury trial over who was entitled to the deposit monies. On complex facts the jury found that the purchaser had breached the contract but that the seller had suffered no actual damages as a result of the breach

of the contract. However, the jury did award the seller an amount representing rent on the property which was also provided for in the contract. On appeal it was held the party who got the greater award was the prevailing party from the standpoint of attorney's fees. We invite the court's attention to pages 372 and 373 of the Casavan opinion where it is twice pointed out that the buyer's breach of the contract resulted in no damages to seller and that the jury specifically so found. Casavan is confusing and was nothing more than a dispute between two parties over an amount of money that had been placed in the registry of the court by a stakeholder. The district court did nothing more than to hold that the party who got the most money was the prevailing party. The issues were substantially different and the dissenting opinion points out that the result was influenced by the liquidated damages clause which of course can no longer be enforced.

The Daniels case is similarly distinguishable. In that case there was no finding that the Daniels breached the contract. Also, the Daniels were the party recovering judgment and the Moritzes were not. All of the mechanics lien foreclosure cases relied upon by Moritz are inapplicable and this court's Fixel opinion specifically so holds.

There is no absolute mathematical formula for determining prevailing party status in contractual litigation. The case which the trial court relied upon was Williams v. Dolphin Reef, Ltd., 455 So.2d 640 (Fla. 2d DCA 1984) and we submit this case is dispositive. The case involved the sale of condominium units and

the purchaser brought an action for damages under a written contract. The developer counterclaimed seeking the purchaser's deposit as liquidated damages. The court ruled that the purchaser had breached the contract and that the developer was entitled to retain a part of the deposit as damages. The trial court refused to award attorney's fees to the developer as the prevailing party on the counterclaim. The Second District Court of Appeal reversed and stated in an opinion as follows:

> The fact that Dolphin Reef was allowed to retain even a portion of the total deposit is evidence that the trial court found appellant had not fulfilled his contractual obligation. Dolphin Reef, therefore, was the prevailing party, even though the amount recovered was less than the amount initially sought in the counterclaim.

This same situation is presented here. Hoyt sued for damages based on the written contract and prevailed and was thus the prevailing party. Mortiz sued for the return of the deposit based on an alleged breach of the contract by Hoyt. Hoyt was found not to have breached the contract. Thus any monies being distributed to Moritz out of the initial deposit were not a recovery pursuant to the contract and Moritz cannot be considered the prevailing party on any contractual claim. There is nothing in this contract saying that a breaching buyer gets a partial return of his deposit if seller's actual damages do not exceed the deposit.

The case for awarding attorney's fees to Hoyt as the seller/builder is even more compelling given the fact that Hoyt offered to return the Moritzes deposit when demand was first made less damages which Hoyt had suffered as a result of the breach of

the agreement. (R.400-1). Moritz refused Hoyt's offer and demanded every cent be returned including funds which Moritz had expended on unauthorized installation of a security system within the home which was of absolutely no value to Hoyt. (R.399-400).

Under common law, rather than under the contract, Hoyt may have had some obligation to "return the difference between the deposit monies and the amount of damages". Hoyt did exactly that. The quote in the preceding sentence is from page 17 and 18 of the Moritz brief. Hoyt, although not required to do so by the contract, offered the return of the deposit less his damages. This offer was rejected by Moritz who at that time had already talked to his lawyer and pursuant to his advice, contracted to buy another house and repudiated the contract with Hoyt. It turned out to be bad advice.

The Fourth District Court of Appeal relied upon Reinhart v. Miller, 548 So.2d 1176 (Fla. 4th DCA 1989). There the court addressed the question of whether there can actually be two prevailing parties under one contract and arrived at an obvious negative conclusion unless the same lawsuit presented distinct claims which would support independent actions. The court concluded that when mutually exclusive theories of liability are litigated only one party can prevail. The language which the petitioner seems upset about is the court's comment that "the breach by one party to a contract releases the other party from performing any further contractual obligations". Moritz argues that the district court has allowed a non-breaching party to act

with impunity and "certainly this cannot be the law when contracts are partially executed by one party". This argument is difficult to grasp. The purchaser made a $52,000 deposit and the seller/builder supplied the real estate and built a $520,000 house to the point of substantial completion. At this point the purchaser reneged on the contract despite the fact that there was absolutely no breach by the builder. It is rather obvious who acted with "impunity" in this factual situation. The Fourth District's reliance on Reinhart was proper and there is certainly nothing wrong with or even unusual about the rule of law announced in Reinhart. We wonder just what more Moritz would have had Hoyt do after Moritz breached the contract. There were no further contractual obligations to be performed by Hoyt as of the date of substantial completion and the issuance of the certificate of occupancy which the trial court chose to designate as the breach of contract date. Hoyt had fully performed his part of the contract and the only thing left was the closing.

Mortiz relies on the dissent but we suggest the argument there is flawed for several reasons. Judge Owen states that Moritz "sought return of the deposited funds" and received return of those funds and thus prevailed. The dissent does not analyze the pleading basis in the complaint for return of the deposit. The only allegation was that Hoyt breached by using the deposit and building a defective house and that Moritz was thus entitled to disavow the contract and retake his deposit. (R.523-4). This alleged breach of contract would certainly have entitled Moritz to

prevailing party status had he won on these issues -- he did not. Instead Hoyt won on these issues and since there was no alternative prayer for relief by Moritz as a breaching buyer, he really was entitled to no relief whatsoever. The partial return of the deposit was a gratuity not required by the contract. Even if Hoyt should have returned a part of the deposit, which he did attempt, it was not required by the contract. In Lockrane v. Willingham, 15 FLW D1351 (Fla. 2d DCA 1991), the same facts supported both an alleged breach of contract claim and an alleged breach of implied warranty. Only success on the contract claim would entail attorney's fees. Here Moritz really recovered on an unplead equitable claim and Moritz had no right to fees on this claim.

Other Approaches to Prevailing Party Status

If there had been no deposit at all in this case the result would have been exactly the same. The purchaser breached the contract and the seller/builder performed the contract. The builder received a judgment for his actual damages and these damages were unaffected by the amount of the deposit. The only thing which affected the damages sustained by the builder was the fact that the builder mitigated his damages by selling the house to a third party for $510,000. This did not occur until after the filing of the lawsuit.

There is no Florida case which deals with this specific factual situation. The overall legal question of the definition of a "prevailing party" for an award of attorney's fees has been

recently addressed by the United States Supreme Court in Texas State Teachers Association v. Garland Independent School District, 109 S.Ct. 1486 (1989). This case concerned attorney's fees and prevailing party status under the various civil rights statutes including 42 U.S.C. § 1988. We do not suggest that the case is specifically applicable to the present situation because it obviously involved specific statutes which the court attempted to construe to effect the congressional purpose behind them. However, the opinion is informative in recognizing that there are various approaches to the determination of prevailing party status.

There is no necessity for an absolute and universal single rule which looks only to an arithematical total. Justice O'Connor wrote for the court and noted that the definition of prevailing party under the civil rights acts was an issue which had divided the federal courts. The Fifth and Eleventh Circuits held to a rule that a party must succeed on the "central issue" in the litigation and achieve the "primary relief sought" to be eligible for prevailing party attorney's fees. Various other federal appellate courts applied a less demanding standard requiring only that a party succeed on a "significant issue and receive some of the relief sought in the lawsuit" to qualify for a fee award. See, e.g., Gringras v. Lloyd, 740 F.2d 210 (CA.2d. 1984) and Lampher v. Zagel, 655 F.2d 99 (Ca.7th 1985).

After a thorough analysis of the various approaches concerning prevailing party status the United States Supreme Court rejected the "central issue" test and instead adopted the approach

taken by the court in Hensley v. Eckerhart, 103 S.Ct. 1933 (1983). Although Hensley did not adopt a single particular standard for prevailing party status, the case did hold that the degree of the plaintiff's success in relation to the other goals of the lawsuit was a relevant factor only in determining the size of a reasonable fee rather than eligibility for a fee.

Ultimately the court adopted the Hensley approach holding that the party is a prevailing party if he has succeeded on "any significant issue in litigation which achieved some of the benefit the parties sought in bringing suit". Under such circumstances the court concluded that the plaintiff had crossed the threshold to a fee award. The court held that plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant. On the other hand, the opinion also points out that a mere technical victory may be so insignificant as to be insufficient to support prevailing party status. Where a plaintiff's success on a legal claim can be characterized as purely technical or de minimis, prevailing party status is not achieved and fees may be denied.

As previously indicated, this case shows only that many different approaches are reasonable for a determination of prevailing party status. It is not necessary that the prevailing party win everything it initially asks for or that the prevailing party even win the central issue in the case. Of course, here Hoyt did win the central issue which was the question of whether the contract had been breached and whether the house had been built in

accordance with the written contract and the plans. The fact that there was a deposit in excess of the ultimate damages is merely ancillary and did not serve to turn the breaching buyer into the winning party in a contract action.

POINT II

WHETHER THE BUILDER'S USE OF THE DEPOSIT MONEY IN THE CONSTRUCTION OF THE HOUSE CONSTITUTED A BREACH OF FIDUCIARY DUTY AND FRAUD AS A MATTER OF LAW.

The $52,000 deposit was given to the real estate agent functioning as Hoyt's agent. (R.67, 81, 181, 399). This agent then gave the deposit monies to Hoyt with direction that it could be used in construction of the home. The face of the contract actually did not state that the entire deposit would be held in escrow. The language on the face of the contract states "Deposit(s) to be held in escrow by Hoyt Enterprises, Inc. in the amount of . . . $10,000". (R.527). The trial court found that the use of this deposit money in the construction of the house was not a material breach of the contract. (R.927).

The Fourth District Court of Appeal did not choose to address this argument in any respect. Now the purchasers assert that this court should reverse both the trial court and the appellate court and conclude as a matter of law that Hoyt's conduct constituted fraud for which Moritz should win the case on the merits and be entitled to attorney's fees. As the trial court found, Moritz made no complaint about the failure to escrow the deposit until Moritz found a better deal on a new house. Even

then, Moritz made no demand on Hoyt to escrow the money and Hoyt testified he would gladly have escrowed the money if it would have motivated the Moritzes to perform their contract by closing on the house. (R.394, 395, 437). Although the $52,000 was not in escrow the money was always in a Hoyt account carrying a balance of double the amount of the deposit. (R.429-30). Both Hoyt and the real estate broker serving as the agent for Mortiz testified that the use of the deposit for construction of the house was a part of the negotiated deal to lower the price and that the failure to delete the words "in escrow" from the standard real estate contract was a mistake. (R.348-349). We recognize that the trial court rejected the scrivener's error defense but this evidence certainly goes to the materiality and importance of use of the deposit as a technical breach.

The Moritz broker testified that she was given the money by Moritz with instructions that it go to Hoyt to be used in the construction of the house. (R.179-181). Moritz knew the money was to be used in the house he just did not know exactly when. The house was built by Hoyt for cash with no mortgages and it had no liens. (R.256-257). Even if Hoyt should have escrowed the money Moritz would have to have given him the opportunity to cure the defect by making the deposit before disavowing the contract. In addition, Hoyt eventually made a $70,000 escrow deposit pursuant to court order. The trial court correctly found that the use of the deposit in construction of the home did not justify the buyers in repudiating the contract after the house had been substantially

completed to the Moritzes specifications. Beefy Trail, Inc. v. Beefy King International, Inc., 267 So.2d 853 (Fla. 4th DCA 1972).

In a rather desperate argument Moritz also argues that his personal trust and confidence was shaken when he learned that his $52,000 had been used to build his $520,000 house. Again Moritz indulges in a fantasy world in asserting that his trust and confidence was shaken because of the use of the escrow monies in conjunction with the poor construction on the house. These are not the facts. The court found the house was constructed in an excellent fashion.

In a further desperate argument Moritz relies upon § 501.1375, Florida Statutes (1980) and another similar statutory preamble where the words "financial collapse of a number of developers" were used. This statute has absolutely no application and Moritz's footnote 6 so admits. The statute only applies to contractors who build ten or more homes in the state in a period of a year. Also, it is frivolous for Moritz to talk about "financial collapse" of Hoyt Enterprises, Inc. This company built the house on land which it owned, for cash and was ready to turn over title to the excellently built structure. Moritz simply pretends he won the lawsuit instead of losing it.

There is absolutely no legal support even offered for the argument that this court should reverse the circuit court and the district court of appeal and conclude that as a matter of law Mr. Hoyt was guilty of fraud.

POINT III

WHETHER THE TRIAL COURT CORRECTLY AWARDED THE BUILDER ACTUAL DAMAGES OF $16,861 PLUS INTEREST.

This argument is difficult to grasp. Moritz seems to argue that this court should reverse the award of approximately $16,000 in actual damages to the builder because the builder had previously received a 10% deposit on the $520,000 house. Moritz thus argues that until the damages exceeded $52,000 Hoyt was not entitled to a judgment for any damages. Again, Moritz chooses to disregard the facts. Hoyt offered to refund the deposit less Moritz's damages and Moritz rejected this offer. At all time, Moritz demanded that he be allowed to walk away from the contract which he breached with his full deposit. Under these circumstances the non-breaching builder of the home was certainly entitled to damages for the breach by the purchaser. Again, it is only by virtue of the sale to a third party for $510,000 that the purchaser was fortunate enough to avoid a much more substantial damage award against him. At the moment of the breach Hoyt had sustained damages of at least $90,000.

We do, however, assert that the trial court should have awarded Hoyt additional damages over and above the $16,000 and that the trial court further erred in awarding Moritz interest of $8,228.

The trial judge determined that the date of the issuance of the certificate of occupancy - June of 1987 - would be considered as the date on which Moritz breached the contract. This

was the date upon which the house was ready to be turned over to Moritz and by this time Moritz had repudiated the contract. For inexplicable reasons the court then held that Moritz was entitled to interest on any amount to be refunded to him and dated the accrual of this interest from the date Moritz breached the contract. (R.927). How or why Moritz should be entitled to interest from the date of Moritz's breach of the contract is unexplained and we suggest it was clear error. Moritz was entitled to no interest whatsoever on the deposit monies. There is nothing in the contract stating Moritz was entitled to return of deposit nor payment of interest and since Moritz breached the contract and Hoyt did not breach the contract, Moritz is not entitled to interest. The early summary judgment in this case related solely to whether Hoyt was entitled to retain the full deposit as liquidated damages and this has nothing to do with this issue. Hoyt was entitled to the additional $8,228.01 awarded as interest.

Hoyt also urges that the trial court erred in awarding him insufficient damages. Hoyt plead and proffered proof of additional damages as follows:

Sales Tax	$1,275.00
Extra Broker's Commission	$4,400.00
Additional Real Estate Taxes	$2,049.00
Total	$7,724.00

This evidence was absolutely uncontested and Moritz offered nothing to counter it. The trial judge erroneously failed to assess these amounts against Moritz. From the proceeds of the sale of the

property for $510,000 on November 13, 1987, Hoyt had to pay $1,275 in sales tax which would not have been payable had Moritz closed the contract as originally scheduled because the sales tax on real estate transactions was not in effect during the time of the initial closing set for May of 1987. Hoyt was also required to pay an additional broker's commission over the original commission negotiated as a part of the Moritz contract of 4%. In the eventual sale Hoyt had to pay a 6% commission resulting in the additional cost of $4,400. Thus Hoyt really sold the property for $510,000 less 6%. In addition, because he had to carry the property from the time between the Moritz breach and the eventual sale Hoyt had to pay additional tax on the property of $2,049. All of these damages were unrefuted and were clearly a result of the Moritz repudiation and breach. The trial court erred in failing to assess these amounts. All of these issues were raised on cross-appeal to the Fourth District Court of Appeal but were not commented on in the court's opinion.

POINT IV

WHETHER THE TRIAL COURT ERRED IN REQUIRING HOYT TO DEPOSIT $70,000 IN ESCROW.

This point was also raised on cross-appeal and not addressed by the Fourth District. Although it is somewhat moot at this point, Moritz filed a notice of lis pendens against the property which was facially invalid. The notice stated it was based on an equitable lien. Obviously a lis pendens must be based on a recorded instrument or a mechanic's lien. In an non-

evidentiary hearing the trial judge ordered the lis pendens dissolved because it was illegal but at the same time ordered Hoyt to post $70,000 in an escrow account out of the proceeds of the sale of the house. There was no legal reason whatsoever and certainly no evidentiary basis whatsoever for this order. Hoyt should not have been ordered to post it and Hoyt was damages by being deprived of the use of the money and by not being allowed 12% interest on the sum. Although it is somewhat mooted the point certainly dramatizes the frivolous nature of all of the Moritz arguments about the $52,000 deposit. The party who never breached the contract was required to post $70,000 in cash to assure the breaching party that more than adequate money would be there just in case Moritz won the suit. This was clear error.

CONCLUSION

Except in regard to insufficient damages and interest the opinion of the Fourth District of Appeal is correct. This court should remand the case to the trial court with direction to assess additional damages and interest in favor of Hoyt Enterprises, Inc. All relief requested by petitioner Moritz should be denied. Hoyt Enterprises should also be awarded appellate attorney's fees as the prevailing party in this litigation. A separate motion for fees has been filed.

I HEREBY CERTIFY that a true copy hereof has been furnished by U.S. Mail to FREEMAN W. BARNER, JR., Cromwell, Pfaffenberger, Dahlmeier, Barner & Griffin, 631 U.S. Highway One, Suite 410, P.O. Box 14036, North Palm Beach, Florida 33408, and this 16th day of December, 1991.

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