O.A. 2-6-92

047 w/app

IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

CARL A. MORITZ, ET UX. Petitioners, vs. HOYT ENTERPRISES, INC., Respondent.	FOURTH DCA CASE NO. 89-1232 89-1252 SUPREME COURT CASE NO. 77,892

PETITIONER'S BRIEF ON THE MERITS

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Preface

Petitioners CARL A. MORITZ and SARA H. MORITZ, his wife, were the Plaintiffs in the Trial Court. They were the Appellants in the Fourth District Court of Appeal. They will be referred to alternatively as "Petitioners," "Moritz," or "Buyer" under the contract for purchase and sale of real property at issue in these proceedings. Respondent Hoyt Enterprises, Inc. was the Defendant and Counterclaimant in the Trial Court and the Appellee in the Fourth District Court of Appeal. It will be referred to alternatively as "Respondent," "Hoyt Enterprises," and "Seller/Builder." The symbol "R." shall refer to the Record on Appeal. The Appendix is referred to as "A."

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Issues Presented for Review

First

WHETHER IT WAS ERROR TO AWARD ATTORNEYS FEES AND COSTS TO HOYT ENTERPRISES, AND WHETHER THE MORITZES WERE ENTITLED TO THEIR ATTORNEYS FEES AND COSTS AS THE PREVAILING PARTY, IF THE MORITZES OBTAINED AN AFFIRMATIVE JUDGMENT IN THE LITIGATION BY REASON OF RECOVERING IN THE TRIAL COURT JUDGMENT THE GREATER AWARD OF THE DEPOSIT MONIES PAID HOYT ENTERPRISES PURSUANT TO THE REAL ESTATE CONTRACT AND OTHERWISE OBTAINED RELIEF ON THEIR CLAIMS IN THE LITIGATION.

Second

WHETHER THE SELLER'S BREACH OF CONTRACT BY USING THE ESCROW FUNDS IN CONSTRUCTION OF THE HOME, IN THE CIRCUMSTANCES OF THIS CASE, WAS A MATERIAL BREACH EXCUSING THE BUYERS FROM FURTHER PERFORMING THE CONTRACT.

Third

WHETHER HOYT ENTERPRISES WAS ENTITLED TO AN AWARD OF DAMAGES OR INTEREST THEREON, WHEN ANY MONIES OWED IT WERE PAID BY THE MORITZES AT TIME OF CONTRACT EXECUTION AND WRONGFULLY USED IN CONSTRUCTION, AND THE MONIES WERE IN EXCESS OF THE AMOUNTS THE COURT DETERMINED HOYT WAS ENTITLED TO RETAIN; CONVERSELY, WHETHER THE MORITZES WERE ENTITLED TO INTEREST ON THEIR AWARD FROM THE DATE THEY PAID TO HOYT THE MONIES THEY WERE AWARDED.

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Statement of Case

This case concerns a real estate contract dispute involving the construction and sale of a single family home. Petitioners Moritz were the contract purchasers. Respondent Hoyt Enterprises, Inc. was the builder and contract seller.

In May 1987 the Moritzes as Plaintiffs filed a Complaint, (R. 521, A. "A"), against Hoyt for damages for breach of a real estate contract, for recovery of their deposit monies paid pursuant to the contract in excess of FIFTY-SEVEN THOUSAND DOLLARS ($57,000.00), and to impose a lien on the property that was the subject of the contract to secure the deposit monies paid. Hoyt answered, claimed the deposit as liquidated damages and counterclaimed for specific performance. (R. 530). Hoyt's Third Amended Counterclaim demanded damages. (R. 763).

During the proceedings a Partial Summary Judgment was entered for Plaintiffs, (R. 761), determining that as a matter of law the Seller was not entitled to the deposit as liquidated damages. The completed home was sold during the litigation by Hoyt to a third party. (R. 411-12). A portion of the proceeds amounting to SEVENTY THOUSAND DOLLARS ($70,000.00), which was Hoyt's money from the sale of the real property titled in its name, was ordered to be held in an interest bearing escrow account subject to further court order. (R. 560, see, R. 411-12).

In it's Amended Final Judgment, (R. 924, A. "B"), the Trial Court eventually found Petitioners Moritz to be in breach of the

contract for wrongfully attempting to cancel the transaction and awarded Hoyt damages. These damages, however, were only approximately SIXTEEN THOUSAND DOLLARS ($16,000.00) and totalled TWENTY THOUSAND FIVE HUNDRED SEVENTY NINE DOLLARS AND 56/100 ($20,579.56) with interest awarded - substantially less than one-half of the amount of the deposit. On the other hand, Petitioners recovered from Hoyt's escrowed money their full deposit plus interest. When off-set by the amount of damages, this resulted in judgment for the Moritzes in the litigation of FOURTY-FIVE THOUSAND FIVE HUNDRED TWENTY FIVE DOLLARS AND 90/100 ($45,525.90). These monies were ordered to be paid from Hoyt's sale proceeds being held as security.

In a post-judgment order the Trial Court found Hoyt to be the prevailing party in the litigation and awarded it attorneys fees and costs from the Moritzes in excess of TWENTY-EIGHT THOUSAND DOLLARS ($28,000.00). (R. 1045, A. "C"). The basis for the Trial Court's award of attorneys fees was the "prevailing party" attorneys fee provision of the contract. Fees were determined by the court solely upon a consideration of which party materially breached the contract, and not by which party had recovered judgment in the proceedings or by the manner in which the deposit monies were disposed of in the final judgment. (R. 510-11, A. "D"). Both the Amended Final Judgment and judgment taxing costs and attorneys fees were appealed by the Moritzes to the Fourth District Court of Appeal, (R. 960, 1046), and consolidated for purposes of the appeal. (R. 1049). Hoyt Enterprises filed in the proceedings

a cross-appeal from the Amended Final Judgment. (R. 970).

The Appellate Court, in a 2-1 decision, (A. "E"), affirmed the award of attorneys fees on the basis that Hoyt was the prevailing party. This was so, the court reasoned, because the Trial Court found the Moritzes to be in breach of contract. The dissenting opinion would have reversed the post-judgment award of fees and costs because the Moritzes prevailed since they:

> realized an affirmative judgment in their favor after Appellee's off-setting claims had been taken into consideration.

On remand, the dissent would have directed fees and costs be awarded to the Moritzes as the prevailing party.

Rehearing in the Appellate Court was denied by Order of April 12, 1991. (A. "F"). On April 26, 1991 Petitioners Moritz filed in this court a Notice to Invoke Discretionary Jurisdiction. (A. "G"). By Order of May 13, 1991 the Fourth District Court of Appeal granted the Moritzes' motion for stay pending review in the Supreme Court, and for stay of the issuance of the mandate from that court. (A. "H"). On October 10, 1991 this court rendered its Order Accepting Jurisdiction and Setting Oral Argument. (A. "I").

Statement of Facts

On December 2, 1986 Carl and Sara Moritz, as buyers, and Hoyt Enterprises, Inc., as seller, entered a contract, (A. "J"), for the sale of a lot and the construction of a house on the lot bordering the Loxahatchee River in Jupiter, Florida. (R. 924). The sales price was FIVE HUNDRED TWENTY THOUSAND DOLLARS ($520,000.00). The Moritzes paid a deposit of FIFTY TWO THOUSAND DOLLARS ($52,000.00). The sum of FIVE THOUSAND EIGHT HUNDRED SEVENTY SEVEN DOLLARS AND 45/100 ($5,877.45) also was advanced to Hoyt for contract extras. (R. 927). (R. 927). The contract was subject to the buyers obtaining financing within sixty (60) days from execution. The contract was a Florida Bar form contract that apparently, and unfortunately, was intended to be used for the sale of a home already constructed. (R. 924-925). At the time the contract was entered there were only minimal improvements to the property, the "footers" were being dug and "rough plumbing" was being installed. (R. 27).

The contract was modified by some typed provisions and an addendum to the agreement that specified particular items that the sales price included. This addendum, however, failed to provide a monetary allowance for a number of these construction items or any detailed descriptions of the items themselves. In paragraph twelve (12), SPECIAL CLAUSES, the contract provided that the house would be "...built according to Building Plans and Contract." Paragraph "R" of the contract contained a clause that in any litigation arising out of the contract the "prevailing party" would

be entitled to recover reasonable attorney's fees and costs.

The contract was drafted by a realtor who was the agent of Hoyt as Seller. (R. 27). As Mr Hoyt testified, the Moritzes input into the contract and the house construction was necessarily limited due to the fact that construction on the home had commenced at the time the contract was executed. (R. 265).

While the Moritzes were advised by a broker involved in the transaction that they should consider having an attorney in connection with the contract, (R. 337), they decided not to do so because they were only in Florida on a house hunting trip, were leaving the following day to travel back north, didn't know any lawyers and they really "liked and trusted Mr. Hoyt." (R. Id.). Of course, subsequent events changed their mind about Mr. Hoyt. (R. Id.).

The Moritzes were not experienced or sophisticated real estate purchasers. Mr. Moritz was retired from the U.S. Navy. (R. 275). He had never built a home prior to the one at issue in this litigation. (R. 276).

Mrs. Moritz was working in her profession when the home at issue was purchased. She was a nurse. At the time the home was purchased Mrs. Moritz did have a real estate license in Maryland, but she was not active in real estate and worked on a referral basis only. (R. 23). She had little real estate experience, (R. id.), and was not really knowledgeable in the field. (R. 66-67).

On the other hand, David Hoyt, a principal and President and shareholder of Hoyt Enterprises, was a builder of luxury private

family homes as his full-time occupation. Hoyt drew the plans for the home in issue. Moreover, Mr. Hoyt often drew contracts for purchase and sale of homes and plans in connection with them. (R. 235-38).

The Moritzes' expert builder, Jimmy Casto, who had been in the building industry twenty-seven (27) years and constructed twenty (20) to thirty (30) custom homes per year in the area, testified to the deficiency of the contract. He said that there were generally accepted articles that were included in the purchase of a custom home. Those articles would consist of plans, specifications, perhaps color sheets, as well as the contract itself. (R. 852). In the type and price range of the home at issue in this case, Mr. Casto testified that various necessary contractual documents were missing from the plans including details relating to the cabinets, fireplace and other items. (R. 854-55).

Specifications also were necessary for the construction of the home in this price range,(R. 857), Mr. Casto testified, so the customer would know what he was getting, and what finishes, materials, etcetera were included. The customer would agree to these prior to time of installation. These items would directly affect the quality of the home. (R. id.). It is important to note that the absence of such specifications, Mr. Casto observed, would result in reasonably foreseeable problems between the builder and an owner. In short, Mr. Casto said that without specifications for the construction there would be no way anyone could appreciate what the seller sold and the buyer purchased. See, id., at 859. No

specifications existed for the home in this case.

In the instant case Mr. Casto reviewed various items that were to be included in the home and noted contract deficiencies in descriptions and problems that would be created because of the absence of specifications. (See, R. 859-863). Moreover, it was the custom in the industry that the builder furnish to the purchaser plans or sketches for various items. (Id. at 865). These were not furnished to the Moritzes, however.

As might be expected, substantial problems arose in construction. These problems were illustrated in detailed correspondence from the Moritzes' counsel to Hoyt. (Pl. Ex. 35). The record in this three (3) day trial is replete with testimony of Mr. and Mrs. Moritz pertaining to various construction problems and other problems with Hoyt with the cabinets, (R. 281-283), retaining wall, (R. 283-84), plumbing allowance, (R. 60), the pool and pool deck, (R. 285, 290), various finish items that were required to be paid as upgrades that were not in the contract, (R. 289), representations pertaining to installation of a pier, (R. 295-299), and problems with communications. (R. 299-119-21).

The cabinets for the home are illustrative of the problems encountered. There were no price limitations placed on the cost of the cabinets in the home when they initially were discussed between the Moritzes and Hoyt. (R. 142). Sometime thereafter, Hoyt arbitrarily imposed a FIVE THOUSAND DOLLAR ($5,000.00) allowance for all of the cabinets in the home. No monetary allowance was specified in the contract. (See, R. 56-59). The Moritzes' cabinet

expert, Barbara Chandler, testified the cabinets actually installed in the completed home would be customary in a home priced under ONE HUNDRED THOUSAND DOLLARS ($100,000.00). (R. 188). On a home as was being built for the Moritzes here, she said the range of the allowance for installed cabinets was from SIX THOUSAND DOLLARS ($6,000.00) to EIGHTY THOUSAND DOLLARS ($80,000.00). (R. 199). Typically, though, Mrs. Chandler testified that for a house as at issue here the average builder would have a TWENTY FIVE THOUSAND DOLLAR ($25,000.00) allowance for cabinets. (R. 200). Obviously, this amount is far in excess of the allowance Hoyt would permit for a home that was represented to the Moritzes as a top of the line luxury home. (R. 328).

As is evident, the deficient contract proivided an economic incentive for Hoyt to reduce the quality of materials and charge for items that should have been included in the contract price. (See, correspondence, Pl. Ex. #35, p. 2). Understandably, the Moritzes felt as though they were being "nickeled and dimed to death" at every point. (R. 324-425).

A further problem arose between the parties with regard to the Moritzes' deposit monies. In violation of the contract provisions the deposits paid to Hoyt were never placed in escrow. Instead, these monies were used in construction of the home on the lot that, of course, Hoyt owned. (R. 273). The Moritzes only learned the deposit was used in construction after they had retained an attorney in the first of March 1987, (R. 294), in connection with the many problems that had arisen in construction. (See, R. 280).

Until then the Moritzes believed the deposit was being held in escrow by Hoyt as Seller, as the contract required. (R. 280).

At the time all of these problems arose, the home was not substantially complete and was not habitable. To the contrary, insulation was still being installed, no sheet rock had been installed, the plumbing was only "roughed in" and no fixtures were installed, no electric was completed and there was no driveway, walkways, landscaping, appliances or other amenities. (R. 303-304). Mr. Hoyt even admitted at that time the house could not have been lived in. (See, R. 420). Needless to say, at this time, which was March 1987, the certificate of occupancy had not been issued. The certificate was not issued until more that three (3) months later in June 1987. (R. 243).

After the Moritzes met with their attorney about the numerous serious problems that had arisen with the home construction and the problems with the Seller, the Moritzes attorney advised them to look for an alternative to the Hoyt home because in his view, the problems with the contract could very well not be resolved. (R. 302). In fact, the attorney was of the opinion that it was a "good chance" the deal could not be put back together. (R. 329). Shortly after this the Moritzes determined that the prospect of resolving matters with Hoyt was hopeless. (R. 202-203). They looked for another home immediately thereafter, (R. 301), because their current living quarters were inadequate and their existing lease

was expiring at the end of April 1987, the very next month. (R. 144, 275).[1]

This litigation followed after the Moritzes' attorney was unsuccessful in resolving with Hoyt the numerous problems involved. Significantly, his detailed letter to Hoyt, directed to the various construction and related problems, was not even responded to by Hoyt. (R. 159). Later a demand was made by the Moritzes' counsel to return the Moritzes' monies paid. No part was ever returned, however. (R. 165).

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1. The contract closing date had been April 15, 1987. (A. "J", part IV).

Summary of Argument

Hoyt Enterprises was not entitled to an award of attorneys fees and costs as the "prevailing party" in the litigation. This Court and other District Courts of Appeal have established that in contract cases a "prevailing party" is the one whose favor an affirmative judgment is rendered. It is immaterial whether there is recovery of the entire amount as long as there is some recovery. Petitioners recovered from the Seller's money being held in escrow the majority of their deposit monies after the Seller's off-setting claims had been taken into consideration. Litigation by the Petitioners was necessary to recover any part of the deposit monies. It was the Petitioners, not Respondent, who should have been held to be the prevailing party in the litigation in the Trial Court and awarded their attorneys fees and costs.

The District Court created and applied an erroneous standard in contract actions, that a breach by one party automatically makes the other party the "prevailing party" if litigation ensues. This principal dictates that if a parties' contract has been breached by another party, the non-defaulting party may act with impugnity and be discharged from future obligations under the contract, even where consideration has been paid by the breaching party and that consideration exceeds any damages incurred. This is and should not be the law.

The Seller's use of the Buyer's real estate deposit in the construction of a residence on the Seller's property in breach of the escrow provisions of the contract in this case, was a material

breach that went to the essence of the contract and excused the Buyer's subsequent performance of the contract. This breach was a breach of fiduciary duty and the equivalent of fraud. In consideration of the facts and circumstances of this case, the breach destroyed the personal trust and confidence of the Buyers that was crucial between the parties to the contract. By reason of the Seller's material breach of the contract, the Moritzes were entitled the return of their entire deposit and all other monies paid on the contract as well as prejudgment interest, costs of the proceedings and reasonable attorneys fees as the prevailing party.

Finally, Respondent as Seller was not entitled to damages or interest thereon, because any monies the Moritzes may have owed Hoyt by reason of the Trial Court finding the Moritzes breached the contract, were paid to Hoyt prior to this litigation as escrow monies, and then were used in breach of the contract in construction of the home on Hoyt's property. There was no basis to award interest when there was no deferral in payment of an obligation found to be due. Conversly, the Moritzes should have been awarded interest on their award from the day Hoyt was paid the deposit and other monies, and it was error to award the Moritzes interest on the award only from the date they were found to be in breach of contract, which was a substantial time after these monies were paid.

The decision below should be quashed and reversed.

Argument

Point One

IT WAS ERROR TO AWARD ATTORNEYS FEES AND COSTS TO HOYT ENTERPRISES, AND THE MORITZES WERE ENTITLED TO THEIR ATTORNEYS FEES AND COSTS, BECAUSE THE MORITZES OBTAINED AN AFFIRMATIVE JUDGMENT IN THE LITIGATION AND WERE THE "PREVAILING PARTY", SINCE THEY RECOVERED IN THE TRIAL COURT JUDGMENT THE GREATER AWARD OF THE DEPOSIT MONIES PAID HOYT ENTERPRISES PURSUANT TO THE REAL ESTATE CONTRACT AND OTHERWISE PREVAILED ON THEIR CLAIMS IN THE LITIGATION.

Subsequent to entry of the Amended Final Judgment, (R. 924), both the Moritzes and Hoyt filed motions in the Trial Court to tax attorneys fees and costs against the other on the grounds that each had been the "prevailing party." (R. 938, 949). The judgment granting Hoyt's motion and denying the Moritzes', (R. 1045), was dictated by the Trial Court finding that Hoyt had not materially breached the contract. (R. 511). The Appellate Court affirmed because the Trial Court found the Moritzes to have breached the contract. (A. "E", p.2). Nevertheless, the award of fees and costs is not supported by law and must be reversed.

There is a substantial body of law in contract cases that the prevailing party is the one in whose favor an affirmative judgment is rendered. See, e.g., Fixall Enterprises, Inc. vs. Theis, 524 So.2d 1015, 1916-17 (Fla. 1988), Casavan vs. Land O'Lakes Realty, Inc., 542 So.2d 371 (5th DCA Fla. 1989), Daniels vs. Arthur

Johannessen, 496 So.2d 914 (2nd DCA Fla. 1986). The rule is the same involving statutory mechanics lien foreclosures. See, e.g., Peter Marich & Assoc., Inc. vs. Powell, 365 So.2d 754 (2nd DCA Fla. 1978), Sharp vs. Ceco Corp., 242 So.2d 464 (3rd DCA Fla. 1970). It is immaterial whether there is recovery of the entire amount sought in the complaint, Peter Marich & Assoc., Inc., supra, at 756, as long as something is recovered. Malagon vs. Solari, 566 So.2d 352, 353 (4th DCA Fla. 1990) (and cases cited therein).

The Moritzes recovered an affirmative judgment in their favor in the Trial Court.[2] Their recovery was from Hoyt's money in escrow from the sale of Hoyt's property to a third party. Regardless of how the result is characterized by the District Court majority, Hoyt was not entitled to retain the entirety of the Moritzes deposit. Hoyt wasn't even entitled to retain the majority of it, only the amount of its damages. Hoyt kept all of the deposit, nevertheless, which necessitated the Moritzes initiation of litigation to recover any part of it.

The conclusion that the Moritzes are the "prevailing party" in the litigation is determined as a matter of law by Casavan, supra. That case involved a real estate transaction where the

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2. The Moritzes prevailed not only on Count I for damages but on Count II as well, since they were successful in obtaining security for the obligation Hoyt owed them. This is because the monies awarded the Moritzes were ordered to be paid to the Moritzes out of the security fund being held by Hoyt's counsel pursuant to court order. Count II had sought an equitable lien on the property in issue to secure the payments made. Ordering certain monies from sale of the property to be held in escrow and paid pursuant to the final judgment, was relief incidental to this claim.

broker was paid a deposit of approximately ELEVEN THOUSAND DOLLARS ($11,000.00). When the deal fell through the broker filed an interpleader action to determine who was entitled to the monies. The Buyer and Seller then cross-claimed against each other for the deposit, damages and other relief. Although the jury found that the buyers, the Cassavans, had breached the real estate contract, nevertheless, the Appellate Court determined that the buyers were the "prevailing parties" because they were entitled to a greater award than the seller out of the interpleaded funds. This was so even though the seller recovered some portion of the deposit as damages for the buyers breach of contract. Id. at 374.

Daniels, supra, also dictates the Moritzes to be the prevailing party in the litigation. In that case there was a real estate contract where the seller was given a TWENTY FIVE THOUSAND DOLLAR ($25,000.00) deposit in connection was the construction of a custom home. The contract entitled the buyers to return of their deposit, less "all costs relating to design, engineering, permits and surveys," if the parties failed to agree on final plans and specifications or if the buyers could not sell their home located elsewhere. Id. at 915. When neither of the two contingencies were satisfied the buyers demanded return of their deposit. When the matter could not be settled, litigation followed.

The jury in Daniels found that the buyers were entitled to receive approximately FIFTEEN THOUSAND DOLLARS ($15,000.00), or sixty percent (60%) of their deposit. The seller was entitled to the remainder. The Appellate Court in Daniels observed as

important that the buyers were forced to initiate legal action to obtain return of the deposit monies, and held that they "prevailed" in the lawsuit based on the sixty perceont (60%) recovery. The buyers, therefore, were entitled an award of attorneys fees and costs. This was in spite of the fact that the jury found that the seller had not breached the contract. Id.

As Cassavan determines, the party who obtains the greater award of the contested funds is the "prevailing party in litigation."[3] That obviously is the Moritzes in this case. Daniels supports the same conclusion and even suggests that if a party is forced to file a lawsuit for a return of a real estate deposit, although he is not successful in obtaining the entire deposit, he nevertheless is the "prevailing party" for the purpose of an award of fees and costs. Both cases illustrate that in this case the Courts below were in error in using a finding of which party was in material breach of contract to determine the prevailing party for the purposes of a fees and costs award.

The District Court in this case did not apply the standard enunciated in Fixell, Cassavan, Daniels and other cited authority,

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3. This approach also was utilized in Williams vs. Dolphin Reef Limited, 455 So.2d 640 (2nd DCA Fla. 1984), Albiez vs. Wilkerson, 546 So.2d 1112 (2nd DCA Fla. 1989), and Flemming vs. Urdl's Waterfall Creations, Inc., 549 So.2d 1057 (4th DCA Fla. 1989). Moreover, it would appear that the instant case is an even more compelling one for determining the buyer to be the prevailing party, since the Moritzes would prevail upon obtaining any recovery because their deposit monies had been used in construction and the monies held were those of the seller and constituted security for the seller's obligations.

which would have resulted in the Trial Court being reversed and the Moritzes being determined to be the "prevailing party" and awarded their attorneys fees and costs. In fact, as the dissenting opinion suggests, the majority simply failed to apply the established law. The effect of the District Court's decision is to overrule by implication the various authority Petitioners cite herein. Instead of following established authority, the decision of the District Court announces a rule of law that the standard to apply in contract cases, for the purposes of an award of attorneys fees, is that if one party breaches a contract it automatically causes the other party to be the "prevailing party" if litigation follows. (See, also, A. "E", Dissent, p.6).

This rule cannot be the standard to be applied in circumstances such as are involved in the instant case. A breach of contract by one party may not result in the other party being damaged at all. [4] Thus, in cases where no damages have been incurred and a deposit has been paid by the buyer to the seller, the entire deposit must be returned. If damages have been sustained in an amount less that the amount of the deposit monies, then there is an obligation of the seller to return the difference

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4. For example, the general damages recoverable on the buyers breach of a real estate contract is the difference, if any, between the agreed purchase price and the actual value of the property at the time of breach. See, Stewart vs. Mehrlust, 409 So.2d 1085, 1086 (2nd DCA Fla. 1982). If there is no difference, or if the value is greater than the contract price, there are no damages.

between the deposit monies and the amount of damages. In either case, where an action by the buyer results in recovery of deposit monies there should be an adjudication that the buyer is the "prevailing party" for attorneys fees purposes.

The District Court opinion also appears to establish a rule of law that when one party breaches a contract the other party may act with impunity and is discharged from further obligations under that contract. The cited portion of Rinehart vs. Miller, 548 So.2d 1176 (4th DCA Fla. 1989), found by the District Court to be similar to the instant case, holds that the breach by one party to a contract releases the other party from performing any future contractual obligation. Certainly this cannot be the law as it applies to contracts which are partially executed by one party by paying consideration in the form of a real estate deposit to a non-defaulting party. It also cannot be the law that if a party in breach of a contract files a suit on the contract pursuant to which he obtains recovery after the other parties off-setting claims are considered, that this party still must pay the non-breaching parties attorneys fees and costs in obtaining what he was legally entitled to, and which should have been paid to him, in the first place. A party to a contract, even one who has breached the contract, should not be discouraged and penalized by having to pay the non-breaching parties' attorneys fees in successful litigation that results in an affirmative judgment for the defaulting party, after any damages occasioned by the breach have been off-set.

Point Two

THE SELLER'S BREACH OF CONTRACT BY USING THE ESCROW FUNDS IN CONSTRUCTION OF THE HOME, IN THE CIRCUMSTANCES OF THIS CASE, WAS A MATERIAL BREACH EXCUSING THE BUYERS FROM FURTHER PERFORMING THE CONTRACT.

As the Trial Court found, the purchase and sale contract expressly required the FIFTY TWO THOUSAND DOLLAR ($52,000.00) deposit to be held in escrow by the Seller, Hoyt. (R. 927). That court held that use of these funds in construction of the house was a breach of the contract. Although the court expressed difficulty apparently in making a decision about whether the breach was material, (R. 927), the court did hold that the breach was not so substantially material that the Moritzes' performance of the contract was excused. (R. id.). In the circumstances of this case the court's decision was in error.

The down payment was a significant amount. The Seller, Hoyt, owned the property. Using the deposit in construction of the home resulted in improvement of his own property. (See, R. 313). The purchase contract provided that the deposit could be used only upon the Seller's full performance of the contract. In paragraph "Q" of the terms and conditions, the contract specifically required that the deposit would be disbursed only in accordance with the terms and conditions of the contract. As far as the Seller was concerned, this was upon either his complete performance or the Buyer's default. The deposit was never placed in escrow, as Hoyt

admits. (R. 273). It was used shortly after receipt in construction of the home. (See, R. 340).

The required retention of the deposit in escrow in this case assumes added significance when it is considered that the contract was contingent upon financing. In paragraph "IV" the contract provided that it was contingent upon the Buyers' obtaining a firm loan commitment within sixty (60) days from its execution. If the Buyers failed to obtain the financing the Buyers were entitled to cancel the contract and obtain return of their deposit. Nevertheless, it is axiomatic that a deposit that has been used cannot be returned and that portion of the contract is unable to be performed.

The Moritzes only learned that the deposit was used in construction after they had retained an attorney, on the second or third of March 1987, (R. 294), in connection with the many problems that had arisen in construction. (See, R. 280). Until that time the Moritzes believed the deposit was being held in escrow. (R. 280). Of course, by then there was nothing left of the deposit. (R. 340).

At the time it was learned that the deposit had been used and the myriad of other problems had reached an impasse, the home was not substantially complete. (R. 320). To the contrary, insulation still was being installed, no sheet rock had been installed, the plumbing had only been "roughed in" and no fixtures were installed, no electric was completed and there was no driveway, walkways,

landscaping, appliances or other amenities. (R. 303-304). Obviously, there was no question but that the home was not habitable. (R. 304).[5]

If the breach of contract by Hoyt in using the escrow funds was a material breach, then the Moritzes would be discharged from any further contractual duty. Beefy Trail, Inc. vs. Beefy King International, Inc., 267 So.2d 853, 857 (4th DCA Fla. 1972). Although there does not seem to be a plethora of authority on the point, a material breach is one that goes to the essence of the contract, as opposed to a "minor breach", which does not discharge the non-breaching party who is still bound to perform as agreed. Id., at 857.

In this case the contract imposed upon the Seller, a builder of luxury private family homes, (R. 235), a contractural and fiduciary duty to hold the deposit in escrow subject to the terms

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5. In the Amended Final Judgment the Trial Court suggested (R. 926) the Moritzes' remedy was to close the deal, sue thereafter for various construction problems and cited Oven Development Corporation vs. Molisky, 278 So.2d 299 (1st DCA Fla. 1973) and Ocean Ridge Development Corp. vs. Quality Plastering, Inc., 247 So.2d 72 (4th DCA Fla. 1971) in support of this remedy. Those cases, however, concern materially different circumstances where the contractor is building on the owner's property and the doctrine of "substantial completion" may appropriately apply to prevent the owner unjust enrichment at the contractor's expense. In the instant case the doctrine is inapplicable conceptually and is inapplicalbe factually as the record shows. Nevertheless, the doctrine well may have erroneously influenced the trial court in determining that the Moritzes' obligations were unexcused.

of the contract. This duty was breached. Florida courts have recognized that a breach of fiduciary duty is the equivalent of fraud. See, Steigman vs. Danese, 502 So.2d 463, 468 (1st DCA Fla. 1987), Harrell vs. Branson, 344 So.2d 604, 607 (1st DCA Fla. 1977), Soud vs. Hike, 56 So.2d 462, 469 (Fla. 1952).

A personal trust and confidence between the parties is critical in a contractual relationship such as in this case. At the time the escrow breach was discovered, numerous serious disagreements had arisen over Hoyt's construction and the deficient contract for which he was responsible and which may have doomed the transaction to failure from the beginning anyway. There also were numerous construction items still to be addressed and resolved by the parties that either were deficient in the contract's description or there was no allowance for these items provided in the contract. Trust and confidence between the parties in this case was thereby even more important than the usual contractual relationship of this type where the contract is not a major problem.

The Seller's breach of its contractual and fiduciary duty in the circumstances of this case effectively destroyed the parties' relationship and goes to the essence of the contract. There is no moral or legal reason the Moritzes should have been required to further perform under the contract. The materiality of Hoyt's breach of contract is further illustrated by the Legislature's passage in 1980 of Florida Statutes, section 501.1375. This statute requires single family residential building contractors and

developers such as Hoyt, who are not excepted from the statute's operation, to hold real estate deposits in escrow subject to stringent civil and criminal penalties. A similar statute was passed related to condominium escrow deposits. See, Florida Statutes, section 718.202. In the preamble to the Act the Legislature found, Ch. 80-386:

. . .

> The financial collapse of a number of developers and building contractors doing business in the state has recently resulted in the loss of purchasers' advance deposits not required by Florida Statutes to be paid into and maintained in escrow accounts...

Regardless of whether section 501.1375 applied to the escrow monies in this case,[6] it is readily apparent that the Legislature perceived the failure to protect deposits to be an exceedingly serious and substantial matter. It certainly is not a minor one.

In its Amended Final Judgment, (R. 927), and apparently related to the issue of materiality, the Trial Court notes that there were no damages from the use of the escrow funds. This is only from an economic standpoint, however, and requires the benefit of hindsight. There is no way the Moritzes could have known at the time they learned the deposit was used in improving Hoyt's property whether Hoyt could or would complete performance of the contract, even sell or mortgage the property to a third party to their prejudice or whether the property would become subject to the

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6. Plaintiff's claims were not based upon a violation of this statute.

claims of Hoyt's creditors.[7] Moreover, and very importantly, the parties' contractual and fiduciary relationship and the Moritzes trust and confidence in the Seller were irreparably damaged by the circumstances. Furthermore, in this situation why should the Moritzes need to make any demand[8] that the deposit be restored as the Trial Court intimated - it was Hoyt's obligation by the contract to have the money in escrow without being further asked to do so, and he already had told the Moritzes' attorney that he did not have the money. (R. 155).

Hoyt's use of the deposit monies was a material breach of the parties' agreement. This Court is in as good a position as the trial and appellate court to determine this issue, which really seems to be merely a question of law. Hoyt's breach of the contract should be determined to be material and the Moritzes' later non-performance of the contract by not closing should be excused. See, Beefy Trail. supra. Thus, Hoyt cannot avail itself of any claimed subsequent breach of contract. See, Cheezem Development Company Intracoastal Sales and Services, Inc.,

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7. In contrast, for example, an escrow or special bank account is not subject to being seized to off-set the indebtedness of the depositor to the bank. See, Nardi vs. The Continental Nat. Bank, 559 So.2d 307, 309 (3rd DCA Fla. 1990). Notice to the bank of the special nature of the account is essential, however. See, id.

8. The Moritzes' attorney's correspondence of March 10, 1987 referred to the failure to put the funds in escrow when the attorney wrote about the many problems in connection with the contract. Hoyt was further advised by the attorney that not having the deposit in escrow was a matter that would have to be resolved. (See, R. 154). Of course, nothing was resolved. (R. 159).

336 So.2d 1210, 1212 (2nd DCA Fla. 1976). Since there was no obligation of the Moritzes to close the deal, their later conduct could not constitute a breach as found by the Trial Court and no damages legally could result. Accordingly, Hoyt was entitled to no off-set in this case. The Moritzes are entitled to return of the entire deposit monies as well as prejudgment interest, costs of the proceedings and a reasonable attorneys' fee as the prevailing party.

Point Three

HOYT ENTERPRISES WAS ENTITLED TO NO AWARD OF DAMAGES OR INTEREST THEREON, SINCE ANY MONIES OWED IT WERE PAID BY THE MORITZES AT TIME OF CONTRACT EXECUTION AND WRONGFULLY USED IN CONSTRUCTION, AND THE MONIES WERE IN EXCESS OF THE AMOUNTS THE COURT DETERMINED HOYT WAS ENTITLED TO RETAIN; CONVERSELY, THE MORITZES WERE ENTITLED TO INTEREST ON THEIR AWARD FROM THE DATE THEY PAID TO HOYT THE MONIES THEY WERE AWARDED.

The court awarded Hoyt damages on its counterclaim of SIXTEEN THOUSAND EIGHT HUNDRED SIXTY ONE DOLLARS ($16,861.00), plus interest of THREE THOUSAND SEVEN HUNDRED EIGHTEEN DOLLARS AND 56/100 ($3,718.56), for a total of TWENTY THOUSAND FIVE HUNDRED SEVENTY NINE DOLLARS AND 56/100 ($20,579.56). Hoyt should have been awarded no damages or interest, however. To award "damages" per se' as the Trial Court did in the Amended Final Judgment, was to project the case in a different posture than it was in factually or legally and to lay the foundation for a legal result relating to who was the "prevailing party" that was not justified as a matter of law.

The measure of a seller's damages for the buyer's breach of contract for purchase of real property usually is the difference between the agreed price and the actual value of the property at the time of breach of the contract, less the amount paid. (e.s.). Pembroke vs. Caudill, 37 So.2d 538, 541 (Fla. 1948), Woods-Hoskins-Young Co. vs. Dittmarr, 136 So. 710 712 (Fla. 1931). The Amended Final Judgment reflects this was the standard applied in the case.

(R. 927). Since Hoyt was found by the court to be entitled to retain only approximately TWENTY THOUSAND DOLLARS ($20,000.00), far less than the almost SIXTY THOUSAND DOLLARS ($60,000.00) paid by the Moritzes, Hoyt could have suffered no damages because any amounts that Hoyt was due had been paid and already used by Hoyt long before the litigation was filed. Examined in this manner, Hoyt really had no more than an "off-set"[9] against the monies due the Moritzes and not a counterclaim upon which it could recover. This is significant because a determination by the court that the Moritzes were in default and damaged Hoyt was used as touchstone for determining Hoyt was the prevailing party and entitled to fees and costs, which is discussed under another point in this brief.

Related to a consideration of the case in this posture is the award of interest to Hoyt on the damages the court awarded. Obviously, the court cannot award interest to Hoyt if it awards Hoyt no damages. Further and importantly, though, Hoyt had the use of the Moritzes' initial deposit from the time of execution of the contract and use of their additional deposit monies from shortly thereafter. By reason of the Moritzes' payments and Hoyt's retention of these monies, Hoyt had long ago been paid any obligation the court found the Moritzes owed. Thus, there was no basis to award Hoyt interest because there was no deferral in payment of the obligation the court found was due from the Moritzes

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9. If that, because the money was paid and used by Hoyt. The monies being held by Hoyt's counsel were Hoyt's money from sale of the home to a third party.

to Hoyt. See, Southeastern Mobile Homes, Inc. vs. Transit Homes, Inc., 192 So.2d 53, 57 (2nd DCA Fla. 1966) (The obligation to pay interest arises out of a debtor-creditor relationship).

On the other had, the Moritzes were awarded interest on their award only from the date the court found they were in breach of the contract, which was the time the certificate of occupancy was issued in June 1987. Nevertheless, the Moritzes paid their initial deposit in December 1986 and the other monies shortly thereafter. Since Hoyt wrongfully used the deposit in construction of the home, the Moritzes should have been awarded legal interest on the amounts awarded to them for the entire time Hoyt had the use of these funds and thereafter until repaid. See, Adams, George, Lee, Schulte & Ward, P.A. vs. Westinghouse Electric Corp., 597 F. 2nd 570, 574 (5th Cir. 1979) (Interest is payable on amount party withholds in excess of monies found to be owed it).

Conclusion

The decision of the District Court should be quashed and reversed. Respondent Hoyt should not be adjudicated to be the prevailing party in the Trial or Appellate Courts, and it's award of fees and costs should be reversed. Petitioners Moritz should be determined to be the prevailing party in the Trial and Appellate Court litigation and awarded their fees and costs in these courts.

Hoyt Enterprises should be found to have been in material breach of the real estate contract and the Moritzes further performance thereof excused. As a result thereof, the Trial Court's award of any damages and costs and fees to Hoyt and the District Courts' affirmance thereof should be reversed and the Moritzes should be awarded return of all their monies paid and interest thereon together with costs and attorneys fees in all courts.

Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to John L. Avery, Esquire, Suite 500, 1001 North U.S. Highway One, Jupiter, Florida 33477 and to John Beranek, Esquire, Aurell, Radey, Hinkle & Thomas, 101 North Monroe Street, Suite 1000, Monroe-Park Tower, Post Office Drawer 11307, Tallahassee, Florida 32302 this 4th day of November, 1991.

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IN THE SUPREME COURT OF FLORIDA
Tallahassee, Florida

CARL A. MORITZ, ET. UX. Petitioners, vs. HOYT ENTERPRISES, INC. Respondent.	Fourth District Court Case No. 89-1232 89-1525 Supreme Court Case No. 77,892

Appendix to Petitioner's Brief on the Meirts

Exhibit	Document
A	Complaint - dated May 1, 1987
B	Amended Final Judgment - dated April 18, 1989
C	Judgment Taxing Costs and Fees - June 7, 1989
D	Excerpt of Fee Hearing - June 2, 1989
E	Fourth District Court Opinion - March 6, 1991
F	Fourth District Court Order on Re-hearing - April 12, 1991
G	Notice to Invoke Jurisdiction - April 26, 1991
H	Fourth District Court Order on Stay Pending Review - May 13, 1991
I	Order Granting Jurisdiction - October 10, 1991
J	Contract for Purchase and Sale - December 4, 1986

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to John L. Avery, Esquire, Suite 500, 1001 North U.S. Highway One, Jupiter, Florida 33477 and to John Beranek, Esquire, Aurell, Radey, Hinkle & Thomas, 101 North Monroe Street, Suite 1000, Monroe-Park Tower, Post Office Drawer 11307, Tallahassee, Florida 32302 this 4th day of November, 1991.

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