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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 REPLY BRIEF

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ATTORNEYS FOR PETITIONERS

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," "Moritzes," or "Buyers" 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 accompanying Petitioner's Brief on the Merits is referred to as "A."

Table of Contents

Table of Citations

Cases **Pages**

Statutes

Procedural Rules

Statement of Case and Facts

Respondent has significantly misconstrued material portions of the record in its Statement Of Case and Facts. Some of those matters deemed most important to the issues to be addressed follow here. Others will be referred to in the argument section.

The Fourth District reasoned in it's opinion, although erroneously, that the Moritzes breach of contract was sufficient to determine Hoyt to be the "prevailing party". It did not state that it reached this conclusion because the seller was awarded an affirmative judgment on the contract, as Respondent asserts. In fact, the seller did not recover judgment against the buyers at all.

It is obvious that not all of the factual issues were determined by the court in favor of the builder/seller. The seller lost on the escrow deposit issues, the Court recognized that the Moritzes could have had construction complaints, (see, R. 927), the Court provided the buyers a security fund during the proceedings and the buyers recovered most of their deposit monies which was at the core of the litigation. Nowhere does the Trial Court find that the construction of the house was "completely in accordance with the plans." The Trial Court did find that the parties contract was insufficient to govern resolution of the parties disputes and was inappropriate for construction of the home here, (see, R. 925), - just what the buyers claimed in their complaint. (R. 521, par. 12).

The Respondent should revisit the record as to whether the contract was drafted by the agent of the seller. Broker Joan

Hilterman prepared the contract. (R. 67). She was the "selling agent." (R. 27). The trial record contains Mrs. Hilterman's own testimony, (R. 175):

> Q. In this transaction, were you acting on behalf of the buyer, or the seller, as an agent?
> A. On behalf of the seller.
> Q. That is Hoyt Enterprises, Inc.?
> A. Right.

Hoyt may infer that there is something improper about Ms. Moritz receiving a small portion of the contemplated real estate commission on the Hoyt/Moritz transaction on a referral basis. This is customary and there is nothing wrong with it at all. (See, R. 64-66).

Respondent emphasizes evidence pertaining to a pier was excluded by the Trial Court. Nevertheless, this evidence was admitted at trial over Respondent's relevance objection. There was testimony about it at length. (See, R. 295-98).

Argument

POINT I

PREVAILING PARTY FOR PURPOSE OF ATTORNEY FEE AWARD

Although not finding it sufficiently material to excuse performance, the Trial Court certainly found that Hoyt breached the contract between the parties by not placing in escrow the substantial deposit monies and using these funds in the construction of the home. (R. 926-27). The Court did not expressly find in it's amended final judgment that the house was built in accordance with the plans and written contract of the parties. The Court merely noted that none of the construction complaints "were so substantial as to entitle the Moritzes to renounce the contract." The Court then suggested that the better course would have been for the Moritzes' claims in this regard to have been asserted in a lawsuit after closing. (R. 926).

Hoyt recovered no judgment or affirmative relief against the Moritzes in the proceedings. Hoyt's damages were found to be $20,579.00. The formula used by the Court was, (R. 226):

> ...the difference between the value of the house at the time of the breach and the contract price, plus interest on his counterclaim, minus the amount deposited by the Moritzes.

Under this formula which is accurate except for the award of interest,[1] see, Pembrook vs. Caudill, 37 So.2d 538, 541 (Fla.

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1. See, POINT III of the Moritzes briefs for an explination.

1948)(and cases cited therein), there were no damages to be recovered in a judgment. Only an offset was determined. The monies ordered to be paid the Moritzes were from a fund the Court established, (R. 560), consisting of $70,000.00 in proceeds from sale of Hoyt's home to a third party. A buyer is entitled to security for his deposit monies in the circumstances of this case. See, Tremont Co. vs. Paasche, 81 So.2d 489, 491 (Fla. 1955). A lien was claimed in COUNT II of the Moritzes' COMPLAINT, (R. 524). The Moritzes money improperly was used. Most of it should have been returned to them. All necessary, equitable and proper relief was demanded in the Complaint as additional relief. (R. 526). The Trial Court should have been able to substitute security in the form of proceeds from sale of the home to protect the Moritzes.

Actual Damages

Hoyt claims that its damages of approximately $20,000.00, (Br. p.13):

> ...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 $510,000.00.

This isn't so. The Court stated that the value of the home for the purpose of calculating damages was to be fixed at the time of breach. (e.s.)(R. 926). This is the proper time. See, et. seq., Pembroke, supra, at 541, Zipper vs. Affordable Homes, Inc., 461 So.2d 988, 981 (1st DCA Fla. 1985). The Moritzes expert appraiser, the only such expert at trial, testified that the value of the completed home at this time was $510,000.00. (R. 205, 206 & 216). This was the basis for computing damages, not the subsequent sales

price. That was inappropriate to a calculation of damages. See, Lake Region Paradise Island, Inc. vs. Graviss, 335 So.2d 341, 342 (2nd DCA Fla. 1976). Thus Hoyt's "mitigation of damages" argument, where damages would fluctuate based upon a later sales price, has no relvance to this case or the established law of damages. It should be disregarded as a consideration in determining prevailing party status or as a reason to depart from established Florida law on this issue.

In an effort to divert attention from the broad attorney's fee clause, Hoyt claims that the Moritzes' recovery was not pursuant to any actual contract provision. The focus of the inquiry, however, should be whether the litigation in the Trial Court arose out of the parties contract. This is what the parties agreement provided. (A. J, par. R). This litigation certainly arose out of the parties contract. Both counts of the Moritzes' complaint are predicated upon the parties contract, payment of the money in dispute pursuant to that contract, a demand for damages for return of that money so together with equitable relief since the deposit monies were improperly used. The Moritzes were damaged by not being returned the money paid under the contract and obtained eqitable relief with respect to establishment of a fund from which they were ordered to be paid.

Hoyt apparently has taken the position that entitlement to attorneys fees is based only upon the express remedy sought being provided in the parties contract. Petitioner disagrees. The attorneys fee provision of the contract is not so constricted.

Moreover, upon failure of performance the contract gives the seller the right to proceed at law to enforce the seller's legal rights under the contract. (A. J, par. S). Hoyt's other options were abandoned or legally precluded. In this case the seller, Hoyt, had no action at law for damages that could be enforced. This is what the Trial Court found too, since the seller already had more of the Moritzes' money than it was entitled to in damages. As far as Hoyt was concerned, the litigation determined how much of the Moritzes' money it was required to return.

Since Hoyt refused to return the Moritzes' deposit they filed suit for damages and equitable relief. As a legal matter, damages include a buyer's deposit money paid. See, Howard vs. Metcalf, 487, So.2d 43, 46 (2nd DCA Fla. 1986).

Liquidated Damages

Liquidated damages was not an issue at trial. Hoyt claimed the entire deposit as liquidated damages in four separate pleadings over the course of most of the litigation. (R. 530, 571, 592 and 765). On May 24, 1988 partial summary judgment was entered for the Moritzes denying Hoyt's claim to the deposit as liquidated damages. (R. 761). This claim the Moritzes prevailed on was a substantial one, especially if you consider the effect of a contrary result.[2]

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2. Hoyt sought and recovered in the Trial Court all attorneys fees expended in this cause. This would include those related to abandoned claims for specific performance, the unsuccessful claims related to recovery of the deposit as liquidated damages and the unsuccessful effort to plead and recover special damages. See, R. 778). This was reversible error even if the Moritzes had not prevailed in the overall result. See, Erwin vs. Scholfield, 416 So.2d 478, 479 (5th DCA Fla. 1982).

Florida Law on Prevailing Parties

Contrary to Hoyt's argument, Fixall Enterprises, Inc. vs. Theis, 524 So.2d 1915 (Fla. 1988), does support the Moritzes' position. It held that a party recovering judgment, even though there are offsetting claims, (see, Id. at 1016), is the "prevailing party" and entitled to attorneys fees under a contract clause providing for attorneys fees in litigation arising out of that contract. Id. at 1016-17.[3] The Moritzes recovered that judgment here after Hoyt's offsetting claims had been taken into consideration. See, A. E, Dis. Op., p. 63.

As its brief reflects, Hoyt has been unable to distinguish Cassavan vs. Land O' Lakes Realty, Inc., 542 So.2d 371 (5th DCA Fla. 1989), from the instant case and seeks to minimize its importance by reference to the dissent and a liquidated damage clause that no relief was based upon. That case still stands for the proposition that the party entitled to the greater award of the contested funds is the "prevailing party". Id. at 374.

Daniels vs. Arthur Johannessen, Inc., 496, So.2d 914 (2nd DCA Fla. 1986), is not distinguished either. The buyers there, as the Trial Court found here, owed money under the contract which reduced the buyer's ultimate recovery from the contested funds which had been paid to the seller at the contract's inception. Although the seller was not found to have breached the contract, the District

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3. If Hoyt had paid without suit the deposit monies he was not entitled to keep and this suit afterwards had been filed to recover the remainder of the deposit, the prevailing party would have changed. Failure to do so affects the outcome. See, Flagala Corp. vs. Hamm, 302 So.2d 195, 196 (1st DCA Fla. 1974).

Court in Daniels held this to be an eroneous basis for denying attorneys fees to the buyers. Id. at 915. The Court determined that the buyers "prevailed" in the lawsuit, finding it significant that the buyers were compelled to initiate legal action to enforce return of the deposit monies owed them. Id.

Hoyt relies on Williams vs. Dolphin Reef, Ltd., 455 So.2d 640 (2nd DCA Fla. 1984) as dispositive. The case is not controlling. In Williams there is no suggestion that the contract purchaser sought attorneys fees as did the seller, unlike the instant case. The contract there only provided attorneys fees to one party, the seller, if it prevailed in any litigation arising out of the contracts. Id. at 641. It also is unclear from the decision whether the purchaser obtained any of the relief he demanded. We know, though, that contrary to the buyer's demands the major portion of the deposit was forfeited and the contract was not rescinded. Finally, and perhaps most significantly, the seller in Williams, unlike Hoyt in the instant case, did recover the majority of the deposit in controversy. See, Id. at 641. The significance of this distinction is reinforced by the Williams court's reference to Peter Marich & Associates vs. Powell, 365 So.2d 754 (2nd DCA Fla. 1978) and Dynamic Bevills, Inc. vs. Tall, 635 So.2d 1032 (3rd DCA Fla. 1979), as support for its holding. Both of those case were mechanics lien foreclosures where the party awarded fees was the party who prevailed overall and recovered the greater amount after offsetting claims had been taken into consideration. Williams really supports the Moritzes position here, as stated by

Judge Owen in his dissent in this case.

Hoyt claims his case for fees is more compelling since it offered to return to the Mortizes all of their deposit less damages which Hoyt suffered as a result of the breach of contract. (BR. p. 18-19). Such an offer has no legal significance in determining the prevailing party in contract litigation as in this case, as this Court already has ruled in Fixall, supra. As a practical matter, the terms and conditions of this elusive "offer" are not described and the amount of the offer is really incalculable since the settlement monies were to be reduced by Hoyt's asserted but unspecified damages. In this connection, Hoyt claimed various damages at various times, (see, R. 403, 476-77), some in excess of the entire monies the Moritzes paid. (R. 476-77). In its initial and subsequent pleadings Hoyt even claimed the entire down payment as liquidated damages, (R. 530, 571, 592 & 765), and sought specific performance of the contract as well. (R. 530). Both legal positions are totally inconsistent with returning any money. If the offer was genuine it obviously was nothing that could be reasonably considered or evaluated. No amount was returned or tendered anyway.

Hoyt's reliance on Rinehart vs. Miller, 548 So.2d 1176 (4th DCA Fla. 1989) is misplaced as noted in Judge Owen's dissent. Hoyt's insistence that when the Moritzes refused to go further with the contract the construction was "substantially complete" is unsupported by the record as shown on page 9 of the Moritzes initial brief. The certificate of occupancy was not issued until

three months later. (R. 243, 303-04). For whatever reason it is offered, the doctrine of substantial completion is inapplicable to benefit Hoyt here. See, J.M. Beeson Coe vs. Sartori, 553 So.2d 180, 182 (4th DCA Fla. 1989)(substantial completion requires completion sufficient to obtain certificates of occupancy), Reider vs. P-48, Inc., 362 So.2d 105, 108 (1st DCA Fla. 1978)(punch list items substantial - no duty to close), Hursey vs. Hallmark Builders, Inc., 54 B.R. 292, 293 (Bk. Ct., MD Fla. 1985)(habitability a material consideration).

The record makes it obvious that there were substantial contractual obligations to be performed by Hoyt when the buyer and seller went their separate ways. Hoyt also did not proceed with a closing or tender performance. What Hoyt ultimately elected to do was sell the property to someone else.

Lockrane vs. Willingham Inv. Fund, Ltd, 563 So.2d 719 (5th DCA Fla. 1990), relied on by Respondent, contained separate theories of tort, implied warranty and breach of contract. Only the contract provided for an award of attorneys fees. This is unlike the present case where the entire litigation arose out of and was related to the contract between the parties. Moreover, even if the Moritzes did not prove every allegation of count one, that should not be determinative of whether they were the prevailing party for attorneys fees purposes. See, Savarese vs. Schoner, 464 So.2d 695 (2nd DCA Fla. 1985), Maw vs. Abinales, 463 So.2d 1245 (2nd DCA Fla. 1985) and Schechman vs. Grobbel, 226 So.2d 1 (2nd DCA Fla. 1969).

There is an interrelationship between both counts in the

Moritzes'complaint. The breach of the escrow provision plead in count two was the basis for the Moritzes ultimately obtaining relief in the form of proceeds from the sale of the home being held in escrow.[4] This fund was the source of satisfying the award to the Moritzes in excess of $45,000.00.

Other approaches to Prevailing Party Status

Hoyts reference to Federal Court cases to support his prevailing party status, while interesting, have no application to the instant case. Texas State Teachers Association vs. Garland Independent School District, 109 S.Ct. 1486 (1989) concerns a federal statute providing for attorneys fees, 42 U.S.C.{1983. The purpose of this statute is to insure effective access to the courts for persons who have civil rights grievances. Hemsley vs. Eckerhart, 103 S. Ct. 1933, 1937 (1983). The statute is a "general formulation" in favor of plaintiffs. Id. at 1939. Tests for determining the "prevailing party" status under section 1988 were devised in view of the congressional intent as expressed in the section's legislative history. Texas State Teachers Association, supra, at 1488. The cases differentiate this statute, which is discretionary as to fees, from contractural provisions as in the instant case. There is no reason to deviate from the approaches to a determination of prevailing party status devised by the Florida courts that apply to the instant case.

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4. See, Fla. R. Civ. P. 1.110(b)(every complaint is to be considered to pray for general relief. The exact form of a prayer for relief is not controlling. Davidson vs. Lely Estates, Inc., 337 So.2d 528, 530 (2nd DCA Fla. 1976)).

Smith vs. Adler, 16 F.L.W. 3048 (4th DCA Fla. December 11, 1991) should not influence the Court's decision either. Smith, supra, no doubt involved a fee provided by statute. So did Hemsley, supra, and Pappert vs. Mobilinium Associates V, 512 So.2d 1096 (4th DCA Fla. 1987), cited by Smith as having adopted the "succeeds on any significant issue" standard for fee awards. This statutorily related standard has an entirely different legislative intent and policy as Hemsley observes. Moreover, Smith and Pappert were Fourth District cases which that district court chose not to apply in this case. We do note in Smith, supra, however, that the court said that it is results that govern the determination of the "prevailing party" status. In that case the Court buttressed its opinion with the fact that the "prevailing party" secured most of the relief originally requested in the suit.

Point II

USE OF DEPOSIT MONEY MATERIAL BREACH OF CONTRACT

The Trial Court found that using the deposit money had not been agreed to. (R. 927). Hoyt suggests that only $10,000.00 of the deposit was required to be held in escrow. This is not a fair reading of the contract. It contemplates the possibility of making more than one deposit to be held in escrow. (A. J, par. II(a)). Hoyt attempts to discolor the Moritzes claims by suggesting that they made no complaints about the escrow monies until they found a better deal on a new house. This is wrong. The Courts attention is invited to various portions of the record as to the

circumstances and the reasons finding another home necessarily was a matter of high priority for the Moritz family. (See, R. 144, 202, 203, 275, 301, 302, 305, 306, 329 & 406).

Hoyt insists that the materiality of the escrow deposit breach should be considered in view of the existing circumstances at the time of breach. While this no doubt is true, the circumstances then did not consist of the house being substantially complete. There is no way the Moritzes could have known what the final product would be, or what extra charges Hoyt would attempt to exact, since the contract was deficient with respect to numerous construction items still to be addressed by the parties. The seller's breach of its duty with respect to the escrow deposit effectively destroyed the parties relationship and went to the essence of the contract.

Point III

Damages and Interest

Hoyt's efforts in reselling the home certainly did not benefit the Moritzes. The sales price did not determine Hoyt's damages. When the claimed breach of contract occurred in March 1987, Hoyt had not "sustained damages of at least $90,000.00". Hoyt's estimate of value of $430,000.00 in early March 1987 was for a house whose construction was not completed and could not have been lived in. (R. 416-20). A $520,000.00 contract price was for a completed house, as Hoyt acknowledged. (R. 419). Therefore, no damages can be suggested using the $520,000.00 contract price as compared with Hoyt's estimate of the value of the house at an incomplete stage

of construction. This is comparing apples to oranges.

With no citation of authority, Hoyt says it was clear error to award the Moritzes any interest on the deposit money. Petitioners disagree. When a party unjustifiably withholds amounts in excess of that which is due to it, interest is required to be paid on the amount retained in excess of his claims. Adams, George, Lee, Schulte & Ward, P.A. vs. Westinghouse Electric Corp., 597 F.2d 570, 574 (5th Cir. 1979). Moreover, interest is recoverable on deposit monies wrongfully withheld. See, Coppola Enterprises, Inc. vs. Alfone, 506 So.2d 1180, 1181 (4th DCA Fla. 1987). In this case the Moritz' were "out of pocket" on their deposit monies from December 1986 and shortly thereafter.

The evidence of Hoyt's special damages of $7,724.00 was objected to. The objection was sustained. (R. 406-08). Testimony regarding these items was received only by means of a "profer" and was not taken as evidence in the case. (R. 408-10). Although Hoyt has not raised as error in his brief the propriety of the Trial Court's ruling on the admissability of this evidence, suffice it to say that the ruling was emminently correct and consistent with the court's PARTIAL SUMMARY JUDGMENT, (R. 761), and the status of Hoyt's pleadings in the Trial Court. (See, R. 762, 292, 778). Furthermore, these damages appear in no way to be recoverable damages since they concerned expenses of a subsequent sale.

Point IV

Hoyt objects to the order escrowing monies from any later sale. (R. 560). If Hoyt had not breached the parties contract the

money would have remained intact and there would have been no necessity for the court's order to protect the Moritzes.

As a final matter, Hoyt was decreed by the court to be entitled to return of the balance of the account after the Moritzes were paid the money awarded them. Thus Hoyt got whatever interest had accrued in this account. Whether a Lis Pendens was appropriate is not an issue, but it most certainly was. See, Chiusolo vs. Kennedy, 16 FLW 2866 (Case #91-943, 5th DCA Op. 11/14/91). The interest issue framed by Hoyt is moot, as acknowledged. In the circumstances here it had no merit in the first place.[5]

Conclusion

The decision of the District Court and trial courts should be quashed and reversed and Hoyt's award of fees and costs reversed. Petitioners Moritz should be determined to be the prevailing party in this Court and lower courts and awarded their fees and costs in all courts. Also, Hoyt Enterprises should be found to have been in material breach of the parties contract and the Moritzes further performance thereof excused. As a result, the Trial Court's determination of any damages for Hoyt and the District Court's affirmance thereof should be reversed and the Moritzes should be awarded return of all their monies paid and interst thereon.

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5. Hoyt's principal's family even lived in the home before and after that subsequent sale for a total period of about eight months. (R. 242-43, 264).

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 17th day of January, 1992.

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