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SUPREME COURT OF FLORIDA

ROBERT M. DANCE,

Petitioner,

vs.

RAY TATUM,

Respondent.

Case No. 80,721

District Court of Appeal,
5th District - No. 91-1098

PETITIONER'S INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The Petitioner (Appellee at the District Court and Defendant at the trial court) is referred to herein as "DANCE," "Bob Dance" or "Robert M. Dance."

The Respondent (Appellant in the Court of Appeal and Plaintiff in the trial court) is referred to herein as "TATUM" or "Ray Tatum."

The map contained in the Appendix was attached to the Joint Pretrial Stipulation (R-134-140), and was referred to by witnesses and counsel for both parties at the trial. Parcel "B" as shown on the map is the land which has been foreclosed in this action. Parcel "A" is the land upon which Bob Dance Dodge is located. References to Parcel "A" and Parcel "B" in this Brief refer to the parcels as shown on that map.

The other documents contained in the Appendix are the documents relied upon by DANCE in his Motion to Dismiss the Appeal based upon TATUM's acceptance of the benefits of the trial court's Judgment.

References to pages in the Record On Appeal are referred to by the designation "R-____".

STATEMENT OF THE CASE AND FACTS

This action proceeded upon TATUM's First Amended Complaint to Foreclose a mortgage on real property located in Seminole County. (R-89-95).

Defendant's Answer (R-107-114) contained affirmative defenses which sought to have the Final Judgment of Foreclosure subject to a right to continue to drain waters from Parcel A (adjacent to the mortgaged premises) into the borrow pit on Parcel B (on the land sought to be foreclosed).

TATUM filed a Reply to such affirmative defenses (R-117-118) and this Reply basically admitted the existence of the borrow pit, denied the history contained therein and stated that such facts were insufficient to establish an easement, and finally stated that such rights, if they existed, were subject to the terms of the mortgage. Neither in the Reply to the Affirmative Defenses (R-117-118) nor elsewhere did TATUM raise the Statute of Frauds as a defense to DANCE's claimed drainage rights.

DANCE claimed the existence of drainage rights based on the fact that when he purchased Parcel A in 1975, both Parcels A and B were in common ownership. One of the owners of that property was an architect by the name of Rapp (R-29). DANCE testified that the purchase of Parcel A and the drainage plan were all part of a "package deal" (R-29-30), and that the system had been designed and engineered when he purchased the property (R-30).

After purchasing the property, DANCE expended approximately $250,000.00 on site improvements to Parcel A (R-23, 24, and 30-32)

for the Bob Dance Dealership (R-21), and paved virtually the entire area of Parcel B (R-23).

As a result of the construction of the Dodge Dealership and the related paving, approximately 5.8 acres of Parcel A is 90% impervious and thus, the run off is discharged into the borrow pit on Parcel B (R-35).

Neither DANCE's First Amended Complaint to Foreclose the Mortgage (R-89-95) nor his Reply to the Affirmative Defenses (R-117-118) pleads that he was a bona fide purchaser without knowledge of the encroaching pipe or the drainage system onto Parcel B, or that any such rights claimed by DANCE were barred by the Statute of Frauds. Mr. Dance testified that the drainage system has not changed since it was originally constructed (R-26) and that he did not think that if you went out there and looked, you could miss the water draining onto Parcel B (R-59).

After the sale to DANCE of Parcel A, Parcel B became vested in TATUM. Thereafter, TATUM sold Parcel B to DANCE and took back the purchase money mortgage which was foreclosed in this case.

When DANCE was negotiating for the purchase of Parcel B, he did so through an agent. TATUM admitted that at the time he was negotiating the contract he was not aware that DANCE was the real party in interest and did not become aware that DANCE was the real party in interest until the contract was signed (R-33-34).

At trial, Robert Holder, a professional engineer, testified that if it were necessary for DANCE to discontinue his drainage into the borrow pit on Parcel B, then he would be required to meet

the current County Drainage Requirements which would result in his losing 1.1 acres of the existing impervious surface which is presently used for parking (R-36). The cost of constructing such design changes would be approximately $88,000.00 (R-37).

On these facts, the case was tried without a jury and the trial court entered a Final Judgment of Foreclosure (R-293-297). In its Final Judgment, the trial court found that DANCE had an oral license from the common grantor of TATUM and DANCE to drain Parcel A into the borrow pit on Parcel B; that DANCE purchased Parcel A, extensively improved it, and constructed the culverts leaving the borrow pit on Parcel B, at which time such oral license became irrevocable; that DANCE had since continuously used the said drainage system and his use of it would have been apparent to TATUM by a reasonable inspection; and, finally, that since such license was a personal right to use land rather than an interest in land, the doctrine of merger of the estates in land did not apply and that, furthermore, since the license arose through the application of principles of equity, the equities required that the irrevocable license survived the foreclosure.

On May 15, 1991, TATUM filed his Notice of Appeal (R-302) to the Fifth District Court of Appeal. After the Notice of Appeal was filed, the property was sold in accordance with the terms of the Final Judgment of Foreclosure on June 13, 1991, and TATUM was the successful bidder at the sale. On July 17, 1991, the Clerk issued the Certificate of Title transferring Parcel B to TATUM.

On August 19, 1991 DANCE filed a Motion to Dismiss TATUM's

Appeal on the ground that by going forward with the foreclosure sale, successfully bidding at the foreclosure sale, and accepting title to Parcel B, then TATUM had accepted the benefits of the Judgment and was therefore estopped to seek a reversal thereof on appeal. The Fifth District Court of Appeal denied such Motion on September 4, 1991.

On August 14, 1992 the Fifth District Court of Appeal issued its decision which:

1. Affirmed the trial court's judgment to the extent that it gave DANCE a personal right to continue drainage but reversed that portion of the judgment providing that such drainage rights would inure to DANCE's successors in interest; and,

2. Certified the following question which it deemed to be of great public importance:

> Whether, in light of Moorings Association, Inc. the Tortoise Island Communities, 460 So.2d 961 (Fla. 5th DCA 1984) (decision quashed), 489 So.2d 22 (Fla. 1986) (dissent approved), the statement in Albrecht v. Drake Lumber Co., 67 Fla. 310, 67 So. 98 (1914), to the effect that an irrevocable license becomes an easement based on equitable estoppel, means that an irrevocable license can no longer exist in Florida.

DANCE filed a Motion for Rehearing in the District Court of Appeal on the following grounds:

1. Since TATUM failed to raise the Statute of Frauds as an affirmative defense, then the case of Tortoise Island Communities, Inc. v. Moorings Association, Inc. 489 So.2d 22 (Fla. 1986) was inapplicable;

2. Since TATUM failed to object at the trial court or in his

Brief that the license inured to DANCE's successors in interest, then the Court of Appeals should not undertake to review the trial court in that respect, and

3. Tortoise Island Communities, Inc. v. Moorings Association, Inc., was inapplicable because, unlike the case at bar, the plaintiffs there, had not improved the easement area in reliance upon the representations of the defendant.

That Motion was denied on October 1, 1992.

Whereupon DANCE filed its notice to invoke discretionary jurisdiction of the Supreme Court on October 29, 1992.

SUMMARY OF ARGUMENT

The Petitioner summarizes the arguments contained herein as follows:

1. After filing his Appeal, TATUM continued with the foreclosure sale in accordance with the Final Judgment. He was the successful bidder at the sale; a certificate of title has been issued transferring the mortgaged property to him. Accordingly, he has accepted the benefits of the Final Judgment and is not entitled to prosecute an Appeal attacking that Judgment. Furthermore, since the title which was sold at public auction was subject to an irrevocable right of DANCE to drain his adjacent property, then to reverse the Judgment at this time (either in whole or in part) would enhance the value of the property which was sold.

2. The action taken by the District Court of Appeal eliminated the portion of the trial court's Judgment which provided that the drainage rights inured to DANCE's successors in title. TATUM never objected to this wording when the matter was before the trial court, nor did he argue this matter in his Brief to the District Court of Appeal. Accordingly, it was improper for the District Court of Appeal to, sua sponte, question this language.

3. The Moorings decision clearly did not overrule Albrecht (upon which the trial court based its decision). First, the Moorings case simply does not address Albrecht and, second, the facts are clearly distinguishable. The Moorings case involved nothing but a promise; whereas, the Albrecht case and the case at bar involve situations where the licensee spent substantial sums of

money to use the licensed area.

4. Assuming that the Moorings case did overrule Albrecht, nonetheless it still requires the pleading of the Statute of Frauds. The Statute of Frauds was the basis of the Moorings decision. The rules of procedure require that the Statute of Frauds be affirmatively pled. In this case, it was not affirmatively pled and therefore was waived.

POINTS ON APPEAL

I. THE DISTRICT COURT OF APPEAL SHOULD HAVE DISMISSED THE APPEAL FROM THE TRIAL COURT BECAUSE TATUM HAD ACCEPTED THE BENEFITS OF THE TRIAL COURT'S JUDGMENT OF FORECLOSURE.

II. THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT, ERRED IN PARTIALLY REVERSING THE TRIAL COURT, BECAUSE SUCH PARTIAL REVERSAL WAS BASED UPON A MATTER NOT OBJECTED TO BY TATUM AT THE TRIAL COURT.

III. THE RULING IN ALBRECHT V. DRAKE LUMBER CO., 67 FLA. 310, 65 SO. 98 (1914) TO THE EFFECT THAT AN IRREVOCABLE LICENSE BECOMES AN EASEMENT BASED ON EQUITABLE ESTOPPEL, WAS NOT OVERRULED BY MOORINGS ASSOCIATION, INC. V. TORTOISE ISLAND COMMUNITIES, INC., 460 SO.2D 961 (FLA. 5TH DCA), DECISION QUASHED, 489 SO.2D 22 (FLA. 1986) (DISSENT APPROVED).

IV. ASSUMING, ARGUENDO, THAT THE MOORING DISSENT (ADOPTED BY THE FLORIDA SUPREME COURT) OVERRULED ALBRECHT V. DRAKE LUMBER CO., SUPRA, AND REQUIRES COMPLIANCE WITH THE STATUTE OF FRAUDS, SUCH REQUIREMENT WAS WAIVED BECAUSE TATUM DID NOT RAISE THE STATUTE OF FRAUDS.

ARGUMENT

I. THE DISTRICT COURT OF APPEAL SHOULD HAVE DISMISSED THE APPEAL FROM THE TRIAL COURT BECAUSE TATUM HAD ACCEPTED THE BENEFITS OF THE TRIAL COURT'S JUDGMENT OF FORECLOSURE.

TATUM chose to go forward with the foreclosure sale in accordance with the trial court's Final Judgment of Foreclosure. He was the successful bidder and a Certificate of Title has been issued to him.

By asking the Appellate Court to eliminate the drainage rights, he was asking that the court increase the value of what he purchased at the foreclosure sale.

This is contrary to law because he had accepted the benefits of the judgment and is also unfair to DANCE because it avoided the possibility of bidding by entities who might have been interested in bidding had they known the drainage rights would be eliminated (in part, as it turned out) from the parcel which was foreclosed.

It is well settled that where a party recovering a judgment accepts the benefits thereof, he is estopped to seek a reversal of that judgment on appeal. McMullen v. Fort Pierce Financing & Construction Co., 146 So. 567 (Fla. 1933); Capital Finance Corporation v. Oliver, 156 So. 736 (Fla. 1934); In re Fredcris, Inc., 101 So.2d 49 (Fla. 3d DCA 1958); McDaniel Gift Shop, Inc. v. Balfe, 179 So.2d 588 (Fla. 1st DCA 1965); Sedgwick v. Shaw, 188 So.2d 29 (Fla. 2d DCA 1966); Brown v. Epstein, 208 So.2d 836 (Fla. 4th DCA 1968); and State Road Department v. Hartsfield, 216 So.2d 61 (Fla. 1st DCA 1968).

The case of McMullen v. Fort Pierce Financing & Construction Co., supra, is the leading Florida decision on the subject. In that case, the Florida Supreme Court stated:

> It is a well settled doctrine that, where a party recovering a judgment or decree accepts the benefits thereof, voluntarily and knowing the facts, he is estopped to afterwards seek a reversal of such judgment or decree on writ of error or appeal. His conduct amounts to a release of errors. His acceptance of payment or enforcement, of the judgment or decree, is a waiver of errors and estops the successful party from appealing.

McMullen v. Fort Pierce Financing & Construction Co., supra, 16 page 568.

While the principle that one who has accepted the benefits of a judgment is estopped from seeking its reversal is clearly the law of Florida, we have been unable to locate any Florida cases dealing with a mortgage foreclosure.

Cases from other states, however, have consistently applied the general rule to mortgage foreclosure cases, as follows:

Male v. Harlan, 12 S.D. 627, 82 NW 179 (S.D. 1900), was an action to foreclose a real estate mortgage. Harlan was made a defendant for the reason that he held a certificate on a tax sale made of the property included in the mortgage, which the mortgagees claimed was subject and subsequent to the mortgage. Harlan claimed that the tax certificate was a prior and paramount lien. The judgment decreed the sale of the mortgage property "excepting, however, a lien in favor of the defendant James E. Harlan" based upon his tax certificate. The plaintiffs proceeded to advertise and sell the property under the final judgment and subsequently

took an appeal from that portion of the judgment excepting the lien in favor of the defendant Harlan. Even though South Dakota law specifically provided, by statute, that an appeal could be taken from a part of the judgment, the court still held that plaintiff had, by proceeding to a sale of the mortgaged premises, waived his right to an appeal of the judgment:

> They (sold) the property subject to the Harlan lien, and this was in effect a ratification of the validity of such lien and a waiver of a right on appeal. The amount of the Harlan lien does not affect the principle which must govern this case. Suppose, therefore, that the Harlan lien, instead of being the small amount found to be paid for taxes, had been a mortgage lien for $2,500.00, which had been adjudged by the court to be a prior lien, and paramount to that of the plaintiffs; would it be seriously contended that the plaintiffs could proceed to enforce the decree by a sale of the property, and still appeal from that part of the judgment adjudging the Harlan lien prior and paramount? We think that no such contention would be made.
>
> (H)e must be consistent, and stand by the position he elects to take. He must rely upon his appeal, or abandon his right to it, and act under the order. He cannot do both. He is not permitted to test the accuracy of the order by appeal, and at the same time accept any benefit which the order confers. ... Our conclusion is that the appellants, by proceeding to sell under the decree have waived their right of appeal; and the appeal is dismissed.

Male v. Harlan, supra, at pages 180 and 181.

Sterne v. Vert, 108 Ind. 232; 9 NE 127 (Ind. 1886), concerned also a suit to foreclose a mortgage. The mortgage covered three separate parcels of land. The court found that the mortgage was a valid lien on two of the three parcels but was invalid as to the

third parcel. A final judgment was entered foreclosing the mortgage and ordering the sale of two of the parcels, and in favor of the cross-complainants as to the third parcel and quieting their title thereto. The appellant was the successful bidder at the foreclosure sale but sought to appeal that portion of the decree disallowing his foreclosure as to the third parcel. The court dismissed the appeal stating:

> Having availed herself of so much of the decree as was favorable to her, both the statute (citation omitted) and the common law affirmed that an appeal is thereafter denied to the appellant. Any other rule might result in bringing about embarrassing complications and manifest injustice to the appellees, in case a reversal of the decree should result. The decree appealed from, and which was in force when the land was sold, having exempted the lands claimed by appellees from the lien of the mortgage, they might not have deemed it of any importance to them to see that the other two tracts sold for a sufficient sum to pay the appellants debt, or for the best price which might have been obtained. The appellant might have thereby secured a bargain in the purchase. If she may now hold on to what she has thus acquired, and yet reverse the judgment so far as it is unfavorable to her, the appellees will not be in the same situation they would have occupied in case the reversal had been secured before the sale of the other tracts.
>
> When the decree appealed from was rendered, the appellant had the election either to appeal, or to adopt the decree as it was, and avail herself of its benefits. Having decisively elected to pursue the latter course, she must now be confined exclusively to the course first adopted.

Sterne v. Vert, supra, 9 NE 127, at 128.

Mathis v. Literal, 117 Ark. 481, 175 SW 398 (Ark 1915), also involved a mortgage foreclosure. A question of lien priority was

raised by the pleadings and determined adversely to the mortgagee. A final decree was rendered foreclosing the appellant's mortgage subject to the superior lien and thus a foreclosure sale was ordered. The appellant was the successful bidder for the sum of $100.00. The appellant then sought to prosecute an appeal from that part of the decree which declared his mortgage lien to be junior. The appeal was dismissed with the following explanation:

> A motion is now presented by appellee to dismiss the appeal on the ground that appellant, by accepting the benefits awarded to him under the decree, waived his right of appeal. That contention is sound, for appellant's purchase under the decree constituted a recognition of the superiority of appellee's lien and his attack upon that lien by this appeal puts him in an inconsistent position. He cannot accept benefits under such decree and then appeal from it. He purchased the land for a small sum at the sale, which was intended only to dispose of the property subject to appellee's mortgage lien; and, if he should obtain a reversal of the decree, it would result in his getting more than he purchased. His position is therefore inconsistent. A litigant "waives his right to an appeal by accepting a benefit which is inconsistent with the claim of the right he seeks to establish by the appeal."
>
> The appeal is therefore dismissed.

Mathis v. Litteral, supra.

Other authorities supporting the proposition that the general rule applies to foreclosures include Lombardi v. Bush, 85 Iowa 718, 50 NW 1068 (Iowa 1892); Stockyards Nat. Bank of Chicago v. Arthur, 262 P 510 (Idaho 1927); Stewart v. McCadden, 107 Md. 314, 68 A 571 Md. App. 1908); Guaranty Sav. Bank v. Butler, 56 Kan. 267, 43 P 229

(Kan. 1896); 4 C.J.S., Appeal & Error §221; and 169 ALR 988, at p. 998.

Accordingly, TATUM's Appeal to the District Court of Appeal should have been dismissed. Thus, the Florida Supreme Court should quash the decision of the Court of Appeal and reinstate the Judgment of the trial court.

II. THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT, ERRED IN PARTIALLY REVERSING THE TRIAL COURT, BECAUSE SUCH PARTIAL REVERSAL WAS BASED UPON A MATTER NOT OBJECTED TO BY TATUM AT THE TRIAL COURT.

The District Court of Appeal partially reversed the trial court's Judgment to the extent that such judgment provided that the Plaintiff's lien was "subject only to the right of Robert M. Dance, and his successors in interest, to continue to drain water from Parcel A into the borrow pit on Parcel B" (emphasis added).

Such purported error was raised by the District Court of Appeal on its own. It was not argued by TATUM in the trial court or in his Brief to the District Court of Appeal.

The purpose of appellate review is to correct the trial court's errors only as to matters raised by the Appellant before the trial court. The trial court should not be reversed on a matter which was not raised by the Appellant. Dober v. Worrell, 401 So.2d 1322 (Fla. 1981). Nor should the Court of Appeal raise, sua sponte, matters which were not raised below. See, Norris v. Edwin W. Peck, Inc., 381 So.2d 353 (Fla. 5th DCA 1980). Admittedly, there is an exception to this rule which relates to "fundamental error." City of West Palm Beach v. Cowart, 241 So.2d

748 (4th DCA 1970). However, "fundamental error" is defined as relating to "the existence of the cause of action, the right to recover, or the jurisdiction of the trial court." City of West Palm Beach v. Cowart, supra, at p. 750. Such exception is clearly not applicable to the present case.

The failure of TATUM to raise this matter before the trial court precluded its consideration by the District Court of Appeal. Thus, the decision of the District Court of Appeal should be reversed, and the judgment of the trial court reinstated.

III. THE RULING IN ALBRECHT V. DRAKE LUMBER CO., 67 FLA. 310, 65 SO. 98 (1914) TO THE EFFECT THAT AN IRREVOCABLE LICENSE BECOMES AN EASEMENT BASED ON EQUITABLE ESTOPPEL, WAS NOT OVERRULED BY MOORINGS ASSOCIATION, INC. V. TORTOISE ISLAND COMMUNITIES, INC., 460 SO.2D 961 (FLA. 5TH DCA), DECISION QUASHED, 489 SO.2D 22 (FLA. 1986) (DISSENT APPROVED).

The issue raised by the District Court of Appeal, Fifth District, was whether Albrecht, supra, and other cases were overruled sub silentio by Tortoise Island Communities, Inc. v. Moorings Association, Inc., 489 So.2d 22 (1986). It is submitted that Albrecht was not so overruled by Moorings for two reasons:

1. Albrecht was not even mentioned in the Moorings decision. If the court had intended to overrule Albrecht, it easily could have said so.

2. Moreover, the factual basis underlying Albrecht was clearly distinguishable from that in Moorings. The reasoning contained in Albrecht therein is based upon the expenditure of substantial amounts of money by the railroad in reliance upon its license. In Moorings, by contrast, there was no allegation that

the complainants had spent any funds whatsoever for improvement of the easement area.

Accordingly, the Moorings case merely stands for the proposition that a promise which would be barred by the Statute of Frauds, without more facts, is unenforceable. It clearly does not stand for the inequitable proposition that a promise does not ripen into a license despite the fact that, in reliance thereon, the licensee has expended great sums of money in reliance thereon.

To the extent that the wording contained in the Moorings case goes further than the facts contained therein, such wording is simply dicta. See for example U.S. Concrete Pipe Company v. Bould, 437 So.2d 1061 (Fla. 1983) and Crabtree v. Aetna Casualty and Surety Company, 438 So.2d 102 (Fla. 1st DCA 1983).

There being no conflict between Albrecht and Moorings, the license granted to DANCE did, upon his expenditure of substantial monies in reliance thereon, ripen into an easement, and the decision of the District Court of Appeal, Fifth District, should be reversed and the judgment of the trial court reinstated.

IV. ASSUMING, ARGUENDO, THAT THE MOORING DISSENT (ADOPTED BY THE FLORIDA SUPREME COURT) OVERRULED ALBRECHT V. DRAKE LUMBER CO., SUPRA, AND REQUIRES COMPLIANCE WITH THE STATUTE OF FRAUDS, SUCH REQUIREMENT WAS WAIVED BECAUSE TATUM DID NOT RAISE THE STATUTE OF FRAUDS.

The thrust of Judge Cowart's dissenting opinion (which was adopted by the Supreme Court) in Moorings Association, Inc. v. Tortoise Island Communities, Inc., 460 So.2d 961 (Fla. 5th DCA 1984) was that the promises of the defendants were unenforceable

because they did not meet the requirements of the statute of frauds:

> Since an express promise to convey an interest in land is unenforceable if it is oral, obviously promises which are merely implied in fact from words and deeds being oral and not in writing, are also within the prohibition of the statute of frauds and constitute unenforceable agreements. Therefore, as to interests in land, including easements, and promises of grants and conveyances thereof, there are no enforceable contracts implied in facts not involving a writing, and any such writing giving rise to such rights, expressly or by implication, must comply with the statute of frauds. (Emphasis added).

Moorings Association, Inc. v. Tortoise Island Communities, Inc., supra, at 969. Judge Cowart then went on (in footnote no. 2, p. 969) to explain that the written sales brochures which were attached to the Plaintiff's complaint in that case did not contain sufficient elements to meet the requirements of the Statute of Frauds.

Rule 1.110(d), Fla. Rules of Civil Procedure, specifically requires that the defense of the Statute of Frauds be affirmatively pled. Plaintiff's Reply to Affirmative Defenses (R-117-118) clearly does not raise the issue of the Statute of Frauds in this case.

The failure to plead the Statute of Frauds as an affirmative defense constitutes a waiver of the right to raise it. Gordon International Advertising, Inc. v. Charlotte County Land & Title Co., 170 So.2d 59, at 60 (Fla. 3d DCA 1964); and Foliage Corporation of Florida, Inc. v. Watson, 381 So.2d 356, at 359 (Fla. 5th DCA 1980).

In view of this, the trial court certainly cannot be held to have committed error in failing to consider the effect of Tortoise Island Communities, Inc. v. Moorings Association, Inc., supra. The Statute of Frauds had not been raised and, accordingly, the lack of any written agreement was not properly before the Court.

Moreover, the requirement of affirmative pleading is to advise the other party of the issues to be tried. It is submitted that if the Statute of Frauds had been raised in this case, it might have been met by presentation of the written contract for sale and purchase between Ray Tatum and Broleman and Rapp (the original owners of both parcels).

Therefore, it would be patently unfair to defeat DANCE's drainage rights based upon the Statute of Frauds, where TATUM clearly failed to plead the Statute of Frauds and, if pled, DANCE might have produced a contract that complied with the Statute of Frauds where the requirements of the Statute of Frauds might have been shown to have been complied with.

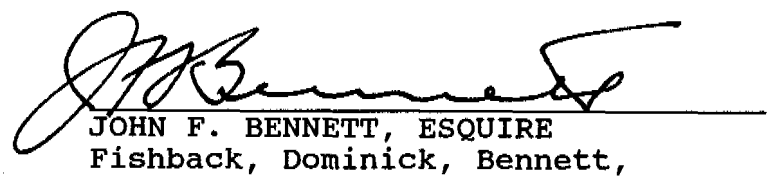
Thus, the decision of the trial court should be reinstated.

CONCLUSION

Based upon any of the points raised herein, the District Court of Appeal, Fifth District, erred in modifying the Final Judgment of Foreclosure entered by the trial court.

It is submitted that this Court should vacate the decision of the District Court of Appeal and reinstate the Judgment of the trial court.

Respectfully submitted,



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