IN THE SUPREME COURT
OF THE STATE OF FLORIDA

SCHICKEDANZ BROS.-RIVIERA
LTD., etc., et al.,

Petitioners

Supreme Court Case No. SC00-221
4th DCA Case No. 98-3854

vs..

ROBERT HARRIS and REAL ESTATE
MARKETING AND CONSULTING INC.

Respondents

_____/

PETITIONER'S AMENDED BRIEF ON JURISDICTION

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CERTIFICATE OF INTERESTED PERSONS

Counsel for Petitioners certifies that the following persons and entities have or may have an interest in the outcome of this case.

1. Thomas F. and Michael J. Ryan (Attorneys for Plaintiffs/Respondents)

2. Robert Harris (Plaintiff/Respondent)

3. Real Estate Marketing and Consulting, Inc. (Plaintiff wholly owned by Robert Harris)

4. Rod Tennyson (Attorney for Defendants/Petitioners)

5. Schickedanz Bros.-Riviera. Ltd. (Defendant-Petitioner)

6. Schickedanz Bros-Palm Beach. Ltd. (Defendant-Petitioner)

7. Schickedanz Enterprises, Inc. (Defendant-Petitioner)

8 Waldemar Schickedanz (A principal of Defendant-Petitioner)

9. Gerhard Schickedanz (A principal of Defendant-Petitioner)

10. The Honorable Moses Baker (Trial Judge)

11. Fourth District Court of Appeal Panel
The Honorable Frederick A. Hazouri
The Honorable Bobby W. Gunther
The Honorable Robert M. Gross

TABLE OF AUTHORITIES

STATEMENT OF THE CASE

Petitioners/Appellees/Defendants, (SCHICKEDANZ), was sued by the Respondent/Appellant/Plaintiff (HARRIS) alleging unpaid commissions were owed him and his company Respondent/Appellant/Plaintiff Real Estate Marketing and Consultants Inc. (REMAC). Neither HARRIS or REMAC were licensed real estate brokers at the time the alleged contracts or services were performed and to this day are not licensed under Chapter 475 F.S. The original contract between the parties was also executed by a licensed real estate broker by the name of David Paley but the Plaintiffs never named or brought Mr. Paley into the litigation.

The Trial Court gave HARRIS and REMAC three (3) separate opportunities to amend its complaint to state a cause of action in compliance with Chapter 475 F.S. and more specifically Section 475.42(1)(d) F.S. which states in part:

> No salesman shall collect any money in connection with any real estate brokerage transaction, whether as a commission, deposit, payment, rental, or otherwise, except in the name of the employer and with the express consent of the employer; and no real estate salesman, whether the holder of a valid and current license or not, shall commence or maintain any action for a commission or compensation in connection with a real estate brokerage transaction against any person except a person registered as his employer at the time the salesman performed the act or rendered the service for which the commission or compensation is due.

Like in baseball "three strikes and your out" HARRIS and REMAC failed three (3) times to state a cause of action which complied with Chapter 475 F.S. The trial court finally dismissed their second amended complaint with prejudice. HARRIS and REMAC then appealed to the Fourth District who reversed the trial court's dismissal with an opinion dated November 17, 1999. SCHICKEDANZ filed a timely Motion for Rehearing which the Fourth District denied on January 6, 2000 and this Petition followed.

The Fourth District's opinion generally describes the contracts in question as follows:

> The complaint alleges that on July 31, 1993, Harris and [SCHICKEDANZ] Riviera entered into a brokerage and marketing agreement concerning [SCHICKEDANZ] Riviera's Woodbine real estate development **(original contract)**. in August 1993 Harris and [SCHICKEDANZ] Palm Beach executed an agreement for Harris to perform marketing consulting service for [SCHICKEDANZ] Palm Beach's real estate projects **(consulting contract)**; and ReMac advanced sums of money on behalf of [SCHICKEDANZ] Riviera which Riviera agreed to repay.
>
> The **original contract** provided for Harris to perform three different services. First, Harris was to **procure purchasers** and obtain contract offers for [SCHICKEDANZ] Riviera's residential units at Woodbine in exchange **for a two percent real estate commission**. Second, Harris was responsible for marketing [SCHICKEDANZ] Woodbine by preparing budgets for advertising, creating advertisements, and soliciting bids for the furnishing of model homes. **Harris was to perform these marketing services without further compensation in addition to the promise to pay the real estate commission set forth above. The third**

service was described in the Bonus Incentive Provision. Harris was to be paid a bonus commission if he kept marketing expenses [first and second services] **below a certain percentage of gross sales. There was a separate formula set forth in the original contract from which to calculate Harris's commission on the savings.**

After the **original contract** was terminated in July or August of 1995, Harris alleges that [SCHICKEDANZ] Riviera reaffirmed the **original contract** provision for an incentive bonus and memorialized it by continuing to give Harris printouts of total marketing expenditures as required by the original contract provision. Harris alleges he continued to perform until March 1997 when his services were terminated.

In Count II for breach of contract **Harris demands payment of his bonus incentive commission** for any savings afforded [SCHICKEDANZ] Riviera by Harris.

...

Overseeing the marketing expenses of a real estate development in order to save the developer money is also not enumerated in the statute. The services under the Bonus Incentive Provision for which Harris alleges he is entitled to payment are not real estate sales or brokerage services as defined in sections 475.01(1)(c) & (d), Florida Statutes (1993). The trial court erred in dismissing on that basis.

...

In count IV Harris alleges that [SCHICKEDANZ] Palm Beach breached the **consulting contract under which Harris was to prepare budgets for advertising the named residential developments, oversee development of these advertisements, solicit bids for the furnishing of model homes, prepare brochures, coordinate the "Grand Opening," design and set up the temporary sales trailer, and other services of a similar nature.** As discussed above, Harris was not directly procuring purchasers. He was not required to appraise, auction, sell, exchange, buy, rent, or offer any real property. He also was not advertising that he was in the business of performing those

> services. See § 475.01(a), Fla. Stat. (1993). The services required by the consulting contract do not fit within the statutory definition of real estate services. The trial court erred when it found Harris was acting as a real estate salesman under the consulting contract and Count IV should not have been dismissed.
> **(E.S., [ ] indicated clarifying language)**

The contracts described above did not provide HARRIS and REMAC compensation in the form of a contract set price, salary or fee for service. The compensation formula was directly tied to the successful closing of real estate transactions or "gross sales." These contract services and compensation were all interrelated to the sale of real estate.

SUMMARY OF ARGUMENT

In its Opinion of November 17th, the Fourth District has redefined the licensing requirements of real estate brokers under Chapter 475, F.S. This new definition conflicts with decisions of other District Courts and the Florida Supreme Court conferring jurisdiction on this Court under Rule 9.030(a)(2)(A)(iv), Appellate Rules.

ARGUMENT

In its Opinion of November 17th, the Fourth District determined that the original contract dated July 31, 1993 was a brokerage and marketing agreement consisting of three different services, including: (a) the procurement of purchasers and contract offers for sales in the Woodbine

project; (b) marketing Woodbine and preparing budgets for advertising, creating advertisements and soliciting bids; and (c) a bonus incentive program wherein Harris was to be paid a bonus commission if he kept marketing expenses (the first and second service) below a certain percentage of gross real estate sales.[1] The Fourth District stated in its Opinion that the second and third services were not governed by the provisions of Chapter 475, F.S. In reaching this decision, the Fourth District opined that the original contract was a binding and valid contract between the parties and that the statutory definition of real estate broker or salesman is confined to "one who directly procures a purchaser, not whose services incidentally result in a real estate brokerage transaction." (p.2, Opinion, Appendix) The Fourth District also concluded in its Opinion that the so-called "Consulting Contract" dated August 1993 was a contract not subject to the provisions of Section 475, F.S. Based on these rulings, the Fourth District issued its mandate that Harris stated a valid cause of action for breach of expressed written contracts under the original contract and the consulting contract all alleged under Counts II and IV

[1] The bonus formula is directly tied to "gross real estate sales" which was the first service under the original contract. The more purchasers Harris procures, the greater the closings and increased "gross" sales which in turn affects his bonus. Of course, to procure more purchasers and increase gross sales, Harris must increase expenditures on marketing. The formula includes all three(3) services which cannot be segregated when computing the "bonus."

of the Second Amended Complaint.

> **However, we find that the statutory definition of real estate broker or salesman is confined to one who directly procures a purchaser not whose services incidentally result in a real estate brokerage transaction.** (e. s.) Page 2 of Opinion in Appendix ....
>
> In count V Harris alleges that Palm Beach breached the consulting contract under which Harris was to prepare budgets for advertising the named residential developments, oversee development of these advertisements, solicit bids for the furnishing of model homes, prepare brochures, coordinate the "Grand Opening," design and set up the temporary sales trailer, and other services of a similar nature. **As discussed above, Harris was not directly procuring purchasers.** He was not required to appraise, auction, sell, exchange, buy, rent, or offer any real property. He also was not advertising that he was in the business of performing those services. § 475.01(a), Fla. Stat. (1993). **The services required by the consulting contract do not fit within the statutory definition of real estate services.** (e.s.) Page 3 of Opinion in Appendix.

The Fourth District's opinion conflicts with ***Allgood v. Florida Real Estate Commission,*** 156 So. 2d 705 (Fla 2nd DCA, 1963). In ***Allgood*** the Court reviewed a sales promotion where unlicensed persons used telephone solicitations directed to the general public which invited them to the developer's project to see home sites. No details were given over the phone, just an invitation. The developer's phone solicitors were not licensed and the Commission brought the action. The trial court found the solicitors' actions to be governed by Chapter 475, Florida Statutes, because the solicitors

received $3 for each member of the public who accepted an invitation just to view the lands. The Second District affirmed, stating:

> **It appears that the legislature intended to encompass a variety of services, which if performed in this state, for another, for compensation, would require licensing. One of such services is the obtaining of prospects for the purchase of real estate.**
>
> ...
>
> The legislature has seen fit to provide that **one who directs or assists in the procuring of prospects** for the purchase of real estate shall be registered, or licensed, as a real estate salesman, or broker.
>
> ...
>
> The "bonus" of $3.00 for each prospect the plaintiff produced is a material factor in this determination. This element takes the job out of the classification of simple clerical employment and indicates the importance of the salesmanship element. **True, she makes no direct effort at sales but like the circus "drummer" she gets them in the tent for the show.**
>
> **The ultimate consideration is that these prospects who are the object of extensive exposure to the sales program at some considerable expense are those determined by the efforts of the plaintiff to be at least interested in the project. She certainly is taking part in the procuring of prospective customers.**

In ***Florida Real Estate Commission v. McGregor***, 268 So.2d 529 (Fla. 1972), this Court expressly approved of ***Allgood*** :

> No better exposition of the meaning and purpose of F.S. Section 475.01(2), F.S.A. is to be found than is expressed by the Second District Court of Appeal itself in the case of Alligood v. Florida Real Estate Commission, 156 So.2d 705. The court there on page 707 said: ...

> **The legislature has seen fit to provide that one who directs or assists in the procuring of prospects for the purchase of real estate shall be registered, or licensed, as a real estate salesman, or broker. The language which is pertinent to this case is admittedly broad, but it is equally clear and unambiguous**.

See also ***Florida Real Estate Commission***[2] ***v. Reliable Rental Agency, Inc.***, 209 So. 2d 675 (Fla. 3rd DCA 1968) wherein the Court stated:

> **We hold that in so ruling the trial judge was in error. We agree with the contention of the appellant that the compensation paid to the appellees on the basis of a percentage of rents collected was compensation for all of their services and not for the rental collections only. This is so because rental of the units of these housing properties is the sine qua non to the production of income and to the creation of rentals to be collected from which the compensation and amount of compensation to Reliable depends.** The fact that Reliable may be compensated on the same percentage of collected rentals from owners who handle their own leases as is paid by owners for whom Reliable undertakes also to negotiate and make leases does not cause the leasing services for the latter group of owners to be done gratis. **Where undertaken and performed, the handling of the leases is a substantial and integral part of the employment and services performed. (E.S.)**

The "Bonus Incentive" as the third service to the original contract is not just incidental to the sale of real estate with paid commissions. The "Bonus" is

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[2] The Fourth District's decision conflicts with the rules of the Florida Real Estate Commission which has concluded that an advertising program for sale of residential properties falls under Chapter 475, F.S. Rule 61J2-5.015, Florida Administrative Code.

"sine qua non" to the whole bundle of services under the original contract.

The above cited standards conflict with the Fourth District's opinion because the Supreme Court, the Third District and the Second District definitions of real estate broker include persons who only "**assist in procuring prospects**" while the Fourth District opinion substantially restricts the definition to only a person who "**directly procures a purchaser**." One who only "assists" is much different than one "directly" involved. A real estate "prospect" is much different than a "purchaser".

The term "assist" is defined in Black's Law Dictionary, Revised Fourth Edition, West Publishing Company, 1968, as: "To help; aid; succor; lend continence or encouragement to; participate in as an auxiliary.... to contribute effort in complete accomplishment of an ultimate purpose intended to be affected by those engaged." However, the phrase "directly involved" has a much different meaning than "assist." Black's Law Dictionary, Revised Fourth Edition, again defines "directly" to mean: "In a direct way without anything intervening; not by secondary, but by direct, means." The term "prospect" is undefined in Black's Law Dictionary, Revised Fourth Edition, but is defined in the Random House Webster's Dictionary to mean: "An apparent probability of advancement, success, profit, etc.; the outlook for the future; good business prospects; anticipation; expectation; a looking forward; something in view as source of profit; a potential or likely customer, client, candidate, etc." However, the term "purchaser" is something quite different as defined in Black's Law Dictionary, Revised Fourth Edition, to mean: "One who acquires real property in any mode than by dissent. One who acquires either real or personal property by buying it for a price in money; a buyer; vendee." It is clear from the different definitions of these terms that the Fourth District's

opinion dramatically restricts and limits the definition of a licensed real estate broker as compared with the definition in the previously cited cases in the other District Courts of Appeal and in the Florida Supreme Court.

CONCLUSION

In conclusion, the above described conflicts between the Fourth District Court of Appeal's Opinion in this case, and previous opinions of the District Courts of Appeal and Florida Supreme Court create a clear and convincing conflict of decisions. These conflicts can create havoc in the real estate-related industries because under the Fourth District's new definition of licensed real estate broker, unlicensed persons are now free to "market" and to otherwise indirectly sell real estate without the public protections of the Florida Real Estate Commission and Chapter 475, Florida Statutes. For these reasons, it is imperative that this Court grant jurisdiction and review the Fourth District Court of Appeal's Opinion in this cause.

CERTIFICATE OF SERVICE/FONT

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Michael Ryan, Esq., Thomas F. Ryan, P.A., 14041 U.S. Highway 1, Suite E, Juno Beach, FL 33408 this 9th day of February, 2000, and that this brief was prepared in Arial 14 pt. which is a proportionally spaced type.

Respectfully submitted,

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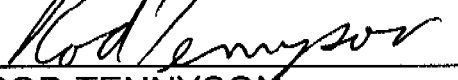
By 
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PETITIONER'S APPENDIX

ROD TENNYSON, P.A.
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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JULY TERM 1999

ROBERT HARRIS, and **REAL ESTATE MARKETING AND CONSULTING, INC.**, a Florida corporation,

Appellants,

v.

SCHICKEDANZ BROS.-RIVIERA LTD., a Florida Limited Partnership, and **SCHICKEDANZ BROS. - PALM BEACH, LTD.**, a Florida Limited Partnership, and **SCHICKEDANZ ENTERPRISES, INC.**, the corporate general partner of **SCHICKEDANZ BROS.-RIVIERA LTD.**, and **SCHICKEDANZ BROS. - PALM BEACH, LTD.**,

Appellees.

CASE NO. 98-3854

Opinion filed November 17, 1999

Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Moses Baker, Judge; L.T. Case No. CL 97-6741 AD.

Michael J. Ryan and Thomas F. Ryan, Juno Beach, for appellants.

Rod Tennyson of Rod Tennyson, P.A., West Palm Beach, for appellees.

HAZOURI, J.

Robert Harris ("Harris") and Real Estate Marketing and Consulting, Inc. ("ReMac") appeal the dismissal with prejudice of their five-count second amended complaint ("complaint") filed against Schickedanz Bros. - Riviera Ltd. ("Riviera"), Schickedanz Bros.- Palm Beach, Ltd. ("Palm Beach"), and Schickedanz Enterprises, Inc. ("Schickedanz"), Riviera's and Palm Beach's corporate general partner. Appellants concede in their brief that the trial court properly granted appellees' motion to dismiss Count I. The trial court dismissed Counts II, III, and IV as in violation of section 475.42(1)(d), Florida Statutes (1993), and its prohibition against real estate salespersons maintaining an action for compensation in connection with a real estate brokerage transaction. Count V was dismissed as violative of the statute of frauds. We affirm the dismissal of Count III and reverse the dismissal of Counts II, IV, and V.

The complaint alleges that on July 31, 1993, Harris and Riviera entered into a brokerage and marketing agreement concerning Riviera's Woodbine real estate development ("original contract"); in August 1993 Harris and Palm Beach executed an agreement for Harris to perform marketing consulting service for Palm Beach's real estate projects ("consulting contract"); and ReMac advanced sums of money on behalf of Riviera which Riviera agreed to repay.

The original contract provided for Harris to perform three different services. First, Harris was to procure purchasers and obtain contract offers for Riviera's residential units at Woodbine in exchange for a two percent real estate commission. Second, Harris was responsible for marketing Woodbine by preparing budgets for advertising, creating advertisements, and soliciting bids for the furnishing of model homes. Harris was to perform these marketing services without further compensation in addition to the promise to pay the real estate commission set forth above. The third service was described in the Bonus Incentive Provision. Harris was to be paid a bonus commission if he kept marketing expenses below a certain percentage of gross sales. There was a separate formula set forth in the original contract from which to calculate Harris's commission on the savings.

After the original contract was terminated in July or August of 1995, Harris alleges that Riviera reaffirmed the original contract provision for an

incentive bonus and memorialized it by continuing to give Harris printouts of total marketing expenditures as required by the original contract provision. Harris alleges he continued to perform until March 1997 when his services were terminated.

In Count II for breach of contract Harris demands payment of his bonus incentive commission for any savings afforded Riviera by Harris. The trial court cited section 475.42(1)(d), Florida Statutes (1993),[1] as its basis for dismissing this count. That section prohibits a real estate salesman from maintaining an action for a commission in connection with a real estate brokerage transaction. Section 475.01(c) and (d), Florida Statutes (1993)[2] (now (a) and (k), respectively), set forth the definitions of a broker and a salesman. These definitions provide that one "who takes any part in the procuring of . . . purchasers . . . of . . . the real property of another . . ." is a real estate broker or salesman. Black's Law Dictionary defines "procure" with respect to brokers as "to find or introduce; —said of a broker who obtains a customer. To bring the seller and buyer together so that the seller has an opportunity to sell." BLACK'S LAW DICTIONARY 1208 (6th ed. 1990). In working for a developer, it might be argued that any services Harris performs would ultimately result in the procuring of real estate purchasers. However, we find that the statutory definition of real estate broker or salesman is confined to one who directly procures a purchaser not whose services incidentally result in a real estate brokerage transaction.

In Hardcastle Pointe Corp. v. Cohen, 505 So. 2d 1381, 1384 (Fla. 4th DCA 1987), this court held that "services for site planning, researching, assisting in preparation of a site plan, consulting, and proposing a name for the project are not specifically enumerated in the statute." Overseeing the marketing expenses of a real estate development in order to save the developer money is also not enumerated in the statute. The services under the Bonus Incentive Provision for which Harris alleges he is entitled to payment are not real estate sales or brokerage services as defined in sections 475.01(1)(c) & (d), Florida Statutes (1993). The trial court erred in dismissing on that basis.

[1]No salesman shall collect any money in connection with any real estate brokerage transaction, whether as a commission, deposit, payment, rental, or otherwise, except in the name of the employer and with the express consent of the employer; and no real estate salesman, whether the holder of a valid and current license or not, shall commence or maintain any action for a commission or compensation in connection with a real estate brokerage transaction against any person except a person registered as his employer at the time the salesman performed the act or rendered the service for which the commission or compensation is due.

[2](c) "Broker" means a person who, for another, and for a compensation or valuable consideration directly or indirectly paid or promised, expressly or impliedly, or with an intent to collect or receive a compensation or valuable consideration therefor, appraises, auctions, sells, exchanges, buys, rents, or offers, attempts or agrees to appraise, auction, or negotiate the sale, exchange, purchase, or rental of business enterprises or business opportunities or any real property or any interest in or concerning the same, including mineral rights or leases, or who advertises or holds out to the public by any oral or printed solicitation or representation that he is engaged in the business of appraising, auctioning, buying, selling, exchanging, leasing, or renting business enterprises or business opportunities or real property of others or interests therein, including mineral rights, or who takes any part in the procuring of sellers, purchasers, lessors, or lessees of business enterprises or business opportunities or the real property of another, or leases, or interest therein, including mineral rights, or who directs or assists in the procuring of prospects or in the negotiation or closing of any transaction which does, or is calculated to, result in a sale, exchange, or leasing thereof, and who receives, expects, or is promised any compensation or valuable consideration, directly or indirectly therefor . . . .

(d) "Salesman" means a person who performs any act specified in the definition of "broker," but who performs such act under the direction, control, or management of another person.

Riviera argues that the dismissal was proper because the alleged agreement was a parol agreement and it violated the statute of frauds, section 725.01, Florida Statutes (1993), which prohibits an action upon any agreement not to be performed within one year from its inception. An exception to this prohibition exists. In Gerry v. Antonio, 409 So. 2d 1181, 1183 (Fla. 4th DCA 1982), this court held:

> When an oral contract has been fully performed by one party, the statute of frauds may not be employed as a defense. The statute of frauds also may not be invoked where non-performance of a contract's original terms has been occasioned by an oral modification and the contract as modified has been performed.

Harris alleges in the complaint that he completely performed and then Riviera terminated the original contract without cause and changed its accounting practices, thereby preventing Harris from receiving his bonus. This is sufficient to place the contract within the exception and outside the statute of frauds. Harris's allegations in Count II state a cause of action for his incentive bonus and it should not have been dismissed. See Hiatt v. Vaughn, 430 So. 2d 597 (Fla. 4th DCA 1983).

Count III is Harris's action in quantum meruit for the marketing services rendered under the original contract which he argues were not within the definition of a real estate brokerage transaction as defined in section 475.01(c), Florida Statute (1993). Payment for these services was included within the commissions paid for the real estate transactions provided for in the same contract.

Harris may not maintain an action for quantum meruit for services he performed while performing under an express contract between the parties. "It is well settled that the law will not imply a contract where an express contract exists concerning the same subject matter." Kovtan v. Frederiksen, 449 So. 2d 1 (Fla. 2nd DCA 1984); Hoon v. Pate Constr. Co., 607 So. 2d 423, 427 (Fla. 4th DCA 1992).

In count IV Harris alleges that Palm Beach breached the consulting contract under which Harris was to prepare budgets for advertising the named residential developments, oversee development of these advertisements, solicit bids for the furnishing of model homes, prepare brochures, coordinate the "Grand Opening," design and set up the temporary sales trailer, and other services of a similar nature. As discussed above, Harris was not directly procuring purchasers. He was not required to appraise, auction, sell, exchange, buy, rent, or offer any real property. He also was not advertising that he was in the business of performing those services. See § 475.01(a), Fla. Stat. (1993). The services required by the consulting contract do not fit within the statutory definition of real estate services. The trial court erred when it found Harris was acting as a real estate salesman under the consulting contract and Count IV should not have been dismissed.

The last count of Harris's and ReMac's complaint is for sums advanced by ReMac on behalf of Riviera which Riviera agreed to repay. The trial court dismissed this action on the grounds that there was a violation of the statute of frauds provisions in sections 671.206 and 687.0304, Florida Statutes (1993).

Section 671.206, which is part of the U.C.C., provides:

> (1) Except in the cases described in subsection (2) of this section a contract for the sale of personal property is not enforceable by way of action or defense beyond $5,000 in amount or value of remedy unless there is some writing which indicates that a contract for sale has been made between the parties at a defined or stated price, reasonably identifies the subject matter, and is signed by the party against whom enforcement is sought or by his authorized agent.
>
> (2) Subsection (1) of this section does not apply to contracts for the sale of goods (s.

672.201) nor of securities (s. 678.319) nor to security agreements (s. 679.203).

The agreement at issue is not a contract for the sale of personal property. This statute is not applicable to this cause of action for money lent.

The other statute cited by the trial court is section 687.0304, entitled Credit Agreements, which provides:

> (1) DEFINITIONS.—For purposes of this section:
> (a) "Credit agreement" means an agreement to lend or forbear repayment of money, goods, or things in action, to otherwise extend credit, or to make any other financial accommodation.
> (b) "Creditor" means a person who extends credit under a credit agreement with a debtor.
> (c) "Debtor" means a person who obtains credit or seeks a credit agreement with a creditor or who owes money to a creditor.
> 2) CREDIT AGREEMENTS TO BE IN WRITING.—A debtor may not maintain an action on a credit agreement unless the agreement is in writing, expresses consideration, sets forth the relevant terms and conditions, and is signed by the creditor and the debtor.

This statute is also inapplicable. ReMac is not a debtor who is trying to maintain an action on a credit agreement. ReMac is a creditor suing for money owed. The trial court erred in dismissing Count V.

Based upon the foregoing, we reverse the dismissal of Counts II, IV, and V and affirm the dismissal of Count III.

AFFIRMED in part; REVERSED in part, and REMANDED.

GUNTHER and GROSS, JJ., concur.

NOT FINAL UNTIL THE DISPOSITION OF ANY TIMELY FILED MOTION FOR REHEARING.