ORIGINAL

IN THE SUPREME COURT
OF THE STATE OF FLORIDA

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

Petitioners

Supreme Court Case No. SCOO-221

4th DCA CASE NO: 98-3854

vs.

ROBERT HARRIS and REAL ESTATE
MARKETING AND CONSULTTNG, INC.

Respondents.

RESPONDENTS' AMENDED ANSWER TO PETITIONER'S BRIEF ON JURISDICTION

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RESPONSE TO STATEMENT OF THE CASE

For the purpose of this case, since the Second Amended Complaint was dismissed by the trial court for failure to state a cause of action, the reviewing courts have to take as true the facts as pled. (Second Amended Complaint is attached for this court's convenience.) The facts as set forth by Petitioner focus on the "Original Contract" which, as set forth in the Second Amended Complaint, was terminated. The references to David Poley, Marshal, etc,, are totally irrelevant and misleading.

SUMMARY OF ARGUMENT

The counts reinstated do not deal with real estate sales commissions because they are not based on compensation for real estate sales' services.

ARGUMENT

The Fourth District Court of Appeals reinstated three counts, none of which have to do with real estate commissions in any way, shape or form. [1]

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[1] Originally, Harris sued for a few unpaid commissions based on the fact that he was working for the Developer, Schickedanz Bros.- Riviera, Ltd., selling its own product, residential units at Woodbine, exclusively; and was owed a few commissions per the terms of the "Last Contract." The trial court dismissed these counts, the Fourth DCA affirmed, and Harris has decided to accept the fact that he is not going to be paid those commissions for which he was the procuring cause and chose (and does choose) to go forward on the rest of his claims, ie. Money lent, consulting fees regarding properties other than Woodbine, and marketing bonus.

AS TO COUNT V:

The fact is that REMAC, wholly owned by Harris, lent the Schickedanzes $33,508.42 during the final months of his employment, which was never paid back. This is Count V for "money lent" which pleading was taken from the form approved by this Florida Supreme Court, Form 1.936 Fla.R.Civ.P. It does not appear that Petitioner takes exception to the Fourth DCA ruling as relates to Count V.

AS TO COUNT IV:

The fact is that the Schickedanz Bros. - Palm beach, Ltd., hired Harris as a marketing consultant and, even though he was to be paid a percent of gross sales, he was not involved in any selling activity, did not meet with buyers or talk directly with potential buyers, and, in short, did not perform any of the services usually provided by real estate sales persons in an effort to procure a buyer. See Count IV.

The Petitioner cites three cases for its proposition that the subject opinion is in direct conflict with each of them or all of them read together. They are all distinguishable from the facts of the case at bar.

In Alligood v. Florida Real Estate Commission 156 So.2d 705 (2nd DCA, 1963), the activities of telemarketers who were paid bonuses for prospects who showed up at the site for a tour were deemed to come within the licensing jurisdiction of the Florida Real Estate Commission. The Court noted at 156 So.2d 706:

> "5. The Plaintiff is compensated for these services at the rate of $1.15 per hour for the time spent on the job, plus $3.00 for every person, or 'buying unit' whom she successfully solicits to visit the area of said lands."

and at 707:

> "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."

In the present case, Mr. Harris had no such direct contact with any potential purchaser and his compensation was a flat percent of all sales irrespective of the success of his efforts *vis a vis* particular purchaser closings. In short, he was not charged with any responsibility to procure buyers.

In Florida Real Estate Commission v. Reliable Rental Agency, Inc. 209 So.2d 675 (3 DCA, 1968), the employees of Reliable were renting other peoples' property as a regular service. They showed the property, signed the people up and took the money. At 209 So.2d at 676, the court noted:

> ""Reliable placed signs on or in the buildings advertising itself as the rental agent and directing prospective lessees to Reliable's office address. There, prospective lessees responding to such advertisements, were screened and leases were made by Reliable on behalf of the respective owners which the appellees found to be acceptable. In some instances the appellees undertook to keep the rental premises of an owner leased to the highest practicable percentage of occupancy."

In short, real estate sales services to directly procure tenants were being provided.

In Florida Real Estate Commission v. MacGregor, 268 So.2d 529 (Fla S.Ct. 1972) the employees of Mid-Sates Homes, Inc. actually solicited buyers and contracted for the sale of the real estate (in other words, they went out and procured buyers). At 268 So.2d 530 the Court noted:

> "[1] It appears Mid-State Homes, Inc., Respondent, is engaged in purchasing and servicing mortgages on real estate, primarily homes. It has approximately 3,200 accounts, aggregating $22,000,000 in mortgages receivable and obtains title to real estate through foreclosures or deed in lieu. Joe Bigsby and Sam Bullara, Jr. Respondents, are salaried employees of Mid-State. devoting. fifteen per cent of their time getting purchasers for the homes Mid-State has acquired by foreclosure or deed. These two are not officers of Mid-State and do not receive any bonus or commission for getting such purchasers." (emphasis supplied)

Again, there was a direct effort to procure buyers. To read the Petitioners' interpretation of the law, then one who paints a billboard advertising a home for sale who then sues to get paid would be barred. This is not the case, since the painter would not be directly involved in the procurement of a buyer. Neither was Harris.

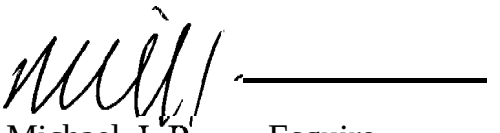
AS TO COUNT II:

As to the Count for the "bonus", it is also likewise factually distinguishable from the three cases cited by Petitioners as being the basis for conflict jurisdiction. Harris was in charge of the marketing budget for Woodbine and he was to receive fifty (50%) percent of all the money saved by judiciously spending the budget which was five (5%) percent of the gross sales. This was the carrot. He bought the TV and radio time, designed the ads, did direct mail, purchased billboard design and space, placed newspaper advertising, etc. His remuneration was not a percent of gross sales, but, rather, one half (1/2) of the savings of the budget which was a percent of gross sales. It never mattered who sold the product. He was not required to have anything to do with procuring buyers, closing deals, showing the property, etc. As I noted above, this is different than the situations addressed in Alligood, MacGregor or Reliable.

CONCLUSION

The cases cited are distinguishable and do not conflict with the decision of the Fourth DCA in the case at bar.

Respectfully submitted,



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CERTIFICATION

I **hereby** certify that I have sent a copy of the foregoing to Rod Tennyson, PPAA at 1890 11 Australian **Ave. So., West Palm Beach, FL 33402,** this 28 day of February, **2000.**

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CERTIFICATION OF FONT SIZE

IT IS HEREBY CERTIFIED that the style and type of font used to prepare this response brief is 14 point proportionately spaced Times New Roman.

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APPENDIX