

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO.:

FIRST DCA CASE NO.: 01-2358

L.T. CASE NO.: 96-7094

ST. JOE CORPORATION,

Defendant/Petitioner,

vs.

H. BRUCE MCIVER,

Petitioner/Respondent.

**PETITIONER'S BRIEF ON JURISDICTION
IN SUPPORT OF NOTICE TO INVOKE
DISCRETIONARY JURISDICTION TO REVIEW
DECISION OF THE FIRST DISTRICT COURT
OF APPEAL OF THE STATE OF FLORIDA**

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PRELIMINARY STATEMENT

Petitioner, St. Joe Corporation, f/k/a St. Joe Paper Company, will be referred to as “St. Joe.” Respondent H. Bruce McIver will be referred to as “McIver.” Citations to the Appendix will refer to the September 13, 2002, decision of the First District Court of Appeal by page number of the decision as follows: (App., P. ____)

STATEMENT OF THE CASE AND FACTS¹

This is a petition to invoke the discretionary jurisdiction of this Court pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv). The decision below (the “Decision”), dated September 13, 2002, became final for discretionary review purposes by the First District’s Order denying Petitioner’s Motion for Rehearing or Certification, entered October 18, 2002. Petitioner timely filed a notice to invoke the discretionary jurisdiction of this Court on Monday November 18, 2002.

In his Third Amended Complaint, Respondent McIver, a licensed real estate broker, alleged the existence and breach of an express oral contract concerning the sale of property owned by St. Joe. This property is approximately 660 acres known as Topsail Hill. (App., P. 2) The alleged express oral agreement provided that Respondent McIver was to act as St. Joe’s real estate agent and broker in selling the Topsail Hill property. Appellant alleged that his real estate commission under the oral agreement would have been 2% of the sale price. The State of Florida never accepted any sale agreement proposed by McIver. Topsail Hill was never sold to the State of Florida pursuant to any sales agreement, whether negotiated by McIver or otherwise. Further, McIver failed to bring to St. Joe an offer from a purchaser able and willing to

¹ This statement recites the facts for jurisdictional purposes only. If this Court accepts jurisdiction, St. Joe will address additional facts and matters.

buy the property at the price St. Joe indicated was acceptable. (App., P. 2)

Subsequently, the State of Florida commenced legal proceedings to acquire the Topsail Hill property from St. Joe through condemnation rather than through a negotiated sale. St. Joe defended itself and sought to defeat the condemnation proceedings. That Court dismissed the State's petition. However, the State had promptly filed a Motion for Rehearing which remained pending when a consent final judgment was entered which provided compensation to St. Joe for the property taken. If a consent final judgment had not been entered, the State would have appealed. (App., P. 3 and 4)

The Circuit Court below granted St. Joe's Motion for Summary Judgment. On appeal by McIver, the First District Court of Appeal reversed summary judgment with respect to McIver's claim of breach of an express contract. (App. P. 10)

SUMMARY OF THE ARGUMENT

In reversing the trial court's granting of summary judgment with respect to McIver's count alleging a breach of express contract, the Decision specifically held that there was no bright-line rule in Florida that once the State has initiated a condemnation action, any conveyance that occurs while that action is pending does not constitute a sale for purposes of a broker's commission, unless the brokerage agreement provides for such a contingency. In this respect, the Decision conflicts

with decisions of other district courts which hold that a taking by condemnation does not constitute a sale for purposes of a broker's commission, unless the brokerage agreement provides for such a contingency. Dauer v. Pichowski, 413 So.2d 62 (Fla. 2d DCA 1982); Keyes Co. v. Florida Nursing Corp., 340 So.2d 1254 (Fla. 3d DCA 1976).

ARGUMENT

I. IN DETERMINING THAT THERE IS NO BRIGHT-LINE RULE THAT CONDEMNATION IS NOT A SALE FOR PURPOSES OF A BROKER'S COMMISSION, THE DECISION CONFLICTS WITH CASES THAT ESTABLISH SUCH A BRIGHT-LINE RULE.

In its Decision, the First District Court of Appeal reversed an order of the trial Court granting summary judgment to St. Joe on a claim by McIver. McIver sued for a real estate commission on the State of Florida's taking, by consent judgment in an eminent domain proceeding, of property owned by St. Joe. Summary judgment had been granted, in relevant part, because McIver was only entitled to a commission, if at all, if the subject property was "sold," and, as a matter of law, a condemnation is not a sale. Accordingly, no commission was owed since the broker's agreement with the seller did not expressly provide for a commission in the event of a taking.

The First DCA reversed summary judgment, opining that existing case law in Florida does not establish a “bright-line rule” that a condemnation does not constitute a “sale” for purposes of determining whether a broker is entitled to a commission. Dauer, however, unambiguously establishes just such a bright-line test. Dauer holds that, “[e]ven where he is the procuring cause of property being acquired by condemnation, a broker can only recover a commission if there is a specific provision in the brokerage contract to this effect.” (Emphasis added) 413 So.2d at 63-64. Dauer further held “[i]t is well settled that a condemnation proceeding does not constitute a sale for purposes of the right to be paid a real estate commission.” Id.

Dauer cited to Wilson v. Frederick R. Ross Ins. Co., 180 P. 2d 226 (Colo. 1947), for the proposition that a transaction “may be considered a sale for purposes of a broker’s commission only when the owner agrees on the property to be sold, concurs as to the time at which he is to give up possession, and has the power to negotiate a satisfactory price.” Dauer, 413 So.2d at 64. Significantly, Dauer then held, “[o]bviously, condemnation meets none of these tests.” (Emphasis added) Id. Dauer does not state that most condemnations fail to meet the “tests,” but that “condemnation” meets none of the tests. Wilson itself is clear why this is necessarily the case, holding that an owner subject to condemnation proceedings has two choices, “(1) reaching an accord in respect to compensation for the property condemned, or

(2) contesting the case in court. The owner is in court whether he wants to be or not, and his only alternatives are to settle or litigate.” (Emphasis added) Wilson at 180 P.2d at 232. This perfectly describes St. Joe’s position in the condemnation proceeding through which its property was taken.

The First DCA suggests that the property owner may still owe a commission in the event of condemnation if he is in fact a “willing seller” of the property. That Court stated that a jury could find that the “condemnation” in this case constituted a sale for purposes of a broker’s commission and that McIver’s express contract claim was thus inappropriate for summary judgment. (App., P. 9)

The First DCA noted that the Dauer court, after citing Wilson and other case law for the proposition that a condemnation is not a sale:

[W]ent on to analyze the particular facts of that case. Had the court intended to set forth a bright-line rule, such an extensive factual analysis would not have been necessary.

(App., P. 6) Review of the Dauer opinion, however, shows that such an analysis is not inconsistent with the Dauer Court’s adoption of a bright-line rule. In Dauer, the Court’s factual discussion was not directed to whether the landowner/seller in that case met the so-called “willing seller” factors from Wilson. Rather, the lengthy factual discussions in Dauer were necessitated because the broker in that case could have recovered on alternate theories of recovery not made by McIver below. McIver’s

express contract claim depended on a sale having been made (and not merely a buyer having been found) and there was no assertion that the express contract provided for a commission in the event of a condemnation.

Dauer, through its citation to Wilson, holds that condemnation cannot be a sale for commission purposes, since condemnation inherently cannot meet the Wilson criteria for a transaction which would constitute a “sale.” The factors which Dauer and Wilson set out describe an actual sale as opposed to a condemnation. They are contrasted with a condemnation, and are not intended to be used to differentiate certain condemnations which may be considered sales. Once condemnation proceedings are initiated, a property owner has no discretion to withdraw from negotiations or refuse to transfer its property to the condemning authority. As noted by Wilson, only where an actual agreement to the terms of a sale existed prior to condemnation proceedings instituted solely to clear title, as in Tyler v. Seiler, 76 Misc. 185, 136 N.Y.S. 394 (1912), can it be contended that a commission may be due. No agreement between St. Joe and the State regarding the acquisition of St. Joe’s property existed prior to condemnation proceedings being initiated.

The same principle found in Dauer, that a taking by eminent domain is not a sale for purposes of the broker’s commission, is also set forth unambiguously in Keyes Company v. Florida Nursing Corporation, 340 So.2d 1254 (Fla. 3d DCA 1976),

discussed in Dauer. There, the property owner and Dade County agreed upon the terms of a sale of property, but the property owner subsequently refused to go through with the sale. Dade County then initiated condemnation proceedings which settled, since the parties “agreed to a price and conditions of a judgment of condemnation” 340 at 1256. The broker claimed a commission. Keyes stated:

Appellee’s position is that the agreement to pay a commission was conditioned ‘ . . . upon completion of this sale’ It is, thereupon, urged that an eminent domain proceeding is not a sale. This position is well-supported by the cases cited by the court in its opinion. See *Wilson v. Frederick R. Ross Inv. Co.*, 116 Colo. 249, 180 P.2d 226, 170 A.L.R. 1410(1947).

340 So.2d at 1256. (Emphasis added, additional citation omitted) The fact that the condemnation action was settled by agreement of the parties did not affect the clear distinction between a sale and a condemnation for the Keyes Court.

Although the Keyes Court reversed the summary judgment entered in favor of the landowner, this was only because of the existence of the factual issue of whether the broker had an agreement entitling it to a commission on “the finding of a purchaser” Id. at 1256. Keyes merely held that if that were true:

. . . then appellant’s position is supported by those cases holding that a seller may not, after a broker has become entitled to a commission for the finding of a purchaser,

frustrate the broker's right to a commission by its own wrong in refusing to proceed with the sale.

Id.

In Keyes an agreement to sell the property had been reached prior to condemnation proceedings being initiated, but the property owner had refused to go forward with the sale. Dauer, 413 So.2d at 64. In the present case the commission was dependent upon a sale (not the finding of a purchaser) and, as previously noted, St. Joe had not reached an agreement on terms for sale with the State and then refused to go forward. (It is undisputed that at the time condemnation proceedings to acquire St. Joe's property were initiated, contract negotiations were at impasse). Since St. Joe did not frustrate a sale previously procured by McIver, the issue remanded in Keyes is not present here. Accordingly, the Keyes holding that a condemnation is not a sale states a bright-line test that is unambiguously applicable to the facts of the present case and is in conflict with the opinion of the First District Court of Appeal opinion below.

II. THE COURT SHOULD EXERCISE ITS JURISDICTION TO REVIEW THIS CASE

The decision below raises issues of major consequence to property owners throughout Florida. It would allow licensed real estate brokers to claim sales commissions in situations where they have produced neither a ready and willing acceptable buyer nor a sale. It would further overturn a settled principle under which professional real estate brokers are responsible for unambiguously setting forth in their

brokerage agreements their expectations regarding the basis for commission. It would interject ambiguity into such transactions encouraging unnecessary litigation. Prior to the decision by the First DCA of which review is now sought, the decisional case law in Florida had been settled. As Dauer unambiguously holds, “[e]ven where he is the procuring cause of property being acquired by condemnation, a broker can only recover a commission if there is a specific provision in the brokerage contract to this effect.” 413 So.2d at 63-64.

CONCLUSION

The decision below directly and expressly conflicts with Dauer and Keyes. St. Joe respectfully requests that this Court exercise its discretionary jurisdiction and review the decision of the First District Court of Appeal in this case.

Respectfully submitted this _____ day of December, 2002.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the true copies of the foregoing have been furnished by U.S. MAIL to **R. STUART HUFF**, 330 Alhambra Circle, Coral Gables, FL 33134; **JULIUS F. PARKER, III**, Pennington, Moore, Wilkinson & Dunbar, P.A., P. O. Box 10095, Tallahassee, FL 32302; and to **ADAM LAWRENCE**, Lawrence & Daniels, 100 North Biscayne Boulevard, 21st Floor, Miami, FL 33132, this _____ day of December, 2002.

Attorney

CERTIFICATE OF FONT STYLE

This Brief has been prepared using 14 Point Times New Roman, proportionately spaced, Word Perfect format, pursuant to the requirements of Florida Rule of Appellate Procedure 9.210(a).

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Attorney

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DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA**

- A. Opinion of the District Court of Appeal for the First District of Florida, rendered September 13, 2002.
- B. Order of the District Court of Appeal for the First District of Florida, rendered October 18, 2002, denying Petitioner's Motion for Rehearing or Certification.