IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-210

L.T. NO. 3D02-1707

ROTEMI REALTY, INC., ET AL.

Petitioners,

v.

ACT REALTY CO., INC.

Respondent.

On Discretionary Review from the District Court of Appeal
of Florida, Third District

AMICUS CURIAE BRIEF
of
The School Board of Miami-Dade County, Florida

MELINDA L. MCNICHOLS, Esq.
The School Board of Miami-Dade
County, Florida
Fla. Bar No. 508128
1450 N.E. 2nd Ave., Suite 400
Miami, Florida 33132
Telephone: (305) 995-1304

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE**

CASES **PAGE**

STATEMENT OF INTEREST

The School Board of Miami-Dade County, Florida, files this amicus curiae brief on behalf of the general public and the taxpayers of Miami-Dade County.

SUMMARY OF ARGUMENT

The contingency commission agreement at issue in this case between real estate broker Petitioners, Rotemi Realty, et al. ("Rotemi" or "Brokers") and the property owner, Respondent, ACT Realty ("ACT"), was not an ordinary real estate listing agreement. Instead, it was a separate agreement contingent solely upon the success of the brokers if they sold certain property to the School Board of Miami-Dade County for a sale price in excess of $1 million. The Third District Court of Appeal correctly held that this contingency commission agreement was illegal and unenforceable as against public policy pursuant to its prior decision in *City of Hialeah Gardens v. John L. Adams & Co.*, 599 So. 1322 (Fla. 3d DCA), *rev. den.*, 613 So. 2d 5 (Fla. 1992), which held that contingent fee contracts involving public entities are illegal on their face.

Moreover, because the contract was illegal, the brokers could not be compensated on the basis of *quantum meruit.* On this basis, the Court properly directed the funds in excess of $1 million to be returned to the School Board.

Finally, because the contract involved a "raid on the public treasury," the Third District Court of Appeal was correct in raising the issue of illegality on its own motion.

The decision should be affirmed.

ARGUMENT

In 1999, the Brokers entered into a "Commission Agreement" with ACT . This contract was not a typical "Exclusive Listing Agreement" in which a real estate commission is earned if a contract for purchase and sale is entered into during the listing period and the sale ultimately closes. Instead, it was a separate agreement specifically providing for a contingency commission only if the brokers were successful in obtaining a sale price for the property from the School Board in excess of $1 million.

The separate, contingency contract provided:

> The owner [ACT] agrees to pay a real estate brokerage commission to the brokers [Rotemi]...This commission agreement is only valid if the brokers are able to procure a sale with the school board of Dade County, Florida as the buyer...The amount of the commission will be equal to the amount of the sales proceeds due the owner at closing that is over $1,000,000.

The School Board ultimately bought the property for a sales price of $1,164,650.50, an amount above its appraised value. ACT refused to pay the commission because it claimed that the Brokers did not do anything to procure the sale. The disputed commission amount was placed into escrow at closing.

The escrow agent filed an interpleader action for the $144,650.[1] ACT Realty and the brokers each made claims for the money and the trial court conducted a bench trial. The trial court concluded that the brokers were entitled to the commission. The owner, ACT Realty, appealed to the Third District Court of Appeal.

On its own motion, and pursuant to its decision in *City of Hialeah Gardens v. John L. Adams & Co., Inc.*, 599 So. 2d 1322 (Fla. 3d DCA 1992), *rev. den.*, 613 So. 2d 5(Fla. 1992), the Third District Court of Appeal raised the issue of illegality of the contingency commission agreement and declared it unenforceable as against public policy. It also decided that the brokers were not entitled to compensation based on *quantum meruit* and remanded the case to the trial court with direction to return the money in excess of $1 million to the School Board. *ACT Realty Co., Inc. v. Rotemi Realty, Inc.*, 863 So. 2d 334 (Fla. 3d DCA 2003).

I. THE COMMISSION AGREEMENT IS ILLEGAL AND UNENFORCEABLE AS AGAINST PUBLIC POLICY.

A. The Third District Court of Appeal Correctly Held That, Pursuant to *City of Hialeah Gardens v. John L. Adams & Co.*, Inc., 599 So. 2d 1322 (Fla. 3d DCA 1992), *rev. den.*, 613 So. 2d 5(Fla. 1992), the Commission Agreement Is Illegal On Its Face.

[1] A lobbyist had become involved in the transaction and was paid a $20,000 fee from these funds. The lobbyist fee is not at issue in this case.

The Third District Court of Appeal held that the Commission Agreement entered into between ACT Realty and Rotemi, the Appellee/brokers, is void and unenforceable because contracts which provide for contingency awards for securing public monies are against public policy. The Court based its reasoning on the authority of its decision in *City of Hialeah Gardens v. John L. Adams & Co., Inc.*, 599 So. 2d 1322 (Fla. 3d DCA 1992), *rev. den.*, 613 So. 2d 5 (Fla. 1992).

In *City of Hialeah Gardens*, the contract contemplated that a consultant, John Adams ("Adams") would use his efforts to influence any governmental agency source into funding specifically designated City projects. Adams was to be paid an hourly rate and a 2% commission, the total amount of which was contingent on the degree of success he had in securing project funding awards for the City. Adams was ultimately paid the hourly amount but the contingency fee was never paid and he sued the City for the contingency amount.

The Court, as reflected throughout its opinion, was deeply concerned about improper influence, and the temptation to exert improper influence, on government officials regarding expenditures of government funds. It stated that "any contract involving the use of public funds is subject to strict scrutiny..." *City of Hialeah Gardens*, 599 So. 2d at 1322. The court said this was particularly true where there is a contingency award. The Court noted that many contracts providing for contingency

awards for securing public monies have been found to be void as against public policy because "agreements for compensation contingent upon success, suggest the use of sinister and corrupt means for the accomplishment of the ends desired," quoting *Wechsler v. Novak,* 26 So. 2d 884 (Fla. 1946), *City of Hialeah Gardens*, 599 So. 2d at 1322.

In *Wechsler,* the Florida Supreme Court struck down a contingent fee contract, holding that "The legality of agreements to influence administrative or executive officers or departments is to be determined in each case by weighing all the elements involved and then deciding whether the agreement promotes corrupt means to accomplish an end or to bring influence to bear on public officials of a nature other than the advancement of the best interest of government. Agreements employing one to secure government contracts or concessions, etc., may be without taint on the face and yet be illegal or unenforceable. 12 Am. Jur. 709, Par. 206. A contract involving the use of personal influence with public executives or administrative officers or the heads of departments in order to induce them to grant favors or privileges, as a general rule, is regarded as against public policy. Many courts hold such agreements invalid on the theory of their tendency to introduce corrupt means in the influencing of public officials and especially is it true in those cases where compensation is contingent on success." 157 So. 2d at 709.

Relying on *Wechsler*, the Court in *City of Hialeah Gardens* also stated, with emphasis, that "*the test to be applied is not what is actually done but that which may or might be done under the terms of the contract; it is the evil tendency of the contract and not its actual injury to the public that is determinative, as the law looks to its general tendency and closes the door to temptation by refusing to recognize such agreements*." *City of Hialeah Gardens*, 599 So. 2d 1324.

The Court in *City of Hialeah Gardens* held that there is "a legitimate public policy concern that such contingent fee arrangements as Adams' promote the temptation to use improper means to gain success." 599 So. 2d at 1324. The Court used lobbying agreements as an example, saying that the fact that compensation bargained for is contingent on the procurement of favorable legislation is frequently held to be a conclusive factor in the determination that the bargain is invalid, is because even though no improper means of such promotion are bargained for, there is inevitable temptation. 599 So. 2d at 1324.

The Court found the contract in *City of Hialeah Gardens* to be closely analagous to those cases involving invalid lobbying agreements "since there is no difference in principle between agreements to procure legislative favors and agreements to secure a governmental monetary funding award to a municipality." The court again cited *Wechsler* for this proposition and pointed out that a similar public policy issue

was at the heart of *Markon v. Unicorp American Corp.*, 645 F. Supp. 62 (D.D.C. 1986).

In *Markon*, the plaintiff broker entered a contract with the property owner defendant to renegotiate a new lease with the tenant, the federal government. The agreement provided that the broker's commission was contingent on negotiating a lease acceptable to the owner. The property owner later refused to pay the commission to the broker. The court granted summary judgment in favor of the property owner, unequivocally holding that such contracts are contrary to federal policy and are therefore unenforceable, notwithstanding the fact that the owner may have received a benefit. 645 F. Supp at 64-65. The Third District Court of Appeal, again with emphasis, explained that "*The objective of the public policy is to eliminate improper influence, or the temptation to exert improper influence, in the obtaining of such project funding awards and to eliminate arrangements which encourage the payment of inequitable fees bearing no reasonable relationship to the services actually performed*." 599 So. 2d 1322, 1325.

Here, the contract under review is no different than that under review in *City of Hialeah Gardens* and *Markon*. The Commission Agreement provided that, "[t]he amount of the commission will be equal to the amount of the sale proceeds due [to ACT Realty] at closing that is over $1,000.000." In other words, ACT Realty sought

a price of $1 million for its property, with the broker's commission contingent on the degree of success the brokers had in obtaining a price higher than $1 million.

Because the Commission Agreement contained a contingency fee and involved "a raid on the public treasury," the Court applied strict scrutiny and declared it illegal. 836 So. 2d at 337. In this case, the evil tendency was the temptation to drive the price of the property beyond the property owner's asking price. Where normally this would not be an issue when the sale of property is solely between private parties, when the property is being paid for with taxpayer funds, the Court felt it necessary, pursuant to its reasoning in *City of Hialeah Gardens*, to refuse to recognize the agreement and declare it illegal. 836 So. 2d at 337.

Markon, *supra*, is particularly applicable to this case. Here, as in *Markon,* there were two private parties, one a property owner and the other a broker who agreed to sell the property to a government entity for a contingency based commission, the amount of which is based solely on whatever price was achieved over $1 million. Regardless of whether any undue or corrupt influence was in fact used to effect the sale to the School Board, the Commission Agreement on its face provided an incentive to drive the purchase price for the property beyond $1 million. Thus, on its face, the Commission Agreement is illegal.

Relying on *City of Hialeah Gardens*, The Third District Court of Appeal held that "Without examining what actually transpired following the signing of the Commission Agreement, this agreement undoubtedly created a situation in which there was a possibility for the use of 'sinister and corrupt' means in order (1) to influence the School Board to purchase this particular property from ACT Realty, and (2) for the brokers to earn the highest possible commission by obtaining as high a price as possible, over and above $1 million from the School Board. Thus, there is little doubt that we are required to conclude that the Commission Agreement involved in the instant case is void and unenforceable for public policy reasons." 836 So. 2d 334, 337.

Thus, as in *City of Hialeah Gardens*, the Third District Court of Appeal properly "closed the door to temptation" and refused to recognize the Commission Agreement. Its decision should be upheld.

B. The Third District Court of Appeal's Decision Is Distinguishable From *Robert & Co. v. Mortland*, 160 Fla. 125, 33 So. 2d 732 (Fla. (1948) Requiring Proof of Wrongdoing Before Declaring A Contingency Contract Illegal.

Rotemi, and the dissent in this case, argue that the decision of the Third District Court of Appeal is contrary to *Robert & Co. v.Mortland*, 160 Fla. 125, 33 So. 2d 732 (Fla. 1948), which stated that the general rule is that compensation contingent on

success in securing contracts from public officials is not illegal on its face. Instead, the Court held that it must be shown that it was in fact induced by favors or corrupt means. However, the case is distinguishable on its facts from this case.

In *Robert & Co.*, the defendant engineering company was bidding on work for a municipality. The Tampa-based plaintiff engineering company assisted the Atlanta-based defendant in obtaining the contract in Tampa. The two companies never actually had a contract between them. It was only after the contract was awarded to the defendant company, that it was determined by a trial court that the plaintiff was entitled to 10% of the amount collected by the defendant. There was no contract, as here, between the parties that provided an incentive to the plaintiff to drive the cost up and cause "a raid on the public treasury." The Court in *Robert & Co.* did not address whether such an incentive or temptation was present between the two parties. Instead, the Court focused on the fact that the plaintiff performed a significant amount of promotional and other services for the defendant with the view of helping it secure the contracts.

Here, in contrast, there was a written contract between the two parties specifically designed to obtain a higher price from the government for property than even the property owner was seeking. This was not, as both Rotemi and the dissent insist, a routine real estate transaction or "exclusive property listing." This was a

separate contingency commission contract. ACT Realty intended to sell his property for $1 million dollars. If the brokers sold the property to the School Board for more than $1 million, they could keep the excess.

Finally, while there may not be direct evidence of wrongdoing, the fact is that the sale price was well in excess of $1 million dollars. In fact, the dissent points out that the School Board paid above the appraised value for the property. 863 So. 2d 334, 341, FN 7. This, in and of itself, is exactly the kind of public injury that the public and the taxpayer should be protected against, and the Third District Court of Appeal decision should be affirmed.

C. Other Jurisdictions Have Held That Contingency Fee Contracts are Void as Against Public Policy Even When There Is No Proof of Wrongdoing.

As in *ACT, City of Hialeah Gardens*, and *Markon*, other jurisdictions have similarly held that agreements for compensation contingent upon success are void as against public policy even where there was no evidence of corruption or evil means. In *Sears, Roebuck and Co. v. Parsons*, 260 Ga. 824, 401 S.E. 2d 4 (Ga. 1991), the Supreme Court of Georgia struck a contingent fee provision of a contract between a county board of tax assessors and private auditor to seek out and appraise unreturned personal properties as against public policy. In *Davidson v. Button Corporation of America*, 137 N.J. Eq., 44 A.2d 800 (N.J. 1945), a New Jersey Appellate Court held

a contingency contract for the procurement of supplies for the federal government invalid even though there was no proof of corruption, reasoning that such contracts "tend to introduce personal solicitation and personal influence, as elements in the procurement of contracts; and thus directly lead to inefficiency in the public service, and to unnecessary expenditures of the public funds." 137 N.J. at 360. The decision did not turn on "whether improper influences were contemplated or used, but upon the corrupting tendency" of the agreement. *See also, Goodier v. Hamilton,* 172 Wash. 60, 19 P.2d 392 (Wash. 1933)("In determining whether a contract is contrary to public policy, the test is not merely what the parties actually did, or contemplated doing, in order to carry out the contract, or even the actual result of its performance, but, rather, when the contract as made has a tendency to evil"); *Glenn v. Southwestern Gravel Co.* 74 Okla. 131, 177 P. 586 (Okla. 1919)(contract making payment conditional upon success was against public policy and void even though there was no proof of wrongdoing).

As in these other jurisdictions declaring contingency contracts void on their face as against public policy, the Third District Court of Appeal correctly held the commission contingency contract void on its face and its decision should be affirmed.

II. THE BROKERS CANNOT RECOVER ON

QUANTUM MERUIT BECAUSE THE AGREEMENT IS ILLEGAL AND UNENFORCEABLE.

As the Third District Court of Appeal decided in this case, the strong public policy which invalidates the parties' contract, also precludes recovery on the basis of *quantum meruit.* The Court cited its decision in *Bradley v. Banks*, 260 So. 2d 256, 257 (Fla. 3d DCA 1972) with regard to a real estate commission, quoting "The contract being void as a matter of public policy, the services rendered in connection therewith cannot be made the basis for a *quantum meruit* claim..." The Court also cited *Vista Designs, Inc. v. Silverman*, 774 So. 884, 888 (Fla. 4th DCA 2001) in which an attorney was not allowed to keep monies earned under a contract that was void *ab initio* even though he provided legal services to the client. On this authority, the Third District Court of Appeal remanded the case to the trial court to direct the escrow agent to return the escrowed funds to the School Board. *Act Realty,* 836 So. 2d 334, 338.

It is also the general rule that no action may be maintained on an illegal agreement. *Local No. 234 v. Henley & Beckwith, Inc*. 66 So. 2d 818. 823 (Fla. 1953 ("A contract against public policy may not be made the basis of any action in law or in equity."); *Stewart v. Stearns & Culver Lumber Co.*, 56 Fla. 570, 587-88 (1908) (contracts violating public policy are illegal and will not be enforced by the courts); *Castro v. Sangles*, 637 So. 2d 989, 990 (Fla. 3d DCA 1994) (no action may be

maintained on an illegal agreement); *D& L. Harrod, Inc. V. U.S. Precast Corp.*, 322 So. 2d 630, 631 (Fla. 3d DCA 1975)("There is no legal remedy for that which is illegal itself.").

Here, the Commission Agreement was illegal and unenforceable. The Third District Court of Appeal properly ordered that the money paid over $1 million be returned to the School Board. Its decision should be affirmed.

III. THE COURT PROPERLY RAISED ILLEGALITY OF THE CONTRACT ON ITS OWN MOTION.

The Court has an affirmative duty to take notice of illegal contracts coming before it. In *Citizen's Bank & Trust Co. v. Mabry*, 102 Fla. 1084, 136 So. 714, 717 (1931), the Florida Supreme Court held that a Court could, on its own motion, take notice of illegal contracts coming before it for adjudication, citing *Escambia Land & Manufacturing Co. v. Ferry Pass Inspectors' & Shipper's Association*, 59 Fla. 239, 52 So. 715 (1910). *See also, Title & Trust Company of Florida v. Parker*, 468 So. 2d 520 (Fla. 1st DCA 1985) (a court may, on its own motion, take notice of illegal contracts coming before it).

In *City of Hialeah Gardens*, the Third District Court of Appeal stated that while it may be necessary as between private parties to a contingent fee contract for the defense of invalidity defense to be raised, citing *Robert & Co. v. Mortland, supra*,

when the contract involves "a raid on the public treasury, it should be the duty of the court at any level to raise the invalidity of the contract on its own motion to protect the interest of the public." 599 So. 2d at 1325.

Furthermore, "For our citizens to support our institutions of government, they must have confidence in the integrity of public officials and in their actions, and among other things, they have a right to expect good faith and honest dealings in expenditure of the public treasury. As between the innocent tax paying public and those who would gain from contingent contracts with public entities, we come down on the side of the tax payer." 599 So. 2d at. 1325.

In the instant case, the Third District Court of Appeal applied strict scrutiny of a contingency contract that involved public money, and raised the issue of illegality on its own motion. In the interest of protecting the "innocent taxpaying public," its decision should be affirmed.

CONCLUSION

The Third District Court of Appeal correctly held that this contingency commission agreement was illegal and unenforceable as against public policy pursuant to its prior decision in *City of Hialeah Gardens v. John L. Adams & Co.*, 599 So. 2d 1322 (Fla. 3d DCA), *rev. den.*, 613 So. 2d 5 (Fla. 1992). Moreover, the brokers could not be compensated on the basis of *quantum meruit* and the Court properly directed

the funds in excess of $1 million to be returned to the School Board of Miami-Dade County. Finally, the Third District Court of Appeal was correct in raising the issue of illegality on its own motion.

The decision of the Third District Court of Appeal should be affirmed.

Respectfully submitted,

MELINDA L. MCNICHOLS, Attorney for
Amicus Curiae, The School Board of
Miami-Dade County, Florida
Fla. Bar No. 508128
1450 N.E. 2nd Avenue, Suite 400
Miami, Florida 33132
Tele. (305) 995-1304; Fax (305) 995-1412

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail this ___ day of October, 2004, to: Sheldon R. Rosenthal, Esq., Sheldon R. Rosenthal, P.A., 25 West Flagler Street, Suite 1040, Miami, FL 33130; ACT Realty Co., c/o Alicia Trujillo, Esq., 3634 Southwest 150th Court, Miami, FL 33185; Henry T. Sorensen II, Esq., Brokers Legal Group, P.A., 32801 U.S.

Highway 19 North, Suite 100, Palm Harbor, FL 34684; and Jorge L. Gonzalez, 321 Palm Avenue, Hialeah, FL 33010-4715.

Melinda L. McNichols, Esquire

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Brief is in compliance with Rule 9.210 of the Florida Rules of Appellate Procedure.

Melinda L. McNichols, Esquire