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.,

Respondent.

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

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AMICUS CURIAE BRIEF
of
CRES COMMERCIAL REAL ESTATE OF TAMPA BAY, INC.

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STATEMENT OF INTEREST

CRES Commercial Real Estate of Tampa Bay, Inc. d/b/a Prudential CRES Commercial Real Estate ("CRES") hereby files this Brief on behalf of Petitioner, Rotemi Realty, Inc. CRES is a licensed real estate brokerage in the State of Florida, and was the highest ranked Prudential-affiliated commercial brokerage in the United States for 2003 based on sales volume. A significant portion of daily operations for CRES involves assisting private landowners in the potential sale and/or lease of commercial property to governmental agencies, and accordingly, the company has a vested interest in the outcome of this matter.

TABLE OF CITATIONS

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STATEMENT OF THE CASE AND THE FACTS

CRES hereby adopts and incorporates as its Statement of the Case and the Facts the entirety of Section I of Judge Cope's dissenting opinion in the Third District Court of Appeal proceedings below.

SUMMARY OF ARGUMENT

This Court should reverse the decision of the Third District Court of Appeal and remand the case to the lower appellate court, as Robert & Co. v. Mortland, 33 So. 2d 732 (Fla. 1948), governs the brokerage agreement at issue in this matter. The lower court erroneously relied upon, and therefore perpetuated, a defective legal analysis conducted by that same court in City of Hialeah Gardens v. John L Adams & Co., 599 So. 2d 1322 (Fla. 3rd DCA), *rev. denied* 613 So. 2d 5 (Fla. 1992). The Adams court incorrectly determined that contingency fee agreements where compensation is based on success in procuring public funds were void from inception, when in fact this Court has stated on numerous prior occasions that such agreements are valid unless and until they are corrupted by improper motives, to be determined on a case-by-case basis.

Moreover, allowing the lower court's decision to stand would drastically modify existing operations in the commercial brokerage industry in the State of Florida, in that it will cause brokers dealing with public agencies to operate under compensation methods that are not pragmatic or a realistic alternative to the present accepted contingency payment methods.

Finally, affirming the lower court's opinion would be in direct conflict with a decision of this Court from earlier this year, St. Joe Corp v. McIver, 875 So. 2d 375 (Fla. 2004), in which a broker was held to have a valid claim for a commission

in the event the seller agreed to pay the broker in the procuring of a condemnation. It would be inconsistent to rule that the broker in McIver could solicit a sale involving public funds but that the Petitioner in this matter was barred from receiving any compensation where no overreaching or improper conduct was shown.

ARGUMENT

I. THIS COURT SHOULD REVERSE THE DECISION OF THE DISTRICT COURT BECAUSE ROBERT & CO. V. MORTLAND GOVERNS THE BROKERAGE CONTRACT AT ISSUE IN THIS MATTER.

A. Robert & Co. v. Mortland and prior cases expressly permit the existence of the contract at issue in this matter.

The Third District Court of Appeal invalidated the brokerage contract at issue in this matter, relying on an erroneous interpretation of Wechsler v. Novak, 26 So. 2d 884 (Fla. 1946), and while totally ignoring the holding in Robert & Co. v. Mortland, 33 So. 2d 732 (Fla. 1948). As the latter case cited back to the Wechsler case in reasoning that the contingency contract at issue in Mortland was enforceable, this Court should find that both cases in fact support the position that the brokerage contract in this case is valid and enforceable.

In this matter, the Third District Court of Appeal failed to cite the Mortland case whatsoever in setting forth the formal opinion. Instead, the court referred back to its prior decision in City of Hialeah Gardens v. John L. Adams & Co., 599 So. 2d 1322 (Fla. 3rd DCA), *rev. denied* 613 So.2d 5 (Fla. 1992), in rendering its decision. In referring back to the Adams case, the court perpetuated an incorrect interpretation on the enforceability of contingency fee contracts where public funds are at issue.

In Adams, the court essentially cited to two references in rendering its decision: the Wechsler case and a decision from the Idaho Supreme Court, the latter of which is obviously not binding on this Court. Concerning the Wechsler case, the Adams court erroneously determined that a contingency agreement concerning success in raising public funds was illegal as a matter of law. In so stating, the Adams court referenced a passage that states as follows:

> 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.

Adams, 599 So.2d at 1323 (citing Wechsler, 26 So. 2d at 888). Importantly, no where in that passage or the entire Wechsler case (or any other Florida Supreme Court case for that matter) is any reasoning adopted which would make such an agreement void *ab initio* or create any presumption of invalidity. Although in Wechsler this Court made reference to cases from other jurisdictions that have adopted a "void from inception" approach with respect to the types of agreements at issue in this case, this Court refused to do so.

In fact, to the contrary, prior to the above-referenced quote from the Wechsler case, this Court stated as follows:

> 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.

Wechsler, 26 So. 2d at 887-88 (emphasis added). The foregoing quote as well as the entire last paragraph of the Wechsler case show that this Court was of the opinion that contingency fee agreements based on the success of obtaining public funds were to be examined on a case by case basis.

The Mortland decision concurred in the foregoing analysis in citing to decisional law from this Court in Edwards v. Miami Transit Co., 7 So. 2d 440 (Fla. 1942) (holding valid a contingent agreement for compensation based on the procuring of a bus franchise from the city of Miami). The Mortland Court further noted that it's decision and the Wechsler opinion were consistent with the "general rule" concerning contingency fee contracts such as that at issue in this case, in that they are not illegal as a matter of law, but that "[i]t must be shown that [the contract] was induced by favors or corrupt means." Mortland, 33 So. 2d at 734.

In this case, as aptly noted in Judge Cope's dissent in the lower court, not only was there no showing of any corrupt means in procuring the sale through the Miami-Dade County School Board, but Moliver's central complaint was that he and Cease were actually the procuring cause of the sale. Act Realty Co. v. Rotemi Realty, Inc., 863 So. 2d 334, 342 (Fla. 3rd DCA 2003). Under such circumstances, it could hardly be argued by Act Realty that some overreaching

or misconduct existed on the part of Rotemi Realty. Moreover, no party to this case has shown that the school board's purchase did not immediately benefit the public by providing additional usable lands for the Miami-Dade County public school system.

B. The broad holding in Robert & Co. v. Mortland and the services provided in this matter were not superseded by the enactment of Section 287.055, Florida Statutes.

This Court in Mortland issued a broad statement concerning the enforceability of contingency fee agreements based upon success in obtaining public monies. The holding of the case was as follows:

> We understand the *general rule* to be that employment in which compensation is contingent on success in securing contracts from public officials *is not* illegal on its face. It must be shown that it was induced by favors or corrupt means.

Mortland, 33 So. 2d at 734 (emphasis added). It is true as set forth in Respondent's Brief on the Merits, that the assistance provided by the plaintiff in Mortland was consulting services in the engineering field, and it is further true, that the services provided by the plaintiff in that case, if provided today, would likely be in contravention of Section 287.055(6), Florida Statutes. Respondent's Brief on the Merits, pgs. 29-32.

However, in reviewing the holding in Mortland as set forth above, as well as the existing case law referenced in Mortland (i.e. Edwards v. Miami Transit Co., 7 So.2d 440 (Fla. 1942)), it is apparent that the "general rule" concerning

such contracts still has vitality except for those narrow categories of contingency fee contracts that have been outlawed by the Florida Legislature. As set forth in Section 287.055(2)(a), Florida Statutes, the services addressed by that section are expressly limited to the fields of traditional architecture, engineering, landscape architecture and surveying. Moreover, an overview of the entire statute discloses that the prohibitions contained therein are predominantly focused toward the design-build process, in assuring that the state or its agencies receive the most competitive bid possible.

Importantly, nowhere in that statute are contingency fee agreements relating to professional real estate brokerage services prohibited. Obviously, in the circumstance of a governmental agency acquiring land for potential use in a design-build process, the Florida Legislature had to assume that a real estate broker may have been involved in that process. Accordingly, it would be well within the province of this Court to assume that the Legislature could have included real estate brokerage contracts within the definitional scope of prohibited agreements, but for whatever reason, it chose not to do so.

II. ALLOWING THE DISTRICT COURT'S DECISION TO STAND WOULD NEGATIVELY IMPACT THE COMMERCIAL REAL ESTATE BROKERAGE INDUSTRY, AND WOULD BE CONTRARY TO A RECENT DECISION OF THIS COURT PERMITTING PAYMENT OF BROKERAGE COMPENSATION IN A CONDEMNATION PROCEEDING.

A. Net listing agreements are commonly used throughout the State of Florida in certain circumstances, and the same have been recognized as valid by the courts of this State.

A net listing is a type of real estate listing whereby a brokerage will obtain any overage paid by a buyer above a pre-determined net sum commanded by the seller. Arthur R. Gaudio, Real Estate Brokerage Law, Section 267 (1987 ed.). Net listings in the private sector have been accepted by the courts of Florida as being legal, even in extreme circumstances where the brokerage stands to substantially profit by the sale. *See* Hillcrest Pacific Corp. v. Yamamura, 727 So. 2d 1053 (Fla. 4th DCA 1999) (dismissing fraud claim against broker, vendor and other agents where finder's fees and commissions totaled almost $3 million on a sale of $9.3 million, as seller agreed to net only $6.2 million from the sale). Importantly, nowhere in Chapter 475, Florida Statutes or Rule 61-J2, Florida Administrative Code, are net listings prohibited.

There are risks inherent for the brokerage in taking a net listing agreement, because the brokerage stands to get nothing if the property is sold at the vendor's specified minimum price. D. Barlow Burke, Jr., Law of Real Estate Brokers, Section 2.2.4 (2nd ed. 1992). However, a vendor of property may

prefer such an arrangement where the fair market value of the property is known with reasonable certainty, or where the local real estate market is inactive and the true market value of the property is less than the seller wants to receive on his investment. Id.; Rohan et al., Real Estate Brokerage Law and Practice, Vol. 10, Section 2A.02(3)(e) (Matthew Bender ed.).

In this case, there was nothing inherently illegal or improper about the use of a net listing agreement to address the circumstances of the sale. As noted by Judge Cope's dissent in the court below, the brokers and Respondent contemplated the subject land selling at the same price per acre as the larger tract. Act Realty Co. v. Rotemi Realty, Inc., 863 So. 2d 334, 339 (Fla. 3rd DCA 2003). Accordingly, this view was consistent with the reasoning why a net listing was taken by the brokers on the property.

B. The Third District Court of Appeal's decision, if allowed to stand, would significantly impair commercial brokerage operations throughout the State of Florida.

Although a net listing was taken by the brokers in this case, an exclusive right to sell, exclusive agency or an open listing agreement can function as a net listing. Rohan et al., Real Estate Brokerage Law and Practice, Vol. 10, Section 2A.02(3)(e) (Matthew Bender ed.). Moreover, a net listing is not the only type of commercial brokerage listing agreement that has a contingency element for compensation.

Although commercial real estate brokerages through the State of Florida use various forms on which to take listings of property, a commonly used form is the Florida Association of Realtors Exclusive Right of Sale Listing Agreement for Commercial Property ("FAR Agreement") or individual company specific variations thereof. Concerning a commission payment from the seller of property to the listing brokerage, the FAR Agreement states in relevant part as follows:

> **4. Compensation:** OWNER agrees to pay BROKER as follows…if BROKER, any agent of BROKER or a Buyer's Broker procures a buyer who is ready, willing and able to purchase, lease, or exchange the Property, and/or inventory of the OWNER…on the terms of this Contract or any other terms acceptable to OWNER. The stated compensation shall be paid to the BROKER in the event of a sale, exchange, or transfer of any interest…in the Property during the term of this Contract…: (complete which ever fee arrangements apply)
>
> **A.** (CHECK ONE): _____% of gross sales price, or $_____ including fees BROKER may pay to cooperating brokers. OWNER shall pay this fee at the time, and from the proceeds, of closing…
>
> **B.** In the event the Property is leased during the term of this Agreement, OWNER shall pay to BROKER a leasing fee of $_____ or ___% of gross sales price. The fee shall be paid to BROKER when BROKER, OWNER or anyone working by or through BROKER produces a tenant acceptable to OWNER…

Consequently, most commercial brokerage listing agreements in Florida have some contingency component for payment of the broker. Compensation is typically either a percentage of the sales price or lease value, or a flat fee based

on the success of the broker in procuring a buyer or lessee for the property on terms that are acceptable to the seller/lessor.

While the listing agreement in this case expressly referenced the school board as the intended buyer of the subject property, the foregoing factual circumstance is no different than if Respondent had signed the FAR Agreement in favor of the brokers without identification of a specific buyer, and then subsequently the school board presented an offer to purchase the property. In either circumstance, the majority below would have apparently invalidated the brokerage agreement, as once the school board presented the offer, any broker representing Respondent would have been paid a contingency fee based upon the procuring of public monies.

In sum, the end result of the net listing in this case and the hypothetical with the FAR Agreement described above is the same: in both circumstances the brokers are paid a contingency fee based upon their success in negotiating an acceptable contract between a private party and a public entity. It is a distinction without a difference that one agreement expressly mentions the identified purchaser and the other takes effect only once the public agency has been procured as a buyer.

Accordingly, if the Third District Court of Appeal's decision is allowed to stand, virtually all listing agreements throughout this state involving the sale or

leasing of commercial property to public agencies will be invalid. The only alternative pay schedule that could even be contemplated by the commercial brokerage industry as a response would be to insert an hourly fee provision in all listing agreements for use in the event that a governmental body was procured as a buyer or lessee. The commercial brokerage industry does not currently use or recognize such a compensation method, nor is it likely that the same would be accepted by the industry. To the contrary, commercial brokers and sellers involved in the industry know that a results-based compensation schedule brings about better results for all parties involved, as the broker has a financial incentive to actually close the sale prior to any payment.

C. This Court has recently upheld the ability of a broker to recover a commission based on the procuring of public funds in a similar circumstance to this case.

The foregoing cannot be the intent of this Court, as earlier this year this Court upheld an oral brokerage agreement between a broker and a well known private landowner in the State of Florida where the intent of the agreement was to procure public monies through condemnation proceedings. In St. Joe Corp. v. McIver, 875 So. 2d 375 (Fla. 2004), the broker and the seller orally agreed to a two percent commission for the sale of certain lands. Although the agreement was not in writing, the parties recognized that the logical purchaser of the property was the State of Florida through its Conservation and Recreation

Lands ("CARL") program, and the broker negotiated with the State for several years to procure the sale of the property. Id. at 377. Eventually, after the State presented its last offer based on the terms of the CARL program, the broker referenced to the seller the possibility of having the State conduct a friendly condemnation of the property to obtain a higher price. Id. at 377-78. The seller purportedly agreed to such an action if the proceeding resulted in a favorable purchase price. Id. at 378. The seller eventually obtained a sufficient purchase price through a consent final judgment in the condemnation action, and then refused to pay the broker. Id.

The broker alleged a valid agreement existed to pay the commission, to which the seller argued that a broker was not entitled to be paid because a condemnation could not constitute a sale for purposes of a commission agreement. Id. at 379. This Court, after a lengthy analysis of cases in this State and various jurisdictions throughout the United States, held that "if the seller and the broker agreed to, and did, pursue condemnation as an acceptable substitute for a sale, then the broker should be entitled to a commission when the property is condemned." Id. at 381.

Importantly, this Court did not seek to *sua sponte* invalidate the commission agreement, although the alleged duties of the broker were to obtain the highest price possible through a legal proceeding that involved payment from the public

treasury. From the reasoning of the majority below in the immediate case, this Court would have had the ability and duty to invalidate the commission agreement in the McIver case. Instead, this Court not only upheld the agreement, but stated that the broker should be paid in the event the seller agreed to pay compensation for the price obtained through the condemnation proceeding. To affirm the ruling of the majority below in this case would be wholly inconsistent with the holding of this Court in McIver.

CONCLUSION

The broad holding of the Mortland case governs the agreement at issue here, which should be held valid. Moreover, to affirm the holding of the majority below would effect a major change in commercial real estate brokerage that the industry would not likely accept. Finally, this Court in the McIver case implicitly acknowledged the validity and value of such commission agreements by the holding in that case. Therefore, this Court should reverse the decision of the Third District Court of Appeal and remand the case to the court below for further proceedings.

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Certificate of Service

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Certificate of Compliance

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

_____

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