IN THE SUPREME COURT OF FLORIDA

CASE NO. SCO4-210

ROTEMI REALTY, INC., et al.,

Petitioners,

v.

ACT REALTY CO.,

Respondent.

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

PETITIONER'S BRIEF ON THE MERITS

LAW OFFICES OF SHELDON R. ROSENTHAL
Suite 1040, City National Bank Building
25 West Flagler Street
Miami, Florida 33130
(305) 379-1452/Fax (305) 358-8020

By: SHELDON R. ROSENTHAL
Fla. Bar No. 068555I.

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Suite 1040, City National Bank Building, 25 West Flagler Street, Miami 305-379-1452 Fax 305-358-8020

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I.

STATEMENT OF THE FACTS AND CASE

The facts of this case on appeal are not in dispute.

In the present case, the Petitioners, Martin-Hidalgo and Rotemi Realty, both real estate brokers, obtained a written listing from a property owner, under which they would earn a commission if they procured the sale of a 10-acre tract to the Miami-Dade County School District.

The School District ultimately purchased the property, and the landowner then refused to pay the agreed commission, contending that the brokers had not been the procuring cause of the sale.

There was a bench trial in which the trial court ruled that the brokers had earned their commission. There was never a claim that the brokers lobbied the School Board members or obtained the contract by favors, influence, or corrupt means. In fact, that defense was never raised by the pleadings or at trial.

The Third District Court of Appeal reversed the Lower Court's decision and ruled that a real estate commission agreement is void where the commission is contingent upon the procurement of a sale of property to a governmental body.

The Court of Appeal never cited the case of *Robert & Co v. Mortland*, 33 So.2d 732, (Fla. 1948), nor did the Court explain how they avoided the rule stated in the case, which is :

> We understand the general rule to be that an 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. The record in this case is devoid of any showing that plaintiff had any personal or political influence or that the contract was induced by illegal influence, *Robert & Co v. Mortland*, supra.

It is therefore essential to review the evidence pertaining to the commission agreement.

The Petitioner, Maria Martin-Hidalgo, was a real estate broker (and architect) with her own company, Martin-Hidalgo Realty. She obtained a listing for an unrelated tract of 20 acres in the western part of Miami-Dade County, Florida. She met with Leon Valentine, director of the real estate department of the Miami-Dade County School District, to determine whether the School Board would be interested in acquiring the 20 acres that she had listed. This was the first time that the Petitioner, Ms. Martin-Hidalgo, had ever met Mr. Valentine or discussed selling real property to the Miami-Dade County School Board.

Law Offices of Sheldon R. Rosenthal
Suite 1040, City National Bank Building, 25 West Flagler Street, Miami Tel.: 305-379-1452 Fax: 305-358-8020

At their meeting, Mr. Valentine explained that a 20-acre parcel is too small for a school site, since the recommended minimum size for a high school was 40 acres. Thus, he explained that the School District had no interest in the 20-acre site Ms. Martin-Hidalgo was attempting to sell.

While the Petitioner, Ms. Martin-Hidalgo, was in the office, she saw a wall map which had certain tracts of land highlighted in yellow. One of these was a U-shaped site consisting of 50 acres. In response to her question about the site, Mr. Valentine advised her that the School District was interested in acquiring the 50-acre tract.

Ms. Martin-Hidalgo asked about the 10-acre tract in the center of the "U". According to her trial testimony, Mr. Valentine responded that it would be nice to have the 10 acres, but it was not essential because the 50-acre tract would give the School District sufficient land for a new high school.

Ms. Martin-Hidalgo decided to investigate the 10-acre tract further, in hopes that she could obtain a listing and persuade the School Board to acquire the 10 acres along with the 50. She called Jose Perez-Urrutia, of Rotemi Realty, a broker with twenty-seven years' experience who was very knowledgeable about land in

Law Offices of Sheldon R. Rosenthal
Suite 1040, City National Bank Building, 25 West Flagler Street, Miami Tel.: 305-379-1452 Fax: 305-358-8020

that area.

Mr. Perez-Urrutia was familiar with the 10-acre tract, as well as the 50-acre tract controlled by Michael Cease. The 10-acre tract was owned by David Moliver through his company, Act Realty Co. Moliver had placed a "for sale" sign on the 10-acre tract. Mr. Perez-Urrutia knew both Cease and Moliver.

The Petitioners met with Moliver and explained that the School District was considering the acquisition of Cease's 50 acres. They offered to represent Moliver in an effort to convince the School District to buy the 10 acres along with Cease's 50 acres. This would give the School District a rectangular tract which would be easier to work with than the U-shaped 50-acre tract.

Moliver agreed and told the brokers that he wanted $1 million for his 10 acres. He proposed that the brokers keep anything over $1 million as their commission. The brokers testified that they agreed to this because they believed that the School District would wind up paying Cease over $100,000 per acre for his 50 acres. They reasoned that if the School District bought Moliver's 10 acres in addition, it would be at the same price. They thus concluded that they had reasonable prospects for earning a commission under the arrangement that Moliver proposed.

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Suite 1040, City National Bank Building, 25 West Flagler Street, Miami Tel.: 305-379-1452 Fax: 305-358-8020

Moliver then personally typed the Commission Agreement which stated:

Commission Agreement

This agreement is between ACT Realty (owner) and Martin-Hidalgo & Associates and Rotemi Realty (brokers).

The owner agrees to pay a real estate brokerage commission to the brokers on the sale of the property described as:

Tract 3, Miami Everglades Land Co., section 29, township 54 south, range 30 east, PB 2, Pg 3 of the public records of Dade County.

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.

This commission agreement is valid for a period of ninety days from the date of execution below. If there is no signed contract between ACT Realty and the school board of Dade County after ninety days, this agreement becomes nul1 and void.

/s/_____
ACT Realty

/s/_____
Martin-Hidalgo & Ass.

/s/_____
Rotemi Realty

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It was agreed that the listing price would be $1.2 million.

Mr. Moliver next typed a letter authorizing the brokers to represent Act Realty on this proposed sale and faxed it immediately to the School District.

The following month, Moliver entered into the identical nonexclusive arrangement with Perez-Urrutia, to sell the 10 acres to Lennar Homes. Once again, the commission to be paid to the broker was the excess over $1 million in the event of a sale to Lennar.

Leon Valentine left the School Board staff, and the brokers (Petitioners) continued to pursue the matter with other School Board staff members.

In June of 1999, Kathryn Wilbur, Director of Land Use and Acquisition for the School District, wrote to the Petitioner, Ms. Martin-Hidalgo, and offered $800,000 for the 10-acre tract.

After communicating the offer to the landowner, Moliver, he made a counteroffer. According to the brokers' testimony, Ms. Martin-Hidalgo's responsibility was to communicate with the School District staff, while Mr. Perez-Urrutia's responsibility was to coordinate with Moliver and Cease. By Moliver's account, he and Cease became personally involved in the negotiations.

Eventually, the School District agreed to buy both tracts: the 50-acre tract

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Suite 1040, City National Bank Building, 25 West Flagler Street, Miami Tel.: 305-379-1452 Fax: 305-358-8020

from Cease and the 10-acre tract from Act Realty. The School District paid the same price per acre for all of the land, and the price paid for the 10-acre tract owned by Moliver was $1,164,650.

The School Board approved the transaction on a 6-3 vote, which was the minimum vote necessary. After this occurred, but before the closing, the Petitioners were told that the owner of the 50-acre tract, Cease, had retained a lobbyist, Dusty Melton, to lobby the School Board members to purchase his 50-acre tract.

Cease requested that Moliver pay $20,000 towards Melton's fee, reasoning that Melton's efforts had resulted in a favorable vote by the School Board members for the entire 60-acre transaction. The Petitioners (brokers) testified that that was the first time that they were aware that a lobbyist was involved in the transaction. Moliver corroborated their testimony. However, Cease stated that Moliver had been aware of Melton's involvement at an earlier stage.

Under the Respondent Moliver's agreement with the Petitioner-brokers, his company (Act Realty) was to receive $1 million net at closing. This meant that a $20,000 lobbyist expense would have to be treated as an expense of the sale and therefore would not come out of Act's $1 million net, but would come out of the

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funds which otherwise have gone to the Petitioner-brokers.

The Petitioners claimed that they were due and had earned a commission of $144,650.00.

The Respondent Moliver refused to pay it, reasoning that the lobbyist, and not the Petitioner-real estate brokers, had procured the sale. The disputed commission amount was escrowed at closing.

The escrow agent filed an interpleader action, and the Petitioners and the Respondent each made claims for the commission money, which resulted in a bench trial and a Final Judgment for the Petitioners.

The District Court of Appeal, Third District, on their own motion, directed the parties to address whether the real estate Commission Agreement in this case is void as being against public policy, under dictum contained in *City of Hialeah Gardens v. John L. Adams & Co.*, 599 So. 2d 1322 (Fla. 3d DCA 1992).

It should be obvious that it is permissible for a landowner to hire a real estate broker to sell the owner's land, and to compensate the broker by a commission in the event the real estate broker procures a sale. It makes no difference whether the buyer is a public agency or a private person. There is nothing inherently illegal about such an arrangement.

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The Florida Supreme Court has said:

> It is quite true that if the contract with a public body is secured as a favor in exchan
> public policy and cannot be enforced. There is not the slightest showing here that the contract in question was induced by favor or reward, nor is it shown that any corrupt influence was used or that anything more than competency and square dealing induced placing the contract.
>
> Appellant relies on *Wechsler v. Novak*, 157 Fla. 703, 26 So. 2d 884, and similar cases, but we think these cases clearly support the rule announced in the previous paragraph. We understand the general rule to be that an 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. 46 A.L.R. 196. *Edwards v. Miami Transit Co.*, 150 Fla. 315, 7 So. 2d 440. The record in this case is devoid of any showing that plaintiff had any personal or political influence or that the contract was induced by illegal influence, *Robert & Co.*, supra.

While this case was pending in the trial court, no one alleged--much less proved--that there were any corrupt means involved in the sale of the land. The evidence clearly showed that the Petitioner-brokers had no special influence with anyone, and, in fact, the Respondent Moliver complained that he and Cease were more effective negotiators than the Petitioner-brokers.

The contract was negotiated by the Petitioners, the Respondent, and the owner of the 50 acres and the School District staff. The contract was presented to the School Board for approval, and the Petitioner-brokers had no contact with the School Board members and didn't even know that a lobbyist was involved until

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Suite 1040, City National Bank Building, 25 West Flagler Street, Miami Tel.: 305-379-1452 Fax: 305-358-8020

after the transaction had already been approved. In fact, the lobbyist had been hired by the neighboring landowner--Cease–and not by the Petitioners or the Respondent.

Under the controlling legal standard, a contract of this type should not be set aside unless there is proof of improper favors or corrupt means. There was no such proof in the trial court, nor was there any such proof presented in the District Court of Appeal.

The majority opinion of the District Court of Appeal, Third District, relied primarily on dictum from the case of *Citv of Hialeah Gardens v. John L. Adams & Co. Inc.*, 599 So. 2d 1322 (Fla. 3d DCA 1992), but that case is of no assistance here. To begin with, a Third District case cannot overrule a controlling decision of the Florida Supreme Court. The decision in *Robert & Co.*, supra, remains good law and has not been receded from by the Florida Supreme Court.

In sum, the rule set forth in *Robert & Co.*, supra, is controlling and must be followed here, all of which, we submit, is why the District Court of Appeal inadvertently erred in its finding that the brokerage contract was void.

The argument that follows will show wherein the District Court of Appeal inadvertently erred in its conclusion and in its reversal of the Lower Court's

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Suite 1040, City National Bank Building, 25 West Flagler Street, Miami Tel.: 305-379-1452 Fax: 305-358-8020

judgment.

II.

ISSUES PRESENTED FOR REVIEW

A. WHETHER THE DISTRICT COURT WAS IN ERROR BY UNILATERALLY RAISING THE DEFENSE OF ILLEGALITY OF CONTRACT.

B. WHETHER THE DISTRICT COURT ERRED IN HOLDING THAT THE COMMISSION AGREEMENT WAS VOID FOR PUBLIC POLICY REASONS, DESPITE NO PROOF INTRODUCED OF FAVORS, INFLUENCE, OR CORRUPT MEANS.

III.

SUMMARY OF THE ARGUMENT

The District Court of Appeal was inadvertently in error in its unilateral decision to raise the defense of illegality of contract when the contract itself was not void on its face. Their decision to view the brokerage contract at issue as being void and against public policy, relying on the authority of *The City of Hialeah Gardens v. John L. Adams & Co.*, 599 So.2d 1322 (Fla. 3rd DCA), *rev. denied*, 613 So. 2d 5 (Fla. 1993), was clearly in error since it directly conflicted with the Supreme Court's decision in *Robert & Co v. Mortland*, 33 So.2d 732, (Fla. 1948).

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The District Court of Appeal, in holding that the contract was absolutely void without any proof or evidence of sinister and corrupt means to influence a governmental body, was clearly in error, based upon the *Robert & Co.* case.

Therefore, the majority opinion rendered by the District Court of Appeal, Third District, should be quashed, and the dissent adopted.

IV.

ARGUMENT

A. WHETHER THE DISTRICT COURT WAS IN ERROR BY UNILATERALLY RAISING THE DEFENSE OF ILLEGALITY OF CONTRACT.

As noted in the Statement of Facts, the Respondent never raised the defense of illegality of contract in its pleadings, not did it ever raise the defense at trial.

When this case was pending in the trial court, no one alleged, much less proved, that there were any corrupt means involved in this land sale.

The Petitioners (brokers) had no contact with the School Board members and did not even know that a lobbyist was involved.

Under controlling legal standards, a contract of this type can be set aside in

Law Offices of Sheldon R. Rosenthal
Suite 1040, City National Bank Building, 25 West Flagler Street, Miami Tel.: 305-379-1452 Fax: 305-358-8020

Florida only if there is proof of improper favors or corrupt means, *Edwards vs. Miami Transit Co.*, 2 So.2d. 440.

In *Robert & Co. v. Mortland*, supra, this Court addressed an oral consulting contract that was contingent upon the Plaintiff's success in procuring public sewer contracts for the Defendant engineering firm. The legality of the contract was challenged for the first time at the close of the Plaintiff's case via a motion for directed verdict. The trial court denied the motion, and the Appellate Court affirmed on that issue, noting that, if a contract is legal on its face, its illegality must be specially pleaded and proven. The Court went on to state as follows:

> We do not think that such a defense can be raised by the pleas entered, because the rule is well settled, that, if a contract is legal on its face, its illegality must be specially pleaded and proven...both sides admitted that its legality was a question of law, and we think the trial court was correct in so holding. What has been said as to political influence applies as well to the charge that Plaintiff's contract was bad because his compensation was contingent. It is quite true that, if a contract with a public body is secured as a favor in exchange for personal or political influence, it is contrary to public policy and cannot be enforced. There is not the slightest showing here that the contract in question was induced by favor or reward, nor is it shown that any corrupt influence was used or that anything more than competency and square dealing induced placing the contract.

Moreover, in *Busot v. Busot*, 338 So.2d 1332 (Fla. 2nd DCA, 1976), the former wife sued the former husband for breaching a post-divorce marital support

Law Offices of Sheldon R. Rosenthal
Suite 1040, City National Bank Building, 25 West Flagler Street, Miami Tel.: 305-379-1452 Fax: 305-358-8020

agreement. The husband failed to raise any affirmative defenses concerning illegality of the contract in the trial court. The Second District Court of Appeal noted that, had the support agreement been void on its face, the Court would have had the power to unilaterally raise the defense of illegality, even though that defense was not pled. However, since the agreement in the *Busot* case was facially valid, the defense of illegality was required to be alleged and proved, or it was otherwise waived by the husband.

In *Jorge v. Rosen*, 208 So.2d 644, (Fla. 3rd DCA, 1968), the Court, citing *Robert & Co.,* supra, held that regulations limiting contingent fee arrangements in cases before the IRS were voidable, as opposed to void, and therefore, its provisions could be waived by the failure to plead that defense.

Most respectfully, the District Court's conclusion that the contract in question was void on its face was erroneous, and we respectfully urge the Court to quash the District Court's decision.

B. WHETHER THE DISTRICT COURT ERRED IN HOLDING THAT THE COMMISSION AGREEMENT WAS VOID FOR PUBLIC POLICY REASONS, DESPITE NO PROOF INTRODUCED OF FAVORS, INFLUENCE, OR CORRUPT MEANS.

In the case on appeal, the District Court decided that the real estate brokerage agreement between the Petitioners and the Respondent was void as being

Law Offices of Sheldon R. Rosenthal
Suite 1040, City National Bank Building, 25 West Flagler Street, Miami Tel.: 305-379-1452 Fax: 305-358-8020

against public policy, since the agreement was purportedly of the type that created a possibility of sinister and corrupt means being used to obtain concessions from a governmental agency.

The Court further stated that no analysis of the parties' conduct under the agreement was necessary, as "It is the evil tendency of the contract, and not its actual injury to the public that is determinative." Accordingly, the Court refused to examine whether the sales contract procured from the School Board was actually influenced by improper or corrupt means.

The dissent by Judge Cope in the opinion succinctly states the evidentiary grounds that clearly reveal that the record was devoid of any showing that the contract was induced by favors or corrupt means. The record further shows that the Petitioners did not have any personal or political influence or that the contract was induced by illegal influence.

The *City of Hialeah Gardens'* case involved a lobbying contract, not a real estate commission agreement. In *City of Hialeah Gardens,* the City hired a lobbyist to procure an appropriation for the public roads. The lobbyist was to be paid a percentage of the appropriation obtained. However, there was never any appropriation, and the contingency never occurred. Id. At 1325. The *City of*

Law Offices of Sheldon R. Rosenthal
Suite 1040, City National Bank Building, 25 West Flagler Street, Miami Tel.: 305-379-1452 Fax: 305-358-8020

Hialeah Gardens' discussion of contingency agreements is dictum. Furthermore, that case did not involve a commission agreement for sale of property or goods, so any discussions which could be construed as relating to sales commission agreements is likewise dictum.

The *City of Hialeah Gardens'* case quoted extensively from the plurality opinion in *Wechsler v. Novak,* 26 So.2d 884 (1946). In 1948, however, the Florida Supreme Court announced the *Robert & Co.,* decision, which expressly explained and limited the *Wechsler* opinion. The limiting language is as follows:

> We understand the general rule to be that an 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.

The majority opinion of the Court of Appeals completely overlooked the distinguishing differences between the case at bar and the *Hialeah Gardens'* case, supra. In *Hialeah Gardens,* payment of the commission was being made from public funds to be received by the City, while, in this case, payment of the brokerage commission was coming from the owners of the property, and not a governmental agency.

In commenting on compensation contingent on success, one may recover for legitimate services in placing before officers of the government authorized to

Law Offices of Sheldon R. Rosenthal
Suite 1040, City National Bank Building, 25 West Flagler Street, Miami Tel.: 305-379-1452 Fax: 305-358-8020

contract for it, such information as may apprise them of the character and value of the articles offered and enable them to act for the best interests of the country and the recovery for such services where the sale is effected may be the ordinary brokerage commission, inasmuch as the percentage allowed by established custom of commission merchants, though dependent upon sales made, is not regarded as "contingent compensation" in the obvious sense of that term, but a rate established by merchants for legitimate services in the regular course of business, 17 Am. Jur. 2d, *Contracts*, p. 286.

The District Court of Appeal, in the case of *L. Y. Douglas v. City of Dunedin*, 202 So.2d 787 (2nd DCA, 1967), in passing on the validity of a contract between an attorney and a municipality, said,

> If the fact that one of the parties is a municipality is disregarded, there is nothing which renders the contract invalid.

It is respectfully submitted that, based upon the case law, the facts of the case at bar, and the well-reasoned dissent of Judge Cope of the Third District Court of Appeal, that the District Court of Appeal has brought itself into conflict with the settled jurisprudence of this state established by the decisions of this Court and other appellate courts of the State. We therefore respectfully urge that the District Court's majority decision be quashed and the dissent be adopted.

Law Offices of Sheldon R. Rosenthal
Suite 1040, City National Bank Building, 25 West Flagler Street, Miami Tel.: 305-379-1452 Fax: 305-358-8020

The District Court of Appeal, in the case of *L. Y. Douglas v. City of Dunedin*, 202 So.2d 787 (2nd DCA, 1967), in passing on the validity of a contract between an attorney and a municipality, said,

> If the fact that one of the parties is a municipality is disregarded, there is nothing which renders the contract invalid.

V.

CONCLUSION

It is respectfully submitted that the majority decision of the District Court of Appeal, Third District, should be quashed and the cause remanded with directions to adopt the dissent filed in that case.

Respectfully submitted,

_____

LAW OFFICES OF SHELDON R. ROSENTHAL, ESQ.
Attorney for the Petitioners
Suite 1040, City National Bank Building
25 West Flagler Street
Miami, Florida 33130
Telephone: (305) 379-1452

By:_____

SHELDON R. ROSENTHAL

Florida Bar No.: 068555

Law Offices of Sheldon R. Rosenthal
Suite 1040, City National Bank Building, 25 West Flagler Street, Miami Tel.: 305-379-1452 Fax: 305-358-8020

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 31st day of August, 2004, to: Alicia Trujillo, Esq., Attorney for the Respondent ACT Realty, 3634 Southwest 150th Court, Miami, Florida 33185; Jorge L. Gonzalez, Esq., Co-Counsel for the Petitioners, 321 Palm Avenue, Hialeah, Florida 33010; Henry T. Sorensen, II, Esq., Attorney for Brokers' Legal Group, P.A., amicus curiae, 32801 U. S. Highway 19 North, Suite 100, Palm Harbor, Florida 34684; and Melinda McNichols, Esq., attorney for the School Board of Miami-Dade County, 1450 Northeast 2nd Avenue, Suite 400, Miami, Florida 33132.

CERTIFICATE OF COMPLIANCE WITH RULE 9.210(a)(2)

I hereby certify that the type style utilized in this brief is 14-point Times New Roman proportionally spaced.

_____

SHELDON R. ROSENTHAL

Law Offices of Sheldon R. Rosenthal
Suite 1040, City National Bank Building, 25 West Flagler Street, Miami Tel.: 305-379-1452 Fax: 305-358-8020