IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-210

Lower Tribunal No.: 3D02-1707

ROTEMI REALTY , INC., et al.,

Defendants/Appellees/Petitioners,

vs.

ACT REALTY CO., INC.,

Plaintiff/Appellant/Respondent.
_____/

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

PETITIONERS' AMENDED BRIEF ON JURISDICTION

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PREFACE

The Petitioners, Rotemi Realty, Inc., and Martin-Hidalgo & Associates Realty, Inc., were the Defendants/Cross-Plaintiffs in the trial court and were the Appellees in the Court of Appeal and will hereinafter be referred to as "Petitioners".

The Respondent, Act Realty Co., Inc., was the Plaintiff/Cross-Defendant in the trial court and was the Appellant in the Court of Appeal and will hereinafter be referred to as "Respondent".

I. STATEMENT OF THE CASE AND FACTS

The District Court of Appeal's opinion is contrary to a controlling decision of the Florida Supreme Court, *Robert & Co. v. Mortland*, 33 So.2d 732 (Fla. 1948).

In the present case, the real estate brokers obtained a listing from the property owner under which they would earn a commission if they procured a sale of the ten-acre tract to the Miami-Dade County School District. The School District bought the property. The owner then refused to pay the agreed commission, contending that the brokers had not been the procuring cause of the sale. (A-8)

There was a bench trial in which the trial court ruled that the brokers had earned their commission. There was no claim that the brokers ever lobbied the School Board Members, obtained the contract by favors, or used corrupt means. (A-8)

On its own motion, the Court 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). (A-16)

The District Court of Appeal, on its own motion, concluded that a real estate

commission agreement is void where the real estate commission is contingent on procuring a sale to a public body. (A-8)

The District Court of Appeal's opinion never cites *Robert & Co. v. Mortland,* nor does it explain how they avoid the rule stated in that 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., 33 So.2d at 734 (emphasis added; citations omitted).

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.

The Florida Supreme Court has said:

> It is quite true that if the 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.

> 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., 33 So.2d at 734 (emphasis added). (A-17)

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 at all. The evidence showed that the brokers had no special influence with anyone. One of Moliver's complaints was that he and Cease were more effective negotiators than the brokers.

The contract was negotiated by the brokers, Cease, and Moliver, with the School District staff. The contract was then presented to the School Board itself for approval. The brokers had no contact with the School Board members whatsoever. The brokers did not even know that a lobbyist was involved at the School Board level until after the transaction had already been approved; and the

lobbyist had been hired by the neighboring landowner–Cease–not Moliver, and not the brokers.[1]

Under the controlling legal standard, a contract of this type can be set aside in Florida only if there is proof of improper favors or corrupt means. There has been no such proof in the trial court nor any such proof in the Appellate Court. (A-18)

The majority opinion relies primarily on dictum from *City 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.* remains good law and has not been receded from by the Florida Supreme Court. (A-19)

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

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[1]As relates to the lobbyist, no one has suggested that there was any prohibition on retaining a lobbyist in connection with this transaction, nor has anyone suggested that there was any illegal conduct by the lobbyist. The lobbyist did not testify at trial, and there is no evidence regarding the lobbyist's fee agreement–which was a fee agreement negotiated with Cease–not Moliver, and not the brokers.

paid a percentage of the appropriation obtained. However, there was never any appropriation, and the contingency never occurred. Id. At 1325. The *City of 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 discussion which could be construed as relating to sales commission agreements is likewise dictum. (A-19)

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.[2] (A-19)

The Florida rule announced in *Robert & Co.* is in harmony with the general rule followed in other jurisdictions. As summarized by the Williston treatise:

> A person having something to sell has the right to sell it through an agent, and this right is an incident to his ownership. To declare that he may not employ an agent, upon commission, where the government is the prospective buyer, is to take away what is ordinarily one of the elements of the enjoyment of ownership–the unrestricted right to sell.

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[2]The *City of Hialeah Gardens* opinion cites the decision in *Markon v. Unicorp. American Corp.*, 645 F. Supp. 62 (D.C. 1986). 599 So.2d at 1324. The *Markon* case actually supports the allowing of a real estate commission in this case. In *Markon*, the agent was denied a commission on the renewal of a lease. Under the applicable federal regulation, only a licensed real estate agent could earn a commission, and Markon had no real estate license, 645 F. Supp. at 66. In the present case, the real estate brokers are licensed.

> Upon this line of reasoning, commission agreements for a sale to the government have bee upheld and enforced in this state where the agreement did not actively require corruption in its performance. Treated as a matter distinct in its nature from agreements to procure legislation, an agreement to compensate an agent for his successful efforts in traffic with the government has been held binding, where unfairness in the dealings or an intention to resort to corruption did not actually appear from the facts.

7 Richard A. Lord, Williston on Contracts, § 16:5, at 357–58 (4th ed. 1997) (footnote omitted). (A-20)

In sum, the rule set forth in *Robert & Co.* is controlling and should be followed, since, under relevant legal standards, there was no basis for holding this commission agreement void.

It is respectfully submitted that the Court has jurisdiction to review the decision and determine for itself that the majority opinion is legally indefensible.

II. SUMMARY OF THE ARGUMENT

The en banc Court's decision is in express and direct conflict with decisions of this Court and other District Courts.

We hope to be permitted to demonstrate that the majority opinion should be quashed and the dissent adopted.

III. ARGUMENT

A. The lower court's procedural decision to unilaterally raise the defense of illegality of the contract expressly and directly conflicts with a decision of the Florida Supreme court and another District Court of Appeal decision.

The lower court, upon its own motion, unilaterally raised the affirmative defense that the brokerage contract at issue was void as being against public policy, relying on the authority *of City of Hialeah Gardens v. John L. Adams & Co.*, 599 So.2d 1322 (Fla. 3rd DCA), *rev. denied*, 613 So.2d 5 (Fla. 1993). This procedure conflicts with decisions of the Florida Supreme Court and the Second District Court of Appeal, which recognized such contracts as only voidable (as opposed to void),

and therefore, the defense of illegality must be pleaded and proved at the trial level, and may not be raised unilaterally by a court.

In *Robert & Co. v. Mortland*, 33 So.2d 732 (Fla. 1948), this Court addressed an oral consulting contract that was contingent on 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. Id. at 734. 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." Id.

Moreover, in *Busot* v. *Busot*, 338 So.2d 1332 (Fla 2nd DCA 1976), the former wife sued the former husband for breach of a post-divorce marital support agreement. The husband did not raise any affirmative defense concerning the 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. Id. at 1334. However, since the agreement in this case was facially valid, the defense of illegality was required to be alleged and proved, or it was otherwise waived by the husband. Id.; see also *Jorge v. Rosen*, 208 So.2d 644,647 (Fla. 3rd DCA 1968) (holding that regulation limiting contingency fee arrangements in cases before the IRS was voidable--as opposed to void--and therefore "its provisions could be waived by the failure to plead" the defense).

This Court should accept jurisdiction of this matter as there exists a present conflict as to whether the type of agreement at issue is void (and therefore subject to unilateral action by a court) or merely voidable (and consequently the illegality defense must be pleaded and properly supported with evidence in the trial court).

B. The lower court's substantive decision that the contract is void as being against public policy expressly and directly conflicts with this court's decision in *Robert & Co. v. Mortland*, 33 So.2d 732 (Fla. 1948).

In this matter, the Third District Court of Appeal decided that the brokerage contract was void as being against public policy, as the contract 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 induced by improper means.

The foregoing decision expressly and directly conflicts with this court's decision in *Robert & Co. v. Mortland*, 33 So.2d 732 (Fla. 1948). In *Mortland*, a consultant provided services to an engineering firm in the hopes that the latter would secure various sewer contracts with the City of Tampa. Id. at 732-33. This Court affirmed the trial court's ruling in favor of the consultant. In doing so, the Court

noted that it was necessary to delve into the actual conduct of the parties behind the contract at issue, and that an actual showing of inappropriate conduct was required before the Court could invalidate the contract:

> It is quite true that if the contact 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.
>
> Appellant relies on *Wechsler v. Novak* [], and similar cases, but we think those 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.

Id. at 734 (citation omitted) (emphasis added); *see also St. Joe Corp. v. Mclver*, 2004 WL 212453 (Fla. Feb 5,2004) (holding that an oral brokerage agreement for payment of a commission in the event broker secured a condemnation by the state was subject to general contract principles).

In *L. Y. Douglas v. City of Dunedin*, 202 So.2d 787 (2nd DCA 1967), the Court, 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."

IV. CONCLUSION

The Court has jurisdiction, and review should be granted

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed this _____day of March, 2004, to: Jorgé L. Gonzalez, Esq., 321 Palm Avenue, Hialeah, Florida 33010-4715; and Craig J. Trocino, Esq., 1401 Brickell Avenue, Suite 1000, Miami, Florida 33131-3504; and Melinda L. McNichols, Esq., 1471 Hammond Drive, Miami Springs, Florida 33166-3232.

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 proportionately spaced.

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