

SUPREME COURT OF FLORIDA

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CASE NO. 72,927

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IRV DAVID, etc.,

Petitioner,

vs.

HAROLD RICHMAN,

Respondent.

**FILED**

SID J. WHITE

OCT 8 1998

CLERK, SUPREME COURT

By:   
Deputy Clerk

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PETITIONER'S REPLY BRIEF

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STATEMENT OF THE CASE

Petitioner IRV DAVID stands by the Statement of the case as related in his Main Brief and denies the mathematical calculations suggested as to how the trial Judge arrived at his Judgment in favor of DAVID for \$3,202.85. The trial Judge was entirely correct.

The trial Court found that Petitioner RICHMAN was entitled to be given credit for 61 monthly mortgage payments of \$681.55. Multiplying \$681.55 x 61 = \$41,574.55, not \$41,745.55 as stated by Petitioner. The confusion was as a result of the trial Court in its Order (APP. 7) entered the incorrect figure of \$41,745.55 but in totaling the credits between the parties entered the correct figure of \$41,574.55.

The trial Court did not incorrectly calculate the debts and credits in its money Judgment in favor of DAVID.

POINT I

WHETHER A PARTY IS PRECLUDED FROM CLAIMING ATTORNEY'S FEES UNDER A CONTRACT WHICH HAS BEEN FOUND TO HAVE NEVER EXISTED.

It is noted that Respondent RICHMAN makes no response to Petitioner's argument or response to any cases cited, but only rephrases the Opinion of the Third District as to its reasons for holding there was no contract, no estoppel and no fees.

Respondent has presented no reply as to the argument of equal justice between the parties, nor did he present one authority except the instant Opinion, from any jurisdiction that denied attorney's fees to the prevailing Defendant being sued under a contract which both parties executed containing a provision for fees.

The Third District says there was no meeting of minds on all essential matters, therefore, the contract never existed.

However, it is crystal clear that both parties in executing the contract had a meeting of minds as to attorney's fees being awarded to the prevailing party which provided:

"In connection with any litigation including appellate proceedings arising out of this contract, the prevailing party shall be entitled to recover reasonable attorney's fees and costs...." (Paragraph "T", APP. 3).

Suppose instead of this provision reading "arising out of this contract" the provision read "arising out of this document". There is no doubt a contract is a document and there is no doubt that the document continues to exist regardless of the legal effect of enforcement.

The Respondent when he filed his action claiming he was entitled to fees and was awarded fees was filing an action "arising out of this contract" regardless of the legal effect of the contract.

The provision for fees did not except nor was it concerned about, the legal effect of the contract. It was an agreement between the parties that any proceedings arising out of this contract, whether a good or bad contract, legally found to have never existed, because of a technical deficiency, or found to be unenforceable for one reason or the other, that the prevailing party shall recover fees and costs. There is no exception to this provision that one party could sue the other and be denied attorney's fees when the Court found the legal effect that the contract never existed.

The Third District's Opinion should be quashed and the trial Court directed to hold a hearing and award Petitioner such trial and appellate fees as it deems fair and reasonable.

POINT II

THE TRIAL COURT ERRED IN ITS COMPUTATIONS OF CREDITS BETWEEN THE PARTIES IN THE AMOUNT OF FOUR THOUSAND AND NO/100 (\$4,000.00) DOLLARS AND RICHMAN WAS SHORTCHANGED BY THIS AMOUNT.

The trial Court did not err in its calculations and Richmond was not shortchanged by any amount.

The trial Court never found that the value of the property increasing from \$89,900.00 in 1979 to \$99,500.00 in 1985, a \$10,000.00 increase in value, was because of the betterments by Richman. The market value of a townhouse valued at \$89,900.00 in 1979 could and should have increased in value through normal appreciation more than \$10,000.00 by December 1, 1985.

Richman was given every consideration for betterments to a unit he took possession of because of fraudulently obtaining a Summary Judgment on the basis of his perjury.

The improvements he made were not necessary improvements, were not made with the approval of DAVID, were made after Motion was made to set aside the Summary Judgment and during the pending appeal. The trial Court had every right to have denied Richman any betterments.

Richman was given \$6,000.00 credit for betterments. DAVID was given credit of \$4,000.00 to restore the townhouse for fixtures wrongfully removed by Richman. Richman

received a balance of \$2,000 over DAVID's restoration costs and was entitled to no more.

The Third District's affirmance relating to the amount of Judgment should stand.

Respectfully submitted,

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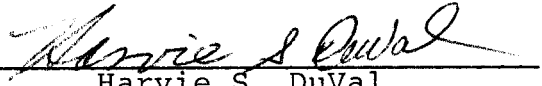
By   
Harvie S. DuVal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was this 30th day of September, 1988, mailed to:

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