

IN THE SUPREME COURT OF FLORIDA

CASE NO. 75,806

ON PETITION FOR REVIEW FROM
THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT, CASE NO. 88-1384

DANIEL LEFEMINE and CATHERINE
A. LEFEMINE,

Petitioners,

vs.

JUDITH W. BARON and S & N
KURASH, INC.,

Respondents.

RESPONDENTS' ANSWER BRIEF ON JURISDICTION

RHEA P. GROSSMAN, P.A.
2710 Douglas Road
Miami, Florida 33133-2728
(305) 448-6692

Counsel for Respondents,
JUDITH W. BARON and S & N
KURASH, INC.

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CITATIONS	ii
REPLY TO STATEMENT OF CASE AND FACTS	1
POINT ON APPEAL (JURISDICTIONAL)	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	
JURISDICTIONAL ISSUE:	
THERE IS NO CONFLICT OF OPINIONS BETWEEN THE	
FOURTH DISTRICT COURT OF APPEAL IN THE CASE	
<u>SUB JUDICE</u> AND THE THIRD DISTRICT COURT OF	
APPEAL OPINIONS IN <u>CORTES V. ADAIR</u> , 494 SO.2d	
523 (FLA. 3rd DCA 1986) and <u>PAPPAS V.</u>	
<u>DERINGER</u> , 145 SO.2d 770 (FLA. 3rd DCA 1962)	
	3
CONCLUSION	6
CERTIFICATE OF SERVICE	7
APPENDIX	8
INDEX TO APPENDIX	9

1

TABLE OF CITATIONS

	<u>Page(s)</u>
<u>Bruce Builders, Inc. v. Goodwin,</u> 317 So.2d 868 (Fla. 4th DCA 1975) 3,4
<u>Cortes v. Adair,</u> 494 So.2d 523 (Fla. 3rd DCA 1986) 1,2,3,4
<u>The Florida Star v. B.J.F.,</u> 530 So.2d 286 (Fla. 1988) 4
<u>Hooper v. Breneman,</u> 417 So.2d 315 (Fla. 5th DCA 1982) 3,4
<u>Hutchison v. Tompkins,</u> 259 So.2d 129 (Fla. 1972) 3,4
<u>Lefemine v. Baron,</u> 15 FLW 261 (Fla. 4th DCA Case No. 88-1384 Opinion filed January 24, 1990) 1,2,3,4
<u>Pappas v. Deringer,</u> 145 So.2d 770 (Fla. 3rd DCA 1962) 1,2,4
<u>Terraces of Boca Associates v. Gladstein,</u> 543 So.2d 1303 (Fla. 4th DCA 1989) 2,4

Other Authorities:

Article V, Section 3(b)(3), Florida Constitution 4
--	-------------

1

REPLY TO STATEMENT OF CASE AND FACTS

For the purpose of the jurisdictional brief Respondents accept the statement of the case and facts as set forth in Petitioners' jurisdictional brief with the following exceptions:

1. On February 5, 1990, Petitioners filed a written Motion for Rehearing (App.2-3) directed to the Opinion filed by the Fourth District Court of Appeal in the case sub judice (App.1) ^{1/}. The motion was neither a Motion for Rehearing En Banc, nor a Suggestion for Certification to the Supreme Court.

2. The Motion for Rehearing was subsequently denied by Order of the Fourth District Court of Appeal dated March 9, 1990 (App.4).

POINT ON APPEAL (Jurisdiction)

WHETHER THE OPINION OF THE FOURTH DISTRICT COURT OF APPEAL IN THE CASE SUB JUDICE, WHICH HOLDS THAT A DEFAULT PROVISION IN A REAL ESTATE CONTRACT, CALLING FOR RETENTION OF THE DEPOSIT BY THE SELLER, IS ENFORCEABLE AS LIQUIDATED DAMAGES, CREATES A CONFLICT WITH THE THIRD DISTRICT COURT OF APPEAL OPINIONS IN CORTES V. ADAIR, 494 SO.2d 523 (FLA. 3rd DCA 1986) and PAPPAS V. DERINGER, 145 SO.2d 770 (FLA. 3rd DCA 1962)?

^{1/} Respondents have not duplicated the Appendix attached to Petitioners' Brief on Jurisdiction. However, Respondents will be relying upon matters not contained in Petitioners' attached appendix. Therefore, the references to "App." relate to the appendix attached to this Response Brief.

SUMMARY OF THE ARGUMENT

The opinion of the decisional panel of the Fourth District Court of Appeal does not conflict with the decisions of Cortes v. Adair, 494 So.2d 523 (Fla. 3rd DCA 1986) and Pappas v. Deringer, 145 So.2d 770 (Fla. 3rd DCA 1962).

The decisional panel of the Fourth District Court of Appeal in the case sub judice, upheld the trial court's findings that the buyers (Petitioners, herein) defaulted: the default provision was an enforceable liquidated damages clause consistent with the principles set forth in prior case law; and there was no lack of mutuality in the remedies afforded either the buyers or the sellers.

The district court opinion only determined that there was nothing offensive in the default provisions of the contract before the trial court in that there was a mutuality of remedies for either party if a default occurred. Since the opinion of Cortes v. Adair, 494 So.2d 523 (Fla. 3rd DCA 1986) seemed to be decided on the lack of mutuality (although the Court did not discuss the remedies afforded the buyer if the seller defaulted), the panel in this case, rejected the holding of Cortes as applicable to the facts presented herein, albeit recognizing the legal principles of Cortes as relied upon by the Fourth District Court of Appeal in Terraces of Boca Associates v. Gladstein, 543 So.2d 1303 (Fla. 4th DCA 1989).

ARGUMENT

THERE IS NO CONFLICT OF OPINIONS BETWEEN THE FOURTH DISTRICT COURT OF APPEAL IN THE CASE SUB JUDICE AND THE THIRD DISTRICT COURT OF APPEAL OPINIONS IN CORTES V. ADAIR, 494 SO.2d 523 (FLA. 3rd DCA 1986) and PAPPAS V. DERINGER, 145 SO.2d 770 (FLA. 3rd DCA 1962)

The decisional opinion of the Fourth District Court of Appeal in the case sub iudice (App.1), affirmed a factual determination by the trial court that the "retention of the deposit by the seller[s] (Respondents herein), was enforceable as liquidated damages".

In reviewing the trial court's judgment, the Forth District found that (1) the deposit amount forfeited was not unconscionable "under the facts here presented"; (2) both the sellers and the buyers had the same available remedies for damages and/or enforcement of the contract in the event of a default; the default provisions were enforceable as liquidated damages and were not unenforceable as a penalty clause. The opinion relied upon Hutchison v. Tompkins, 259 So.2d 129 (Fla. 1972); Hooper v. Breneman, 417 So.2d 315 (Fla. 5th DCA 1982); and Bruce Builders, Inc. v. Goodwin, 317 So.2d 868 (Fla. 4th DCA 1975) and the legal principles expounded therein as applied to the facts of this cause in affirming the trial court.

Petitioners' are relying upon the "uncertainty of the District Court of Appeal as to what to 'make of' the decision in Cortes v. Adair, 494 So.2d 523 (Fla. 3rd DCA 1986)" in their attempt to show

a conflict and seek review by this Court. This "uncertainty", however, creates no conflict as constitutionally mandated.^{2/}

The "uncertainty" arises, as explained by the decisional panel (App.1), from the Petitioners' reliance on the Cortes decision and from the fact that the Cortes Court "never discusses or distinguishes Hutchinson, Hooper, or Bruce Builders^{3/}." The opinion further explains that "Cortes does not set forth what would happen under the contract, which it interpreted, if the seller defaulted."

The Fourth District Court of Appeal, by utilizing its decision in Terraces of Boca Associates v. Gladstein, 543 So.2d 1303 (Fla. 4th DCA 1989), which relied upon Cortes, determined that Cortes, like Gladstein, was decided upon the "unreasonable disparity in remedy alternatives available to seller and buyers." Cortes was not applicable, therefore, since the Fourth District Court of Appeal specifically found in the case, sub judice, that "[n]o such disparity is found in the purchase and sale agreement at bar".

Similarly, the decision by the Third District Court of Appeal in Pappas v. Deringer, 145 So.2d 770 (Fla. 3rd DCA 1962) is based on the mutuality of the remedies to all parties to the contract and the factual determination of whether a forfeiture provision is an

^{2/} Article V, Section 3(b)(3), Florida Constitution; The Florida Star v. B.J.F., 530 So.2d 286 (Fla. 1988).

^{3/} Bruce Builders, Inc. v. Goodwin, 317 So.2d 868 (Fla. 4th DCA 1975).

enforceable liquidated damage clause or an unenforceable penalty clause.

The case at bar does not address a question of law which expressly and directly conflicts with a decision of the Third District Court of Appeal.

CONCLUSION

The Petitioners have asserted a conflict where none exists in an attempt to have this Court revisit the factual findings and conclusions of law decided by the trial court and affirmed by the Fourth District Court of Appeal in its unanimous decision in the case sub judice. Thus, the Petition for Discretionary Review should be denied.

Respectfully submitted,

RHEA P. GROSSMAN, P.A.
2710 Douglas Road
Miami, Florida 33133-2728
(305) 448-6692

BY: 

RHEA P. GROSSMAN

Florida Bar #092640

Counsel for Respondents

DATED: April 23, 1990.