IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. SC05-1381

FRANCISCO DE LA FUENTE, individually, and as Trustee, and
BARBARA LEWIS DE LA FUENTE,

Petitioners,

v.

ADRIAN DEVELOPERS CORP., a Florida corporation, et al.,

Respondents.

PETITIONERS' BRIEF ON JURISDICTION

ON DISCRETIONARY REVIEW FROM A DECISION OF THE
THIRD DISTRICT COURT OF APPEAL

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Constitutional Provisions

Art. V, § 3(b)(3), Fla. Const. 1

"This appeal involves a time of the essence contract in which a payment was not timely made . . . ." *Adrian Developers Corp. v. De La Fuente*, 905 So. 2d 155 (Fla. 3d DCA 2004) ("*De La Fuente*"). A copy of the decision is attached.

Francisco and Barbara De La Fuente ("the de la Fuentes") seek review of a decision of the Third District which denied their right to terminate a real estate contract with Adrian Developers Corp. ("Adrian") for its failure to make a deposit of purchase money funds within the time frame specified in a "time of the essence" contract of purchase and sale. That decision creates facial conflict with decisions of other district courts of appeal on three important issues of real property and contract law. Jurisdiction is conferred by Article V, section 3(b)(3) of the Florida Constitution.

STATEMENT OF THE CASE AND FACTS

The de la Fuentes entered into a real estate contract with Adrian which contained a time of the essence provision. An $130,000 escrow deposit required of Adrian was not made when it was due, but Adrian nonetheless made that deposit "some seven days late, at which time [it] requested an addendum authorizing this late payment." 905 So. 2d at 156. Ten days later, the de la Fuentes advised Adrian they would accept the addendum only if Adrian waived certain purported title objections. Adrian rejected the de la Fuentes' proposal, prompting the de la Fuentes to bring a suit to quiet title and for a declaration that the contract was terminated. Adrian counterclaimed for breach of contract and specific performance.

The district court's decision recites that the trial court determined the contract

"was not properly terminated" on the authority of *Lance v. Martinez-Arango*, 251 So. 2d 707 (Fla. 3d DCA 1971). *Id*. "The trial court, in essence, held that one who wishes to claim under a time of the essence provision must do so in a timely manner," but that the de la Fuentes had not notified Adrian before it made its untimely deposit.[1] *Id.* The district court then held: "We agree and affirm." *Id*.

The trial court had denied Adrian's request for specific performance of the contract, however, based on a finding that it did not have sufficient funds or financing arrangements to close, had not done due diligence it acknowledged a lender would require, and consequently was not ready, willing and able to proceed to closing. The district court reversed on this issue, holding that the de la Fuentes' announcement of their intent to terminate, and the filing of their suit some ten months before the last possible date for a closing,[2] "relieved [Adrian] from proceeding to financing until the matter was resolved." *Id*. The district court held that

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[1] The trial court also held that the de la Fuentes had not instructed the escrow agent to return the deposit when Adrian rejected the demand to retract its purported title objections. That ruling by the trial court is not significant for purpose of the Court's jurisdiction (and incidentally makes no sense), because the district court's decision turns on the de la Fuentes' failure to give notice of termination *before the deposit was made* by Adrian seven days after its due date. The de la Fuentes could hardly instruct the third party escrow agent to return a deposit before they knew he had not received it. If and when the Court accepts this case for review, the issue regarding instructions to the escrow agent will be put into a very different perspective than is stated in the district court's decision.

[2] The district court mistakenly says ten months before the "scheduled" closing, which obviously could not exist with the sellers unwilling to go forward with a sale. Ten months later was an absolute deadline for closing; not a scheduled date for closing. *See De La Fuente*, 905 So. 2d at 156.

the parties should be restored "to the status quo by putting them in the position they were in prior to the seller's unsuccessful attempt to terminate." *Id*.

SUMMARY OF ARGUMENT

The Third District's decision – that the seller of real property must give notice of termination in order to enforce a "time of the essence" contract against a party who knows and acknowledges that it has failed to perform on a timely basis -- is directly contrary to the Fourth District's repeated decisions that there is *no* requirement of notice to a party in default under a time of the essence contract. The Third District's decision that failure to give notice of termination after a default before untimely performance constitutes a "waiver" of the right to invoke a time of the essence provision, expressly conflicts with a decision of this Court and the Fifth District that mere forbearance from the exercise of a contract right does *not* constitute a waiver. These conflicts create significant disparity in the law governing contracts and real property transactions in Florida.

ARGUMENT

I. The Third District's decision invalidating a time of the essence provision in a contract expressly and directly conflicts with the Fourth District's decisions in *Rybovich Boat Works, Inc. v. Atkins*, 587 So. 2d 519 (Fla. 4th DCA 1991), and *Hufcor/Gulfstream, Inc. v. Homestead Concrete & Drainage, Inc.*, 831 So. 2d 767 (Fla. 4th DCA 2002).

A time of the essence clause in a real estate contract is not boilerplate language. It has long been a pivotal provision in the time-sensitive world of commerce, and particularly in real estate conveyancing. The Fourth District best captured the significance of these provisions when it held in *Rybovich* that a time of

the essence clause is not a "stock phrase" which can be disregarded, and that untimely performance under a time-specific contract carries legal consequences. 587 So. 2d at 521.

The question before the Third District in this case was whether the buyer of real property can unilaterally extend the due date for performance under a time of the essence contract by belatedly performing before the seller has communicated a formal notification of default. The court held that it can, because the de la Fuentes did not notify Adrian that its untimely deposit was not acceptable until after they learned of the deposit. The court has held that a time of the essence provision is meaningless if the defaulting party succeeds in performing before the non-defaulting party cries "termination."

Exactly the opposite answer was given to that question in *Rybovich*, where the court held that under a time of the essence contract "***no*** notice of a default is required." *Rybovich*, 587 So. 2d at 521 (emphasis added). In *Rybovich*, the buyer had failed to schedule a closing before the drop dead date for a closing specified in the parties' contract. The court put *no* notification obligation on the seller, based on the venerable proposition that courts may not rewrite, alter, or amend contracts. *Id*.

Eleven years after *Rybovich*, the Fourth District in *Hufcor* again refused to deny enforcement of a time of the essence clause in the face of an untimely deposit by the party in default. The City of Homestead entered into an agreement with a subcontractor which provided that the subcontractor would be entitled to an agreed judgment amount if the City did not make a payment within five days of notifica-

tion by the subcontractor that the settlement-specified deadline for the payment had been missed. More than five days passed after the subcontractor gave notice that a payment deadline had been missed. The City made the required payment eighteen days later. The district court refused to give effect to the City's untimely deposit, holding that the time of the essence provision in the settlement contract was clear and unambiguous, and that even though "the result seems harsh" the subcontractor was entitled to the benefit of his "bargained-for agreement." 831 So. 2d at 769.

The facts and legal elements of this case and *Hufcor* are indistinguishable. In both cases, a party missed a contract-imposed deadline for a deposit required under a time of the essence contract, but unilaterally decided to make that payment several days later. The Fourth District flatly rejected the notion that a non-breaching party to a time of the essence contract will lose termination rights by failing to notify the breaching party of its default before it is able to perform belatedly, on the ground that a denial of that right would rewrite the parties' bargained-for contract. The Third District has now held just the opposite.

The parties in this case were in the same legal posture as the parties in *Hufcor*. Adrian was in default by having breached a time of the essence contract and expressly acknowledged its breach, yet on its own initiative put up the money which was overdue. The non-breaching de la Fuentes rejected Adrian's untimely payment with a counteroffer,[3] putting the possibility of a retroactive cure back into

[3] A counteroffer constitutes the rejection of the original offer. *Press v. Jordan*, 670 So. 2d 1016, 1017 (Fla. 3d DCA 1996).

Adrian's hands. The de la Fuentes, like the non-breaching party in *Hufcor*, invoked their right to terminate the contract by instituting a court proceeding.

The Third District has denied the de la Fuentes the relief which their legal posture and contract required, by imposing on them a condition nowhere mentioned in either their contract or the law. The court has held that time was ***not*** of the essence in de la Fuentes' contract, and gave Adrian the unfettered right to decide when it would perform the material condition of making a $130,000 deposit up until it received a notification of termination from the de la Fuentes. The court in *Hufcor* held just the opposite, holding that "[a]n attempted performance . . . does not cure the default where time is made of the essence in the agreement." 831 So. 2d at 769.

The Court will note the Third District did not give legal significance either to the seven day time interval between the deadline for Adrian's deposit and its belated deposit, or to the ten day interval between that deposit and the de la Fuentes' notification of termination. Nothing in the court's decision addresses the reasonableness or unreasonableness of Adrian's 7-day late performance or the de la Fuentes' 10-day rejection of the untimely deposit.[4] The court defined the issue presented by the parties as "whether a right to terminate an agreement flowing from a time of the essence provision is waived by not terminating the agreement in

[4] The *Lance* decision on which the district court relied was just the opposite. The *only* issue in *Lance* was "whether the delay in accepting the counter-offer was an unreasonable length of time" (251 So. 2d at 708), and the only decision of the court was that seven days was reasonable.

a timely manner" (905 So. 2d at 155), with "timely" defined by the court to mean immediately after the expiration of the due date, and before Adrian made its untimely deposit.

To the extent the court's decision can be read as approving the trial court's reliance on the *Lance* decision, and to the extent that *Lance* is consistent with the notion that courts will allow a party in breach of a time of the essence provision to perform within a reasonable time before the non-breaching party gives notice of termination, that decision of the Third District is also in direct conflict with the black letter law expressed in the Fourth District's decisions in *Rybovich* and *Hufcor* that ***no*** notice of default is required when parties to a contract make time of the essence. In the same circumstance, the Fourth District has refused to rewrite the parties' contract and deprive the non-breaching party of bargained-for rights, despite harsh consequences to the breaching party. The district court's decision here *does* rewrite the parties' contract, to reward the breaching party.

II. The Third District's decision that a time of the essence provision is automatically waived by the non-breaching party's failure to immediately terminate expressly and directly conflicts with this Court's decision in *Gilman v. Butzloff*, 22 So. 2d 263 (Fla. 1945), and with the Fifth District's decision in *Costello v. The Curtis Bldg. Partnership*, 864 So. 2d 1241 (Fla. 5th DCA 2004).

The district court held that "a right to terminate an agreement flowing from a time of the essence provision is *waived* by not terminating the agreement in a timely manner." 905 So. 2d at 155 (emphasis added). This is directly contrary to the principle of law announced in *Gilman*, that waiver "does not arise from forbearance for a reasonable time." 22 So. 2d at 265. It also conflicts with

Costello, which applied the same "no waiver by forbearance alone" principle based on like decisions of the First and Fourth District Courts of Appeal.

In *Gilman*, the buyer of real property brought a suit for earnings lost as a result of seller's failing to comply with an oral contract provision requiring the property to be turned over within 35 days, and for damages to structures on the property. The seller alleged that a deed had been timely given but was subject to a tenant's right of possession, and that the property was in the same condition as when the contract was executed. The Court denied the buyer relief, on the ground that the record contained substantial evidence of acts and conduct inferring a waiver. The Court made a point of holding, however, that the waiver did not arise just from the buyer's forbearance in accepting the deed within the 35-day time period.

In *Costello*, the court held that a landlord's acceptance of rent from a tenant over a period of 75 years, in and of itself, did not waive the right to argue the invalidity of the tenant's option to purchase the property which required as a condition precedent that the tenant construct a building on the property before the end of the first year of the lease. Applying decisions from the First and Fourth District Courts of Appeal, the court held that waiver does not arise "merely from forbearance for a reasonable time." 864 So. 2d at 1244.

The district court in this case has held that the de la Fuentes waived the right to invoke the time of the essence provision in their contract by forbearance alone – *i.e.*, by "not terminating the agreement in a timely manner." This conflicts with *Gilman* and *Costello*.

III. The district court's grant of equitable relief to a party in breach of contract expressly and directly conflicts with *JNC Enterprises, LTD v. ICP 1, Inc.*, 777 So. 2d 1182 (Fla. 5th DCA 2001), and *Robinson v. Abreu*, 345 So. 2d 404 (Fla. 2d DCA 1977).

The trial court in this case had made a factual determination that Adrian had not secured financing for the de la Fuentes' property, and had not even conducted an environmental audit and survey which were prerequisites to obtaining financing. The district court reversed that determination, to hold that the de la Fuentes' termination announcement and lawsuit "relieved [Adrian] from proceeding to financing until the matter was resolved." 905 So. 2d at 156. The court reasoned that Adrian's counterclaim for specific performance was merely asking the court "to restore the parties to the status quo" prior to the seller's unsuccessful attempt to terminate. *Id*.

Specific performance is not available to a party in default of a contract, however. *JNC Enterprises*, 777 So. 2d at 1185; *Robinson*, 345 So. 2d at 405. *Robinson*, like this case, involved a real property contract with a time of the essence provision, and a payment by the buyer which was untimely. The buyer's request for specific performance – based on a deposit of the required funds 5 days after the date specified in the contract – was rejected by the court:

> A party to a contract is not entitled to specific performance of that contract where he did not perform his obligations according to the clear and unambiguous terms of the contract.

Robinson, 345 So. 2d at 405. The court's decision in this case expressly and directly conflicts with *JNC Enterprises* and with *Robinson*.

REASONS FOR GRANTING REVIEW

In Miami-Dade and Monroe Counties, a party can ignore a time of the essence provision in a contract and perform material terms after contract-specified deadlines with impunity, so long as the party's performance is accomplished before the receipt of a notice of default from the non-breaching party. In Broward, Palm Beach, Indian River, Martin, Okeechobee and St. Lucie Counties, no notice is required for termination of a contract to a defaulting party under a time of the essence contract.

A key responsibility assigned this Court by the Constitution is the harmonization of the law throughout Florida. *Sullivan v. Sapp*, 866 So. 2d 28, 34 (Fla. 2004). No business activity is more pervasive or economically significant in Florida, or more dependent on the principles of contract law, than the purchase and sale of real estate. A time of the essence clause is one of the most important provisions put into real estate contracts. To have different rules of law governing these provisions in two of the state's largest metropolitan areas is inimical to state-wide uniformity in commerce. To give real estate attorneys, brokers, buyers, and sellers of real property in south Florida mixed messages as to the legal significance of time of the essence provisions in contracts is intolerable.

CONCLUSION

The Court should accept the decision of the district court for review.

Respectfully submitted,

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ATTACHMENT

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905 So.2d 155, 30 Fla. L. Weekly D150
Briefs and Other Related Documents

District Court of Appeal of Florida,Third District.
ADRIAN DEVELOPERS CORP., a Florida corporation; Adrian Home Communities, Ltd., a Florida corporation; AHC at Monarch Lakes, Ltd., a Florida corporation; Adrian Homes With PMBC; Miller South Corp., a Florida corporation, and Pedro Adrian, Appellants/Cross-Appellees,
v.
Francisco DE LA FUENTE, individually and as trustee, and Barbara Lewis De La Fuente, Appellees/Cross-Appellants.
No. 3D04-891.

Dec. 29, 2004.
Rehearing and Rehearing En Banc Denied July 13, 2005.

Background: Vendor brought action to quiet title and for determination that land sales contract was properly terminated. Purchaser counterclaimed for breach of contract and specific performance. The Circuit Court, Miami -Dade County , Jerald Bagley, J., determined that contract was not properly terminated, but denied relief to purchaser. Parties appealed.

Holdings: The District Court of Appeal held that:

(1) contract was not properly terminated, and

(2) purchaser was entitled to specific performance order.

Affirmed in part, reversed in part, and remanded.

West Headnotes

[1] **Vendor and Purchaser 400 78**
400k78 Most Cited Cases
Vendor failed to timely assert time is of the essence clause in land sales contract after purchaser failed to make second deposit on time, and thus, contract was not properly terminated; purchaser made second deposit some seven days late, vendor did not assert the time is of the essence clause until some ten days after the deposit was made, and vendor did not instruct escrow agent to return the deposit.

[2] **Specific Performance 358 65**
358k65 Most Cited Cases

Specific Performance 358 93
358k93 Most Cited Cases
Purchaser under land sales contract was entitled to order for specific performance to return parties to status quo after vendor attempted to terminate contract under time is of the essence clause, even though trial court determined purchaser was not ready, willing, and able to immediately close on property; trial court determined that attempted termination was ineffective, as vendor's attempted termination of contract some ten months before scheduled closing relieved purchaser from proceeding to closing.

***155** Paul Morris , Miami and Brooks Alayon, LLP., for appellants/cross-appellees.
Billbrough Marks, P.A. , and Geoffrey B. Marks ; Roland R. St. Louis, for appellees/cross-appellants.

Before GERSTEN and FLETCHER , JJ., and HARRIS , CHARLES M., Senior Judge.

PER CURIAM.
This appeal involves a time of the essence contract in which a payment was not timely made but which, when made, was not timely rejected. Thus, the issue is whether a right to terminate an agreement flowing from a time of the essence provision is waived by not terminating the agreement in a timely manner. We affirm the trial court's determination that the agreement was not properly terminated but reverse on the issue of whether the ***156** purchaser should be permitted to proceed to purchase under the agreement.

On August 8, 2001, Adrian Developers Corp., as buyer, and Francisco de la Fuente, as seller, entered into an agreement to buy and sell certain real estate. The contract contained a time of the essence provision and required that the transaction close by February 6, 2003. The contract, after some earlier modifications, provided that a second deposit in the amount of $130,000 be made on or before February

6, 2002. However, the second deposit was not made until February 13, some seven days late, at which time buyer requested an addendum authorizing this late payment.

[1] Some ten days after the second deposit was made, the seller notified the buyer that the addendum authorizing the extension of time for making the second deposit would be granted only if the buyer waived certain title objections. When the buyer rejected this condition, the seller brought an action to quiet title and to determine that the contract had been properly terminated. The buyer counterclaimed for breach of contract and specific performance.

The trial court, in essence, held that one who wishes to claim under a time of the essence provision must do so in a timely manner. Even though the second deposit had not been made on the 6th as required by the contract, it was not until the 22nd that the seller put a condition on accepting the addendum which would have extended the payment date. By this time, however, the payment had been made. And when buyer rejected seller's condition causing seller to terminate the contract, seller did not instruct the escrow agent to return the deposit.

The trial court, on the authority of *Lance v. Martinez-Arango*, 251 So.2d 707 (Fla. 3d DCA 1971), determined that the contract was not properly terminated. We agree and affirm.

[2] However, even though the court held that the contract had not been properly terminated, it refused to grant relief to the buyer on the basis that the buyer had not proved that it was ready, willing and able to proceed to closing. The buyer did not show, said the court, that it had sufficient funds in its account to close nor did it show that financing arrangement had been made. The trial court further explained that the buyer had not conducted the environmental audit nor had it completed a survey of the property, both of which would have been necessary to obtain financing. It appears to us, however, that when the seller announced its intent some ten months before the scheduled closing to terminate the contract and filed action to do so, it relieved the buyer from proceeding to financing until the matter was resolved. The buyer in this case was not seeking to force an immediate, premature closing but merely to require the seller to comply with its obligations under the contract so that buyer could do what was required of it to meet its contractual obligations. In other words, the buyer requested the court to restore the parties to the status quo by putting them in the position they we in prior to the seller's unsuccessful attempt to terminate. We believe the court erred in not doing so.

AFFIRMED in part; REVERSED in part, and REMANDED for further action consistent with this opinion.

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905 So.2d 155, 30 Fla. L. Weekly D150

Briefs and Other Related Documents (Back to top)

• 3D04-891 (Docket) (Apr. 15, 2004)

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