IN THE SUPREME COURT
OF THE STATE OF FLORIDA
CASE NO. SC07-1482

JAN KRZYNOWEK

Petitioner,

v.

TZVI SCHACHTER

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM
THE FOURTH DISTRICT COURT OF APPEAL
WEST PALM BEACH, FLORIDA
Case No. 4D06-2266

RESPONDENT'S BRIEF ON JURISDICTION

SUBMITTED BY:

Randall L. Gilbert, Esq.
Ronald E. Kaufman, Esq.

Gilbert & Kaufman P.A.
15700 Northwest Seventh Avenue
Miami, Florida, 33169
Dade (305) 769-3000
Facsimile (305) 769-0203

TABLE OF CONTENTS

PREFACE

For ease of reference, wherever possible, the Respondent, TZVI SCHACHTER, will be referred to as "RESPONDENT." The Petitioner, JAN KRZYNOWEK, will be referred to as "PETITIONER."

The Fourth District Court of Appeals opinion of Schachter vs. Kryznowek, 958 So.2d 1061 (Fla. 4th DCA 2007) will be referred to as Schachter.

TABLE OF AUTHORITIES

CASES *Page(s)*

SUPPLEMENT TO STATEMENT OF THE FACTS

PETITIONER notified RESPONDENT four (4) days prior to the closing date that PETITIONER would not be going to closing. PETITIONER deeded the property away to a third party fifty one (51) days after PETITIONER was supposed to close with RESPONDENT. Thirteen (13) days after the property was sold to a third party, RESPONDENT'S attorney filed the lawsuit for breach of contract and specific performance and never filed a *lis pendens.* RESPONDENT argued below that by PETITIONER selling the property away, RESPONDENT lost the benefit of the bargain of being able to claim specific performance, and which RESPONDENT was legally entitled to sue upon within the one (1) year statute of limitations allowed by law**.**

SUMMARY OF ARGUMENT

Despite PETITIONER'S argument, Schachter, does not hint, imply, suggest, or even make any mention whatsoever of whether or not a party needs to act reasonably diligently in seeking specific performance. This Court has no jurisdiction because Schachter does not "expressly and directly conflict" with any of the opinions cited by Petitioner. Petitioner has not even quoted any language from Schachter which Petitioner is alleging directly and expressly conflicts and there is no such thing as obtaining jurisdiction through what Petitioner believes Schachter is "implying."

The district court of appeal already denied Petitioner's Motion to certify conflict when the standard of being "in direct conflict" was much lower than obtaining jurisdiction before this Court requiring an "express and direct conflict."

Lastly, there are a plethora of cases which were directly in line with Schachter.

ARGUMENT

Article V, section 3(b)(3) of the Florida Constitution enables the Supreme Court to exercise its discretion and review a decision of a district court of appeal that "expressly and directly conflicts" with a decision of another district court of appeal or of the supreme court on the same question of law. The Fourth District Court of Appeal has already denied Petitioner's Motion for Certification, rejecting PETITIONER'S argument that Schachter was in "direct conflict" with any of its sister court decisions.[1] Accordingly, this Court is without discretion to invoke its jurisdiction because there is no decision which expressly and directly conflicts.

The use of an "implication" to find conflict is contrary to article V, section 3(b)(3), which requires an "express and direct conflict." Rather, "the district court decision under review 'must contain a statement or citation effectively establishing a point of law upon which the decision rests.' " *E.g.* Tippens v. State, 897 So.2d 1278, 1280 (Fla. 2005).

[1] See, Appendix to Respondent's Brief on Jurisdiction

Despite Petitioner's citation to three (3) cases, no where within Schachter did the Fourth District Court of Appeal ever hold that a person seeking specific performance does not have to act with reasonable promptness. Petitioner fails to quote any part of the opinion, let alone the part that it contends shows a conflict. Moreover, all three (3) of the cases cited by Petitioner are inapposite because none of them involved a *lis pendens* nor the seller taking affirmative actions to shorten and destroy a buyer's right of specific performance by selling the property away to a third-party.

The Supreme Court in Aravena v. Miami-Dade County, 928 So.2d 1163, 1166 -1167 (Fla. 2006) held that one of the tests for obtaining conflict jurisdiction is if the decisions are irreconcilable. *Citing*, Crossley v. State, 596 So.2d 447, 449 (Fla.1992) (concluding that because the court below "reached the opposite result on controlling facts which, if not virtually identical, more strongly dictated" the result reached by the alleged conflict case, a conflict of decisions existed that warranted accepting jurisdiction). In two of the cases cited by PETITIONER, Shirley v. Lake Butler Corp., 123 So.2d 267, 270 (Fla. 2nd DCA 1960) and De Huy v. Osborne, 96 Fla. 435, 442, 118 So. 161, 163 (Fla. 1928) the courts held that "Where a party is not reasonably diligent in seeking to enforce the contract for the sale of land, the delay *may* render it inequitable to enforce the claim."

On its face, Schachter does not conflict with these cases at all because RESPONDENT'S specific performance claim is not being enforced, rather the claim for damages is being enforced. *See,* Schachter v. Krzynowek, 958 So.2d 1061, 1065 (Fla. 4th DCA 2007) (holding that the "seller's [i.e. Petitioner's] conduct deprived the buyer [i.e. Respondent] of the specific performance remedy.")

Moreover, the tipsy coachmen doctrine would apply as well since the case was reversed on summary judgment, and whether or not a party acted with reasonable diligence would be a question of fact precluding summary judgment anyway.

Lastly, there is no express and direct conflict considering Schachter is consistent with other districts and this Court's decisions which have invalidated limitation on remedies clause based on similar facts where the seller has sold real estate to a third party despite having an enforceable contract with pre-existing buyer. *See e.g.,* Coppola Enterprises, Inc. v. Alfone, 531 So.2d 334 (Fla. 1988); Gassner v. Lockett, 101 So.2d 33, 34 (Fla. 1958); Romines v. Nobles, 55 So.2d 563, 563 (Fla.1951); Sperling v. Davie, 41 So.2d 318 (Fla. 1949); Greenstein v. Greenbrook, Ltd., 413 So.2d 842 (Fla. 3rd DCA 1982); Ocean Dunes of Hutchinson Island Development Corp. v. Colangelo, 463 So.2d 437 (Fla. 4th DCA 1985); Hackett v. J.R.L. Development, Inc., 566 So.2d 601 (Fla. 2nd DCA 1990); Blue

Lakes Apartments, Ltd. v. George Gowing, Inc., 464 So.2d 705 (Fla. 4th DCA 1985); Bird Lakes Development Corp. v. Meruelo 626 So.2d 234 (Fla. 3rd DCA 1993); Port Largo Club, Inc. v. Warren, 476 So.2d 1330 (Fla. 3rd DCA 1985).

CONCLUSION

This Court is requested to deny jurisdiction.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed and emailed this **20th** day of **August**, 2007 to: **Bruce Botsford, Esq.,** Botsford & White, LLC., 3595 Sheridan Street, Suite 208, Hollywood, FL 33021. [Telephone: (954) 374-1420 • Facsimile (954) 374-1422 • Email: bbotsford@botsfordwhite.com]; and emailed same to e-file@flcourts.org as "Filing in SC07-1482" per Admin Order No. AOSC04-84

GILBERT & KAUFMAN, P.A.
15700 NORTHWEST SEVENTH AVENUE
MIAMI, FLORIDA 33169

_____

RANDALL L. GILBERT
FLORIDA BAR NO. 0173835
RONALD E. KAUFMAN
Florida Bar No. 524212

CERTIFICATE OF COMPLIANCE

I hereby certify that the font of this computer-generated brief is Times New Roman 14 point and is otherwise being submitted in accordance with Fla.R.App.P. 9.210(a)(2).

_____

RANDALL L. GILBERT
FLORIDA BAR NO. 0173835
RONALD E. KAUFMAN
Florida Bar No. 524212