

SUPREME COURT
STATE OF FLORIDA

NACOOCHEE CORPORATION,)	
Assignee of Eagle Land)	
Group, Inc.,)	CASE NO.: SC07-435
)	
Petitioner,)	
)	CASE NO. 1D05-3675
vs.)	
)	
F. DIANE PICKETT,)	
)	
Respondent.)	

JURISDICTIONAL BRIEF OF PETITIONER NACOOCHEE CORPORATION

ON REVIEW FROM A DECISION OF THE
FIRST DISTRICT COURT OF APPEAL

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STATEMENT OF JURISDICTION

The decision of the First District Court of Appeal ("First District") conflicts with decisions of the Second, Third and Fourth District Courts of Appeal and with decisions of this Court. Moreover, this conflict may affect the interpretation of every real property contract in the State of Florida. Thus, this Court has jurisdiction and should exercise its discretion to consider the case to insure uniformity among the districts and to preserve basic principles of law. Art. V, § 3(b)(3), Fla. Const.

STATEMENT OF THE CASE AND FACTS

Petitioner Nacoochee Corporation ("Nacoochee") seeks review of a decision rendered by the First District Court of Appeal on February 8, 2007, involving a claim by Nacoochee against Respondent F. Diane Pickett ("Pickett") seeking specific performance of a Purchase and Sale Agreement (the "Agreement") for the sale of 1400 acres of real property ("Property"). Nacoochee Corp. v. Pickett, 31 Fla. L. Weekly D3057, 2006 WL 3499983 (Fla. 1st DCA). Under the Agreement, Nacoochee was obligated to make two earnest money deposits on certain dates. After signing the contract, all parties believed the earnest money deposits had been timely made, but, due to oversight and error, they had not been. As soon as it learned of the

oversight, Nacoochee tendered deposit of the earnest money to Pickett and the title company identified in the Agreement.

Weeks after learning that the earnest money had not been deposited, and shortly after learning of a potential buyer who was willing to pay significantly more for the Property, Pickett still had not declared a default. Instead, Pickett continued to negotiate the details concerning the purchase of the Property and requested all of Nacoochee's work product related to the Property. Then, on May 28, 2004, Pickett announced her refusal to accept Nacoochee's tender of the earnest money, declared Nacoochee in default based upon its failure to make the deposit, and terminated the Agreement. While the Agreement contained a notice and cure provision (the "Notice Provision") requiring Pickett to give Nacoochee notice of any default and 60 days within which to cure the same before she could terminate, Pickett gave neither.

Following a bench trial, the trial court found that Nacoochee had a right to notice and cure, which Pickett had not provided, that Pickett's termination of the Agreement was invalid, and that Nacoochee was entitled to specific performance. Nacoochee appealed the trial court's decision as to the calculation of the purchase price, and Pickett cross-appealed on the grant of specific performance.

On February 8, 2007, the First District issued a decision approving the purchase price calculation and denying specific performance. The First District held that Nacoochee's failure to timely tender the earnest money violated an essential provision of the Agreement that was not subject to the Notice Provision, and that Nacoochee was not entitled to specific performance of the Agreement because it had not tendered the full purchase price at closing.

SUMMARY OF ARGUMENT

The First District's decision conflicts with decisions of other districts, and with a decision of this Court, on both of the decisive issues. First, the court's holding that Nacoochee's delay in tendering the earnest money constituted a material breach that discharged Pickett's obligations, and that the notice and cure provision of the Agreement did not apply to such a breach, conflicts with decisions of the Second, Third, and Fourth Districts, as well as with a decision of this Court

Second, the court's holding that Nacoochee's failure to tender the purchase price at closing constituted a material breach, despite Pickett's purported termination of the Agreement prior to the actual occurrence of any closing, conflicts with two decisions in the Third District.

While the First District apparently decided that either of these grounds provided a sufficient basis on which to deny

Nacoochee specific performance, both facets of its decision conflict with decisions of other Districts or of this Court. Nacoochee therefore requests that this Court resolve the conflict as to each ground.

ARGUMENT

I. The First District's Holding that the Untimely Deposit of the Earnest Money was a Material Breach Not Subject to the Notice Provision Is In Conflict with Other Districts and this Court.

The first conflict arises from the First District's holding that the late tender of the earnest money was a material breach that discharged Pickett of her obligations under the Agreement. This finding ignored the fact that neither Pickett nor the First District identified any prejudice or injury suffered by Pickett as a consequence of the late tender. Hence, the holding that the delay in depositing the earnest money amounted to a material breach directly conflicts with decisions of other districts involving the same or substantially similar facts.

For example, in Lance v. Martinez-Arango, 251 So.2d 707 (Fla. 3d DCA 1971), the Third District upheld the grant of specific performance of a purchase contract because the buyers' untimely payment of an earnest money deposit did not warrant forfeiture of their rights or a discharge of the seller's obligations. The trial court found that "even when a 'time is of the essence' clause is in the contract...the seller must give

reasonable notice to comply to the buyer and give a reasonable time to comply with the notice." Id. at 709 (emphasis added). As the buyers had cured their default and the delay in making the deposit caused no harm to the sellers, the trial court found that the delay did not give rise to a forfeiture. Id. The Third District affirmed these holdings and upheld the trial court's grant of summary judgment to the buyers. Id.

Similarly, in Callins v. Abbatecola, 412 So.2d 58 (Fla. 4th DCA 1982), the court held that the buyer's failure to timely make two deposits "was not sufficiently material to warrant [seller's] termination of the contract." Id. at 59. Callins involved a real estate sales transaction in which the buyer was obligated to make a \$4,500 deposit. The buyer made the deposit with two checks, but the first of the checks was returned for insufficient funds. Before the seller even learned of the bounced check, the buyer discovered the problem and tendered two cashier's checks covering the deposit. In spite of that tender, the seller, who had second thoughts, terminated the contract.

The court described the issue to be decided as follows: "whether appellant's giving a bad check as part of the deposit constituted such a material breach of the contract as to justify appellee's termination thereof." Citing Lance, the court found such a breach was not sufficiently material and, indeed, had been cured even before the appellee discovered the default. Id.

Finally, in Jackson v. Holmes, 307 So.2d 470 (Fla. 2d DCA 1975), the Second District held that the buyer's untimely submission of a contractually-required financing certification was not sufficiently material to justify the seller's termination of a purchase agreement. Due to logistical issues, the buyer was late in obtaining the financing certification, but it was obtained prior to closing. Citing the delay, but also because the seller found a more lucrative deal with another buyer, the seller refused to close. On appeal, despite a provision stating that time was of the essence, the Second District affirmed the trial court's award of specific performance in favor of the buyer, noting that where, as here, "the failure to perform is not substantial, the non-performing party should not be deprived of his rights unless it appears from the contract that this was clearly contemplated by the parties." Id.

In each of the above cases, the courts found that the delayed compliance with earnest money or similar obligations did not constitute a material breach. The First District, without citation to any authority whatsoever, held that the same conduct by Nacoochee was a material breach sufficient to discharge Pickett's obligations under the Agreement. Given that Nacoochee tendered the money and cured the default prior to termination and that there was no evidence of prejudice to Pickett, the

finding that the default was material creates a conflict with the decisions discussed above.

The second conflict related to the earnest money issue arises from the First District's holding that the Notice Provision did not apply to the earnest money obligation. The First District thereby allowed Pickett to terminate the Agreement without first providing Nacoochee notice and an opportunity to cure.¹ That holding directly conflicts with a decision of this Court.

In Morris v. Knox Corp., 153 Fla. 130 (Fla. 1943), this Court held that where a lease provided for thirty days notice of a breach and an opportunity to cure, "[u]ntil such time elapsed and such conditions were fully complied with, no legal basis existed for institution of suit." Id. at 133. Because the requisite notice and opportunity to cure had not been provided, the Court upheld dismissal of the suit as premature. Id.

Contrary to the Morris decision, the First District held that the Notice Provision, which applied on its face to all of Nacoochee's contractual obligations, did not apply to certain elements of the Agreement, specifically timely payment of

¹ Compare Lance, 251 So.2d 707, discussed above, in which the Third District required reasonable notice and time to cure, despite a "time is of the essence" clause and despite the apparent lack of any express "notice and cure" provision in the agreement.

earnest money.² Although Morris involved a lease, the difference in the nature of the agreements involved does not afford a basis for distinguishing this case; there is no legal or logical reason why a notice and cure provision would be subject to enforcement in a lease but not a purchase agreement.

II. The First District's Ruling Regarding Nacoochee's Failure to Tender the Purchase Price Conflicts with Two Decisions in the Third District.

The First District also held that Pickett was discharged from her obligations under the Agreement because Nacoochee had not tendered the full amount of the purchase price and, thus, was not ready, willing and able to do so. Nacoochee did not tender the purchase price, however, because Pickett declared a default based upon the delayed earnest money deposit and terminated the Agreement prior to the closing and, thus, prior to a point at which the purchase price could be tendered.³

The First District's holding on this issue directly conflicts with the Third District, which has held "that when the seller announced its intent...before the scheduled closing to

² Compare Sun Bank v. Lester, 404 So.2d 141 (Fla. 3rd DCA 1981) (only where agreement expressly stated that notice and cure provision did not apply to the nonpayment of monies did court find that notice and cure were not required upon plaintiff's failure to make a deposit required by the parties' agreement).

³ Indeed, even as of today's date, the deadline for closing has not yet passed because the deadline is tied to completion of the entitlements process, which was suspended on May 28, 2004 when Pickett terminated the Agreement.

terminate the contract...it relieved the buyer from proceeding to financing until the matter was resolved." Adrian Developers Corp. v. de la Fuente, 905 So.2d 155, 156 (Fla. 3d DCA 2004).

The First District's holding, in turn, appears to be based on a finding that "ready, willing and able to pay" "implies that Nacoochee tendered payment in cash of the full purchase price, which the record does not support." 2006 WL 3499983 at *4. This definition and the conclusion drawn therefrom, that Nacoochee's failure to tender breached the contract, constitute an additional conflict with a Third District decision.

In Shapiro v. Jacobs, 32 Fla. L. Weekly D401, 2007 WL 403781 (Fla. 3d DCA), the seller asserted that the buyer was not "ready, willing, and able to close at the time of the closing" because of the buyer's delay in receiving financing documents. Id. at *1. The Third District held first that a buyer is "ready, willing, and able" to close so long as "he has definitely arranged to raise the necessary money...or...by obtaining a binding commitment for a loan..." Id. at 2. The buyer, thus, need not actually tender the money. See also Perper v. Edell, 35 So.2d 387, 391 (1948)("ready, willing and able" does not require a buyer to be "standing outside of the office door with all the cash in hand" but the buyer need only be financially able to command the necessary money to close). Here, the trial court found as a matter of fact that Nacoochee

had the financial wherewithal to close and was prepared to do so. Thus, the First District's finding that Nacoochee was not a ready, willing and able buyer simply because it failed to actually tender the purchase price prior to Pickett's improper termination creates conflict with holdings of the Third District and of this Court.

Finally, even if Nacoochee had defaulted at closing, the First District again declined to apply the express Notice Provision. As explained in Section I above, the First District's refusal to apply the express and broad Notice Provision to Nacoochee's alleged defaults conflicts with Morris v. Knox.

CONCLUSION

For the foregoing reasons, Appellant Nacoochee respectfully submits that the Court should accept jurisdiction to resolve these issues.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail to the following this 15th day of March, 2007.

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CERTIFICATE OF TYPE SIZE AND STYLE

This brief is typed using Courier New 12 point, a font which is not proportionately spaced.

/s/ Major B. Harding

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