

IN THE SUPREME COURT OF FLORIDA

SABERLO FAMILY LIMITED
PARTNERSHIP, a Florida Limited
Partnership,

Petitioner,

vs.

JUAN SUAREZ,
Respondent(s).

Case No.: SC07-507

3rd DCA Case No.: 3D04-1398

L. T. Case No.: 03-13049 CA 27

PETITIONER'S JURISDICTIONAL BRIEF

On Review from the District Court of Appeal, Third District
State of Florida

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STATEMENT OF THE CASE AND FACTS

This case involves the validity and enforceability by specific performance of a purported contract for the sale and purchase of approximately 46.78 acres of land (real property) in Miami-Dade County between the Respondent (Appellant below), who was the plaintiff in the lower court and the putative Buyer, and the Petitioner (Appellee below), who was the defendant in the lower court and putative Seller [hereinafter “Contract”]. The Defendant canceled the Contract and the Plaintiff thereafter sought to specifically perform the Contract.

Plaintiff and Defendant entered into the Contract on or about May 8, 2004. The Contract contained the following term: “Buyer will . . . within 30 days . . . determine whether the Property is suitable, in Buyer’s sole and absolute discretion, . . . if Property is unacceptable to Buyer . . . this Contract will be deemed terminated . . . and Buyer’s deposit(s) will be returned.” [paragraph 6(c)(1) of the contract, hereinafter “Feasibility Paragraph”].

The record shows the following undisputed timeline and facts essential to the case at bar are:

March 8,2003	Effective Date of Contract.
April 9, 2003	Date of Letter from Buyer’s Attorney is sent to Seller, Exhibit 2 of the Second Amended Complaint.
April 15,2003	Letter from Seller’s Counsel to Buyer’s Counsel canceling Contract. Exhibit 3 of the Second Amended Complaint.

April 17, 2003	Letter from Buyer's Counsel to Seller's Counsel indicating intent to close pursuant to the Contract. Exhibit 4 of the Second Amended Complaint.
April 21, 2003	Expiration of Feasibility Study Period. [Thirty business days from the Effective Date of the Contract]
May 19, 2003	Letter from Buyer's Counsel to Seller's Counsel for the first time seeking to schedule a closing date. Exhibit 5 of the Second Amended Complaint.

The trial court Dismissed the Plaintiff's Second Amended Complaint With Prejudice and the Appellant appealed to the Third District Court of Appeal.

Having successfully obtained a Dismissal with Prejudice of the Plaintiff's Second Amended Complaint, the Petitioner herein has neither answered nor filed any affirmative defenses to the claims or allegations in the Plaintiff's Second Amended Complaint.

The Third District Court of Appeal, reversed the trial court's order Dismissing the Plaintiff's Second Amended Complaint With Prejudice. In its decision, the Third District Court of Appeal, held that:

The second amended complaint alleges that (a) the Buyer and Seller agreed that the Buyer would take the property as is, and (b) the Buyer sent the April 9 letter requesting a closing. Either of those acts was sufficient to waive the Feasibility Study provision, both are alleged to have taken place prior to the April 15 letter in which the Seller attempted to cancel the contract. The attempted cancellation came too late. We conclude that the waiver of the Feasibility Study provision

removed any issue that the contract was illusory or lacked mutuality.
[Emphasis Added.]

The emphasized wording of the Third District Court's decision establishes a waiver by the Respondent by Judicial Mandate, and its holding that the waiver removed any issue that the contract was illusory or lacked mutuality, the decision of the Third District Court of Appeals dictated the law-of-the-case. Unlike other language in the decision, which alludes to "allegations", the emphasized words are definitive and not contingent upon any further allegations, evidence or findings of fact by the trial judge or jury

The Petitioner herein filed a Motion for Rehearing or in the Alternative for Clarification, which was denied by the Third District Court of Appeal. The decision of the Third District Court of Appeal and the Order Denying Rehearing and the Motion for Clarification are appended to this Brief.

It is crucial to note that the Petitioner herein has yet to file any pleading in the case at the circuit level, the Petitioner has not admitted any facts alleged by the Respondent, that there has been no evidence presented nor admitted, and the trier of fact, be it the trial judge or jury, has yet to hear and rule on the evidence.

JURISDICTIONAL STATEMENT AND SUMMARY OF THE ARGUMENT

The Honorable Court has jurisdiction of this matter because the Third District's decision expressly and directly conflicts with the decisions of other courts of appeal and of this Court.

The Third District Court of Appeal held, in relevant part, that: (1) “The attempted cancellation came too late.” and that (2) “We conclude that the waiver of the Feasibility Study provision removed any issue that the contract was illusory or lacked mutuality.” [Emphasis Added.]

This decision of the Third District Court established a waiver by the Respondent by Judicial Mandate, prior to any pleading being filed by the Petitioner at the trial level and prior to any evidence being admitted. The decision of the Third District Court is expressly and directly in conflict with the decision of the Fourth District Court in *Anthony v. Gary J. Rotella & Assoc. P.A.*, 906 So.2d 1205 (Fla. 4th DCA 2005), and the decision of the Fifth District Court in *Goodwin v. Blu Murray Insurance Agency, Inc.*, 939 So.2d 1098 (Fla. 5th DCA 2006).

Furthermore, the decision of the Third District Court establishes the *law of the case*. The holding establishes a waiver and that the waiver removes any issue that the contract was illusory or lacked mutuality. In doing so, the decision of the Third District Court is expressly and directly in conflict with the decision of this Court in *Wells Fargo v. Sunshine Security*, 575 So.2d 179 (Fla. 1991).

The opinion of the Third District court deprives the Petitioner of its opportunity to its day in court, its right to plead its case and defenses and to have the facts determined by the trier of facts, be it at the trial judge or the jury based upon the evidence rather than the bare unanswered allegations. By establishing waiver, as a matter of law, (prior to the Petitioner answering or filing affirmative defenses to the complaint and prior to any evidence being admitted) and by establishing the law of the case based upon the Court's finding of waiver; the Third District Court's opinion effectively removes the issue of waiver from the providence of the jury.

ARGUMENT

The Third District Court of Appeal held in the case at bar, in relevant part, that: (1) “The attempted cancellation came too late.” and that (2) “We conclude that the waiver of the Feasibility Study provision removed any issue that the contract was illusory or lacked mutuality.” [Emphasis Added.] By establishing a waiver as a matter of law, and thereby the law of the case regarding the waiver and the application of the waiver to the defenses of lack of mutuality and illusory contract, the Third District Court has expressly and directly created conflicts with the decisions of the Fourth District Court in *Anthony v. Gary J. Rotella & Assoc. P.A.*, 906 So.2d 1205 (Fla. 4th DCA 2005); of the Fifth District Court in *Goodwin*

v. Blu Murray Insurance Agency, Inc., 939 So.2d 1098 (Fla. 5th DCA 2006); and this Honorable Supreme Court in *Wells Fargo v. Sunshine Security*, 575 So2d. 179 (Fla. 1991).

Although the Third District Court’s decision does in part contain language appropriate to the case at the pleading stages, such as “sufficiently alleges” and “are alleged to”; the holding above cited makes it clear that the Third District Court concluded that there was a waiver and that the waiver removed any issue that the contract was illusory or lacked mutuality. The wording of the Third District Court’s decision is definitive and not contingent upon any further allegations, evidence or findings of fact by the trial judge or jury.

The Third District Court’s failure to limit its holding to the sufficiency of the pleading, (before any pleading was filed by the Petitioner at the trial level and before any evidence being admitted) has created multiple express and direct conflicts on the same question of law.

A. Standard of Review.

This Court has conflict jurisdiction pursuant to *Article V, Section 3(b)(3)* of the Florida Constitution when the district court’s decision expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.

- B. Conflict regarding the establishment of waiver as a matter of law, prior to any pleading being filed by the Petitioner at the trial level and prior to any evidence being admitted.

In *Anthony v. Gary J. Rotella & Assoc. P.A.*, 906 So.2d 1205 (Fla. 4th DCA 2005), citing, *Hill v. Ray Carter Auto Sales*, 745 So.2d 1136, 1138 (Fla. 1st DCA 1999), the Fourth District Court of Appeals, held that in any given situation, the determination of whether a waiver has occurred is generally a question of fact.

Similarly, in *Goodwin v. Blu Murray Insurance Agency, Inc.*, 939 So.2d 1098 (Fla. 5th DCA 2006), the Fifth District Court of Appeals reversed a trial court's ruling that as a matter of law (a summary judgment) there had been a waiver, and held that: (1) the burden of proving waiver rested upon the party invoking it; (2) that summary judgment was particularly unsuitable where facts and circumstances indicated a possibility of waiver; and (3) that waiver is a factual issue to be determined by the finder of fact.

In the case at bar, the Third District Court of Appeals established waiver as a matter of law at the initial pleading stage of a case. Such a finding is expressly and directly in conflict with the decisions of the First, Fourth and Fifth District

Courts of Appeal cited above, and is therefore within the jurisdiction of this Honorable Court pursuant to *Article V, Section 3(b)(3) of the Florida Constitution*.

- C. Conflict regarding the establishment of the law of the case, prior to any pleading being filed by the Petitioner at the trial level and prior to any evidence being admitted and before a proper determination on the merits has been had.

In *Wells Fargo v. Sunshine Security*, 575 So2d. 179 (Fla. 1991), this Honorable Court rejected a Third District Court's affirmance based upon the law-of-the-case doctrine, and held that "The law-of-the-case doctrine was meant to apply to matters litigated to finality, not to matters that remained essentially unresolved due to the erroneous ruling of a lower court." [Emphasis Added.]

In the case at bar, by making a finding of waiver and then a finding that the waiver removed any issue that the contract was illusory or lacked mutuality the decision of the Third District Court of Appeals dictated the law-of-the-case. With this case being at the initial pleading state, the establishment of the law-of-the-case creates an express and direct conflict with the decision of this Honorable Supreme

Court in *Wells Fargo, Id.*, and is therefore within the jurisdiction of this Honorable Court pursuant to *Article V, Section 3(b)(3) of the Florida Constitution*.

CONCLUSION

The wording of the Third District Court's decision is definitive and not contingent upon any further allegations, evidence or findings of fact by the trial judge or jury. The Third District Court's decision establishes a waiver by the Respondent by Judicial Mandate. Through its establishment of waiver as a matter of law and its holding that the waiver removed any issue that the contract was illusory or lacked mutuality, the decision of the Third District Court of Appeals dictated the law-of-the-case.

Both the determination of waiver and its application of that determination of its effect on the defenses of illusory contract or lack of mutuality, at the initial pleading stage of this action, creates an express and direct conflict with the decisions of other district courts of appeal and of the supreme court, on the same question(s) of law.

Reversal is essential to a fair day in court for the Petitioner. Moreover, the decision of the Third District Court of Appeals in the case at issue is crucial to the fair adjudication of cases any case in which a waiver is alleged as a basis for

affirmative relief or as an affirmative defense. Additionally, allowing the precedent of the establishment of the law-of-the-case prior to the matter being litigated to finality, would greatly expand the doctrine and will lead to wildly divergent and unjust results; particularly in cases such as the one at bar where the Petitioner has yet an opportunity to file an answer or affirmative defenses.

This Court has discretionary jurisdiction to review the decision of the Third District Court of Appeal, and the Court should exercise that jurisdiction to consider the merits of the petitioner's argument.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this brief has been furnished by United States Mail, this 9th day of April, 2007 to:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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APPENDIX

1. Third District Court of Appeal's Opinion Reversing Trial Court's Decision.
2. Third District Court of Appeal's Order Denying Rehearing and Motion for Clarification.