IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA

Case No: 12-034123(07)
Complex Litigation Unit

P&S ASSOCIATES, GENERAL PARTNERSHIP, a Florida limited partnership; and S&P ASSOCIATES, GENERAL PARTNERSHIP, a Florida limited partnership, PHILIP VON KAHLE as Conservator of P&S ASSOCIATES, GENERAL PARTNERSHIP, a Florida limited partnership, and S&P ASSOCIATES, GENERAL PARTNERSHIP, a Florida limited partnership

Plaintiffs,

v.

MICHAEL D. SULLIVAN, an individual, STEVEN JACOB, an individual, MICHAEL D. SULLIVAN & ASSOCIATES, INC., a Florida corporation, STEVEN F. JACOB, CPA & ASSOCIATES, INC., a Florida corporation, FRANK AVELLINO, an individual, MICHAEL BIENES, an individual, KELCO FOUNDATION, INC., a Florida Non Profit Corporation, VINCENT T. KELLY, an individual, VINCENT BARONE, an individual, EDITH and SAM ROSEN, individuals, PREMIER MARKETING SERVICES, INC., a Florida Corporation, and SCOTT HOLLOWAY, an individual,

Defendants.
_____/

PLAINTIFFS' NOTICE OF SUPPLEMENTAL AUTHORITY

Plaintiffs P & S Associates, General Partnership ("P&S"), S & P Associates, General Partnership ("S&P") (collectively, the "Partnerships" or "Plaintiffs"), hereby give notice of filing the following Supplemental Authority to Defendants' Replies to Motions to Dismiss:

1. *Cohen v. Hattaway*, 595 So. 2d 105, 108 (Fla. 5th DCA 1992);

2. *Harris v. Schickendanz Bros. – Riviera Ltd.*, 746 So. 2d 1152 (Fla. 4th DCA 1999);

3. *State v. Herman*, 466 So. 2d 435, 436 (Fla. 5th DCA 1985)

4. *Willner v. Wilder,* 280 So. 2d 1, (Fla. 3rd DCA 1973); and

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served via Electronic Mail upon counsel identified below registered to receive electronic notifications this 25th day of April, 2014 upon the following:

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595 So.2d 105, 17 Fla. L. Weekly D414
(Cite as: 595 So.2d 105)

C

District Court of Appeal of Florida,
Fifth District.

Matthew COHEN, Appellant,
v.
J. Michael HATTAWAY, etc., et al., Appellees.

No. 91-1284.
Feb. 7, 1992.
Rehearing Denied March 16, 1992.

Shareholder of closed corporation sued certain directors on behalf of the corporation and individually. The Circuit Court, Brevard County, John Dean Moxley, Jr., J., dismissed the complaint with prejudice, and the shareholder appealed. The District Court of Appeal, Cowart, J., held that: (1) shareholder of closed corporation sufficiently alleged breach of fiduciary duties against director/officer by self-dealing and adequately stated a cause of action for conversion by alleging that director/officer took money belonging to the corporation, bought certain real property with the money, titled the property in his own name, never returned the money to the corporation, sold the property and kept the proceeds of the sale for himself, and (2) allegations of shareholder that director/officer bought property with corporate funds, placed title in his own name and then resold the property at a profit, retaining the proceeds of the sale for himself sufficiently alleged existence of a business opportunity which fit into present activities of corporation and therefore stated cause of action for appropriation of corporate opportunities; however, allegations against directors/officers that they actively participated in or knew about the activities did not allege any facts showing that they themselves appropriated a corporate opportunity.

Affirmed in part; reversed in part; and remanded.

West Headnotes

[1] Corporations and Business Organizations 101 ⚿1844

101 Corporations and Business Organizations
101VII Directors, Officers, and Agents
101VII(D) Rights, Duties, and Liabilities as to Corporation and Its Shareholders or Members
101k1840 Fiduciary Duties as to Management of Corporate Affairs in General
101k1844 k. Good faith. Most Cited Cases
(Formerly 101k307)

Corporations and Business Organizations 101 ⚿1874

101 Corporations and Business Organizations
101VII Directors, Officers, and Agents
101VII(D) Rights, Duties, and Liabilities as to Corporation and Its Shareholders or Members
101k1873 Individual Profits or Benefits from Corporate Business
101k1874 k. In general. Most Cited Cases
(Formerly 101k314(1))

Corporate directors and officers owe a fiduciary obligation to the corporation and its shareholders and must act in good faith and in the best interest of corporation; those fiduciary obligors cannot, either directly or indirectly, in their dealings on behalf of the fiduciary beneficiary with others, or in any other transaction in which they are under a duty to guard interests of the fiduciary beneficiary, make any profit or acquire any personal benefit or advantage, not also enjoyed by the fiduciary beneficiary, and if they do, they may be compelled to account to the beneficiary in an appropriate action.

[2] Contracts 95 ⚿96

95 Contracts
95I Requisites and Validity
95I(E) Validity of Assent

95k96 k. Undue influence. Most Cited Cases

A fiduciary obligor is not precluded from contracting with his beneficiary.

[3] Contracts 95 ⚿99(1)

95 Contracts
95I Requisites and Validity
95I(E) Validity of Assent
95k99 Evidence
95k99(1) k. Presumptions and burden of proof. Most Cited Cases

A purchase by a fiduciary obligor of property belonging to the fiduciary beneficiary is not void but rather is voidable at option of the fiduciary beneficiary, with the burden of showing the validity of such a contract and the fairness and honesty of such a transaction being on the fiduciary obligor.

[4] Corporations and Business Organizations 101 ⚿1937(2)

101 Corporations and Business Organizations
101VII Directors, Officers, and Agents
101VII(D) Rights, Duties, and Liabilities as to Corporation and Its Shareholders or Members
101k1929 Actions Between Shareholders or Members and Directors, Officers, or Agents
101k1937 Pleading
101k1937(2) k. Bill, petition, or complaint. Most Cited Cases
(Formerly 101k320(7))

Shareholder of closed corporation sufficiently alleged breach of fiduciary duties against director/officer by self-dealing and adequately stated a cause of action for conversion by alleging that director/officer took money belonging to the corporation, bought certain real property with the money, titled the property in his own name, never returned the money to the corporation, sold the property and kept the proceeds of the sale for himself.

[5] Corporations and Business Organizations 101 ⚿1883

101 Corporations and Business Organizations
101VII Directors, Officers, and Agents
101VII(D) Rights, Duties, and Liabilities as to Corporation and Its Shareholders or Members
101k1883 k. Usurping corporate opportunities. Most Cited Cases
(Formerly 101k315)

If a fiduciary obligor acquires in opposition to the corporation, property in which corporation has an interest or tangible expectancy or which is essential to its existence he violates doctrine of corporate opportunity.

[6] Corporations and Business Organizations 101 ⚿1883

101 Corporations and Business Organizations
101VII Directors, Officers, and Agents
101VII(D) Rights, Duties, and Liabilities as to Corporation and Its Shareholders or Members
101k1883 k. Usurping corporate opportunities. Most Cited Cases
(Formerly 101k315)

Florida recognizes concept of appropriation of a corporate opportunity.

[7] Corporations and Business Organizations 101 ⚿1883

101 Corporations and Business Organizations
101VII Directors, Officers, and Agents
101VII(D) Rights, Duties, and Liabilities as to Corporation and Its Shareholders or Members
101k1883 k. Usurping corporate opportunities. Most Cited Cases
(Formerly 101k315)

In order to show a corporate opportunity, a pleader must allege existence of a business opportunity, which fits into the present activities of the corporation or into an established corporate policy which acquisition of the opportunity would forward; corporation need not have an existing right in the business opportunity or property and the opportunity need not be of the utmost importance to the welfare of the corporation in order for a corporate opportunity to be found.

[8] Fraud 184 ⚿7

184 Fraud
184I Deception Constituting Fraud, and Liability Therefor
184k5 Elements of Constructive Fraud
184k7 k. Fiduciary or confidential relations. Most Cited Cases
(Formerly 379k10(3), 379k10(3))

Torts 379 ⚿211

379 Torts
379III Tortious Interference
379III(B) Business or Contractual Relations
379III(B)1 In General
379k211 k. Business relations or economic advantage, in general. Most Cited Cases
(Formerly 379k10(3), 379k10(3))

While a fiduciary obligor is precluded from appropriating for himself a business opportunity that belongs to fiduciary beneficiary, fiduciary obligor is not precluded from entering into and engaging in another business enterprise similar to but separate from the fiduciary beneficiary if he acts in good faith and refrains from interference with the business of the beneficiary.

[9] Corporations and Business Organizations 101 ⚿1937(2)

101 Corporations and Business Organizations
101VII Directors, Officers, and Agents
101VII(D) Rights, Duties, and Liabilities as to Corporation and Its Shareholders or Members
101k1929 Actions Between Shareholders or Members and Directors, Officers, or Agents
101k1937 Pleading
101k1937(2) k. Bill, petition, or complaint. Most Cited Cases
(Formerly 101k320(7))

Allegations of shareholder that director/officer bought property with corporate funds, placed title in his own name and then resold the property at a profit, retaining the proceeds of the sale for himself sufficiently alleged existence of a business opportunity which fit into present activities of corporation and therefore stated cause of action for appropriation of corporate opportunities; however, allegations against directors/officers that they actively participated in or knew about the activities did not allege any facts showing that they themselves appropriated a corporate opportunity.

***107** Mark P. Lang of Lang & Baker, Attorneys at Law, Orlando, for appellant.

Stephen H. Coover of Hutchison, Mamele & Coover, Sanford, for appellees.

COWART, Judge.

Cohen, a shareholder of a closed corporation, sued certain directors of the corporation on behalf of the corporation and individually. The shareholder appeals from an order dismissing his fifth amended complaint with prejudice.

The shareholder sued the defendant directors/officers in four counts. The shareholder alleged that he and the defendants formed the corporation for the purpose of purchasing and reselling real property. The shareholder alleged that he is a 50% shareholder of the corporation and had provided 90% of the capital funds for investment by the corporation while each of the three defendants is an officer and director of the corporation and each owns 16 2/3 % of the shares of the corporation.

Count I is a shareholder's derivative action for breach of fiduciary duty, alleging that the defendant J.M. Hattaway purchased certain real property (Big Tree property) from the corporation and then transferred one-half of the property to defendant J.R. Hattaway. The count continues that the defendant directors/officers then developed and resold the property at a profit and kept the profit for themselves and that the third defendant director/officer, Zabel, actively participated in these activities or knew about them but did nothing to protect the corporation's interests. The shareholder alleged that the development and resale of the former corporate

property was a significant bona fide corporate opportunity and that the defendants' activities constituted a breach of their fiduciary duties to the corporation.

Count II was styled as another shareholder's derivative action for breach of fiduciary duty and alleged that J.M. Hattaway took $31,000 of the corporation's money (by a check co-signed by Zabel) and purchased, in his own name, a parcel of real property (Lake Cockran property). The count alleges that J.M. Hattaway resold the property at a profit and kept the proceeds of the sale for himself. The count continues that this transaction was a significant corporate opportunity and that Zabel and J.R. Hattaway actively participated in or knew about these activities but took no action to protect the corporation's interest.

The trial court construed Counts I and II as attempting to allege multiple causes of action. The court construed Count I to attempt to allege improper purchase by a director of corporate property and also usurpation of a corporate opportunity. The court construed Count II to attempt to allege conversion as well as usurpation of a corporate opportunity.

[1][2][3] The trial court found that the allegation of improper purchase in Count I was defective because "it does not allege the transaction was not fair specifically with regard to the purchase price paid." Corporate directors and officers owe a fiduciary obligation to the corporation and its shareholders and must act in good faith and in the best interest of the corporation. *Tillis v. United Parts, Inc.*, 395 So.2d 618 (Fla. 5th DCA 1981). These fiduciary obligors cannot, either directly or indirectly, in their dealings on behalf of the fiduciary beneficiary with others, or in any other transaction in which they are under a duty to guard the interests of the fiduciary beneficiary, make any profit or acquire any other personal benefit or advantage, not also enjoyed by the fiduciary beneficiary, and if they do, they may be compelled to account to the beneficiary in an appropriate action. *Seestedt v. Southern Laundry, Inc.*, 149 Fla. 402, 5 So.2d 859 (1942). *See Tinwood, N.V. v. Sun Banks, Inc.*, 570 So.2d 955 (Fla. 5th DCA 1990). A fiduciary obligor is ***108** not precluded from contracting with his beneficiary. A purchase, by a fiduciary obligor of property belonging to the fiduciary beneficiary is not void but rather is voidable at the option of the fiduciary beneficiary, with the burden of showing the validity of such a contract and the fairness and honesty of such a transaction being on the fiduciary obligor. *Orlando Orange Groves Co. v. Hale,* 107 Fla. 304, 144 So. 674 (1932); *Chipola Valley Realty Co. v. Griffin,* 94 Fla. 1151, 115 So. 541 (1927); *Corr v. Leisey,* 138 So.2d 795 (Fla. 2d DCA 1962).

[4] Under these principles, Count I sufficiently alleges breach of fiduciary duties against the fiduciary obligor J.M. Hattaway by self-dealing. The fairness of the transaction is a defense to the claim of self-dealing.

Count II adequately states a cause of action for conversion by alleging that J.M. Hattaway took money belonging to the corporation, bought certain real property with this money, titled the property in his own name, never returned the money to the corporation, sold the property and kept the proceeds of the sale for himself.

Counts I and II further sought to allege breach of corporate opportunities. The trial court concluded that in order for a corporate opportunity to be found, there "must be an existing right in the subject property or a [sic] expectancy arising out of an existing right in the property or the property must be essential to the corporate existence." The shareholder argues that the court misapprehended the concept of corporate opportunity and erroneously concluded that Counts I and II contained insufficient allegations that a corporate opportunity had been appropriated.

[5] If a fiduciary obligor acquires "in opposition to the corporation, property in which the corporation has an interest or tangible expectancy or which is essential to its existence" he violates the

doctrine of corporate opportunity. *Farber v. Servan Land Co., Inc.,* 662 F.2d 371 (5th Cir.1981) (Florida law).

[6] Florida recognizes the concept of appropriation of a corporate opportunity. *News-Journal Corporation v. Gore,* 147 Fla. 217, 2 So.2d 741 (1941); *Pan American Trading & Trapping, Inc. v. Crown Paint, Inc.,* 99 So.2d 705 (Fla.1957). In *Farber v. Servan Land Co., Inc.,* the Fifth Circuit explained:

> Florida has long recognized the doctrine of corporate opportunity, [citations omitted] and has described a corporate opportunity as a business opportunity in which the corporation has an interest for a "valid and significant corporate purpose." *Pan American Trading & Trapping v. Crown Paint, Inc.,* 99 So.2d 705, 706 (Fla.1957). *See Corr v. Leisey,* 138 So.2d 795, 799 (Fla.App.1962). The opportunity need not be "of the utmost importance to the welfare of the corporation," *Pan American,* 99 So.2d at 706, to be protected from preemption by the corporation's directors and officers. As we elaborated in the first appeal of this case, however, the opportunity must "fit into the present activities of the corporation or fit into an established corporate policy which the acquisition of the opportunity would forward." *Farber* [*v. Servan Land Co., Inc.*], 541 F.2d [1086] at 1088 [5th Cir.1986].

In footnote 6, the court explained:

> " 'Whether in any case an officer of a corporation is in duty bound to purchase property for the corporation, or to refrain from purchasing property for himself, depends upon whether the corporation has an interest, actual or in expectancy, in the property, or whether the purchase of the property by the officer or director may hinder or defeat the plans and purposes of the corporation in the carrying on or development of the legitimate business for which it was created.' " 3 *Fletcher,* § 861.1 at 234.

[7] Thus, in order to show a corporate opportunity, a pleader must allege: (1) the existence of a business opportunity, (2) which fits into the present activities of the corporation or into an established corporate policy which acquisition of the opportunity would forward. Contrary to the trial court's conclusions, the corporation need ***109** not have an existing right in the business opportunity (property) and the opportunity need not be "of the utmost importance to the welfare of the corporation," *Pan American v. Crown Paint,* 99 So.2d at 706, in order for a corporate opportunity to be found.

[8] Count I alleges that the corporation had been formed for the purpose of "purchasing and reselling real property" and that J.M. Hattaway purchased the Big Tree property from the corporation and proceeded with J.R. Hattaway to develop said property and resell it at a profit. Count I alleges that the development and resale of the property was a

> significant bona fide corporate opportunity within the proper course and scope of the Corporation's business and fit into established corporate policy which the opportunity would forward[,]

but Count I never alleges that *development* of real property was a present activity of the corporation and thus fit into an established corporate policy. While a fiduciary obligor is precluded from appropriating for himself a business opportunity that belongs to the fiduciary beneficiary, *Pan American v. Crown Paint,* a fiduciary obligor is not precluded from entering into and engaging in another business enterprise similar to but separate from the fiduciary beneficiary if he is in good faith and refrains from interference with the business of the beneficiary. *Renpak, Inc. v. Oppenheimer,* 104 So.2d 642 (Fla. 2d DCA 1958). While Count I sufficiently alleges self-dealing in that J.M. Hattaway purchased property from a corporation in which he was a director/officer, it does not adequately allege that the defendants, by developing and then reselling the property, appropriated a corporate opportunity.

[9] In contrast, Count II alleges that J.M. Hatt-

away bought the Lake Cockran property with corporate funds, placed title in his own name and then resold the property at a profit, retaining the proceeds of the sale for himself. These allegations sufficiently allege the existence of a business opportunity which fit into the present activities of the corporation. The allegations against J.R. Hattaway and Zabel however, which merely are that they actively participated in or knew about the activities, do not allege any facts showing that they themselves appropriated a corporate opportunity.

In summary, Count I adequately alleges a cause of action for breach of fiduciary duties by self-dealing against J.M. Hattaway. Count II adequately alleges causes of action for conversion and for breach of fiduciary duties against J.M. Hattaway by appropriation of a corporate opportunity. The trial court's order dismissing Counts I and II as to J.M. Hattaway is reversed. The remainder of the trial court's order, which dismissed Counts III and IV, is affirmed.

AFFIRMED IN PART; REVERSED IN PART; and REMANDED.

HARRIS and DIAMANTIS, JJ., concur.

Fla.App. 5 Dist.,1992.
Cohen v. Hattaway
595 So.2d 105, 17 Fla. L. Weekly D414

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746 So.2d 1152, 24 Fla. L. Weekly D2579
(Cite as: 746 So.2d 1152)

District Court of Appeal of Florida,
Fourth District.
Robert HARRIS, and Real Estate Marketing And Consulting, Inc., a Florida corporation, Appellants,
v.
SCHICKEDANZ BROS.-RIVIERA LTD., a Florida Limited Partnership, and Schickedanz Bros.-Palm Beach, Ltd., a Florida Limited Partnership, and Schickedanz Enterprises, Inc., the corporate general partner of Schickedanz Bros.-Riviera Ltd., and Schickedanz Bros.-Palm Beach, Ltd., Appellees.

No. 98-3854.
Nov. 17, 1999.
Rehearing Denied Jan. 6, 2000.

Marketing consultant brought action against real estate developer to recover bonus incentive for marketing the residential units. The Fifteenth Judicial Circuit Court, Palm Beach County, Moses Baker, J., dismissed claims. Consultant appealed. The District Court of Appeal, Hazouri, J., held that: (1) consultant did not engage in real estate sales or brokerage services, thus did not act as a "broker" or "salesman," and was not precluded from recovering a bonus incentive, and (2) statute of frauds did not bar suit.

Affirmed in part, reversed in part, and remanded.

West Headnotes

[1] Brokers 65 ⚿2

65 Brokers
65I Regulation and Conduct of Business in General
65k2 k. Who Are Brokers. Most Cited Cases
A consultant's acts of overseeing the marketing of a real estate development in order to save the developer money, soliciting bids to furnish model homes, preparing brochures, coordinating the "Grand Opening," and designing and setting up the temporary sales trailer were not "real estate sales or brokerage services," and, thus, the consultant did not act as a "broker" or "salesman" and was not precluded from recovering a bonus incentive under statute prohibiting real estate salespersons from maintaining an action for compensation in connection with a real estate brokerage transaction. West's F.S.A. §§ 475.01(a, k), 475.42(1)(d); F.S.1997, § 475.01(1)(c, d).

[2] Brokers 65 ⚿2

65 Brokers
65I Regulation and Conduct of Business in General
65k2 k. Who Are Brokers. Most Cited Cases
A real estate "broker" or "salesman" is one who directly procures a purchaser, not one whose services incidentally result in a real estate brokerage transaction. West's F.S.A. § 475.01(a, k); F.S.1997, § 475.01(1)(c, d).

[3] Frauds, Statute Of 185 ⚿139(1)

185 Frauds, Statute Of
185IX Operation and Effect of Statute
185k139 Contracts Completely Performed
185k139(1) k. In General. Most Cited Cases
Real estate developer's alleged agreement to pay incentive bonus to consultant was outside the statute of frauds, where the consultant allegedly performed the agreement. West's F.S.A. § 725.01.

[4] Implied and Constructive Contracts 205H ⚿60.1

205H Implied and Constructive Contracts
205HI Nature and Grounds of Obligation
205HI(D) Effect of Express Contract
205Hk60 Contract for Services
205Hk60.1 k. In General. Most Cited Cases

Quantum meruit action may not be maintained for services performed under an express contract between the parties.

[5] Frauds, Statute Of 185 ⇐84

185 Frauds, Statute Of
185VII Sales of Personal Property
185VII(A) Contracts Within Statute
185k84 k. Nature of Contract. Most Cited Cases

Real estate developer's agreement to repay consultant was not a "contract for the sale of personal property" within the meaning of statute of frauds in the Uniform Commercial Code (UCC) making an oral contract for the sale of personal property unenforceable above $5,000. West's F.S.A. § 671.206.

[6] Frauds, Statute Of 185 ⇐1.8

185 Frauds, Statute Of
185I In General
185I(A) In General
185k1.8 k. Credit Agreements. Most Cited Cases
(Formerly 185k119(1))

Statute of frauds for usury actions did not apply to consultant's action to recover repayment from developer; the consultant was a creditor, not a debtor, and was not suing on a credit agreement. West's F.S.A. § 687.0304.

***1153** Michael J. Ryan and Thomas F. Ryan, Juno Beach, for appellants.

Rod Tennyson of Rod Tennyson, P.A., West Palm Beach, for appellees.

HAZOURI, J.

Robert Harris ("Harris") and Real Estate Marketing and Consulting, Inc. ("ReMac") appeal the dismissal with prejudice of their five-count second amended complaint ("complaint") filed against Schickedanz Bros.-Riviera Ltd. ("Riviera"), Schickedanz Bros.-Palm Beach, Ltd. ("Palm Beach"), and Schickedanz Enterprises, Inc. ("Schickedanz"), Riviera's and Palm Beach's corporate general partner. Appellants concede in their brief that the trial court properly granted appellees' motion to dismiss Count I. The trial court dismissed Counts II, III, and IV as in violation of section 475.42(1)(d), Florida Statutes (1993), and its prohibition against real estate salespersons maintaining an action for compensation in connection with a real estate brokerage transaction. Count V was dismissed as violative of the statute of frauds. We affirm the dismissal of Count III and reverse the dismissal of Counts II, IV, and V.

The complaint alleges that on July 31, 1993, Harris and Riviera entered into a brokerage and marketing agreement concerning Riviera's Woodbine real estate development ("original contract"); in August 1993 Harris and Palm Beach executed an agreement for Harris to perform marketing consulting service for Palm Beach's real estate projects ("consulting contract"); and ReMac advanced sums of money on behalf of Riviera which Riviera agreed to repay.

The original contract provided for Harris to perform three different services. First, Harris was to procure purchasers and obtain contract offers for Riviera's residential units at Woodbine in exchange for a two percent real estate commission. Second, Harris was responsible for marketing Woodbine by preparing budgets for advertising, creating advertisements, and soliciting bids for the furnishing of model homes. Harris was to perform these marketing services without further compensation in addition to the promise to pay the real estate commission set forth above. The third service was described in the Bonus Incentive Provision. Harris was to be paid a bonus commission if he kept marketing expenses below a certain percentage of gross sales. There was a separate formula set forth in the original contract from which to calculate Harris's commission on the savings.

After the original contract was terminated in July or August of 1995, Harris alleges that Riviera reaffirmed the original contract provision for an in-

centive bonus and memorialized it by continuing to give Harris printouts of total marketing expenditures as required by the original contract provision. Harris alleges he continued to perform until March 1997 when his services were terminated.

[1][2] In Count II for breach of contract Harris demands payment of his bonus incentive commission for any savings afforded Riviera by Harris. The trial court cited *1154section 475.42(1)(d), Florida Statutes (1993), [FN1] as its basis for dismissing this count. That section prohibits a real estate salesman from maintaining an action for a commission in connection with a real estate brokerage transaction. Section 475.01(c) and (d), Florida Statutes (1993) [FN2] (now (a) and (k), respectively), set forth the definitions of a broker and a salesman. These definitions provide that one "who takes any part in the procuring of ... purchasers ... of ... the real property of another ..." is a real estate broker or salesman. Black's Law Dictionary defines "procure" with respect to brokers as "to find or introduce;-said of a broker who obtains a customer. To bring the seller and buyer together so that the seller has an opportunity to sell." BLACK'S LAW DICTIONARY 1208 (6th ed.1990). In working for a developer, it might be argued that any services Harris performs would ultimately result in the procuring of real estate purchasers. However, we find that the statutory definition of real estate broker or salesman is confined to one who directly procures a purchaser not whose services incidentally result in a real estate brokerage transaction.

> FN1. No salesman shall collect any money in connection with any real estate brokerage transaction, whether as a commission, deposit, payment, rental, or otherwise, except in the name of the employer and with the express consent of the employer; and no real estate salesman, whether the holder of a valid and current license or not, shall commence or maintain any action for a commission or compensation in connection with a real estate brokerage transaction against any person except a person registered as his employer at the time the salesman performed the act or rendered the service for which the commission or compensation is due.
>
> FN2. (c) "Broker" means a person who, for another, and for a compensation or valuable consideration directly or indirectly paid or promised, expressly or impliedly, or with an intent to collect or receive a compensation or valuable consideration therefor, appraises, auctions, sells, exchanges, buys, rents, or offers, attempts or agrees to appraise, auction, or negotiate the sale, exchange, purchase, or rental of business enterprises or business opportunities or any real property or any interest in or concerning the same, including mineral rights or leases, or who advertises or holds out to the public by any oral or printed solicitation or representation that he is engaged in the business of appraising, auctioning, buying, selling, exchanging, leasing, or renting business enterprises or business opportunities or real property of others or interests therein, including mineral rights, or who takes any part in the procuring of sellers, purchasers, lessors, or lessees of business enterprises or business opportunities or the real property of another, or leases, or interest therein, including mineral rights, or who directs or assists in the procuring of prospects or in the negotiation or closing of any transaction which does, or is calculated to, result in a sale, exchange, or leasing thereof, and who receives, expects, or is promised any compensation or valuable consideration, directly or indirectly therefor....
>
> (d) "Salesman" means a person who performs any act specified in the definition of "broker," but who performs such act under the direction, control, or manage-

ment of another person.

In *Hardcastle Pointe Corp. v. Cohen,* 505 So.2d 1381, 1384 (Fla. 4th DCA 1987), this court held that "services for site planning, researching, assisting in preparation of a site plan, consulting, and proposing a name for the project are not specifically enumerated in the statute." Overseeing the marketing expenses of a real estate development in order to save the developer money is also not enumerated in the statute. The services under the Bonus Incentive Provision for which Harris alleges he is entitled to payment are not real estate sales or brokerage services as defined in sections 475.01(1)(c) & (d), Florida Statutes (1993). The trial court erred in dismissing on that basis.

[3] Riviera argues that the dismissal was proper because the alleged agreement was a parol agreement and it violated the statute of frauds, section 725.01, Florida Statutes (1993), which prohibits an action upon any agreement not to be performed within one year from its inception. An exception to this prohibition exists. In *Gerry v. Antonio,* 409 So.2d 1181, 1183 (Fla. 4th DCA 1982), this court held:

> ***1155** When an oral contract has been fully performed by one party, the statute of frauds may not be employed as a defense. The statute of frauds also may not be invoked where nonperformance of a contract's original terms has been occasioned by an oral modification and the contract as modified has been performed.

Harris alleges in the complaint that he completely performed and then Riviera terminated the original contract without cause and changed its accounting practices, thereby preventing Harris from receiving his bonus. This is sufficient to place the contract within the exception and outside the statute of frauds. Harris's allegations in Count II state a cause of action for his incentive bonus and it should not have been dismissed. *See Hiatt v. Vaughn,* 430 So.2d 597 (Fla. 4th DCA 1983).

Count III is Harris's action in quantum meruit for the marketing services rendered under the original contract which he argues were not within the definition of a real estate brokerage transaction as defined in section 475.01(c), Florida Statute (1993). Payment for these services was included within the commissions paid for the real estate transactions provided for in the same contract.

[4] Harris may not maintain an action for quantum meruit for services he performed while performing under an express contract between the parties. "It is well settled that the law will not imply a contract where an express contract exists concerning the same subject matter." *Kovtan v. Frederiksen,* 449 So.2d 1 (Fla. 2nd DCA 1984); *Hoon v. Pate Constr. Co.,* 607 So.2d 423, 427 (Fla. 4th DCA 1992).

In count IV Harris alleges that Palm Beach breached the consulting contract under which Harris was to prepare budgets for advertising the named residential developments, oversee development of these advertisements, solicit bids for the furnishing of model homes, prepare brochures, coordinate the "Grand Opening," design and set up the temporary sales trailer, and other services of a similar nature. As discussed above, Harris was not directly procuring purchasers. He was not required to appraise, auction, sell, exchange, buy, rent, or offer any real property. He also was not advertising that he was in the business of performing those services. *See* § 475.01(a), Fla. Stat. (1993). The services required by the consulting contract do not fit within the statutory definition of real estate services. The trial court erred when it found Harris was acting as a real estate salesman under the consulting contract and Count IV should not have been dismissed.

[5] The last count of Harris's and ReMac's complaint is for sums advanced by ReMac on behalf of Riviera which Riviera agreed to repay. The trial court dismissed this action on the grounds that there was a violation of the statute of frauds provisions in sections 671.206 and 687.0304, Florida

Statutes (1993).

Section 671.206, which is part of the U.C.C., provides:

(1) Except in the cases described in subsection (2) of this section a contract for the sale of personal property is not enforceable by way of action or defense beyond $5,000 in amount or value of remedy unless there is some writing which indicates that a contract for sale has been made between the parties at a defined or stated price, reasonably identifies the subject matter, and is signed by the party against whom enforcement is sought or by his authorized agent.

(2) Subsection (1) of this section does not apply to contracts for the sale of goods (s.672.201) nor of securities (s.678.319) nor to security agreements (s.679.203).

The agreement at issue is not a contract for the sale of personal property. This statute is not applicable to this cause of action for money lent.

***1156** [6] The other statute cited by the trial court is section 687.0304, entitled Credit Agreements, which provides:

(1) DEFINITIONS.-For purposes of this section:

(a) "Credit agreement" means an agreement to lend or forbear repayment of money, goods, or things in action, to otherwise extend credit, or to make any other financial accommodation.

(b) "Creditor" means a person who extends credit under a credit agreement with a debtor.

(c) "Debtor" means a person who obtains credit or seeks a credit agreement with a creditor or who owes money to a creditor.

2) CREDIT AGREEMENTS TO BE IN WRITING.-A debtor may not maintain an action on a credit agreement unless the agreement is in writing, expresses consideration, sets forth the relevant terms and conditions, and is signed by the creditor and the debtor.

This statute is also inapplicable. ReMac is not a debtor who is trying to maintain an action on a credit agreement. ReMac is a creditor suing for money owed. The trial court erred in dismissing Count V.

Based upon the foregoing, we reverse the dismissal of Counts II, IV, and V and affirm the dismissal of Count III.

AFFIRMED in part; REVERSED in part, and REMANDED.

GUNTHER and GROSS, JJ., concur.

Fla.App. 4 Dist.,1999.
Harris v. Schickedanz Bros.-Riviera Ltd.
746 So.2d 1152, 24 Fla. L. Weekly D2579

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466 So.2d 435, 10 Fla. L. Weekly 885
(Cite as: 466 So.2d 435)

C

District Court of Appeal of Florida,
Fifth District.

STATE of Florida, Appellant,
v.
Larry HERMAN, Appellee.

No. 84–1029.
April 4, 1985.

Defendant charged with unlawful sale of business opportunity without first filing copy of required disclosure statement with Division of Consumer Services moved to dismiss. The Circuit Court, Seminole County, C. Vernon Mize, Jr., J., granted defendant's motion, and State appealed. The District Court of Appeal, Sharp, J., held that statute defining "business opportunity" as sale or lease in which seller represents that seller will provide locations for vending machines or other similar devices, that seller will purchase products made, that seller guarantees that purchaser will derive income, or that seller will provides sales or marketing program is written in the disjunctive or alternative sense, so that State was only required to prove that seller made one of four listed types of representations.

Reversed.

West Headnotes

[1] Statutes 361 ⇐1367

361 Statutes
361III Construction
361III(M) Presumptions and Inferences as to Construction
361k1366 Language
361k1367 k. In general. Most Cited Cases
(Formerly 361k197)
Normally an "or" will be implied following semicolons in subsections of definitional statute, where "or" is used preceding last in series of subsections.

[2] Antitrust and Trade Regulation 29T ⇐271

29T Antitrust and Trade Regulation
29TIII Statutory Unfair Trade Practices and Consumer Protection
29TIII(D) Particular Relationships
29Tk271 k. Business opportunities; seller-assisted marketing plans. Most Cited Cases
(Formerly 382k862.1 Trade Regulation)
Statute defining "business opportunity," for purposes of statutory requirement that seller of business opportunity must first file copy of required disclosure statement with Division of Consumer Services, was intended to provide remedy for fraud in various business contexts. West's F.S.A. §§ 559.801, 559.801(1)(a-d).

[3] Antitrust and Trade Regulation 29T ⇐271

29T Antitrust and Trade Regulation
29TIII Statutory Unfair Trade Practices and Consumer Protection
29TIII(D) Particular Relationships
29Tk271 k. Business opportunities; seller-assisted marketing plans. Most Cited Cases
(Formerly 382k862.1 Trade Regulation)
Statute defining "business opportunity" as sale or lease in which seller represents that seller will provide locations for vending machines or other similar devices, that seller will purchase products made, that seller guarantees that purchaser will derive income, or that seller will provides sales or marketing program was written in the disjunctive or alternative sense, so that State was only required to prove that seller made one of four listed types of representations in order to establish that seller was required to file disclosure statement with Division of Consumer Services. West's F.S.A. §§ 559.801, 559.801(1)(a-d).

***435** Jim Smith, Atty. Gen., Tallahassee, and Belle B. Turner, Asst. Atty. Gen., Daytona Beach, for appellant.

James K. Freeland, Orlando, for appellee.

SHARP, Judge.

The state appeals from an order granting Herman's motion to dismiss pursuant to Florida Rule of Criminal Procedure 3.190(c)(4). The trial court granted the motion because it found that section 559.801, Florida Statutes (1983) does not apply to the type of transaction charged in the information. We reverse.

The sole issue in this case is the construction of section 559.801. Herman was ***436** charged with the unlawful sale of a business opportunity without first having filed a copy of the required disclosure statement with the Division of Consumer Services of the Department of Agriculture and Consumer Services.[FN1] The undisputed facts were that Herman sold video machines to Jack Durie, and leased them back, promising to pay $50.00 per week per machine. Herman thereafter sold his interest in the business and Durie stopped receiving the lease payments.

> FN1. §§ 559.803; 559.805(1); 559.815, Fla.Stat. (1983).

Section 559.801 defines a "business opportunity" as:

> (1) ... the sale or lease of any products, equipment, supplies, or services which are sold to a purchaser to enable the purchaser to start a business, and in which the seller represents:
>
> (a) That the seller will provide locations or assist the purchaser in finding locations for the use or operation of vending machines, racks, display cases, or other similar devices or currency-operated amusement machines or devices on premises neither owned nor leased by the purchaser or seller;
>
> (b) That the seller will purchase any or all products made, produced, fabricated, grown, bred, or modified by the purchaser using in whole or in part the supplies, services, or chattels sold to the purchaser;
>
> (c) That the seller guarantees that the purchaser will derive income from the business opportunity which exceeds the price paid for the business opportunity or that the seller will refund all or part of the price paid for the business opportunity or repurchase any of the products, equipment, supplies, or chattels supplied by the seller if the purchaser is unsatisfied with the business opportunity; *or*
>
> (d) That, upon payment by the purchaser of a fee or sum of money which exceeds $50 to the seller, the seller will provide a sales program or marketing program which will enable the purchaser to derive income from the business opportunity, except that this paragraph shall not apply to the sale of a marketing program made in conjunction with the licensing of a registered trademark or service mark. (Emphasis supplied).

The state contends the definition is satisfied by proof of *either* subsection (a) or (b) or (c) or (d). In sum, the state reads into the statute an "or" following the semicolons in (a) and (b). Herman argues that an "and" should be read after the semicolons in (a) and (b), making proof of facts under (a) and (b), and then either (c) or (d) necessary to charge an offense. The state conceded it had no proof of (b) in this case, but claimed it could prove (a), (c), and (d).

[1] Normally an "or" would be implied following the semicolons in such a statute, because an "or" was used preceding the last in the series. *See* J. Hodges and M. Whitten, *Harbrace College Handbook* § 12c at 111 (8th ed. 1977). However, in ascertaining the meaning of any word the legislative intent is paramount. *Infante v. State,* 197 So.2d 542 (Fla. 3rd DCA 1967).

[2][3] The legislative history of section 559.801 indicates that a remedy for fraud in various different kinds of business contexts was intended to be provided.[FN2] This would not be achieved if all or even three of the subsections had to be proved in any one case. Further, it appears virtually impossible to prove all three subsections conjunctively since they purport to describe different undertakings or business arrangements, which would not often (if ever) occur in the same venture. That would not be a reasonable interpretation of the statute. *Smith v. Piezo Technology & Professional Administrators,* 427 So.2d 182 (Fla.1983); *City of St. Petersburg v. Siebold,* 48 So.2d 291 (Fla.1950).

> FN2. The bill analysis explains the definition of "business opportunity" as providing equipment ... locations or assistance, or guaranteeing a specified return. Senate Staff Analysis and Economic Impact Statement, *Fraudulent and Deceptive Practices,* May 18, 1979 (Florida State Archives).

*437 Therefore, we construe section 559.801 as having its lettered subsections written in the disjunctive or alternative sense. *See Kirksey v. State,* 433 So.2d 1236, 1239 (Fla. 1st DCA 1983), *rev. denied,* 446 So.2d 100 (Fla.1984); *Linkous v. Department of Professional Regulation,* 417 So.2d 802 (Fla. 5th DCA 1982).

The order appealed is

REVERSED.

COBB, C.J., and COWART, J., concur.

Fla.App. 5 Dist.,1985.
State v. Herman
466 So.2d 435, 10 Fla. L. Weekly 885

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District Court of Appeal of Florida, Third District.
Norman WILLNER et al., Appellants,
v.
Ben D. WILDER, d/b/a Southland Associates, Appellee.

Nos. 72-513, 72-514.
June 19, 1973.
Rehearing Denied July 23, 1973.

Action by real estate broker to recover a commission on lease of premises. The Circuit Court for Dade County, Francis J. Christie, J., entered a judgment in favor of the broker and the defendant landlord and tenant appealed. The District Court of Appeal, Carroll, J., held that where real estate which was suitable for operation as a nightclub and had a liquor license, was listed with broker at $550,000 for sale or for lease at rental of $48,000 per year with a $40,000 security deposit and lease as actually made called for a rental of $42,000 a year including liquor license for term of lease, transaction was essentially a lease of real estate and broker whose allegation of performance was based solely on services performed by an unregistered salesman employed by broker was not entitled to recover commission.

Reversed and remanded.

West Headnotes

[1] Brokers 65 ⇨42

65 Brokers
65V Compensation
65k42 k. Necessity of License. Most Cited Cases

If only services relied upon to support broker's allegations of performance of listing contract were those performed by unregistered salesmen in employ of broker, recovery of a commission was barred by statute. F.S.A. § 475.41.

[2] Brokers 65 ⇨42

65 Brokers
65V Compensation
65k42 k. Necessity of License. Most Cited Cases

Where real estate, which was suitable for operation as a nightclub and had a liquor license, was listed with broker at $550,000 for sale or for lease at rental of $48,000 per year with a $40,000 security deposit and lease as actually made called for a rental of $42,000 a year including liquor license for term of lease, transaction was essentially a lease of real estate and broker whose allegation of performance was based solely on services performed by an unregistered salesman employed by broker was not entitled to recover commission. F.S.A. §§ 475.01(2), 475.13, 475.41.

*1 Pallot, Stern, Proby & Adkins, Henry W. Clar, Miami, for appellants.

Ainslee R. Ferdie, Miami, for appellee.

Before PEARSON, CHARLES CARROLL and HENDRY, JJ.

CARROLL, Judge.

Norman Willner (by No. 72-514) and Jay Glynn and Jay Glynn Enterprises, Inc. (by No. 72-513) appealed from a judgment entered against them, based on a jury verdict in an action by the appellee for recovery of a real estate broker's commission *2 upon a lease of certain improved real estate. The appeals were consolidated here.

The appellant Jay Glynn Enterprises, Inc. was the owner of property in Miami known as the Prila property, consisting of certain real estate improved by a building suitable for operation thereon of a night club, restaurant and cocktail lounge. Prior to the time of the occurrences involved in this case the premises had been so operated by a former lessee. After that lease operation had ended and the lessee

had vacated the premises, the owner advertised the property in the press as a business for sale. An attorney for the owner, being acquainted with the plaintiff broker, informed the latter thereof. A registered real estate salesman named Sirk, employed by the broker, testified that on January 27, 1970, following such advice to the broker, he telephoned Glynn, who was the president of the owner corporation, and was advised by Glynn that the business property, with benefit of a liquor license, was for sale for $550,000, or would be leased for $4,000 a month with a $40,000 security deposit, and that a commission would be paid. Based on that oral listing, a non-exclusive listing card was prepared and filed in the broker's office.

Russell Engren who was not registered as a real estate salesman under the provisions of Ch. 475 Fla.Stat., F.S.A., was employed by the broker as a business opportunities salesman (for the performance of services in relation to which he was not required to be registered under Ch. 475). By deposition Engren testified that following receipt by the broker's office of the oral listing he contacted Willner, with whom he had done business before; that he informed Willner of the availability of the Prila property, and discussed the matter with him at length; that he continued negotiations with Willner with respect thereto for some time, and that suddenly the negotiations were broken off by Willner; and that later Willner informed him that he (Willner) had obtained a lease on the property by direct negotiation, and informed Engren that he had been in contact with the owner with respect to the property, in response to the advertisement, prior to the time Engren had taken the matter up with him. Willner testified Engren telephoned him about the Prila property on February 7, 1970, but that he had met with Glynn regarding the property previously on February 1, 1970, in response to the owner's advertisement.

The lease was made on February 20, 1970, between the owner corporation as lessor to Wilkobros Enterprises, Inc., a corporation of which Willner was an officer, as lessee. The term of the lease was five years, with options for three five-year renewals and for purchase. The lease was of the real estate and personal property thereon, with transfer of the liquor license for the term of the lease. The lease was not accompanied by a sale or transfer of a business. According to Willner the lease was acquired in order to obtain a location for operation of a certain franchise business right which he had obtained.

The plaintiff broker filed action against the lessor corporation and its president Jay Glynn, and against Norman Willner an officer of the corporation to which the lease was made. The complaint alleged an oral listing with provision for a 10% Commission; alleged performance by producing a purchaser ready, willing and able to buy or lease on the terms listed or on terms satisfactory to the seller. As factual support for that allegation of performance the complaint alleged that on or about February 8, 1970, the defendant Willner 'was introduced to the business known as Prila's Restaurant by the employees of the plaintiff.' By his complaint the plaintiff broker sought recovery (ex contractu) of the commission from the defendant owner corporation which was alleged to be obligated for its payment; and sought recovery thereof against the individual defendants (in tort) upon alleging interference by them with plaintiff's commission contract relationship with the owner.

*3 The defendants answered denying the allegations of the complaint. The defendant Willner averred additionally that he had been in touch with the owner with respect to the premises in response to the owner's advertisement, prior to being contacted thereon by anyone from the broker's office.

[1] The appellants contend the trial court committed reversible error by denying their motions for directed verdict on the ground that when the evidence showed that the services relied on to support the broker's allegation of performance of the listing contract were those and only those that were performed by an unregistered salesman in the employ

of the broker, recovery of the claimed commission was precluded by s 475.41 Fla.Stat., F.S.A. We hold that contention of the appellants has merit. We have been shown no decision passing on that precise point, but see Boca Raton Housing Ass'n v. Marqusee Associates of Fla., Inc., Fla.App.1965, 177 So.2d 370; Wegmann v. Mannino, 5 Cir. 1958, 253 F.2d 627; 5 Fla.Jur., Brokers s 33. To hold otherwise would permit a registered broker to use the services of unregistered salesmen to handle sales and leases of real estate, and to recover commissions or compensation therefor, contrary to the letter and spirit of Chapter 475, Fla.Stat., F.S.A. and to the express prohibition of s 475.41 thereof.

A pivotal question in this case is whether the transaction was a lease of real estate, or was a sale of a business or liquor license with relation to which the real estate lease was only incidental and deserving of little or no part of the consideration which was paid or agreed to be paid.

In view of certain provisions of Chapter 475, Fla.Stat., F.S.A., including s 475.41,[FN1] if the transaction was a lease of real estate or essentially a lease of real estate, the broker's commission contract was invalid and unenforceable because the services relied on as the basis for the claim for the commission consisted of those performed by the broker's unregistered salesman. Florida Real Estate Commission v. McGregor, Fla.1972, 268 So.2d 529, 531. Cf. Pearce v. Previews, Inc., 5 Cir. 1953, 201 F.2d 385, cert. den. 345 U.S. 993, 73 S.Ct. 1132, 97 L.Ed. 1400.

> FN1. Section 475.41 Fla.Stat., F.S.A., provides: 'No contract for a commission or compensation for any act or service enumerated in subsection (2) of s 475.01 shall be valid unless the broker or salesman shall have complied with this chapter in regard to registration and renewal of the certificate at the time the act or service was performed.'
>
> A salesman who takes part in the procuring of a lessee of real estate, or of an interest therein is regarded as a 'real estate salesman' under sub-section (2) of Section 475.01 Fla.Stat., F.S.A. Section 475.13 requires that a person who is a real estate salesman under the terms of Chapter 475 is required to be registered by the commission, and to obtain a registration certificate for each license period.

If, however, as contended for by the appellee broker, the transaction was a sale of a business, and the lease entered into on the real estate being only incidental thereto with little or no part of the consideration being paid for the lease, then the controls and restrictions of Chapter 475 Fla.Stat., F.S.A. would not be applicable, and would not bar recovery of the commission notwithstanding the services relied on as the basis of the right to the commission were performed by the broker's unregistered salesman. See Schindler v. Florida Real Estate Commission, Fla.App.1962, 144 So.2d 862; Hughes v. Chapman, 5 Cir. 1959, 272 F.2d 193.

[2] In our view the facts of this case were such as to place this transaction in the former category; that is, as being essentially and principally a lease of real estate.

*4 When the lease was made there was no business in operation on the premises. The nature or character of the property was such that it was suitable for use as a night club, restaurant and cocktail lounge, which were the uses the lease specified were to be made theeof. Incident to the lease was a limited transfer of a liquor license (for the term of the lease). On the facts of this case it would not be reasonable to regard this transaction as one for the sale or transfer of a liquor license, with the making of the new long-term lease on the property only incidental thereto.

The availability of the liquor license was important, and it was essential for the type of operation intended for the premises. However, in the listing of the property it was valued at $550,000 for

sale, or for lease at a rental of $48,000 per year with a $40,000 security deposit. In the lease as actually made, the rental was $42,000 per year, with provision for rent increases for the authorized extension periods. If the premises had been sold at the listed price of $550,000, a transfer of the liquor license therewith would have represented an item of value in the sale, but its value would appear relatively minor compared to the total amount paid for the property. Likewise, in the case of the multiyear lease, the annual rental of $42,000 could not reasonably be regarded as payment for or rental of the liquor license, with no part of the consideration being for rental of the premises, as would be required in order for the transaction to be regarded as one which did not involve a lease of real estate or transfer of interest in real estate, and therefore not controlled or affected by Chapter 475.

For the reasons stated we hold that the commission contract declared on by the broker was invalid and unenforceable, and that the motions of the defendants for a directed verdict should have been granted.

The judgment is reversed, and the cause is remanded with direction to enter judgment for the defendants.

Fla.App. 1973.
Willner v. Wilder
280 So.2d 1

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