

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA  
FIFTH DISTRICT

BUFUS OUTLAW, JR. AND  
LINDA D. OUTLAW,  
Appellants,

vs.

Case No. 5D24-0131  
L.T. No.: 2023-SC-004181

HARVEY A. ROSENBERG AND REALTY  
PROFESSIONALS OF FLORIDA, LLS,  
Appellees.

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ANSWER BRIEF OF APPELLEES

On appeal from the County Court of the Fifth Judicial Circuit, Lake  
County, Florida

Gregory L. Hobbs, Esquire  
2910 Kerry Forest Pkwy D4-213  
Tallahassee, FL 32309-6892  
850-893-5985  
Email: gregoryhobbpa@gmail.com  
Florida Bar Number: 708291`  
Attorney for Appellant

John A. Kruse, Esquire  
JAK LAW LLC  
300 East Highway 50  
Clermont, Florida 34711  
352-530-9988  
Email: john@jaklawfl.com  
Florida Bar Number: 91780  
Attorney for Appellees

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## STATEMENT OF THE CASE AND FACTS

This is an action appealing the final judgment of the County Court of Lake County wherein the court entered a judgment in favor of the Appellees following a one-half (1/2) day non-jury trial. The trial court made no findings of fact or conclusions of law and entered a judgment in full for the Appellees.

The facts are as follows:

On February 19, 2014, the parties entered into an Exclusive Rental Management Agreement (“the agreement”) whereby the Appellants appointed the Appellees as their agents for the purpose of managing and renting out the Appellants property. The Appellants were labeled as the Landlord and the Appellees as the Broker, respectively. The contract was allowed to self-renew over the years, with the last renewal on or about February 20, 2023. The parties executed the agreement and abided by the terms of the agreement until June 1, 2023, when the Appellants gave notice of cancellation of the agreement.

Section 3 of the agreement addressed cancellation or termination of the agreement and specified that a cancellation fee would be paid by the Landlord in the event they breached the agreement. The relevant portion states the following:

“Should the LANDLORD cancel this agreement prior to property being rented, LANDLORD will pay a cancellation fee to the BROKER equal to one months rent and additional advertising expenses. LANDLORD may only cancel this agreement without a penalty should the home not become rented within the initial four (4) months as long as the landlord has BROKER a full 120 days to market the property prior. Termination by LANDLORD is effective when actually physically received by BROKER. In the event that this agreement is terminated by LANDLORD, the BROKER shall continue to receive rental commission set forth below as long as the tenant(s) placed on the property by the BROKER shall remain in the unit. In the event this agreement is terminated by LANDLORD, the BROKER’s rights provided for in paragraphs 15 THROUGH 18 shall survive such termination...An additional cancellation fee of 50% of the remaining annual contract will be charged to LANDLORD should LANDLORD terminate this agreement. BROKER reserves the right to terminate this agreement with 30 days written notice of LANDLORD at any time...”

The Appellants’ property was continually occupied by a single tenant from roughly four (4) months after the parties signed the agreement until April 30, 2023, when the tenants moved out. On February 23, 2023, the Appellees notified the Appellants that the tenants would not renew their lease and would vacate the property when their lease expired on April 1, 2023. On March 1, 2023, the Appellants notified the Appellees that he would take possession of the property on May 1, 2023.

On March 2, 2023, the Appellees notified the Appellants through email correspondence of the cancellation fee and explained the exact fee of \$5,700.00, and how it was calculated. On March 24, 2023, the Appellants responded by citing a disagreement. The parties exchanged

further correspondence over the resolution and payment of the fee. On April 13, 2023, the Appellants notified the Appellees that he wished to rescind his notice of cancellation and collect the unpaid rents, but he did request that the property be re-rented. The property remained unoccupied while the Appellees conducted an inventory, cleaning and other administrative duties in conjunction with their management of the property. On June 1, 2023, the Appellants notified the Appellees that he wished to cancel the agreement and asked for the payment of the unpaid rent. The property was vacant and unrented from April 30, 2023, until June 1, 2023. The Appellees informed the Appellant they would retain \$5,700.00 as the cancellation fee for cancellation of the agreement.

On July 18, 2023, the Appellant filed a claim against the Appellee for damages in the amount of \$5,700.00, alleging one (1) count of breach of contract under paragraph 3. The Appellees filed a motion to dismiss alleging failure to state a claim. On August 20, 2023, the Appellants filed an amended statement of claim alleging a breach of contract in a one (1) count complaint. The Appellants alleged that there was no contractual basis for the Appellees to retain rental proceeds collected in accordance with paragraph 3 of the rental management agreement. The matter proceeded to trial.

At a half day trial, the Appellants orally changed their claim, arguing that in addition to their original claim, the rental management agreement was not valid because it violated *F.S. §501.165*. The Court heard testimony from Bufus Outlaw and Harvey Rosenberg and argument from counsel. The Court entered a judgment in favor the Appellees without findings of fact or conclusions of law.

### SUMMARY OF ARGUMENT

This appeal was made by Appellant of a final judgment entered after a non-jury trial. The issues raised by the Appellant revolve around whether (i) the cancellation fee is enforceable as a liquidated damages clause; (ii) whether mutuality is required to render the agreement valid; (iii) whether *Fla. Stat. §501.165* applies; and (iv) if the contract too was ambiguous to render it enforceable. The court heard argument only on issues (i) and (iii).

The cancellation fee in paragraph 3 of the agreement is enforceable as it is not a penalty. It is a fee as agreed to by the parties, and the fee was reasonable and not egregious as to enforce compliance with the contract. Liquidated damages clauses are a staple of contract law and serve as a legitimate and mutually beneficial mechanism to keep the parties in compliance with the terms of the contract.

The parties to a contract can limit their remedies in the event of a breach of contract. Mutuality of terms is not required. What is required is that the contract and the remedies for each party are reasonable.

The claim that the parties had a service contract as defined in *Fla. Stat. §501.165*. This is an erroneous claim as the agreement clearly appoints the Appellees as agents. They are appointed to act on behalf of the Appellants by entering into agreements and making decisions on behalf of the Appellants. They clearly fall into the statutory exceptions as well.

The final claim of ambiguity in the agreement is rebutted by the Appellants own behavior. He issued a notice of cancellation and when notified of the cancellation fee he rescinded his notice. This is a clear indication that he knew the fee was present and it would have to be paid upon his cancellation of the agreement.

Finally, the clear lack of record by the trial court presents a challenge to this Court as it requires it to make legal determinations without the benefit of factual findings. Appellate courts are not in the position to make initial determinations. *Romeo v. Romeo*, 310 So. 3d 1064, 1065 (Fla. 2d DCA 2020).

## STANDARD OF REVIEW

Questions related to contracts are subject to a *de novo* standard of review. *Essex Insurance Company v. Simpler*, 911 So.2d 794 (Fla. 1st DCA 2005), *Centennial Mortgage Incorporated v. SG/SC LTD*, 772 So.2d 564 (Fla. 1st DCA 2000).

## ISSUES

- I. WHETHER THE CANCELLATION PROVISION IN PARAGRAPH THREE OF THE AGREEMENT IS ENFORCEABLE OR REQUIRE MUTUAL TERMS REGARDING REMEDIES
- II. WHETHER THE PARTIES HAD A SERVICE CONTRACT AS DEFINED BY FLA. STAT. §501.165
- III. WHETHER THE AGREEMENT'S CANCELLATION FEE IS TOO AMBIGUOUS TO BE ENFORCED

## ARGUMENT

### PARAGRAPH THREE OF THE AGREEMENT IS ENFORCEABLE AS WRITTEN AND DOES NOT REQUIRE MUTUAL TERMS

The cancellation fee provision of Section 3 of the agreement is enforceable as it is written. The Appellants begins their analysis by mistakenly describing the agreement and its provisions.

The first mistake the Appellants makes is arguing that the agreement provides an option to bring an action for actual damages or retain agreed

upon liquidated damages thereby making the liquidated damages a penalty and ultimately making the contract unenforceable. The Appellees in theory could sue the Appellants for damages, but the cancellation fee makes that unnecessary. The Appellants cited four provisions of the agreement designed to compensate Appellees in the event of a breach. *Appellants' Brief*, p.6. Each of these are sufficient to reasonably compensate the Appellees in the event the Appellants cancelled the agreement. This clearly makes them liquidated damages intended to compensate the Appellees in the event of a breach by the Appellants.

"Florida law dictates that parties to a contract may stipulate in advance to an amount to be paid or retained as liquidated damages in the event of a breach." *Rusniaczek v. Tableau Fine Art Grp., Inc.*, 139 So.3d 355, 358 (Fla. 3d DCA 2014) quoting *Lefemine v. Baron*, 573 So.2d 326, 328 (Fla.1991). In this case the stipulations were clearly laid out in the agreement. "Should the LANDLORD cancel this agreement prior to property being rented, LANDLORD will pay a **cancellation fee to the BROKER equal to one month's rent** and any additional advertising expenses." The liquidated damages in this provision are laid out and stipulated to by the parties, with each on notice as to what would be paid in the event of a breach. This cancellation fee retains it "compensatory

character” and should be presumed to be liquidated damages and not a penalty. *Hyman v. Cohen*, 73 So.2d 393, 402 (Fla.1954)

The Florida Supreme Court in *Hyman* established a two-prong test to determine whether a fee is to be considered liquidated damages or will be stricken as a penalty. *Rusniaczek* 139 So.3d at 358. The first prong is that damages consequent upon a breach must not be readily ascertainable. *Lefemine* 573 so.2d at 328. Damages here were readily ascertainable. They were explained via email on two different occasions to the Appellants. The second prong is that the sum stipulated to be forfeited must be so grossly disproportionate to any damages that might be reasonably to be expected to "follow from a breach as to show that the parties could have intended only to induce full performance, rather than to liquidate their damages." *Id*, *Rusniaczek* 139 So.3d at 358. Clearly, that is not the factual circumstance here. The liquidated damages were such that they were not intended to induce full performance, but rather they were intended to compensate Appellee in the event of a breach.

The second error the Appellant makes in arguing that the agreement is not enforceable is that they conclude that only one party retains the option of fulfilling or declining to fulfill its obligations under the contract, therefore making the contract invalid. They argue the contract is illusory

because it is not mutually enforceable. This is simply not the case. The agreement permits the Appellees to collect a cancellation fee in the event of termination by the Appellant which is appropriate because the Appellees are contractually obligated to perform on behalf of the Appellants by renting, leasing, operating, controlling, and managing the property. If the Appellees breached the agreement the Appellants could certainly sue for a breach of the agreement, and possibly other causes of action, to recover damages. While it is true that the Appellees reserved the right to terminate the agreement with thirty (30) days' notice, this would not constitute an unauthorized termination of the agreement. The Appellees right to terminate the agreement with thirty (30) days' notice is consistent with common contract law as it serves to allow them to mitigate any damages the Appellees may incur. *Baggett v. Clark*, 161 So.3d 491, 493 (Fla. 5<sup>th</sup> DCA 2014) It would be unjust to allow one party to continue damaging the other simply because the damaged party is subject to mutual terms. The duty to mitigate damages "prevents a party from recovering those damages inflicted by a wrongdoer which the injured party 'could have avoided without undue risk, burden, or humiliation.'..." *Graphic Associates, Inc. v. Riviana Restaurant Corp.*, 461 So.2d 1011, 1014 10 Fla. L. Weekly 55 (Fla. App. 1984) The Appellees carried all the risk and burden and by retaining the

right to withdraw, they had a way to mitigate any damages that may arise from their role as agent.

The Appellants always retained the right to sue to enforce the agreement against the Appellees. The Appellants correctly cite *Blue Lakes Apt v. George Gowing*, 464 So.2d 705, 709 (Fla. 4<sup>th</sup> DCA 1985), when it stated “parties to a contract may agree to limit their respective remedies and those remedies need not be the same. Such contractual provisions, however, must be reasonable to enforced.” That is certainly the circumstance present in the terms of the agreement.

Despite the lack of written findings, there can be no other conclusion than the trial court agreed with this analysis or something similar. The parties made these arguments at trial and issued a ruling in favor of the Appellees in this matter.

### AGENCY CONTRACT

In order to create a contract, it is essential that there be reciprocal assent to a certain and definite proposition. *Mann v. Thompson*, 100 So.2d 634, 637 (1st DCA 1958).

“Evidence of an agency relationship is a question of fact; however, when the moving party fails to produce any supportive evidence to when evidence is presented so unequivocal that reasonable persons

could reach one conclusion, that fact becomes a question of law to be determined by the court.” *Rubin v. Gabay*, 979 So.2d 988, 990 (Fla. 4<sup>th</sup> DCA 2008) citing *Fernandez v. Fla. Nat’l College, Inc.*, 925 So.3d 1096, 1100 (Fla. 3d DCA 2006).

In this case, the terms of the agreement were spelled out in the first paragraph where the parties are named and then identified, respectively. The Appellants are named and identified as “Landlord.” The Appellees are named and identified as “the Broker.” The Broker is appointed by the Landlord as the “Exclusive Agent.” It is evident from the beginning the role of each party, and that the Appellees are the exclusive agent of the Appellants. Testimony provided was uncontested as the role of each party, thus it is a matter of law that the Appellees was the agent of the Appellants.

Appellee Rosenberg testified to this relationship at trial. He testified that the Appellants approved the rent amount. They raised the amount on an almost annual basis. The reason the tenants moved out after such a long was because the Appellants wanted to raise the rent to a level that was above the market standard for the area. Rosenberg further testified that certain repairs were needed to the home. The Appellants retained the authority to approve or disapprove repairs. The most the Appellees could do was make suggestions and then procure vendors to take the needed.

This testimony was unrebutted and was confirmed by Appellant, Bufus Outlaw, in his testimony. He testified that he declined recommended repairs, demanded an increase in rent, which resulted in a dispute between the parties and ultimately led to the Appellants decision to terminate the agreement.

A service contract is defined as “a written contract for the performance of services over a fixed period of time or specified duration.” *Fla. Stat. 501.165(1)(d)*. The agreement in this case did not address performance of services, but rather appointment as agent. "The key element in establishing actual agency is the control by the principal over the actions of the agent." *Hickman v. Barclay's Intern. Realty, Inc.*, 5 So.3d 804, 806 (Fla. 4<sup>th</sup> DCA 2009), *Rubin*, 979 So.2d at 990. "And it is the right of control, not actual control or descriptive labels employed by the parties, that determines an agency relationship." *Id.* citing *Parker v. Domino's Pizza, Inc.*, 629 So.2d 1026, 1027 (Fla. 4th DCA 1993). The Appellants had clear control as the principle over the Appellees who were the agents. The agents screened and procured tenants, collected and distributed rent, and then managed the property. These are services performed at the direction of the Appellants. The Appellants determined the amount of rent, approved recommended tenants, and recommended maintenance and repairs.

The Appellants' argument focuses only on the services they received and therefore argue that *Fla. Stat. §501.165* is applicable and makes the agreement unenforceable. They do not consider the differences in what the statute considers services and what they actually received by way of the agreement. The agreement appointed the Appellees to "rent, lease, operate, control and manage" the Appellants property. The statute addresses consumers. Fla. Stat §501.165(2)(a) begins with "[a]ny seller that sells, lease or offers to sell or lease any service to a consumer...". The statute clearly addresses sellers and consumers with the intention to protect consumers from ordinary sellers who might sign contracts with self-renewing contracts without disclosure or end dates. The agreement in this case is not between a seller and consumer, but a real estate broker and a property owner. The parties in this case are more sophisticated than an ordinary parties might expect to be. The Appellants did not purchase a service. They agreed to give agency to the Appellees for the purposes of having their property rented, leased, operated, controlled or managed. The Appellants retained ultimate control. The evidence is unequivocal. The Appellees limited their ability to contract with anyone in a way that might conflict with their relationship with the Appellants. That stands in stark

contrast to a seller with no loyalty to the consumer and who might contract with anyone.

### CONTRACTUAL AMBIGUITY

Whether a contract is ambiguous is a matter of law. *Douglass v. Buford*, 9 So.3d 636,637 (Fla. 1<sup>st</sup> DCA 2009) The trial ruled in favor of the Appellees following an evidentiary hearing. While the trial court did not address findings of fact or conclusions of law, it is reasonable and prudent to conclude that the trial court found as a matter of law that the agreement was not ambiguous.

In the event that a contract is found to be ambiguous, then it is necessary to resort to parol evidence in order to ascertain the parties' intent. *Douglass* 9 So.3d at 637 See, e.g., *O'Neill v. Scher*, 997 So.2d 1205, 1206 (Fla. 3d DCA 2008); *Castillo v. State Farm Fla. Ins. Co.*, 971 So.2d 820, 823 (Fla. 3d DCA 2007); *Barnett v. Destiny Owners Ass'n, Inc.*, 856 So.2d 1090, 1092 (Fla. 1st DCA 2003); *Cleanco, Inc. v. Manor Inv. Co.*, 568 So.2d 1309, 1310 (Fla. 4th DCA 1990).

The record is absent, so it is left to the Appellants arguments to claim that Section 3 is ambiguous. Appellants claim where Sections 3 states “[s]hould the LANDLORD cancel this agreement prior to prior to the property being rented, LANDLORD will pay a cancellation fee to the

BROKER” is subject to different interpretations. *Appellants Brief* at 12. This is simply not the case. It was easy for the trial court to conclude that it was not ambiguous based on the testimony and evidence presented at trial. A simple reading of the agreement leads to only one conclusion, that the statement is clear in its presentation.

The property was vacant twice while the parties subject to the agreement- right after the agreement was signed in 2014 and then from February 23, 2023, the date the tenants gave notice that they would not renew the lease, until June 1, 2023, when the Appellants finally cancelled the agreement. Until the Appellants cancelled the agreement, the property was unrented and empty but still eligible to be rented if the Appellants so desired. They were clearly under contract at the time the property was unrented. It is unreasonable for the Appellants to argue that the “prior to property being rented” condition did not recur unless the Appellees were directed to rent the property. The property was unrented and vacant by virtue of the Appellants actions. The Appellees could not unilaterally rent the property or do anything with it without approval. Thus, the property remained unrented due to the inaction of the Appellants and clearly met the condition as specified in the agreement.

The property became unrented after the renewal of the agreement. When the Appellants learned that the property would be unrented, they tried to cancel the agreement. They then notified the Appellees of their intention to go forward with the agreement in an attempt to recover undistributed rents. The Appellants concede that this was an attempt to recover rent rather than a sincere rescission of their prior cancellation. *Appellants' Brief* at 14. Appellee Rosenberg testified that he understood what was happening and he did not believe this rescission to be genuine, but a fraudulent or misleading attempt to get out from under the terms of the agreement. The Appellants were well aware that the property was unrented and therefore subject to the terms of the agreement. Their behavior is a clear indication that there was no ambiguity, but rather an insincere and misleading attempt to gain the rents.

The Appellants had another option under the agreement which they could have exercised. They could have exercised their right to re-rent the property for the remainder of the agreement, but instead chose to go forward with the termination of the agreement.

There was no action or condition by the parties to trigger the "prior to property being rented condition." *Appellants' Brief* at 14. The mere notice by the tenants that they wished to no longer rent the property was enough

to label the property as unrented. This occurred in February 2023. The Appellants' notice to terminate the agreement after learning that the property was no longer being rented was enough to trigger the cancellation provision, entitling the Appellees to a cancellation fee.

Appellants also argue that the clause in Section 3 which states “[a]n additional cancellation fee of 50% of the remaining annual contract will be charged to LANDLORD should LANDLORD, terminate this agreement” is ambiguous because of the language. They further argue that the 50% is speculative or doesn't exist. Again, this argument is not consistent with the facts and evidence adduced at trial. The trial court clearly disagreed that the language was ambiguous or speculative.

Appellee Rosenberg was very clear when he testified at trial. Further, email correspondence was provided that showed how the amount of \$5,700.00 was calculated. He testified that the amount withheld was \$5,700.00. Of that amount, \$3,800.00 was one month's rent. That is the clear cancellation fee identified in Section 3. The remainder of \$1,900.00 was calculated by taking 10% of \$3,800.00, which is \$380.00. The \$380.00 is ten percent of the monthly rents, \$380.00 per month is what the Appellees would have been entitled to for ten (10) months had the Appellants not cancelled the contract. One-half, or 50%, of that is \$190.00

times ten (10) months which is \$1,900.00. That is the “remaining annual contract.” This exact explanation was given to the Appellants by the Appellees by email on March 2, 2023, and March 21, 2023. These emails were presented at trial.

The Appellants argued there was no tenant and no rents to be received. While it is true that the property was unrented from February 2023 until June 2023, the Appellees were still obligated to manage the property, and were entitled to 50% of the amount they would receive if the property was rented. Appellee Rosenberg testified as such. This provision and the fee to be collected therein is to ensure that the property is property maintained and ready in the event it is re-rented. It is reasonable for the Appellees to receive minimal payment while they continue management of an unrented property for the purpose of presumably re-renting it. In this instance the property sat unrented for a period of time as the Appellants delayed notifying the Appellees of their desire to cancel the agreement. Prior to receiving the Appellants’ notice of cancellation, the Appellees diligently continued to manage the property and perform other functions.

## CONCLUSION


Based on the foregoing it is clear the trial made the right and legal decision in entering a final judgment in favor of the Appellees. The agreement between the parties was binding, fair and enforceable in all of its terms. The Appellee respectfully requests that the trial court's final judgment be affirmed.

Respectfully submitted this 28th day of June, 2024.

  
\_\_\_\_\_  
JOHN A. KRUSE, ESQUIRE  
Counsel for Appellees  
Florida Bar No. 91780  
JAK LAW, LLC  
300 E. Hwy 50  
Clermont, FL 34711  
Ph. 352.530.9988  
John@jaklawfl.com  
attorneykruse@gmail.com

## CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document has been served on Gregory Hobbs, Esquire, Attorney for Appellants via email through the Florida Courts E-Filing Portal System and via US mail at Gregory Hobbs, 2910 Kerry Forest Pkwy D4-213, Tallahassee, FL 32309-6892 on this 28th day of June, 2024.

  
\_\_\_\_\_  
John A. Kruse, Esquire  
Attorney for Appellees  
Fla. Bar No. 91780

CERTIFICATE OF COMPLIANCE with Rule 9.100(1)

I hereby certify that this computer generated answer brief was prepared in 14 point Arial font with a minimum one inch margins and has 3,994 words in the body of the brief.

*John Kruse*

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John A. Kruse, Esquire  
Attorney for Appellees  
Fla. Bar No. 91780